No. _____

**BEFORE THE STATE OF WEST VIRGINIA**
**SUPREME COURT OF APPEALS**

SCA EFiled: Jul 25 2025
04:03PM EDT
Transaction ID 76730982

**IN THE MATTER OF:**

**TRACARDEBRE, LLC,**

**Petitioner,**

**v.**

**JCN: 2023004462**
**ICA No.: 24-ICA-303**

**FERNANDO MARQUEZ,**

**Respondent.**

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# PETITIONER'S BRIEF

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**July 25, 2025**

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## I. STATEMENT OF THE CASE

This claim comes before this Court pursuant to the employer's Petition for Appeal from the April 29, 2025, Memorandum Decision **(Exh. 28)** and June 25, 2025, Mandate **(Exh. 29)** of the West Virginia Intermediate Court of Appeals. The claim was before the Intermediate Court pursuant to the claimant's appeal from the June 28, 2024, Order of the Board of Review. **(Exh. 24)**. The claim was before the Board pursuant to the claimant's protests to the following orders of the Claims Administrator:

- The June 19, 2023, order denying a reopening of the claim for the payment of temporary total disability ("TTD") benefits. The Board reversed this decision and awarded TTD benefit from April 5, 2023, through August 5, 2023, and thereafter as substantiated by proper medical evidence.

- The August 3, 2023, order denying the addition of diagnoses for right rotator cuff tear, left medial meniscus tear, left patella fracture and left patellar tendon avulsion to the claim. The Board reversed this order insofar as it denied the addition of right rotator cuff tear and affirmed this order insofar as it denied the addition of left medial meniscus tear, left patella fracture and left patellar tendon avulsion as compensable conditions in the claim.

- The August 3, 2023, order denying authorization for left knee arthroscopy and right shoulder arthroscopy. The Board affirmed this order.

- The September 11, 2023, order denying NCS/EMG right upper extremity and referral to WVU Pain Management Clinic. The Board affirmed this order.

The claimant's appeal to the Intermediate Court concerned the Claims Administrator's August 3, 2023, order denying authorization for left knee arthroscopy and right shoulder arthroscopy, and the Claims Administrator's September 11, 2023, order denying NCS/EMG right upper extremity and referral to WVU Pain Management Clinic. The Board's findings regarding the June 19, 2023, order denying a reopening of the claim and August 3, 2023, order denying the addition of diagnoses for right rotator cuff tear, left medial meniscus tear, left patella fracture and left patellar tendon avulsion to the claim were not challenged on appeal to the Intermediate Court, and are not at issue in the present appeal.

## II. SUMMARY OF EVIDENCE

The evidentiary record establishes that the claimant, Fernando Marquez, sustained an injury to his right shoulder on July 7, 2022, when he slipped and fell while carrying a four-gallon pot of chicken wings to the sink to drain them. He was first seen by Annie Mills, N.P., at East Mountain Health Physician – Spring Mills in Martinsburg, West Virginia on July 18, 2022. **(Exh. 3)**. The office note from that day indicates that the claimant injured his right elbow up to his shoulder and right hip when he fell. X-rays of his right elbow and right shoulder were obtained at Valley Health Urgent Care – Spring Mills, and these were unremarkable. **(Exh. 1)**. The diagnosis noted by Ms. Mills was ICD-10 Code M75.31 ("calcific tendinitis of right shoulder"). The claimant and Ms. Mills completed the claimant's application for benefits that day. **(Exh. 2)**. The "Addendum" page to the application for benefits indicates that the claimant injured his right elbow up to his shoulder and right hip when he fell on July 7, 2022. Neither the application nor the office notes make any mention of a neck or knee injury. Ms. Mills requested physical therapy three times weekly for two weeks. **(Exh. 3, p. 9)**. The claimant began physical therapy at Pilot Physical Therapy on September 6, 2022, for treatment of right shoulder and elbow pain. **(Exh. 4)**. On September 7, 2022, the Claims Administrator wrote a letter to East Mountain Health Physician - Spring Mills, stating:

> Dear Provider: Please accept this as authorization to allow the claimant to schedule and reschedule any appointments needed with your office in regards to the Workers Compensation claim for the Left shoulder, elbow, and arm. This is including his initial appointment. I do not have his availability and he is the best person to schedule any appointments.

**(Exh. 5)**[1]. The claimant was discharged from physical Therapy after his 16th visit on October 27, 2022. **(Exh. 4, pp. 57 - 60)**. The discharge note indicates that the claimant was

[1] This document is not listed as being in the record before the Board of Review. The claimant noted in the Petitioner's Brief before the Intermediate Court that this letter was submitted to the Board of Review as evidence on November 7, 2023. On review of the copies of the evidence the claimant submitted on that date which were served on the employer at that time, the letter is contained therein. The employer is thus

demonstrating increased range of motion and strength but continued to experience pain and clicking/cracking in his right shoulder and had reached a plateau in his recovery, and the therapist felt that additional medical management was indicated. **Following his discharge from physical therapy, the Claims Administrator received no additional requests for treatment from the claimant or any of his providers until the claimant filed a complaint with the West Virginia Offices of the Insurance Commissioner**. **(Exh. 24)**.

The claimant was seen by John Mikes, N.P., on January 27, 2023, for a left knee injury. **(Exh. 6)**. The claimant reported "that he apparently has a fractured patella from 3 months ago," but related the injury to his July 7, 2022, injury more than six months earlier. Mr. Mikes noted a deformity to the inferior patella that was tender to palpitation. The claimant was referred for an MRI. This office note is the earliest mention in any record regarding a left knee injury.

The claimant underwent an MRI study of his left knee on January 27, 2023. **(Exh. 7)**. The impression of Dr. William Hirsch, who reviewed the study, was: Horizontal tear of the posterior horn and body of the medial meniscus. Recent fracture of the inferior aspect of the patella. The fracture fragment is separated from the rest of the patella by about 5 mm. No tear of the patellar tendon detected. The claimant was seen by Mr. Mikes again on February 2, 2023, for follow up on his left knee. **(*Id.*)**. Mr. Mikes recommended left knee arthroscopy with partial medial meniscectomy versus meniscal repair scheduled for February 15, 2023. On February 15, 2023, the claimant underwent a partial medial meniscectomy by arthroscope performed by Dr. Dwight Kemp. **(Exh. 8)**.

The claimant was seen by Mr. Mikes for follow-up from his knee surgery on March 3, 2023. **(Exh. 9)**. The claimant reported that he was walking without pain, and that his elbow pain had resolved, but he continued to experience pain in his shoulder. Mr. Mikes diagnosed right

certain that the letter was in fact submitted to the Board of Review on that date and may have been unintentionally overlooked or appended to the back of another filing when filed with the Board.

shoulder rotator cuff dysfunction and ordered a right shoulder MRI. The claimant underwent an MRI study of the right shoulder on March 22, 2023. **(Exh. 10)**. That MRI revealed a large full-thickness incomplete tear of the supraspinatus tendon with mild tendon retraction and no muscle atrophy. The claimant was then seen by Mr. Mikes on March 24, 2023. **(Exh. 11)**. Mr. Mikes noted the MRI findings and scheduled right shoulder arthroscopy with rotator cuff repair and platelet rich plasma injection for April 5, 2023. The claimant underwent that surgery on April 5, 2023, again performed by Dr. Kemp. **(Exh. 12)**.

On April 14, 2023, the claimant completed a West Virginia Offices of the Insurance Commissioner Complaint Form. **(Exh. 25)**. That form does not state an articulated complaint but merely states that the claimant was injured in a fall at work, that his injuries were to the left knee and right elbow and shoulder, and that the claimant had undergone surgeries on both. The form lists "Angie" as a contact at Berkshire Hathaway GUARD.

The claimant returned to Dr. Kemp on April 24, 2023, for a postop following right shoulder surgery. The claimant was in a fair amount of pain. He was advised to continue with self exercises for about 3-4 weeks and then would start a course of physical therapy. Dr. Kemp indicated that the claimant could not do a full-time job requiring the use of his shoulder or lifting. **(Exh, 15)**.

The claimant spoke to Andrea Anzalone, an adjuster at Berkshire Hathaway GUARD Insurance, by telephone on May 10, 2023. (**Exh. 26)**. Ms. Anzalone noted that:

> Clmt said he had surgery for his left knee (2/15/2023) and right shoulder (5/5/2023). Clmt said he is diabetic. Clmt said he went from full time to part time Oct/Nov/Dec 2022 due to his injury and work restrictions. Clmt said he has not worked since 1/8/2023. I told clmt we not made aware of his surgeries or him being OOW. Clmt said he did not call us as he was and still is on medication and messed up. Clmt said they gave him pain meds.

On May 16, 2023, Valley Health System send to the Claims Administrator by facsimile the claimant's July 18, 2022, application for benefits and the office notes from the

claimant's July 18, 2022, office visit. (**Exh. 27)**. This application is different than the one submitted into evidence by the claimant **(Exh. 2)**, in that diagnosis codes TCD-10-CM, W01.OXXA, and M75.31 were indicated. However, no corresponding diagnoses were listed with the diagnosis codes.

On May 18, 2023, the claimant returned to NP Mikes for a 6-week follow up from the right shoulder surgery. **(Exh. 26)**. The claimant indicated that he was doing well and worked on his own exercises. He was referred for physical therapy.

On May 25, 2023, Mr. Mikes prepared a request to Berkshire Hathaway for authorization of the February 15, 2023, left knee surgery and the April 5, 2023, right shoulder surgery. **(Exh. 14)**. On that date, Mr. Mikes also prepared an application for reopening of the claim for TTD benefits from October 2022 to August 2023 for the claimant's shoulder injury. **(Exh. 15)**. A second application for reopening was prepared by Mr. Mikes on June 9, 2023. (**Exh. 16)**.

The claimant was seen again by Mr. Mikes on August 24, 2023. **(Exh. 17)**. The claimant reported numbness in his arm that had not gotten better since the injury. He stated that he had pain in his neck and trapezius area, which radiated down his arm posteriorly and into the volar forearm. He also reported intermittent pain across his chest to the lateral shoulder and intermittent numbness in the ulnar nerve distribution in his hand. The assessment was traumatic complete tear of right rotator cuff, postoperative state, and cervical radiculopathy.

The claimant testified by deposition on August 29, 2023. **(Exh. 18)**. On July 7, 2022, the claimant was working as the main cook for the employer's pizza restaurant. He described the injury that occurred on that date as a slip and fall while carrying a pot of boiling water. He stated that he slipped with his right foot, went into the air, and pushed the bucket of hot water to try to not get burned. He stated that he twisted his left leg and fell to the ground holding the bucket with his right hand and his elbow hit the ground. He stated that his right elbow was bleeding and his right shoulder felt kind of dislocated. He stated that his left knee swelled. He indicated that he

was seen by his primary care physician at Shenandoah Health on July 8, 2022, and then went to Valley Health urgent care on July 18, 2022. He stated that the primary care physician gave him muscle relaxers and made an appointment at Valley Health for an x-ray to be done for the right shoulder and left knee to allow time for the swelling to reduce. He stated that he was sent for physical therapy, and then after two months of physical therapy, he was sent for an MRI. He stated that his left knee MRI was done in January and then the right shoulder MRI was done in April. He stated that he was seen by the orthopedist in January.

The claimant stated that he underwent physical therapy from September 6, 2022, to October 27, 2022, at which time he was working light duty four to six hours. He stopped working in January when he underwent knee surgery. He underwent shoulder surgery in April. The claimant stated that he talked to the workers' comp carrier, Berkshire Hathaway Guard Insurance, about his surgeries. He stated that he called the carrier in January even while he was still undergoing physical therapy. He stated that he was told that his case was on hold because they did not know surgery for his knee would be scheduled. He stated that he was told that the surgery was not approved, and his case was pending. He stated that he put it under his regular insurance since he was told that his case was pending. He indicated that he spoke with Angie when he called the carrier. He stated that he underwent physical therapy following each surgery. He was still in physical therapy for the shoulder. He indicated that he was sent for pain management and an EMG. He denied having any problem with his knee or shoulder prior to the July 7, 2022, injury. He stated that this was his first workers' compensation claim.

The claimant indicated that he spoke with Angie when he called the carrier. He stated that she told him that the claim was on hold because they did not know if he had been hurt that bad. He stated that he told her he had been calling her in October, December, and now January and he needed to get the surgery done and she said it was not approved. He believed that she told

him she did not have the records nor the request for the surgery and she would call the hospital or doctor to get the records. He believed his last date of work was either January 6th or 8th and that the surgery was on the 16th. He stated that Mr. Mikes took him off work when he had surgery. He agreed that he and NP Mikes completed a request for TTD benefits. He indicated that he took the application for disability to his employer but was told that the employer did not need to sign anything. He stated that the employer did not turn in the TTD request. He later took the reopening request to his attorney. He agreed that he completed a workers' compensation application following the injury and took it to his boss.

The claimant agreed that he was treated for his right arm and shoulder when he first went to physical therapy. He stated that his left knee was not bothering him that much at that time and he did not receive treatment for his left knee.

The claimant was evaluated by Dr. Leslie Foster at Pain Management, WVU Medicine Brain and Spine on September 8, 2023. **(Exh. 19)**. She indicated that the claimant was referred by Mr. Mikes. He presented with right shoulder, right elbow, neck, right upper extremity numbness and tingling, and knee pain related to a work injury on July 7, 2022. The pain was cramping, shooting, stabbing, sharp electric, tender with numbness tingling and stinging in the right upper extremity. He noticed that the numbness seemed to come from his right elbow into his hand. His pain level was 8/10. Dr. Foster indicated that the claimant had intermittent numbness in an ulnar nerve distribution versus cervical radicular C8 distribution. She noted that he had an EMG of the right upper extremity scheduled for October 12, 2023. The impression was cervical radiculopathy, rotator cuff tear, elbow pain, numbness and tingling right upper extremity, and weakness right upper extremity. X-rays and a CT of the cervical spine were ordered.

A CT of the cervical spine was performed on September 19, 2023, and interpreted on September 20, 2023. **(Exh. 20)**. The impression was no acute fracture or traumatic malignment of the cervical spine and mild degenerative changes of the cervical spine with no definite high-grade spinal canal or high-grade osseous neural foraminal stenosis.

EMG/NCV testing was performed on October 12, 2023, for the symptoms of neck pain, right upper extremity pain, paresthesias, and weakness that started in July 2022. **(Exh. 21)**. The impression was mild right median neuropathy at the wrist (carpal tunnel syndrome) and mild chronic right ulnar neuropathy not further localized (likely at his right elbow).

The claimant was evaluated at Frederick Health Medical Group by Alan Dombrosky, PA-C, on November 30, 2023. **(Exh. 22)**. The claimant reported right shoulder and left knee pain following a work injury on July 7, 2022. The assessment was chondromalacia patella, left knee and primary osteoarthritis, unspecified shoulder/acromioclavicular joint arthritis. Injections were given into the right shoulder and left knee. Mr. Dombrosky issued an addendum report dated December 15, 2023. **(Exh. 23)**. He indicated that the claimant's injury was in July 2022 and that he had surgery on his knee and shoulder and continued to have pain.

By Order dated June 28, 2024, the Board of Review correctly affirmed, *inter alia*, the Claims Administrator's August 3, 2023, order denying authorization for left knee arthroscopy and right shoulder arthroscopy, and September 11, 2023, order denying an NCS/EMG right upper extremity and referral to WVU Pain Management Clinic. **(Exh. 24)**. The claimant appealed in this Order to the Intermediate Court of Appeals insofar as it denied authorization for right shoulder arthroscopy, an NCS/EMG right upper extremity and referral to WVU Pain Management Clinic.

By Memorandum Decision dated the April 29, 2025, the Intermediate Court of Appeals reversed the Board's Order and authorized right shoulder arthroscopy, an NCS/EMG right upper extremity and referral to WVU Pain Management Clinic. **(Exh. 28).** On June 25, 2025, the

Intermediate Court issued its Mandate finalizing its Memorandum Decision **(Exh. 29)**. The employer now appeals from the Intermediate Court's decision.

## III. SUMMARY OF ARGUMENT

1. The Intermediate Court exceeded its statutory Standards of Review.
2. The Intermediate Court failed to apply applicable law to the case.
3. The intermediate Court's determinations were made on findings of fact not supported by the evidentiary record.

## IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The employer submits that the questions before the Court concern errors by the Intermediate Court in the application of settled law, unsustainable exercise of the Intermediate Court's discretion, and holding against the weight of the evidence, and involve issues of fundamental public importance. As such, the employer would request that this matter be scheduled for argument before the Court.

## V. ARGUMENT

The claimant fell at work and injured his right shoulder on July 7, 2022. Thereafter the claimant received initial treatment at East Mountain Health Physician – Spring Mills in Martinsburg, West Virginia on July 18, 2022, where he was diagnosed with ICD-10 Code M75.31 ("calcific tendinitis of right shoulder") and referred to physical therapy. **(Exh. 1-3)**. The claimant began physical therapy at Pilot Physical Therapy on September 6, 2022, for treatment of right shoulder and elbow pain. **(Exh. 4)**. All of this treatment was authorized by the Clams Administrator and covered under the claim. **(Exh. 5)**. The claimant was discharged from physical Therapy after his 16th visit on October 27, 2022. **(Exh. 4, pp. 57 - 60)**.

The record establishes that, on October 27, 2022, the claimant had been diagnosed with calcific tendinitis of right shoulder, had received physical therapy with some benefit, but needed medical follow-up. On that date, this was a no-lost-time clam, as the claimant had continued to work.

After October 27, 2022, the Claims Administrator received nothing from the claimant or any treatment provider for nearly six months. The next communication the Claims Administrator received in the claim from anyone was a notice from the Insurance Commissioner that the claimant had filed a complaint regarding his claim on April 14, 2023. **(Exh. 25)**. The complaint states that the claimant was injured in a fall at work, that his injuries were to the left knee and right elbow and shoulder, and that the claimant had undergone surgeries on both., but does not indicate any wrongdoing by the Claims Administrator with regard to administering the claim.

What happened with the claim between October 27, 2022, and April 14, 2023? A lot. Without notice to, or authorization from, the Claims Administrator, the claimant changed the primary care provider for his claim from Annie Mills, N.P., at East Mountain Health Physician to John Mikes, N.P. at WVU Medicine, and underwent two MRIs, and two arthroscopic surgeries, one on his knee and one on his shoulder, both for conditions which had not been held compensable in his claim.

The legal framework for the administration of workers' compensation claims in West Virginia contemplates providing necessary treatment to injured workers for workplace injuries but also provides for oversight of that treatment by the Claims Administrator. As noted by the Intermediate Court in its Memorandum Decision:

> The claim administrator must provide a claimant with medically related and reasonably necessary treatment for a compensable injury. *See* W. Va. Code § 23-4-3 (2005) and W. Va. Code R. § 85-20-9.1 (2006).

**(Exh. 28, at 5)**. However, the West Virginia Code and the applicable regulations found at 85 C.S.R. 20 impose requirements with regard to treatment received. West Virginia Code § 23-4-3, cited by the Intermediate Court, is the enabling statute for 85 C.S.R. 20. That section of the Code specifically contemplates authorization for certain procedures prior to such treatment being provided, stating:

> Each health care provider who seeks to provide services or treatment which are not within any guideline shall submit to the commission, and effective upon termination of the commission, all private carriers,

> self-insured employers and other payors, specific justification for the need for the additional services in the particular case and the commission shall have the justification reviewed by a health care professional before authorizing the additional services.

W. Va. Code § 23-4-3(1). Eighty-Five C.S.R. 20 provides more specific guidance regarding authorizations for treatment, all of which were violated by the claimant and his providers between October 27, 2022, and April 14, 2023.

First, the claimant changed his treating physician without giving notice to the Claims Administrator or receiving authorization from the Claims Administrator for the change. The role of the treating physician is set forth at 85 C.S.R. 20 § 6, *et seq*. Section 6.1 requires a claimant to select a treating physician. The claimant did so when he commenced treatment with Annie Mills, N.P. A claimant can change his treating physician during the course of treatment, but, with certain exceptions, this change must be authorized by the Claims Administrator. 85 C.S.R. 20 § 6.7. None of the exceptions to the requirement for authorization are applicable in this case, yet no request to change treating physicians was ever submitted. Pursuant to 85 C.S.R. 20 § 6.8, a change in treating physicians "will require a detailed explanation to ensure that the change is documented on the claim file. Failure to do so may result in the delay of benefits and ***will result in the denial of payment for medical services***." (Emphasis added). No such explanation was ever filed. Section 6.9. requires that "the previous treating physician must file a final report of the injured worker's physical status on the effective date of change. The new treating physician of record must file an initial narrative report of his/her findings. It is the responsibility of every provider to make reasonable effort to ascertain whether there was a prior treating physician." Neither a final report nor an initial report was ever filed in this case.

Regardless of the propriety of John Mikes, N.P., acting as the claimant's treating physician when the surgery performed by Dr. Kerr took place, that surgery required preauthorization. Pursuant to 85 C.S.R. 20 § 4.1.:

> [T]he treatments and limitations on treatments set forth in this Rule are presumed to be medically reasonable and treatments in excess of those set forth in this rule are presumed to be medically unreasonable. A preponderance of evidence, including but not limited to, detailed and documented medical findings, peer reviewed medical studies, and the elimination of causes not directly related to a compensable injury or disease, must be presented to establish that treatments in excess of those provided for in this Rule are medically reasonable. ***To receive reimbursement from the Commission, insurance commissioner, self insured employer or private carrier, whichever is applicable, for treatment in excess of that provided for in this Rule, all providers must thoroughly document and explain the action taken and the basis for the deviation from this Rule and shall receive authorization before providing said treatment.***

(Emphasis added). Eighty-Five C.S.R. 20 § 9.9. requires that:

> Written authorization must be obtained from the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, in advance for the procedures and services listed below, except in emergencies or where the condition of the patient, in the opinion of the medical vendor, is likely to be endangered by delay. ***Failure to comply with this rule will result in disapproval of the medical vendor's bill. The vendor shall not seek reimbursement from the injured worker if payment is denied under this provision***. This rule does not apply in cases involving initial treatment.

"All surgeries" require preauthorization. 85 C.S.R. 20 § 9.10.d. By "providing treatment to an injured worker," the claimant's treatment providers were required to abide by these regulations, and providing treatment "constitutes acceptance by the medical provider of the Commission's or Insurance Commissioner's rules and fee schedules." 85 C.S.R. 20 § 4.2. Further, § 5.7. provides:

> The provision of health care services to injured workers under the workers' compensation system of this state constitutes an agreement to:
>
> e. Accept all provisions of this Rule, and all policies, procedures, and other requirements adopted from time to time by the Commission or Insurance Commissioner, whichever is applicable. . . .

These regulations are not ambiguous, and provide the correct remedy in the instant case with regard to the claimant's right shoulder arthroscopic surgery. Mr. Mikes and Dr. Kerr both

know this was a workers' compensation claim. In providing treatment, they agreed to accept and abide by the regulations. Mr. Mikes failed to "make reasonable effort to ascertain whether there was a prior treating physician" or "file an initial narrative report of his/her findings" as required under 85 C.S.R. 20 § 6.9. Dr. Kerr failed to obtain pre-authorization for the surgery as required under §§ 9.9. and 9.10. Pursuant to 85 C.S.R. 20 § 9.9., they cannot bill either the Claims Administrator or the claimant for their services.

In addressing this issue. The Intermediate Court ignored all of these provisions, and held:

> Regarding the authorization for right shoulder arthroscopy, the Board found that NP Mikes requested authorization for this surgery on May 25, 2023, after the surgery had been performed on April 5, 2023. West Virginia Code of State Rules § 85-20-9.10d (2006) provides that all surgeries require prior review and authorization before services are rendered and reimbursement made. The Board concluded that NP Mikes did not properly request prior authorization for the surgery, and that the claim administrator properly denied authorization for the right shoulder arthroscopy. However, we note that the Board's order also held the claim compensable for right rotator cuff tear. This condition was not compensable when the surgery was performed. Right shoulder arthroscopy is reasonable and necessary treatment for the compensable condition of right rotator cuff tear. Thus, we conclude that the Board was clearly wrong in affirming the denial of right shoulder arthroscopy.

This finding is in direct contradiction to the law cited above, as well as common sense. The rules requiring preauthorization are not dependent upon whether the claimant's for right rotator cuff tear was compensable. When the claimant stopped communicating with the Claims Administrator in October of 2022, there was no issue as to whether the claimant had sustained a right rotator cuff tear; the only diagnosis in any record at that time was the calcific tendinitis of right shoulder diagnosed by Ms. Mills in July 2022. The first notice of a possible diagnosis of a rotator cuff tear provided to the Claims Examiner was on May 25, 2023, when Mr. Mikes requested authorization for the right shoulder arthroscopy and an unrelated knee surgery. The rotator cuff tear was not excluded from the

claim at the time the surgery was performed on April 5, 2023; the Claims Administrator had not even been provided notice of that diagnosis. That, subsequent to Mr. Mikes's and Dr. Kerr's failure to comply with the regulations concerning their provision of treatment in a workers' compensation claim, the diagnosis of rotator cuff tear was initially denied by the Claims Administrator does not somehow render the unauthorized provision of treatment to be proper, and the Intermediate Court offers no explanation as to how it would. Authorization for the right shoulder arthroscopy was correctly denied, that denial was correctly affirmed by the Board of Review, and was improperly reversed by the Intermediate Court.

Regarding the denial of authorization for EMG/NCS testing and a referral to WVU Pain Management, The Intermediate Court exceeded its statutory standard of review, as set forth at West Virginia Code § 23-5-12a(b). That statute states that the Court may reverse, vacate, or modify the Board's findings when they are:

> (1) In violation of statutory provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the Board of Review;
>
> (3) Made upon unlawful procedures;
>
> (4) Affected by other error of law;
>
> (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 23-5-12a(b). The reversal of the denials of pain management and an EMS/NCS by the Intermediate Court was not based on any permissible basis under this statute. The Intermediate Court identifies no errors of law and no factual determinations made by the Board of Review that are "clearly wrong."

In finding that this treatment was properly denied, the Board of Review had held:

> Regarding the denial of the request for an NCS/EMG of the right upper extremity and referral to the WVU Pain Management Clinic, this treatment was requested by NP Mikes on August 24, 2023. At that time, the assessment was traumatic complete tear of right rotator cuff, postoperative state, and cervical radiculopathy. NP Mikes indicated that he would get an EMG study for his nerve symptoms. He stated that the symptoms seemed to be coming from the neck but may have a double crush. The claimant was also referred to pain management to begin treatment on his cervical spine. Based on the evidence of record, it is determined that the NCS/EMG of the right upper extremity and referral to the WVU Pain Management Clinic were requested based on the diagnosis of cervical radiculopathy. The record does not establish that cervical radiculopathy is a compensable condition in this claim. Accordingly, the treatment was not reasonable and necessary for the July 7, 2022 injury.

**(Exh. 24, p. 11)**.

In authorizing the NCS/EMG of the right upper extremity and referral to WVU Pain Management Clinic, the Court relies on the August 24. 2023, office note from N.P. Mikes. As the Court noted regarding this visit:

> On August 24, 2023, Mr. Marquez was seen by NP Mikes for a post-operative visit. Mr. Marquez reported that he had numbness in his arm that had not improved since the injury. Further, Mr. Marquez indicated that he had pain in his neck and trapezius area, which radiates down to his arm posteriorly and into the volar forearm. NP Mikes assessed traumatic complete tear of the right rotator cuff, postoperative state, and cervical radiculopathy. NP Mikes indicated that he planned to request an EMG study for Mr. Marquez's nerve symptoms, which seemed to be coming from his neck, but could possibly be the result of a double crush injury. NP Mikes referred Mr. Marquez to pain management to begin treatment on his cervical spine.

**(Exh 27, p. 3)**. Based on this office note, the Court held:

> Turning to the issue of the denial of the requested EMG/NCS testing and a referral to WVU Pain Management, we conclude that these were reasonable and necessary tests and treatments to determine the cause of Mr. Marquez's shoulder pain following the compensable injury. NP Mikes referred Mr. Marquez for the EMG/NCS, a diagnostic tool, to determine the source of Mr. Marquez's ongoing symptoms of numbness across his right upper extremity. Mr. Marquez was not required to have a compensable cervical condition

> prior to a diagnostic test that was intended to determine whether his symptoms were coming from the cervical spine or the shoulder itself.
>
> Thus, we conclude that the Board was also clearly wrong in affirming the claim administrator's denial of the requested EMG/NCS testing and a referral to WVU Pain Management.

**(Exh. 28, p. 6)**.

The finding by the Board is fully supported by the evidentiary record. The compensable conditions in the claim were the calcific tendinitis of right shoulder as initially diagnosed by Ms. Mills on July 18, 2022, and the right rotator cuff tear added by the Board of Review's decision. The Intermediate Court misstates Mr. Mikes's August 24, 2023, office note, which actually says:

> As far as therapy, he is allowed to continue to work on strengthening and internal rotation range of motion. He should mostly keep range of motion pain-free. He may begin lifting heavier in a neutral position. May also increase lifting overhead and reaching. He should keep these relatively pain-free and light as he begins, As he feels comfortable, weight can increase. For his nerve symptoms, I will get EMG study and pain management referral. His symptoms seem to be coming from the neck, but may have double crush. See him back for EMG results.

**(Exh. 17)**. At the time, as noted by the Board of Review, Mr. Mikes's assessment of the claimant's diagnoses was traumatic complete tear of right rotator cuff, postoperative state, and cervical radiculopathy. The Intermediate Court held that "Mr. Marquez was not required to have a compensable cervical condition prior to a diagnostic test that was intended to determine whether his symptoms were coming from the cervical spine or the shoulder itself," but Mr. Mikes never states that the differential diagnoses for the nerve symptoms were "the cervical spine or the shoulder itself." Dr. Mikes states that he suspects cervical radiculopathy – not a compensable condition in the clam – and a "double crush" – also not a compensable condition in the claim. There is no evidence that the EMG/NCS is in any way related to the claimant's compensable injury.

In assessing this question, with regard to N.P. Mikes's note and the Intermediate Court's interpretation thereof, is what is "double crush." The Intermediate Court represents this as reference to "the result of a double crush injury." N.P. Mikes does not state that there is a "double crush injury." He states that the claimant "may have double crush." This distinction is important; the Intermediate Court is stating that there is an injury where the medical evidence does not support this claim. The term "double crush" is not defined anywhere in the record or in the Intermediate Court's decision, and Mr. Mikes in no way explains how a "double crush" is related to the claimant's compensable rotator cuff tear, so it is unclear how the Intermediate Court related this unspecified condition to the compensable injury in the claim. However, according to the American Academy of Orthopedic Surgeons, as reported by the National Institute of Health on PubMed:

> Double crush syndrome is a distinct compression at two or more locations along the course of a peripheral nerve that can coexist and synergistically increase symptom intensity. In addition, dissatisfaction after treatment at one site may be the result of persistent pathology at another site along a peripheral nerve. Double crush syndrome is a controversial diagnosis; some scientists and surgeons believe it is an illness construction that may do more harm than good because it emphasizes an objective pathophysiologic explanation for unexplained symptoms, disability, and dissatisfaction that may be more psychosocially mediated. However, peripheral neuropathy may coexist with compressive neuropathy and contribute to suboptimal outcomes following nerve decompression. To better manage patients' expectations, treating practitioners should be aware of the possibility of concomitant cervical radiculopathy and carpal tunnel syndrome, as well as the presence of underlying systemic neuropathy.

"Double Crush Syndrome," https://pubmed.ncbi.nlm.nih.gov/26306807/. Notably, and predictably based on Dr. Mikes's own assessment and an understanding of what "double crush" means, the erroneously authorized EMG/NCS found carpal tunnel syndrome and ulnar neuropathy, neither of which are related to the compensable injury in this claim. Nonetheless, N.P. Mikes's differential diagnoses of a cervical problem or "double crush" makes no mention of any relationship to the claimant's shoulder or his compensable injury. It is a reference to a "controversial diagnosis" that

"may do more harm than good," without any reference to the claimant's shoulder injury in this claim. There is no evidence whatsoever in the record that a supposed "double crush" was the result of any injury, or that it is in any way related to the claimant's compensable injury in the claim. The Intermediate Court is manufacturing a connection between this vague, undefined diagnosis and the compensable injury where none exists in the record. This is certainly not a valid basis for holding the requested treatment compensable.

The Intermediate Court also plainly relies on an invalid "factual" basis for authorizing the pain management treatment. As the Intermediate Court notes, "NP Mikes referred Mr. Marquez to pain management to begin treatment on his cervical spine," specifically acknowledging that the referral to pain management is for cervical treatment. **(Exh. 28, p. 3)**. The Intermediate Court also states that pain management is a test or treatment "to determine the cause of Mr. Marquez's shoulder pain following the compensable injury," which is a plan misstatement regarding the treatment at issue. **(Exh. 28, p. 5)**. The record in this claim plainly establishes that the referral for pain management was cervical treatment, and not treatment for the claimant's compensable injury. As such, it was improperly authorized by the Intermediate Court.

## VI. CONCLUSION

The findings by the Board of Review are plainly supported by substantial evidence in the record and are not clearly wrong. The Intermediate Court's holdings to the contrary exceeded its statutory Standards of Review, failed to apply applicable law to the case, and were made on findings of fact not supported by the evidentiary record. Accordingly, the employer respectfully requests that the Intermediate Court's decisions below be REVERSED, and the Board of Review's June 8, 2024, Order REINSTATED.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I, Daniel G. Murdock, legal counsel for the employer, Petitioner, do hereby certify that copies of the foregoing "petitioner's Brief" and "Petitioner's Appendix" were served upon the parties of record this 25th day of July 2025, by forwarding a true copy thereof through the File & Serve Xpress e-filing system, to the following:

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