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STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES

IN THE MATTER OF:

Edward Birch
Claimant

JCN: 2004040678

and

DOI: 03-09-2004

SWVA, Inc.
Self-Insured Employer

DECISION OF ADMINISTRATIVE LAW JUDGE

NOV 20 2013
JUDITH FANSTORMAKER, JUDGE

PARTIES:

Claimant, Edward Birch, by counsel, Thomas Maroney
Employer, SWVA, Inc., by counsel, Steven Wellman

ISSUE:

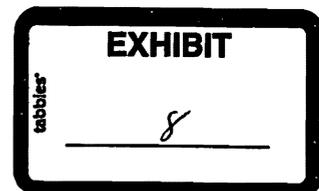
The claimant protested the Claim Administrator's Order of November 15, 2011, which granted the claimant an 8% permanent partial disability award.

DECISION:

It is hereby ORDERED that the Claim Administrator's Order of November 15, 2011, be REVERSED and the claimant granted an additional 5% PPD above and beyond the 8% previously granted.

RECORD CONSIDERED:

See attached, Record Considered.



FINDINGS OF FACT:

1. The claimant filed a workers' compensation claim application for a low back injury sustained on March 9, 2004. According to the claimant's application for benefits, the claimant was throwing an 8 foot piece of metal when he slipped on some grease. The physician's portion of the claim application indicates that the claimant was diagnosed with a lumbar sprain (847.2) and backache (724.5). The physician further noted that the claimant had an old injury from 2002 that was unrelated to the injury of March 9, 2004.

2. By Claim Administrator's Order dated April 21, 2004, the claim was ruled compensable for strain/sprain of the lumbar region (847.2).

3. On October 27, 2011, Marsha Bailey, M.D., performed an independent medical evaluation of the claimant. Dr. Bailey noted that the claimant injured his back on March 9, 2004, when he slipped while throwing an 8 foot piece of metal. An MRI of the claimant's lumbar spine performed on March 19, 2004, revealed a large extruded disc at L2-3 along with degenerative disc disease at all levels. On March 25, 2004, Dr. Weinsweig performed a bilateral L2-3 lumbar microdiscectomy with bilateral foraminotomies for a post-operative diagnosis of lumbar radiculopathy secondary to herniated disc with extruded fragment at L2-3. Thereafter, on January 10, 2005, Dr. Weinsweig performed a right L2-3 lumbar re-exploration and microdiscectomy for a post-operative diagnosis of recurrent lumbar radiculopathy secondary to recurrent herniated disc to the right at L2-3.

Dr. Bailey found the claimant to be at maximum medical improvement (MMI) in regard to his compensable back injury. In regard to impairment, Dr. Bailey found the claimant to fall under Category II-E of Table 75 of the AMA Guides, 4th Edition (AMA Guides) for a total of 12% whole person impairment. Dr. Bailey found no impairment for abnormal range of motion of the lumbar spine as the claimant's measurements were restricted by pain and considered invalid for rating purposes. Applying Rule 20, Dr. Bailey placed the claimant under Lumbar Category III of Table 85-20-C. Because the claimant's 12% whole person impairment under the range of motion model fell within the impairment range of Category III (10-13%), no further adjustment of the claimant's impairment was required under Rule 20. However, Dr. Bailey found that a portion of the claimant's impairment should be apportioned for the pre-existing conditions of degenerative joint and disc disease. In that regard, Dr. Bailey apportioned 4% of the claimant's impairment to these pre-existing conditions and recommended 8% whole person impairment for the compensable injury of March 9, 2004.

4. By Order dated November 15, 2011, the claim administrator granted the claimant an 8% permanent partial disability award based upon Dr. Bailey's IME report of October 27, 2011, report. This matter is now before the Office of Judges pursuant to the claimant's protest to the Order of November 15, 2011.

5. On August 13, 2012, Bruce Guberman, M.D., performed an independent medical evaluation of the claimant. Dr. Guberman found the claimant to have 12% whole person impairment under Table 75 of the AMA Guides. Dr. Guberman also obtained valid lumbar range of motion measurements and found the claimant to have 13% whole person impairment for abnormal range of motion of the lumbar spine. Dr. Guberman further determined that pre-existing degenerative changes had likely contributed to the claimant's range of motion abnormalities. In that regard, Dr. Guberman apportioned 6% of the claimant's abnormal range of motion to non-compensable degenerative

changes. Combining 12% whole person impairment under Table 75 with the remaining 7% impairment for abnormal lumbar range of motion, Dr. Guberman found the claimant to have a combined total of 18% whole person impairment under the range of motion model. Like Dr. Bailey, Dr. Guberman placed the claimant in Lumbar Category III of Table 85-20-C. However, because the claimant's impairment under the range of motion model (18%) exceeded the allowable impairment range under Category III (10-13%), Dr. Guberman adjusted the claimant's impairment rating under Rule 20 to 13% whole person impairment.

In regard to Dr. Bailey's impairment findings, Dr. Guberman noted that Dr. Bailey did not obtain valid range of motion measurements and was unable to recommend impairment for abnormal range of motion. Additionally, Dr. Guberman opined that Dr. Bailey incorrectly apportioned impairment for pre-existing degenerative changes from her final impairment rating under Rule. In that regard, Dr. Guberman opined that apportionment of any pre-existing impairment should be made under the range of motion model of the AMA Guides.

6. The employer filed a closing argument dated September 6, 2013. The employer argues that Dr. Bailey correctly apportioned the claimant's pre-existing impairment from her final impairment rating under Rule 20, while Dr. Guberman improperly deducted the claimant's pre-existing impairment in the middle of the rating process and then applied Rule 20. The employer argues that the Order of November 15, 2011, should be affirmed.

DISCUSSION:

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The issue is the amount of claimant's permanent partial disability. This award is for residual disability, which will remain with the claimant after his or her recovery. It is referred to as "partial" because, even though it may affect an individual's ability to work and enjoy life, the individual is not totally disabled because of it.

If a party protests the Order pertaining to an award, the parties have an opportunity to present evidence concerning the claimant's disability. Evidence of permanent partial disability in the form of testimony and reports by physicians and other experts may be submitted. The fact that a particular expert may find a certain percentage of permanent partial disability does not mean the Office of Judges is required to accept it. All reliable, probative and substantial evidence will be weighed and considered in determining if the permanent partial disability awarded is correct.

For injuries occurring after May 12, 1995, under W. Va. Code § 23-4-6 and 85 CSR 20, permanent partial disability awards are based on medical impairment. The Commission has adopted the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, as the measure of whole body medical impairment. In cases where the examination upon which the award was based was conducted on or after June 14, 2004, range of impairment limitations, as set forth in 85 CSR 20, apply to some types of injuries.

There are two IME reports of record. Both Dr. Bailey and Dr. Guberman found 12% whole person impairment under Table 75 of the Guides. In regard to abnormal range of motion of the lumbar spine, Dr. Bailey found no impairment as the claimant's measurements were invalid under the AMA Guides validity criteria, while Dr. Guberman obtained valid range of motion measurements and found the claimant to have 13% whole person impairment for abnormal range of motion. Although Dr. Bailey should not be faulted for the claimant's invalid range of motion measurements, Dr. Guberman's rating under the range of motion model must be considered the most comprehensive rating of record as Dr. Guberman was able to assess the claimant's impairment for abnormal lumbar range of motion whereas Dr. Bailey was not. However, the most important distinction between the impairment ratings of Dr. Bailey and Dr. Guberman involve the

apportionment of impairment for the claimant's pre-existing degenerative condition. Both doctors agree that at least some portion of the claimant's overall lumbar impairment is attributable to a non-compensable degenerative condition. However, in apportioning for that pre-existing impairment, the two doctors employed different methods. Dr. Bailey found the claimant to fall under Category III of Table 85-20-C for 12% impairment. Dr. Bailey then apportioned 4% of the claimant's final impairment rating under Rule 20 to the pre-existing condition, leaving the claimant with a final impairment rating of 8% whole person impairment for the compensable injury. Dr. Guberman on the other hand apportioned 6% of the claimant's impairment under the range of motion model to the pre-existing condition, and then applied Rule 20 for a final impairment rating. The issue then is whether apportionment for a pre-existing condition should be made under the range of motion model or taken from the final impairment rating under Rule 20.

W. Va. Code § 23-4-9b states:

Where a claimant has a definitely ascertainable impairment resulting from an occupational or nonoccupational injury, disease or any other cause, whether or not disabling, and the employee, thereafter receives an injury in the course of and resulting from his or her employment, unless the subsequent injury results in total permanent disability within meaning of section one [§ 23-3-1], article three of this chapter, the prior injury, and the effect of the prior injury, and an aggravation, shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury. Compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment.

In addition, W.Va. C.S.R. § 85-20-64.1 requires that a claimant's impairment be calculated under the range of model of the AMA Guides, 4th Edition. Once a claimant's whole person impairment is determined under the range of motion model, the claimant's PPD rating is then determined by adjusting the range of motion impairment so as to fit within the PPD range of the appropriate Table C category.

Pursuant to W. Va. Code § 23-4-9b and W.Va. C.S.R. § 85-20-64, it is found that any apportionment for pre-existing impairment should be made from a claimant's whole person impairment as determined under the range of motion model, and not from the final PPD rating as determined under Rule 20. W. Va. Code § 23-4-9b refers to both ascertainable impairment related to a pre-existing condition and the award of compensation; however, impairment and compensation are not synonymous. Impairment is a medical assessment based upon the AMA Guides, while permanent partial disability is a legal measure of the amount of compensation to which the claimant is entitled. According to the clear

language of the statute, W.Va. Code § 23-4-9b provides for the apportionment of impairment related to a pre-existing injury, not the apportionment of permanent partial disability.

The employer argues that apportionment prior to the application of Rule 20 produces an absurd result whereby claimants could conceivably receive a new 5-8% PPD award for every new lumbar spine sprain/strain. However, this is not so. To use the employer's example, any prior PPD award for the lumbar spine would have to be deducted from any subsequent PPD award for the lumbar spine. The case law is clear that our workmen's compensation law does not authorize injured workmen to be twice compensated for the same disability. See Syl. pt. 7, Gillispie v. State Workmen's Compensation Commissioner, 157 W.Va. 829, 205 S.E.2d 164 (1974), and Linville v. State Compensation Commissioner, 112 W.Va. 522, 165 S.E.2d 803 (1932). In this particular case, however, we are not dealing with prior awards of compensation, but rather apportionment of a pre-existing impairment.

For the reasons set forth above, it is found that Dr. Bailey incorrectly apportioned the claimant's pre-existing impairment from the final Rule 20 PPD rating, whereas Dr. Guberman properly apportioned the claimant's pre-existing impairment under the range of motion model. Accordingly, it is found that Dr. Guberman's report provides the most accurate and reliable assessment of the claimant's permanent partial disability in this claim. Therefore, the Order of November 15, 2011, should be reversed and the claimant granted an additional 5% PPD above and beyond the 8% previously granted in accordance with Dr. Guberman's report.

CONCLUSIONS OF LAW:

Based upon the evidence of record, it is found that Dr. Guberman's report provides the most accurate and reliable assessment of the claimant's permanent partial disability in this claim.

Accordingly, it is hereby ORDERED that the Claim Administrator's Order of November 15, 2011, be REVERSED and the claimant granted an additional 5% PPD above and beyond the 8% previously granted.

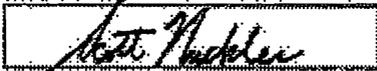
Edward Birch

JCN: 2004040678

APPEAL RIGHTS:

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or action of the Administrative Law Judge. **The appeal shall be filed directly with the Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: November 7, 2013


Scott Nuckles
Administrative Law Judge

SN:srp

cc: EDWARD D BIRCH
THOMAS MARONEY - COUNSEL FOR CLAIMANT
SWVA INC
STEVEN WELLMAN - COUNSEL FOR EMPLOYER
AVIZENT

Edward Birch

JCN: 2004040678

JCN: 2004040678

Date: November 7, 2013

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of November 15, 2011, regarding PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified
Document Date: 8/13/2012
Submit Date: 8/28/2012
Author: Medical report Dr. Guberman

Employer Evidence

Document Type: Not Specified
Document Date: 3/18/2004
Submit Date: 2/21/2013
Author: Report of Injury

Document Type: Not Specified
Document Date: 4/21/2004
Submit Date: 2/21/2013
Author: Claims Admin Order

Document Type: Not Specified
Document Date: 10/27/2011
Submit Date: 2/21/2013
Author: Marsha Lee Bailey, MD-IME Report

Document Type: Not Specified
Document Date: 11/15/2011
Submit Date: 2/21/2013
Author: Claims Admin Order

Edward Birch

JCN: 2004040678

CLOSING ARGUMENTS:

Party Submitted: Employer
Letter Date: 9/6/2013

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ADM

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW

SWVA, INC.,
Appellant

v.

EDWARD D. BIRCH,
Appellee

Appeal No. 2048996
JCN: 2004040678
DLE 03/09/2004

ORDER

The following case is an appeal by the employer from a final order of the Workers' Compensation Office of Judges dated November 7, 2013, which reversed the claims administrator's order dated November 15, 2011, granting an 8% permanent partial disability award, and the Administrative Law Judge granted an additional 5% permanent partial disability above and beyond the 8% previously granted.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language as interpreted by the West Virginia Supreme Court of Appeals.

Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated November 7, 2013, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved.

RECEIVED

APR 21 2014

Jenkins Fenstermaker, PLLC



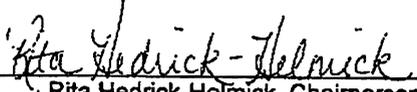
EDWARD D. BIRCH

Appeal No. 2048996

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated November 7, 2013, is hereby AFFIRMED. If payment to the claimant or other action is required as a result of this order, the responsible party shall pay the payment (or first payment if more than one payment will be disbursed), or take such other action as is required, within 15 days of the date of this order.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED: APRIL 18, 2014


Rita Hedrick-Helmick, Chairperson

cc: SWVA, INC.
STEVEN K. WELLMAN
YORK RISK SERVICES
EDWARD D. BIRCH
EDWIN H. PANCAKE