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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-067

**GEORGE C. TURLEY, Jr.,**

Petitioner,

v.

Appeal from a final order of the  
Workers' Compensation Board of Review,  
(BOR Appeal No. 2045576)

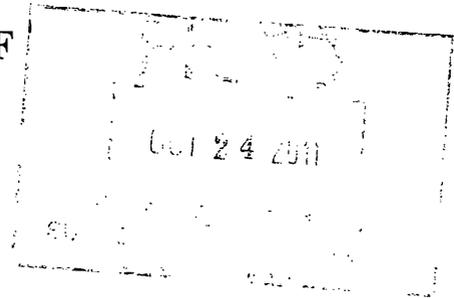
**WEST VIRGINIA OFFICE OF THE INSURANCE COMMISSIONER,  
and ALLEGHANY ENERGY SERVICE CORPORATION,**

Respondents.

**PETITIONER'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. THE BOR AND ALJ ERRED BY NOT APPLYING RES JUDICATA AND COLLATERAL ESTOPPEL TO PETITIONER'S CLAIM, WHICH DOCTRINES BAR RE-EVALUATION OF PETITIONER'S IMPAIRMENTS.

2. THE BOR AND ALJ ERRED BY NOT CREDITING DR. PADMANABAN'S PTD EVALUATION, WHICH IS THE MOST RELIABLE AND CREDIBLE OF THE RELEVANT REPORTS.

3. THE BOR AND ALJ ERRED BY APPLYING TABLE §85-20-C TO PETITIONER'S CLAIM BECAUSE IT IS CONTRARY TO WEST VIRGINIA CODE §23-4-6(I)

4. THE BOR AND ALJ'S EXCLUSION OF PETITIONER'S PRIOR PPD AWARD FOR CTS FROM PTD CONSIDERATION IS UNCONSTITUTIONAL UNDER THE WEST VIRGINIA AND U.S. CONSTITUTIONS.

## **STATEMENT OF THE CASE**

Petitioner's occupational injuries are summarized as follows.<sup>1</sup> On January 12, 1967, Mr. Turley, while employed as an auditor for the Kroger Company, suffered a fracture of his cervical spine when an automobile in which he was a passenger, struck a bridge. On February 19, 1968, the then-Workmen's Compensation Fund ("WCF"), sent Mr. Turley for an IME with Dr. George

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<sup>1</sup>References to the Appendix Record are set forth as "A.R. \_\_\_\_." Note that not all prior medical reports and PPD awards are available and included in the Appendix, given the vintage of Petitioner's prior claims. As to the percentages of such historical awards, Petitioner's counsel is not aware of any factual dispute between the parties to this appeal.

Miyakawa, M.D. and upon his examination, recommended ten percent (10%) permanent partial disability (“PPD”) for this injury. On April 24, 1968, the WCF accepted Dr. Miyakawa’s findings and awarded the ten percent (10%) PPD to Mr. Turley. A.R., 15.

On February 9, 1982, Mr. Turley, while employed with Carbon Fuel Company (U.S. Steel Mining Corp.), fell down steel steps and broke his right arm. On March 11, 1983, the WCF sent Mr. Turley for an IME with Dr. A.A. Abplanalp, M.D. and upon his examination, recommended eight percent (8%) PPD. On June 7, 1983, the WCF accepted Dr. Abplanalp’s findings and awarded the eight percent (8%) PPD to Mr. Turley. A.R., 16.

On July 1, 1985, Mr. Turley, while employed with U.S. Steel, injured his right ankle when a power box fell on it. On March 29, 1987, the WCF sent Mr. Turley for an IME with Dr. James Banks, M.D. and upon his examination, recommended five percent (5%) PPD. On May 29, 1987, the WCF accepted Dr. Banks’ findings and awarded the five percent (5%) PPD to Mr. Turley. A.R., 17.

On July 25, 1996, Mr. Turley, while employed with West Virginia Power, dislocated his right knee while trying to jump out of the way of an end loader. On October 9, 1997, the then-Workers’ Compensation Division (“WCD”) sent Mr. Turley for an IME with Dr. Mario C. Ramas, M.D. and upon his examination, recommended two percent (2%) PPD. A.R., 18-21. On November 7, 1997, the WCD accepted Dr. Ramas’ findings and awarded the two percent (2%) PPD to Mr. Turley. A.R., 27.

Petitioner last worked as an electrician with Allegheny Power. On March 1, 2000, Mr. Turley, while employed with Alleghany Power, was in a motor vehicle accident causing injuries to his neck, cervical spine, and both hands. On September 30, 2002, the WCD sent Mr. Turley

for an IME with Dr. Bruce A. Guberman, M.D., (discussed in a supplemental report of May 15, 2003), and upon his examination, recommended twenty-five percent (25%) PPD, which Mr. Turley was awarded by the WCD. A.R., 28-40. Also under the current injury and claim number, Mr. Turley was sent by the now self-insured employer through Acordia, for an IME with Licensed Psychologist Stephanie K. Ford. Upon examination, Ms. Ford recommended five percent (5%) PPD for the psychiatric overlay, which award has been made. A.R., 41-45

Petitioner's prior PPD awards thus total fifty-five percent (55%) PPD (which is 5% over what was included in his original Motion for a Permanent Total Disability award). That motion was amended to reflect the 5% additional PPD which was granted while the PTD claim was pending. The PTD Examining Board in its Final Recommendations, "revised" Petitioner's 55% cumulative PPD to a WPI calculation of 27%, A.R., 83-86, using the Combined Values Chart from the AMA Guides, 4th Edition. The PTD Examining Board's Final Recommendations entered in August 18, 2008 were based on the PTD evaluation by Dr. Joseph Grady, A.R., 46-59, and the psychiatric evaluation by Dr. Bobby Miller, A.R. 87-98. Subsequently, Petitioner submitted a PTD evaluation by Dr. Ramanathan Padmanaban, M.D., A.R., 60-82, dated May 11, 2010, which concluded that Petitioner has a 47% Combined Value WPI, excluding his carpal tunnel syndrome ("CTS"), for which Petitioner has received the maximum allowable award of 12% WPI. Including Petitioner's CTS and again applying the Combined Values Chart from the AMA Guides, 4th Edition, Petitioner has a 52% WPI, which contrary to the ALJ/BOR's conclusion, clearly qualifies him for PTD consideration.

In its Closing Argument before the ALJ below, the Employer made several misstatements worthy of brief mention here. The 1967 neck "injury" was, as discussed herein, a fracture which

required several weeks' hospitalization and Mr. Turley continuously wore a body frame with neck brace with halo for some six months. Mr. Turley's camper injury involved a fall into the camper's metal instep after his compensable right knee gave out, resulting in fractured ribs and a punctured right lung. He subsequently required lung surgery at UVA. Dr. Grady opined in 2007 that Mr. Turley would require no further surgeries, however he had a total right knee replacement, with followup arthroscopic surgery, only months thereafter. While this claim has been pending, Mr. Turley's wife left him and his income is limited to Social Security benefits of \$1565 per month and \$557 from an essentially involuntary early retirement. Contrary to the Employer's contention below, the most significant and debilitating injuries Mr. Turley suffers from are his compensable neck, knee, and ankle injuries.

### **STANDARD OF REVIEW**

W.Va. Code §23-5-15 governs this Court's review of the decisions below. That statute provides in pertinent part:

(b) In reviewing a decision of the board of review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections (c) and (d) of this section.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from

erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

### **SUMMARY OF ARGUMENT**

Petitioner submits there are at least four (4) distinct errors in the decisions below. First, the BOR/ALJ erred by approving the PTD Examining Board's arbitrary reduction of Petitioner's prior 55% PPD awards to a much-lower 27% WPI rating. Res judicata and collateral estoppel should have been applied to Petitioner's PTD claim; they bar the "re-evaluation" of Petitioner's impairments in the manner done by the PTD Examining Board, and approved by the BOR/ALJ. Second, the BOR/ALJ erred by not crediting Dr. Padmanaban's PTD evaluation, which is the most reliable and credible of the relevant reports. Third, the BOR/ALJ erred by applying Table §85-20-C to Petitioner's claim because it is contrary to W.Va. Code §23-4-6(I). Finally, the BOR/ALJ's exclusion of Petitioner's prior PPD award for CTS from PTD consideration is unconstitutional under the West Virginia and U.S. Constitutions.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests oral argument of this matter pursuant to Rule 20(a)(1), (2), and (3). Issues raised herein involve matters of first impression arising out of recent Workers' Compensation amendments, issues of public importance for many Workers' Compensation claimants, and a challenge to the constitutionality of a Workers' Compensation amendments.

## ARGUMENT

### **I. THE BOR AND ALJ ERRED BY APPROVING THE PTD EXAMINING BOARD'S ARBITRARY REDUCTION OF PETITIONER'S WPI RATING; RES JUDICATA AND COLLATERAL ESTOPPEL BAR THE "RE-EVALUATION" OF PETITIONER'S IMPAIRMENTS.**

The PTD Examining Board in its Final Recommendations, "revised" Petitioner's 55% cumulative PPD to a WPI calculation of 27%, A.R., 83-86, using the Combined Values Chart from the AMA Guides, 4th Edition. The PTD Examining Board's Final Recommendations entered in August 18, 2008 were based on the PTD evaluation by Dr. Joseph Grady, A.R., 46-59, and the psychiatric evaluation by Dr. Bobby Miller, A.R. 87-98. Subsequently, Petitioner submitted a PTD evaluation by Dr. Ramanathan Padmanaban, M.D., A.R., 60-82, dated May 11, 2010, which concluded that Petitioner has a 47% Combined Value WPI, excluding his carpal tunnel syndrome ("CTS"), for which Petitioner has received the maximum allowable award of 12% WPI. Including Petitioner's CTS and again applying the Combined Values Chart from the AMA Guides, 4th Edition, Petitioner has a 52% WPI, which contrary to the ALJ/BOR's conclusion, clearly qualifies him for PTD consideration. Res judicata and collateral estoppel bar "revising" Petitioner's 55% cumulative PPD to a WPI calculation of 27% as discussed further, infra.

The doctrine of res judicata is applicable to workers' compensation cases. White v. SWCC, 164 W.Va. 284, 262 S.E.2d 752 (1980). The PTD Examining Board and ALJ, by "re-evaluating," and thereby reducing, Petitioner's prior 55% PPD awards to 27% WPI, ignored the binding effect of prior judgments and/or issues previously litigated and decided. This is so because the "threshold" in W.Va. Code §23-4-6(n)(1) is a threshold of eligibility to apply for

permanent total disability benefits. The provision cited was not intended to provide the PTD Examining Board a mechanism to reassess a jurisdictionally-final impairment rating; the ALJ erroneously accepted the Board's reevaluation.

The concept of "impairment" and the impairment threshold was first introduced in the 1995 legislative changes. Prior to that time, West Virginia based permanent partial awards upon an injured worker's "disability." Since most, if not all, applications for permanent total disability benefits would be based upon the disability standard in effect prior to the effective date of the 1995 reforms, a mechanism was provided for the PTD Examining Board to evaluate earlier disability claims in order to convert those claims to a "medical impairment". It is irrational to interpret W.Va. Code §23-4-6(n)(1) as providing authority to reassess a jurisdictionally-final impairment award. Not only does such an unreasonable interpretation of the statute open a Pandora's Box of litigation and delay, it implicates serious due process concerns which include the attempt to grasp jurisdiction of a matter which is final and barred from further litigation. The Legislature, having expressly established one "threshold" did not indicate that it intended to establish yet another "super threshold" in order to throw jurisdictionally-final impairment awards supported by appropriate findings of fact back into dispute. Rather, it intended to provide a mechanism which permitted the Board to convert older "disability" awards into current "impairment" awards. This Board's interpretation and application of West Virginia Code §23-4-6(n)(1) is irrational and contrary to reason. The doctrines of res judicata and collateral estoppel matter, and the jurisdictional finality provided by statute controls. White v. SWCC, 164 W.Va. 284, 262 S.E.2d 752 (1980); West Virginia Code §23-4-6(n)(1).

## **II. DR. PADMANABAN'S PTD EVALUATION IS THE MOST RELIABLE AND CREDIBLE OF THE RELEVANT REPORTS.**

On May 11, 2010, Petitioner presented to Dr. Ramanathan Padmanaban, M.D., for a PTD Evaluation. Dr. Padmanaban found him to be at maximum medical improvement. For the loss of range of motion in the cervical spine, Dr. Padmanaban felt the Petitioner is entitled to a 6% whole person impairment, using Table 70, Page 3-118, Table 77, Page 3-120, table 78, Page 3-122 from AMA Guide Fourth Edition. According to Figure 80, spine impairment summary, based on diagnosis for 50% compression fracture C5 from Table 75, Page 3-113 the Petitioner received 6% whole person impairment. Based on range of motion loss, he got 6% whole person impairment. He noted also a loss of sensation at the C5 distribution with partial sensory loss. Sensory loss at C5 distribution gave Mr. Turley the maximum upper extremity impairment of 5% whole person impairment. Since his is partial sensory loss, Dr. Padmanaban rated it as 3% upper extremity impairment, which equaled 2% whole person impairment. Total impairment thus combined 6 to 6 and then to 2, for a total of 14% whole person impairment. Using Rule 20 Section VII table 85-20-E cervical impairment rating table for cervical spine, the Petitioner fell at cervical category II, because he has C5 50% compression fracture and MRI C3-C4 and C5-C5 showed bilateral neural foraminal encroachment and left sided C5 radiculopathy, according to Dr. Weinstein's report; Dr. Padmanaban made the same finding in his examination of Mr. Turley. Cervical category III gave him a range of 15 to 18% impairment. Rating him at the high range, Dr. Padmanaban recommended a maximum impairment in this category of 18% whole person impairment for the cervical spine.

According to Figure 1, Part 2, wrist, elbow and shoulder for right upper extremity, the

radius and ulna on the right forearm caused range of motion loss in the right wrist and right elbow. For the range of motion loss in the right wrist, Dr. Padmanaban felt the Petitioner was entitled to 3% upper extremity impairment. For range of motion loss in the left wrist, the Petitioner was entitled to 4% upper extremity impairment. Using Figure 26, Page 3-36, Figure 29, 3-38, Figure 32, page 3-40, Figure 35, Page 3-41 Mr. Turley's total impairment for the right wrist was 3% and 4% for the left wrist upper extremity impairment for a total of 7%, which was equal to 4% whole person impairment for the right forearm fracture he sustained.

For the right ankle extension, according to Table 42, Page 3-78 AMA Guide Fourth Edition it is mild impairment, Petitioner received 3% whole person impairment from Dr. Padmanaban. For Mr. Turley's inversion 20 degrees, which was a mild impairment as per Table 43, page 3-78 AMA Guide Fourth Edition this gave him 1% whole person impairment. For eversion 10 degrees, which was a mild impairment, he got 1% whole person impairment. Total impairment for the ankle range of motion thus was 5% whole person impairment.

The Petitioner has mild to severe persistent carpal tunnel syndrome in both wrists. Using Table 16, Page 57 the Petitioner received 10% whole person impairment for each wrist, which equaled to 6% upper extremity impairment for each wrist for a total of 12% whole person impairment. He had tingling and numbness in the fingers and weak handgrip on both sides. Mr. Turley was entitled to 6% whole person impairment for a total of 12% whole person impairment for bilateral CTS. Mr. Turley developed CTS after the injury and Dr. Padmanaban felt it is related to the trauma of this injury by gripping the steering wheel during the severe jarring.

Total impairment was based on combining 8% for the cervical spine injury, 4% for the

right forearm fracture, 5% for the right ankle injury, 20% for the right knee injury, and 5% for the psychiatric impairment for a total of 47%, using the combined value chart page 322 AMA Guide Fourth Edition. This was without adding the CTS. Adding the bilateral carpal tunnel syndrome of 12% whole person impairment to the 45%, it gave the Petitioner 52% whole person impairment on the Combined Values table. It was Dr. Padmanaban's opinion that the carpal tunnel syndrome should be included in the motor vehicle claim with the neck injury. Dr. Padmanaban opined that given Mr. Turley's age, education, work experience and other medical problems, he is permanently and totally disabled for any kind of gainful employment.

With regard to Dr. Grady's IME on March 7, 2007, he described a "letter" from Dr. Miyakawa recommending a 10% PPD when in actuality this letter was a full-fledged report detailing Dr. Miyakawa's examination of Mr. Turley. In addition, Dr. Grady failed to mention in his report the IME with Dr. Banks for the 7/1/85 right ankle injury and also the IME with Dr. Ramas' for the 7/25/96 right knee injury, for which Mr. Turley was awarded five percent (5%) and two percent (2%) respectively. Dr. Grady's comments in the Summary section of his report are confusing and/or ambiguous. After finding 8% WPI on the right lower extremity, 1% on the right elbow, and 15% WPI on the cervical spine, he totals those figures at 23%, when they actually add up to 24%. Perhaps Dr. Grady is using a combined values chart to achieve the reduced figure of 23% but he does not say so explicitly. In sum, Dr. Grady's report is incomplete at best, and inaccurate at worst. It is not a reliable, persuasive, or probative report on Mr. Turley's current condition. The reports of Drs. Guberman (8% WPI on the right elbow) and Abplanalp (8% PPD on the right elbow) are far more persuasive.

### III. TABLE §85-20-C IS CONTRARY TO W.VA. CODE §23-4-6(I)

Insofar as the PTD Examining Board's Initial Recommendations relied on Table §85-20-C, that regulation (which was designed for the specific purpose of reducing PPD awards), is contrary to West Virginia Code §23-4-6(I). As applied to this claim, Table §85-20-C resulted in lower ratings than Petitioner's previous low back permanent partial disability awards, despite the fact that Petitioner's condition undoubtedly has deteriorated as he has aged. This is not what the Legislature intended. Table §85-20-C, supra, which is expressly designed to "reduce" impairment awards, is in excess of the statutory authority conferred upon the agency which promulgated the regulation, and is contrary to statute.

In addition to its mandate that a Petitioner's permanent partial disability award is to be determined exclusively by the degree of whole body medical impairment, West Virginia Code §23-4-6(I) continues, in pertinent part, as follows:

[t]he workers' compensation commission shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment. Once the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant.

This statutory provision does not mandate that claim administrators are empowered to "reevaluate" permanent partial disability awards based upon whole person medical impairment, but only provides that standards be adopted for the evaluation process and determination of impairment. The Legislature substantially reduced permanent partial impairment award rates elsewhere in the 2003 amendments to the Workers' Compensation Act. It expressed a clear intent that permanent disability awards were to be based exclusively upon the "claimant's degree

of whole body medical impairment.” It retained the requirement of an impairment threshold for eligibility to apply for permanent total disability benefits. It did not, and indeed could not, delegate its legislative authority to an agency / company, which shortly thereafter privatized, operated, and is profiting, under the rules in question, to arbitrarily reduce the amount of a permanent partial disability award through the artifice of tables, with no medical or scientific basis for determining whole person medical impairment. It provided for limited authority of the now-abolished Workers’ Compensation Commission to “adopt standards for the evaluation process and determination of impairment.” West Virginia Code §23-4-6(I). The Legislature did not empower the Commission to adopt standards for the evaluation process and determination of impairment, and thereafter arbitrarily reevaluate the degree of impairment in order to reduce permanent partial disability awards. This effort, all aimed at reducing Workers’ Compensation awards, is beyond the statutory mandate, clearly in excess of statutory authority, and contrary to the statute which creates a substantive right of a claimant to a permanent partial disability award based upon his whole person medical impairment. West Virginia Code §23-4-6(I).

Under West Virginia Code §23-4-6(I), all workers’ compensation claimants have a substantial right to have an award of permanent partial disability based upon a standard of whole body medical impairment. For spine injury claimants, Table §85CSR20-C deprives them of that right. The regulation expressly identifies its purpose as intending to “reduce” impairment within an arbitrary “range.” Table §85 CSR 20-C, relating to the lumbar spine, does not determine whole person medical impairment, (as that term is defined elsewhere in the regulations, *supra*, and/or in the authoritative treatise of the AMA Guides, *supra*). It cannot be used as a basis to determine permanent partial disability awards pursuant to West Virginia Code §23-4-6(I).

A cursory review of §85-20-64.1 plainly demonstrates that the regulation exceeds statutory authority:

Once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth below. Permanent partial disability assessments in excess of the range provided in the appropriate category as identified by the rating physician shall be reduced to the within the ranges set forth below:

64.4 Cervical Spine Impairment: A single injury or cumulative injuries that lead to a permanent impairment to the Cervical Spine area of one's person shall cause an injured worker to be eligible to receive a permanent disability award within the ranges identified in Table §85-20-E. The rating physician must identify the appropriate impairment category and then assign an impairment within the appropriate range designated for that category.

Since the Legislature enacted a statutory scheme directing that impairment directly translates to the amount of an award, regulations with the express purpose of reducing a percentage to something other than "whole person medical impairment" clearly are in excess of statutory authority, and constitutes an unconstitutional delegation of legislative authority. See generally, Chapman v. Huntington Housing Authority, 121 W.Va. 319, 3 S.E.2d 502 (1939). The citizens of West Virginia vote for Legislators; they are unable to vote for the now-privatized agency responsible for the further unlawful benefit reductions attempted in Rule 20. That rule purports to implement the provisions of West Virginia Code §23-4-3b(b). However, that statutory provision states:

the board of managers promulgate a rule establishing the process for the medical management of claims and awards of disability which includes, but is not limited to, reasonable and standardized guidelines and parameters for appropriate treatment, expected period of time to reach maximum medical improvement and range of permanent partial disability awards for common injuries and diseases, or in the alternative, which incorporates by reference the medical and disability

management guidelines, plan or program being utilized by the commission for the medical and disability management of claims, with the requirements, standards, parameters and limitations of such guidelines, plan or program having the same force and effect as the rule promulgated in compliance herewith.

This provision clearly and unambiguously provides that the various claim administrators have some consistent guidelines and parameters in place to manage claims. It no more authorizes the arbitrary establishment of some standard other than whole person medical impairment to reduce the amount of an award than the tax code authorizes a state agency to arbitrarily go forth and set tax rates in any amount it chooses, or authorizes another agency to set an arbitrary amount for a medical malpractice damage cap. Those functions constitute a legislative function and cannot be delegated. However, in enacting West Virginia Code §23-4-3b(b), the Legislature did not confer authority on an agency to deprive claimants of permanent partial disability awards based upon the standard of whole person medical impairment for a class of injured workers who sustain compensable spine injuries. It merely mandated that the various claim administrators manage claims under consistent standards as the workers' compensation system privatized and various carriers entered the system who would be charged with claims administration performance in a manner which would operate fairly between carriers and self-insured, self-administering employers. The statute clearly did not authorize the agency to reduce permanent partial disability awards through medico-legal subterfuge.

#### **IV. EXCLUDING PETITIONER'S PRIOR PPD AWARD FOR CTS FROM PTD CONSIDERATION IS UNCONSTITUTIONAL UNDER THE WEST VIRGINIA AND U.S. CONSTITUTIONS.**

It is unconstitutional for West Virginia Code §23-4-6(n)(4)(A) to exclude CTS from consideration (aggregation) in PTD litigation. Specifically, it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. See, e.g., SER Boan v. Richardson, 198 W.Va. 545, 482 S.E.2d 162 (1996), *modified on other grounds*, Fitzgerald v. Fitzgerald, 219 W. Va. 774, 639 S.E.2d 866 (2006). Where economic rights are concerned the courts:

look to see whether the classification is a rational one based on social, economic, historic, or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

Syll. Pt. 1, SER Boan v. Richardson [internal citations omitted]. Here, the exclusion of CTS claimants is irrational, and bears no reasonable relationship to a proper governmental purpose. Rather it obviously disadvantages one group of Workers' Compensation claimants over another. Id. In fact, in this case under Dr. Padmanaban's analysis, such exclusion effectively disqualifies Petitioner from PTD consideration. Under these circumstances, West Virginia Code §23-4-6(n)(4)(A) violates equal protection principles and cannot stand. Syll. Pt. 1, SER Boan v. Richardson. In addition, Petitioner respectfully submits it violates the Certain Remedy Clause of Article III, Section 17 of the West Virginia Constitution.

## CONCLUSION

In sum, Mr. Turley has suffered a number of compensable injuries, none of which has improved with the passage of time. The Social Security Administration agrees that the cumulative effect of his occupational injuries totally disables him from any work activity for which he is suited by training or prior experience. The decisions below should be reversed because the BOR/ALJ erred by approving the PTD Examining Board's arbitrary reduction of Petitioner's prior 55% PPD awards to a much-lower 27% WPI rating. Res judicata and collateral estoppel should have been applied to Petitioner's PTD claim; they bar the "re-evaluation" of Petitioner's impairments in the manner done by the PTD Examining Board, and approved by the BOR/ALJ. The BOR/ALJ also erred by not crediting Dr. Padmanaban's PTD evaluation, which is the most reliable and credible of the relevant reports. The BOR/ALJ erred by applying Table §85-20-C to Petitioner's claim because it is contrary to W.Va. Code §23-4-6(I). Finally, the BOR/ALJ's exclusion of Petitioner's prior PPD award for CTS from PTD consideration is unconstitutional under the West Virginia and U.S. Constitutions. Petitioner requests that the decisions below be reversed, and this matter remanded for consideration on the merits of his PTD petition.

**Signed:**



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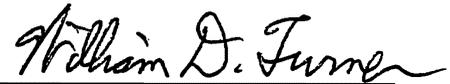
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CERTIFICATE OF SERVICE

I, William D. Turner, counsel for Petitioner, do hereby certify that I have served the foregoing *Petitioner's Brief*, upon all parties, by mailing a true and exact copy thereof, via United States First Class Mail, postage paid, on this the 21<sup>st</sup> day of October, 2011, and addressed as follows:

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