NO._____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVE ARGABRIGHT,

Petitioner

vs.

MYSTIC LLC

Respondents

APPEAL FROM THE WORKERS' COMPENSATION BOARD OF REVIEW
BOR Appeal No.: 2045592
JCN No.: 2008000603

PETITION FOR APPEAL

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INTRODUCTION

This is a appeal by the Claimant from a decision and order of the Workers' Compensation Board of Review, dated September 27, 2011. (App. 2). The Board's decision reversed the decision of the Office of Judges, which granted the Claimant a 6% permanent partial disability. (App. 5). The Administrative Law Judge reversed the order of the Claim Administrator, who had denied any further permanent partial disability by order dated March 26, 2009. (App. 16) The Claimant contends that he is entitled to a 6% permanent partial disability pursuant to the report and recommendation of Dr. Guberman. (App. 17).

The issue on appeal is the conflicting interpretations of the Office of Judges and the Board of Review, regarding how permanent partial disability awards subject to Rule 20 should be calculated where injuries are reduced due to prior injuries or conditions.

STATEMENT OF FACTS

This claim has a long history. This claim is in its fifth year of litigation. The Claimant suffered an injury in on November 9, 2004, while working for Mystic Energy. He injured his low back while trying to pick up a box of glue for the roofbolter, while bent over in a stooped position. He was off work for some period of time, and was eventually evaluated by Dr. Robert Kropac in Princeton, who recommended an 8% permanent partial disability. (App.58).

On February 22, 2006, Mr. Argabright again injured his back and again sought treatment with Dr. Adnan Silk, who had treated him for the earlier injury. The Claimant and Dr. Silk submitted a reopening application on the assumption that the injury of February 22, 2006 was a recurrence of the earlier injury. (App. 67-68). However, the reopening request was denied.

The short version of the story is that the Claimant suffered either a new injury or an aggravation of a previous injury on February 22, 2006. The previous injury of November 9, 2004 was an Old Fund claim. If the injury of February 22, 2006 was a new injury, it was the responsibility of Brickstreet. The Insurance Commissioner asserted that it was a new injury, and denied the petition to reopen. Protests were filed to both actions, and the protests began their long journey toward a resolution. Neither Brickstreet nor the Old Fund provided any medical treatment or temporary total disability benefits.

Months later, an Administrative Law Judge ruled that Mr. Argabright's injury on February 22, 2006, was a new injury. The Claimant then filed a new claim with Brickstreet. (App. 69). That claim also promptly rejected, asserting that it was an aggravation of the Old Fund injury. The Board of Review affirmed that ruling, and also stated in its order that if Mr. Argabright refiled as a new claim, that the Claim Administrator could not reject the claim on the basis that the was untimely filed. (App. 66-67). It was rejected by Brickstreet on the grounds that it was untimely, notwithstanding the Board's order,. Finally, on October 8, 2008, another Administrative Law Judge ruled the new claim compensable, more that two and a half years from the injury. (App. 70).

Once the compensability and responsible insurer's issues, he was eventually referred for a permanent partial disability rating. Brickstreet eventually referred the Claimant to Dr. Paul Bachwitt for a permanent total disability evaluation with respect to the new injury. (App. 32). Dr. Bachwitt found a 10% impairment based upon the application of the *AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.* He found a 5% impairment based upon the diagnostic component, classifying him in Category II-B on Table 75 at page 113 of the *AMA*

Guides. Dr. Bachwitt also found 5% impairment based upon the range of motion criteria of the *AMA Guides*. However, Dr. Bachwitt first applied Rule 20 to reduce the impairment rating to 8%, and then applied the apportionment of the earlier injury based upon the *AMA Guides* to wipe out any additional impairment rating.

The Claimant contends that Dr. Bachwitt's methodology was contrary to the regulations of Rule 20, and that his rating is therefore incorrect. Dr. Bruce Guberman also evaluated the claimant and found a 14% permanent partial disability. (App.17). He agreed with the 5% rating based upon Category II-G on Table 75. He also found somewhat greater range of motion abnormalities based upon the range of motions criteria in the *AMA Guides*, 7% for range of motion abnormalities of flexion and extension and 2% for restriction of lateral flexion. Unlike Dr. Bachwitt, he applied the apportionment of the earlier injury pursuant to the *AMA Guides* first, subtracting the 8% from the earlier injury from the overall impairment rate, leaving a 6% impairment, and then applied the restrictions of Rule 20.

The Office of Judges ruled that the method applied by Dr. Guberman was the correct method pursuant to the interpretation of the Office of Judges and the opinion of the Insurance Commissioner's medical advisors. Judge Smith credited the report of Dr. Guberman, who found a 14% permanent partial disability, subtracted the 8% for the prior award, and recommended a 6% award. Since that was within the limits of Rule 20 (5%-8%), no further adjustment was necessary under Rule 20. (App. 5, 13-14).

The Employer appealed the decision of the Office of Judges to the Board of Review. The Board reversed, on the basis of its interpretation that the deduction of the prior award was to subtract the prior award *after* the reductions due to the limits of Rule 20.

SUMMARY OF THE ARGUMENT

The issues in this appeal are essentially issues of law, whether the interpretation of the Office of Judges and the Insurance Commissioner or the interpretation of the Board of Review is correct. The Claimant contends that the language of Rule 20 and the use of the AMA Guides supports the method used by Dr. Guberman and the interpretation of the Office of Judges.

ARGUMENT

Dr. Guberman provided a clear explanation for his method:

> The claimant has previously received a 0 percent impairment of the whole person for this injury. That was based on an Independent Medical Evaluation performed by Dr. Bachwitt dated February 26, 2009. At that time, Dr. Bachwitt obtained a 10 percent impairment of the whole person using the Range of Motion Model. He then applied Rule 20, Section VI! to decrease that to an 8 percent impairment of the whole person. He then divided that in half because of pre-existing conditions to obtain a 4 percent impairment of the whole person. At the time of Dr. Bachwitt's report, that was his recommendation. However, that was reduced to a 0 percent impairment of the whole person since the claimant previously received an 8 percent impairment of the whole person for his earlier lumbar spine injuries.
>
> *However, in my opinion, the 8 percent impairment of the whole person that the claimant received for his earlier injuries should be apportioned from the total obtained using the Range of Motion Model before application of Rule 20, Section VII. Rule 20, Section VII indicates that an impairment rating should be obtained using the Range of Motion Model, Fourth Edition of the AMA Guides, and subsequent to that, Rule 20, Section be applied. Therefore, the proper use of the Range of Motion Model from the AMA Guides, Fourth Edition indicates that any prior impairment rating should be subtracted from the amount obtained using the Range of Motion Model. Therefore, the 8 percent impairment of the whole person he has previously received should be subtracted from the total of 14 percent impairment of the whole person obtained at the present time using the Range of Motion Model, Fourth Edition. That leaves a 6 percent impairment of the whole person. Then Rule 20, Section VII should be applied.*

The language of Rule 20 supports Dr. Guberman's interpretation:

> Permanent partial disability assessments ***shall be determined based upon the range of motion models contained in the Guides Fourth. 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
>
> 85 CSR 64.1

The plain language of the Rule indicates that once the impairment rating, based upon the range of motion model of the *AMA Guides*, has been determined, ***then*** Rule 20 is applied to the impairment rating, not before.

The rule states that impairment under the AMA Guides is determinated first, and then Rule 20 is applied. The apportionment of prior injuries is a part of the AMA Guides process.[1] Dr. Guberman's method is clearly consistent with the Rule. He determines the impairment according to the *AMA Guides*, including any apportionment, and only then applies any adjustment required by Rule 20. Rule 20 is essentially an arbitrary limitation, grafted onto the basic method of the AMA Guides. Dr. Bachwitt and the Board of Review apparently assert that Rule 20 should be applied prior to any apportionment. Nothing in Rule 20 says that, and they make no reasoned case for why their method should be applied. The objections to Dr. Guberman's method was that a "double dipping" would occur. The Board of Review decision offered no analysis of the AMA Guides, regulations or statutes, but simply declared that prior awards should be deducted after making any reductions required by Rule 20.

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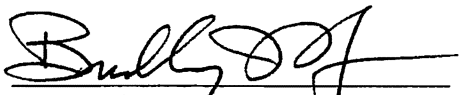
[1]"For example, in apportioning a spine impairment first the current spine impairment would be estimated, and then the impairment from any preexisting spine problem would be estimated. The estimate for the preexisting impairment would be subtracted from that for the present impairment to account for the effects of the former. Using this approach to apportionment would require accurate information and date on both impairments." *AMA Guides* at 2/10.

The procedure endorsed by the Board of Review systematically reduces awards to injured workers, but does not enlighten us on the question of why they think Dr. Guberman is wrong. However, the method the Board prefers is problematic with respect to fundamental fairness as well as the plain language of Rule 20 and the *AMA Guides*. By counting both the current injury and the previous injury or condition before making the apportionment and comparing both impairments to the Rule 20 limits, they are retroactively applying the artificial limits of Rule 20 to the impairment rating of the *prior injury* as well as the current one, where the prior injury occurred at a time when those limits did not exist. That method does indeed reduce the award whenever there is limitation caused by Rule 20, but it does by so subjecting both impairments to Rule 20, one of them *ex post facto*. Dr. Guberman's method avoids that problem. The apportionment is made between the two impairment ratings by the *AMA Guides*, then the rule is applied to the difference. Dr. Guberman's method is consistent with the Rule and avoids the problems described above.

CONCLUSION

The apportionment provisions are part of the AMA Guides, and Dr. Guberman correctly concluded that the rating under the AMA Guides was to be done first and only then that the Rule 20 ranges be applied. The Order of the Board of Review should be reversed and the Claimant should be granted an additional 6% permanent partial disability award as recommended by Dr. Guberman.

STEVE ARGABRIGHT,
Claimant, by Counsel



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CERTIFICATE OF SERVICE

I, Bradley J. Pyles, counsel for the Claimant hereby certify that on October 21, 2011, I served the foregoing Petition for Appeal of the Claimant upon all parties to this claim, as indicated below, by depositing true copies thereof in the United States Mail, postage prepaid, addressed as follows:

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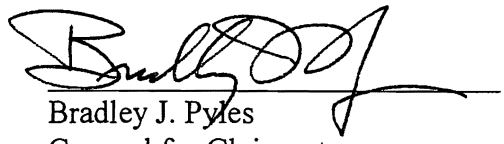

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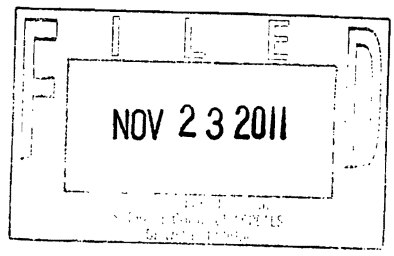
November 23, 2011



VIA HAND DELIVERY

Rory L. Perry II, Clerk
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Re: ***Steve Argabright, Petitioner, v. Mystic, LLC, Respondent***
Appeal No.2045592, JCN: 2008000603, SC Docket No. 11-1449

Dear Mr. Perry:

Enclosed herewith please find the original and five copies of the **RESPONSE ON BEHALF OF RESPONDENT MYSTIC, LLC, TO PETITION FOR REVIEW** and **"APPENDIX."** By copy of this letter, I am serving counsel for all interested parties.

Thank you for your attention to this matter.

Very truly yours,

H. Dill Battle III

HDB/jaw/3242108
Enclosures

cc: Bradley J. Pyles, Esq.
BrickStreet Mutual Insurance Co.
Sue Patterson, Mystic (w/o enc.)
Beth Smock, City Insurance Professionals (w/o enc.)