

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

NOV 23 2011

STEVE ARGABRIGHT,

Petitioner,

v.

APPEAL NO.: 2045592

JCN: 2008000603

CRN: 2007020530

DLE: 02/22/06

CA ORDER: 03/24/09

ALJ ORDER: 01/18/11

BOR ORDER: 09/27/11

MYSTIC, LLC,

Respondent.

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FROM THE WEST VIRGINIA WORKERS' COMPENSATION BOARD OF REVIEW

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RESPONSE ON BEHALF OF RESPONDENT  
MYSTIC, LLC, TO PETITION FOR REVIEW**

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**MEMORANDUM OF PARTIES**

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**RESPONSE ON BEHALF OF RESPONDENT  
MYSTIC, LLC. TO PETITION FOR REVIEW**

**I. STATEMENT OF THE CASE**

Steve Argabright ("Claimant") was employed as a roof bolter for Mystic, LLC ("Employer" or "Mystic"). (Petitioner's Appendix No. 12.) He initially suffered a back injury on November 9, 2004 (Claim No. 2005019479). (Respondent's Appendix No. 1.) He re-injured himself on February 22, 2006, while lifting timbers and putting them in a scoop bucket. (See Petitioner's Appendix No. 12.) He filed a claim for this second injury, Claim No. 2007020530. (See Respondent's Appendix No. 1.)

Following an order from the Office of Judges reversing the July 9, 2008 claim rejection (Petitioner's Appendix No. 13), the Claim Administrator ruled this claim compensable for lumbar sprain/strain by an order dated December 23, 2008. (Respondent's Appendix No. 2.)

Paul Bachwitt, M.D., evaluated Claimant on or about February 23, 2009. (Petitioner's Appendix No. 6.) He reviewed Claimant's medical history and diagnostic testing. He attributed half Claimant's complaints to pre-existing pathology, spondylosis and degenerative changes as documented in Claimant's medical records prior to the injury in this claim. He relied upon the records showing that Claimant had treatment from November 2004 through December 2005 consisting of physical therapy, Darvocet and Lortab. Dr. Bachwitt also noted that the December 2004 lumbar MRI showed bulging discs at multiple levels. He noted the MRI exams of 2004 and 2009 showed no significant changes. Dr. Bachwitt diagnosed lumbar sprain/strain superimposed on pre-existing degenerative changes. *Id.*

Dr. Bachwitt found Claimant had 5% impairment based on Category II-B, Table 75, page 113 of the *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition ("*Guides*" or "*AMA Guides*"). He found 5% impairment for reduced range of motion for a total of 10% impairment. He placed Claimant in Lumbar Category II of Table 85-20-C, with a range of 5-8% impairment. Since the 10% range of motion impairment does not fall within the accepted ranges for Lumbar Category II, Dr. Bachwitt adjusted the impairment to 8% impairment pursuant to Rule 20, Section VII. He then apportioned half of the impairment to Claimant's pre-existing degenerative changes, and half to the compensable injury. He relied upon W. Va. Code § 23-4-9b, which provides that prior injuries should not be taken into consideration in determining impairment. He found that Claimant suffered 4% whole person impairment ("WPI") as a result of the work injury. *Id.*

The Claim Administrator issued the March 26, 2009 Order finding that Claimant was not entitled to any additional permanent partial disability (“PPD”) as a result of the compensable injury in this claim. (Petitioner’s Appendix No. 5-1.) The Claim Administrator explained that Claimant had been fully compensated by the 5% PPD award he received in Claim No. 890009745. *Id.*

During the course of litigation, Claimant’s counsel referred Claimant to Bruce Guberman, M.D., for an IME. (Petitioner’s Appendix No. 5-2) Dr. Guberman utilized flawed methodology in arriving at his impairment calculation, and for that reason, his IME report, and the opinions expressed therein, is entitled to little weight. Specifically, Dr. Guberman examined Claimant; diagnosed lumbosacral sprain/strain, and found Claimant to be at maximum medical improvement (“MMI”). Using the range of motion model under the *AMA Guides*, Dr. Guberman found that Claimant had 14% WPI. However, before Dr. Guberman applied Rule 20, Section VII, Table 85-20-C, he deducted 8% for prior low back awards to arrive at 6% WPI. Then, he moved on to the required Rule 20 adjustment, and found that Claimant fell within Lumbar Category II under Table 85-20-C with an impairment range of 5% to 8%. Thus, according to Dr. Guberman, no adjustment was necessary, and he asserted that Claimant was entitled to an additional 6% PPD for lumbar spine impairment. *Id.*

The evidentiary record contained a January 31, 2005 IME report prepared by George Orphanos, M.D., in Claim 2005019479, for the date of injury of November 9, 2004. (See Respondent’s Appendix No. 1.) Dr. Orphanos noted that he reviewed a report from West Virginia Workers’ Compensation Commission that shows Claimant had multiple back injuries in the past, including Claim No. 890009745 for which he

received a 5% award. Dr. Orphanos summarized his findings that Claimant sustained a soft tissue injury involving his lumbar spine with evidence of radiculitis, but no gross abnormalities were present. He found that the symptomatology following this injury is superimposed on pre-existing degenerative disk changes and bulging disk as reported at L4-5 and L5-S1 with no definite herniated disk. He did not find Claimant to have reached MMI, and recommended further evaluation with myelogram. He deferred any impairment rating until further improvement occurs and additional studies completed.

*Id.*

The evidentiary record contained a May 16, 2005 IME report prepared by Robert Kropac, M.D., in Claim 2005019479, for the date of injury of November 9, 2004. (Petitioner's Appendix No. 9.) Based upon his clinical examination, Dr. Kropac diagnosed a lumbosacral musculoligamentous strain, secondary to the compensable injury. He noted that apportionment would be indicated if Claimant had received a prior impairment for his back. Dr. Kropac found Claimant had a total of 8% impairment based upon the range of motion model, but had no impairment from Table 75. Dr. Kropac applied Rule 20, Section VII and placed Claimant in Table 85-20-C, Lumbar Category II, with 8% impairment, from which he would subtract any prior awards for back injuries.

*Id.*

The evidentiary record also contained a November 16, 2006 IME report dated November 16, 2006, prepared in Claim No. 2005019479 by Prasadarao Mukkamala, M.D. (Respondent's Appendix No. 3.) Dr. Mukkamala diagnosed lumbar sprain, and noted naturally occurring degenerative lumbar disk disease. He concluded the medical evidence did not sustain a diagnosis of herniated disk or a diagnosis of

radiculopathy. He noted that the compensable injury of November 9, 2004, as well as the re-injury of February 2006, was only for lumbar sprain. Furthermore, he concluded that Claimant had reached MMI and there was no reason for any further treatment and/or investigations. *Id.*

Dr. Silk's February 2, 2009 record provides a good history of Dr. Silk's treatment of Claimant since December 2, 2004. (Petitioner's Appendix No. 7.) On November 9, 2004, Claimant injured his back lifting boxes. At that time he complained of severe pain in his back and legs. Claimant had a hernia repair on the left side after his back injury. He continues to have pain in back and lower extremities, and he works intermittently. EMG/NCS on June 20, 2006, were normal. An MRI in 2004 showed a bulging disc at L4-5 and L5-S1. Physical therapy provided some improvement. Claimant reinjured his back on February 2, 2006, and there was re-aggravation of the old injury. It was subsequently determined that the injury on February 2, 2006, was a new injury and he has not returned to work. Lumbar myelogram and CT showed midline bulging disc at L4-5 and L5-S1 with severe bulging at L2-3 and L3-4. Lumbar MRI on January 28, 2009, showed lumbar spondylosis and bulging disc at L5-S1 and L3-4. Claimant's examination remains essentially the same. Dr. Silk concluded that the recent lumbar MRI showed lumbar spondylosis and bulging disc at multiple levels, and that Claimant has no indication for surgery. His condition remains stable, and he has reached MMI. *Id.*

In a Decision dated January 18, 2011, Judge Tucker Smith reversed the Claim Administrator's March 24, 2009 Order granting a 0% PPD award, and granted an additional 6% PPD. (Petitioner's Appendix No. 3.) Judge Tucker Smith failed to

consider the overwhelming evidence that Claimant was not entitled to any additional PPD as a result of the compensable injury in this claim.

The Employer appealed Judge Tucker Smith's January 18, 2011 Decision to the West Virginia Workers' Compensation Board of Review ("BOR" or "Board"). On September 27, 2011, the Board reversed the ALJ Decision and reinstated the Claim Administrator's March 24, 2009 Order granting Claimant 0% additional PPD award. (Petitioner's Appendix No. 2.) Claimant prosecutes the instant petition for review from the Board's Order.

## **II. SUMMARY OF ARGUMENT**

Claimant has not demonstrated with reliable and credible evidence that the Board of Review's decision to reinstate the Claim Administrator's Order of March 24, 2009, which granted Claimant a 0% additional PPD award is clearly wrong based on the evidentiary record. Claimant fails to demonstrate that the Board of Review's decision is in clear violation of constitutional or statutory provisions, or is clearly the result of erroneous conclusions of law. Moreover, Claimant has not demonstrated that the Board of Review's decision is so clearly wrong based upon the evidentiary record, that even when all inferences are resolved in favor of the Board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. See W. Va. Code § 23-5-15(d).

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

The Employer submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

An appeal from the BOR to the West Virginia Supreme Court of Appeals is guided by W. Va. Code § 23-5-15(b) which provides that “[i]n 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[.]” *Williby v. West Virginia Office Ins. Comm’r, et al.*, 224 W.Va. 358, 361, 686 S.E.2d 9, 11 (2009). W. Va. Code § 23-5-15(d) provides that

[i]f the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board’s findings, reasoning and conclusions, there is insufficient support to sustain the decision. The court may not conduct a de novo re-weighing of the evidentiary record.

In this case, the BOR reversed the Administrative Law Judge’s Decision under the standards set forth at W. Va. Code § 23-5-12(b) because the decision of the administrative law judge was “[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record.” Claimant argues that the Board of Review erred in its interpretation of the statutory requirements for the determination of whole body impairment.

The Supreme Court explained that “[w]hile the findings of fact of the Board of Review are conclusive unless they are manifestly against the weight of the

evidence, the legal conclusions of the Board of Review, based upon such findings, are subject to review by the courts.” *Lovas v. Consolidation Coal Co.*, 222 W. Va. 91, 95, 662 S.E.2d 645, 649 (2008)(quoting *Barnett v. State Workmen’s Compensation Commissioner*, 153 W. Va. 796, 172 S.E.2d 698 (1970)).

Claimant does not challenge the findings of fact of the Board of Review. Claimant challenges the legal conclusions; therefore, the Court’s review is *de novo*, particularly where, as it does in this case, the challenge relates to the interpretation of administrative rule. “Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

As discussed below, the legal conclusions are proper and in accordance with this Court’s prior decisions.

- B. The decision of the Board of Review is not in clear violation of constitutional or statutory provisions, is not clearly the result of erroneous conclusions of law, or is not so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board’s findings, reasoning and conclusions, there is insufficient support to sustain the decision.**

At issue is the proper percentage of permanent impairment Claimant should be awarded for the residuals of her compensable injury. More specifically, Claimant challenges how that figure is calculated using Rule 20 and the *AMA Guides*.

The Board of Review properly determined that Judge Tucker Smith’s decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record that Claimant is not entitled to any additional PPD as a result of the compensable injury in this claim. See W. Va. Code § 23-5-12(b). Moreover, Judge

Tucker Smith's decision is arbitrary and capricious because she relies upon a method of calculating impairment "approved by the medical advisors to the Insurance Commissioner's office[.]" that was not presented in the evidentiary record. *Id.*

All evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the *AMA Guides*.

W. Va. C.S.R. § 85-20-65.1.

W. Va. C.S.R. § 85-20-64.2 provides:

The range of motion methodology for assessing permanent impairment shall be used. However, a single injury or cumulative injuries that lead to a permanent impairment to the Lumbar Spine area of one's person shall cause an injured worker to be eligible to receive a permanent partial disability award within the ranges identified in Table §85-20-C. The rating physician must identify the appropriate impairment category and then assign an impairment within the appropriate range designated for that category.

Dr. Bachwitt performed his evaluation using the range of motion methodology of the *AMA Guides* to determine that Claimant's WPI was 10%. He adjusted this estimate to 8% WPI by identifying Lumbar Category II, Table 85-20-C of Rule 20. Dr. Bachwitt's final estimate was 4% WPI because he apportioned 50% of his impairment to preexisting degenerative changes as seen on MRI exams in 2004 and 2009, and half to the compensable injury.

Dr. Bachwitt's apportionment was medically appropriate and consistent with the Legislature's statutory directions and with the Insurance Commissioner's regulations. W. Va. Code § 23-4-9b provides that the degree of preexisting impairment may be established by competent medical or other evidence and compensation shall be

awarded only in the amount that would have been allowable had the employee not had the preexisting impairment. Dr. Silk's records and the prior IME reports from Drs. Orphanos, Kropac, and Mukkamala document preexisting lower back problems and degenerative conditions and demonstrate definitely ascertainable impairment which should be apportioned from a final impairment estimate.

W. Va. C.S.R. § 85-20-66.4 demands that an evaluator consider all of a claimant's medical conditions when determining whole person impairment:

To the extent that factors other than the compensable injury may be affecting the injured worker's whole body medical impairment, the opinion stated in the report must, to the extent medically possible, determine the contribution of those other impairments whether resulting from an occupational or a non-occupational injury, disease, or any other cause.

Dr. Bachwitt's impairment estimate and apportionment is consistent with the AMA Guides, 4<sup>th</sup> Edition.

If 'apportionment' is needed, the analysis must consider the nature of the impairment and its possible relationship to each alleged factor, and it must provide an explanation of the medical basis for all conclusions and opinions.

Apportionment and causation are considered more fully in the Glossary (p. 315).<sup>1</sup>

For example, in apportioning a spine impairment, first the current spine impairment would be estimated, and then impairment from any preexisting spine problem would be

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<sup>1</sup> The Glossary section of the AMA Guides provides:

2. *Apportionment*: This is an estimate of the degree to which each of various occupational or non-occupational factors may have caused or contributed to a particular impairment. For each alleged factor, two criteria must be met:

a. The alleged factor *could have caused* or contributed to the impairment, which is a medical determination (see "causation," p. 316).

b. In the case in question, the factor *did cause* or contribute to the impairment, which usually is a nonmedical determination. The physician's analysis and explanation of causation is significant.

AMA Guides, Glossary, pp. 315-316.

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 data on both impairments.

*AMA Guides*, 2.3 General Comments on Evaluation, 2/10.

The impairment calculation process begins when the total impairment recommendation is calculated without regard to apportionment. Once the impairment has been calculated and Rule 20 applied, then apportionment is considered. Dr. Guberman's procedure of apportioning past impairment is in error and violates Rule 20 and the *AMA Guides*. He assigns an additional 6% impairment following a simple sprain and strain injury. Dr. Bachwitt's opinion is that Claimant suffered no additional impairment as a result of this simple sprain and strain, and that he has been adequately compensated in the past for the sum total of his lumbar spine impairment. Subtracting prior awards from the impairment recommendations is consistent with Rule 20 and the *AMA Guides*.

Dr. Guberman's analysis and methodology for apportionment of preexisting impairment is contrary to the *AMA Guides* and W. Va. Code § 23-4-9b. In cases in which a claimant has received a prior award for an injury to the same body part, the Office of Judges has held that the evaluating physician must deduct the amount of the prior award *after* application of the Rule 20 adjustment. See August 6, 2010 Administrative Law Judge decision in Claim No. 2006025234, OOJ-A307-007991, submitted by the Employer in the record of this protest. (Respondent's Appendix No. 4.)

Dr. Guberman's methodology clearly was erroneous in that his rating allowed Claimant to receive a double recovery for his previous lumbar spine injuries.

Apportionment prior to applying Rule 20 artificially inflates the impairment rating due to the work injury and defeats the purpose of apportionment. There is no specific direction for apportionment prior to or after applying Rule 20 within Rule 20. Therefore, the examiner should consult the *AMA Guides* for direction on apportionment. Once an impairment evaluation of the current spine impairment is performed, the pre-existing impairment is then subtracted from the present impairment. The authors of the *Guides* expect the apportionment to be the final step in the impairment rating process.

Judge Tucker Smith states in her opinion that “Dr. Guberman’s method of calculating impairment has been approved by the medical advisors to the Insurance Commissioner’s office.” What method these “medical advisors” utilize in calculating impairment and how that method was presented in the evidentiary record before the administrative law judge is unexplained.

Dr. Guberman’s report is not valid because Dr. Guberman did not appropriately address Claimant’s prior PPD award for injuries to the same body part. Dr. Guberman’s apportionment procedure contradicts the *AMA Guides*. The apportionment procedure employed by Dr. Bachwitt is an accurate assessment of the nature of Claimant’s current condition and is inclusive of all injuries and all claims to date involving the lumbar spine.

Claimant has not demonstrated with reliable and credible evidence that the Board of Review’s decision was clearly wrong. Judge Tucker Smith was wrong to reverse the denial of the 0% PPD award in this claim where the methodology utilized by Dr. Guberman in estimating permanent impairment did not follow the *AMA Guides* and Rule 20. Claimant failed to demonstrate that the decision of the Board of Review was in

clear violation of constitutional or statutory provisions, clearly the result of erroneous conclusions of law, or clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. See W. Va. Code § 23-5-15(d). Therefore, Claimant's petition for appeal should be refused.

**V. CONCLUSION**

Judge Tucker Smith's decision was clearly wrong because Claimant failed to show that he was entitled to any PPD award above the 5% he previously received in Claim No. 890009745. The findings of fact of the Board of Review are not manifestly against the weight of evidence. See W. Va. Code § 23-5-15(d); *Lovas*, at 95, 662 S.E.2d at 649. Moreover, the decision of the Board did not violate statutory provisions because the apportionment of preexisting impairment coincided with the requirements of Rule 20 and the *AMA Guides* that PPD awards be based on a claimant's whole body medical impairment. For the foregoing reasons, the Employer urges this Court to refuse Claimant's Petition for Review.

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Dated: November 23, 2011

**CERTIFICATE OF SERVICE**

I, H. Dill Battle III, counsel for Mystic, LLC, do hereby certify that I have served a true copy of the foregoing **“RESPONSE ON BEHALF OF RESPONDENT MYSTIC, LLC TO PETITION FOR REVIEW”** and **“APPENDIX”** upon the following, by placing the same in the United States mail, first class, postage prepaid, and addressed as follows on November 23, 2011:

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