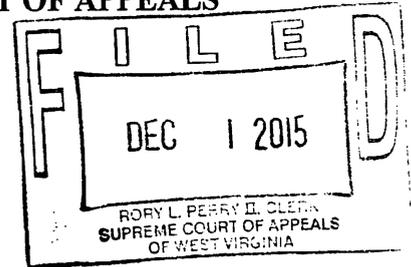


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN CHARLESTON



SWVA, INC.,

Petitioner,

v.

JCN: 2004040678
CRN: 2004040678
DOI: 3/9/04
APPEAL NO.: 2048996
SUPREME COURT NO. 14-0471

EDWARD BIRCH,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF SWVA, INC.

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I. TABLE OF AUTHORITIES

The “Guberman method” of allocating pre-existing impairment has been rejected in each of the following Memorandum Decisions issued by this Honorable Court: *Reese v. West Virginia Division of Environmental Protection*, No. 12-0852 (April 23, 2013); *Jeffrey v. Pinnacle Mining Co.*, No. 11-1426 (February 4, 2014); *Blair v. Mason Mining, LLC*, No. 11-0537 (February 4, 2014); *Preece v. Health Management Associates of WV, Inc.*, No. 11-1749 (February 6, 2014); *Boone v. SWVA, Inc.*, No. 12-0221 (June 11, 2014); *Varney v. Brody Mining, LLC*, No. 11-1483 (June 11, 2014); *Lowe’s Home Centers, Inc. v. Ramsey*, No. 12-0752 (June 11, 2014); *Kimble v. UCB*, No. 11-1685 (June 11, 2014); *Lewis v. Laurel Coal Corp.*, No. 12-0354 (June 11, 2014); *McClure v. Bluestone Coal Co.*, No. 13-0392 (June 27, 2014); *Shreves v. Town of Rivesville*, No. 11-1463 (October 3, 2014); *EQT Corp. v. Smith*, No. 13-0808 (October 15, 2014); *Manley v. Patriot Coal Corp.*, No. 13-0509 (October 15, 2014); *Whitt v. Alcan Rolled Products-Ravenswood, LLC*, No. 13-0643 (October 20, 2014); *Roberts v. Mary Roberts*, No. 13-0867 (November 20, 2014); *Young v. Heartland Employment Services, LLC*, No. 13-1169 (December 3, 2014); *Schultz v. Heartland Publications*, No. 13-1025 (June 1, 2015); *Martin v. Magnum Coal Co.*, No. 13-1026 (July 27, 2015); and *Thomas v. Pine Ridge Coal Co., LLC*, No. 14-1194 (September 16, 2015). [Cited on page 7]

An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law. Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d 169 (1974). [Cited on page 8]

Memorandum Decisions “may be cited in any court or administrative tribunal.” Rule 21, Revised Rules of Appellate Procedure. [Cited on page 9]

Where an employee has a definitely ascertainable impairment resulting from an occupational or a 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 the meaning of section one, 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.** Nothing in this section requires that the degree of the preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from the employee’s employment or that benefits must have been granted or paid for the preexisting impairment. The degree of the preexisting impairment may be established at any time by competent medical or other evidence. W.Va. Code § 23-4-9b (2003) (emphasis added). [Cited on page 9]

The Legislature finds that a deficit exists in the workers’ compensation fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund. The Legislature further finds that addressing the workers’ compensation crisis requires the efforts of all persons and entities involved. Modification to the rate system,

alteration of the benefit structure, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers' compensation system viable and solvent. It is the intent of the Legislature that the amendments to this chapter enacted in the year two thousand three be applied from the date upon which the enactment is made effective by the Legislature. The Legislature finds that an emergency exists as a result of the combined effect of this deficit, other state budgetary deficits and liabilities and other grave social and economic circumstances currently confronting the state and that unless the changes provided by the enactment of the amendments to this chapter, as well as other legislation designed to address the problem are made effective immediately, the fiscal stability of this state will suffer irreparable harm. Accordingly, the Legislature finds that the need of the citizens of this state for the protection of the state treasury and the solvency of the workers' compensation funds requires the limitations on any expectations that may have arisen from prior enactments of this chapter. W.Va. Code § 23-1-1 (a) (2003). [Cited on pages 10-11, at Footnote 4]

In addition to the requirements of subsection (a) of this section, on or before the thirty-first day of December, two thousand three, the board of managers shall 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. W.Va. Code § 23-4-3b (b) (2003). [Cited on page 11]

W.Va. C.S.R. Section 85-20 et seq. was a valid exercise of legislative power. See generally *Simpson v. West Virginia Office of Ins. Comm'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009). [Cited on page 11]

Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed. Syl. pt. 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). [Cited on page 11, at Footnote 5]

Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation. *Id.* at Syl. pt. 2. [Cited on page 11, at Footnote 5]

For the purposes of this chapter, with the exception of those injuries provided for in subdivision (f) of this section and in section six-b [§ 23-4-6b] of this article, the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered...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. W.Va. Code § 23-4-6 (i) (2003). [Cited on page 12]

Workers' Compensation statutes dealing with the same subject matter are to be read *in pari materia*. *Nelson v. Merritt*, 176 W.Va. 485, 345 S.E.2d 785, fn. 3 (1985), *citing Hudson v. State Workmen's Comp. Comm'r*, 162 W.Va. 513, 515, 256 S.E.2d 864, 865 (1979). [Cited on page 13]

64.1 Pursuant to W. Va. Code §23-4-3b(b), the Commission or Insurance Commissioner, whichever is applicable, hereby adopts the following ranges of permanent partial disability for common injuries and diseases. 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 forth below:

64.2. Lumbar Spine Impairment: 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. W.Va. C.S.R. § 85-20-64.1 & .2 (2004). [Cited on pages 13-14]

If 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* reweighing 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 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. W. Va. Code § 23-5-15 (d) (2005). [Cited on page 17]

While a finding of fact by the [Board of Review] is not to be disturbed unless shown to be clearly wrong, such rule is not applicable where the facts are undisputed. *Pirlo v. State Workmen's Compensation Comm'r*, 242 S.E.2d 452, 454 (W.Va. 1978). [Cited on page 18]

Where the finding of the [Board of Review] is contrary to undisputed evidence, or at variance with a clear preponderance of the whole evidence, [its] finding will be reversed. *McGeary v. State Compensation Director*, 135 S.E.2d 345, 347 (W.Va. 1964) (citations omitted). [Cited on page 18]

II. ASSIGNMENTS OF ERROR

The Workers' Compensation Board of Review committed reversible error in its decision of April 18, 2014 insofar as it adopted the ALJ's finding that claimant is entitled to a permanent partial disability award in this Workers' Compensation claim based upon a whole-person medical impairment rating with no apportionment, when a portion of claimant's impairment undisputedly preexisted the occurrence of the compensable injury.

III. STATEMENT OF THE CASE

The employer/appellant hereby restates and relies upon the Statement of the Case set forth in its original brief to this Honorable Court. In short, the undisputed evidence shows that claimant has a compensable workers' compensation claim for a low back injury as well as a significant pre-existing condition, and the physicians who have performed permanent partial disability evaluations used different methods to subtract or "allocate" the pre-existing impairment.

In its order directing the parties to file supplemental¹ briefs, the Court requested that the parties address the following question: "What is the correct methodology for apportioning the level of impairment in workers' compensation cases involving pre-existing conditions?"

The question revolves around the sequencing of the impairment calculation. The method utilized by Dr. Bruce Guberman, who performed his permanent partial disability evaluation at the request of claimant's counsel, was (1) rate the impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition; (2) allocate or subtract preexisting impairment; and then (3) apply Table 85-20-B. The employer contends that this method is

¹ The employer notes that claimant did not file a brief in response to the employer's original appeal. Claimant was **required** to file a response to the employer's appeal. See Clerk's Comment to Rule 10 of the Revised Rules of Appellate Procedure. Because claimant did not file a response brief, the Court may deny oral argument to "the derelict party" and "such other sanctions as the Court may deem appropriate." Rule 10 (i), Revised Rules of Appellate Procedure.

contrary to West Virginia law, in that steps 2 and 3 should be inverted, such that the pre-existing impairment is allocated or subtracted last, which is the method utilized by Dr. Marsha Bailey in her rating of claimant's whole-person impairment.

As will be demonstrated below, the method used by Dr. Guberman is contrary to West Virginia law and results in no actual allocation of pre-existing impairment, with claimant receiving the same award that he would have received whether he had a pre-existing impairment or not.

IV. SUMMARY OF ARGUMENT

West Virginia Code Section 23-4-9b unambiguously precludes an award for preexisting, unrelated impairment. The method of allocation used by claimant's expert, Dr. Guberman, and adopted by the Administrative Law Judge ("ALJ") and affirmed by the Board of Review, results in no actual allocation or exclusion of pre-existing impairment. In order to result in actual exclusion of pre-existing impairment, as clearly intended by the legislature and consistently done for nearly a century of workers' compensation jurisprudence, the pre-existing impairment allocation must be performed last.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Not applicable. Oral argument is scheduled for January 26, 2016.

VI. ARGUMENT

- A. There is no basis for abandoning the method of excluding pre-existing impairment which has been followed for nearly a century in West Virginia workers' compensation jurisprudence, nor for contravening 19 Memorandum Decisions issued by this Honorable Court since 2013 specifically finding the Guberman method to be improper.**

In West Virginia Workers' Compensation jurisprudence, the method of allocating or deducting pre-existing impairment for a pre-existing condition and impairment has been

unchanged for nearly a century. The process has always been quite simple and quite logical. A claimant's overall impairment is calculated, then the definitely ascertainable pre-existing impairment is deducted. This simple method was also consistent with the applicable statute, W.Va. Code Section 23-4-9b. Claimant points to no reason why the adoption of the Rule 20 impairment tables were intended to change this methodology. If the legislature and/or Industrial Council had intended to change this well-settled method, they would have clearly said so.

This Honorable Court has issued at least 19 Memorandum Decisions in the immediate past terms of Court in which the Guberman method, as described herein, was at issue, and in each of the decisions, **the Guberman method was rejected**, including as recently as September 16, 2015. *See Reese v. West Virginia Division of Environmental Protection*, No. 12-0852 (April 23, 2013); *Jeffrey v. Pinnacle Mining Co.*, No. 11-1426 (February 4, 2014); *Blair v. Mason Mining, LLC*, No. 11-0537 (February 4, 2014); *Preece v. Health Management Associates of WV, Inc.*, No. 11-1749 (February 6, 2014); *Boone v. SWVA, Inc.*, No. 12-0221 (June 11, 2014); *Varney v. Brody Mining, LLC*, No. 11-1483 (June 11, 2014); *Lowe's Home Centers, Inc. v. Ramsey*, No. 12-0752 (June 11, 2014); *Kimble v. UCB*, No. 11-1685 (June 11, 2014); *Lewis v. Laurel Coal Corp.*, No. 12-0354 (June 11, 2014); *McClure v. Bluestone Coal Co.*, No. 13-0392 (June 27, 2014); *Shreves v. Town of Rivesville*, No. 11-1463 (October 3, 2014); *EQT Corp. v. Smith*, No. 13-0808 (October 15, 2014); *Manley v. Patriot Coal Corp.*, No. 13-0509 (October 15, 2014); *Whitt v. Alcan Rolled Products-Ravenswood, LLC*, No. 13-0643 (October 20, 2014); *Roberts v. Mary Roberts*, No. 13-0867 (November 20, 2014); *Young v. Heartland Employment Services, LLC*, No. 13-1169 (December 3, 2014); *Schultz v. Heartland Publications*, No. 13-1025 (June 1, 2015); *Martin v. Magnum Coal Co.*, No. 13-1026 (July 27, 2015); and *Thomas v. Pine Ridge Coal Co., LLC*, No. 14-1194 (September 16, 2015).

In fact, it should be noted that Rule 20 has been in effect since June 14, 2004, and Dr. Guberman is a well-known, nearly ubiquitous participant² in litigated Workers' Compensation claims. His new and novel method of calculating impairment in the face of pre-existing conditions is a relatively new phenomenon. If Dr. Guberman's method is the proper way to allocate pre-existing impairment it would have been so immediately upon the promulgation of Rule 20 and its impairment tables. With regard to the issues presented in this appeal, nothing has changed since 2004. Dr. Guberman simply came up with a new strategy to get around West Virginia Code Section 23-4-9b, and it was completely contrived and unsupported by any legal basis.

“An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.” Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W.Va. 1023, 207 S.E.2d 169 (1974).

The legal principles at issue in this appeal have been unchanged since the 2004 adoption of Rule 20. There are no “changing conditions” that would justify the abandonment of the 19 precedents cited herein. To suggest that there was “serious judicial error” in these decisions is also wrong. Whether one agrees or disagrees with the Court's decisions in those 19 cases, they were certainly decided in a rational, reasonable way which was supported by the evidentiary records and were consistent with a logical, sound interpretation of the statutes and other

² Note that Dr. Guberman was claimants' medical expert in all 19 Memorandum Decisions discussed *infra*, and that his controversial method of “allocating” pre-existing impairment was never an issue prior to 2010 in any of these cases, despite the fact that Rule 20 has been in effect since 2004. A review of the Court's 19 Memorandum Decisions above indicates no reports from Dr. Guberman prior to 2010, and a review of the Court's decisions since 2004 reveals no cases prior to the 19 discussed *infra* in which the Guberman method was at issue. This illustrates that the Guberman method was first imagined and applied in 2010, six years after the promulgation of Rule 20.

authorities. While the 19 cases were Memorandum Decisions, they “may be cited in any court or administrative tribunal.” See Rule 21, Revised Rules of Appellate Procedure. The sheer number of precedents on this question, as well as the recent issuance of such decisions, should greatly weigh in favor of the principle of *stare decisis*.

B. West Virginia Code Section 23-4-9b clearly and unambiguously requires the exclusion of pre-existing impairment from a claimant’s permanent partial disability award.

Where an employee has a definitely ascertainable impairment resulting from an occupational or a 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 the meaning of section one, 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. Nothing in this section requires that the degree of the preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from the employee’s employment or that benefits must have been granted or paid for the preexisting impairment. The degree of the preexisting impairment may be established at any time by competent medical or other evidence.

In the case at bar, Dr. Bailey, in her report dated October 27, 2011, found that claimant had 12% whole-person impairment under the AMA *Guides to the Evaluation of Permanent Impairment*, Fourth Edition (“*Guides*”). Dr. Bailey opined that claimant’s specific motions were pain-restricted and invalid, so her 12% impairment rating was based upon Table 75, page 113 of the *Guides*, entitled “Whole-person Impairment Percents Due to Specific Spine Disorders.” She then categorized claimant’s impairment under Table 85-20-C as a Category III³ impairment.

³ This category is defined as follows: Significant signs of radiculopathy, such as dermatomal pain and/or in a dermatomal distribution, sensory loss, loss of relevant reflex(es), loss of muscle strength or measured unilateral atrophy above or below the knee compared to measurements on the contralateral side at the same location; impairment may be verified by electrodiagnostic findings
or
history of a herniated disk at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy, or individuals who had surgery for radiculopathy but are now asymptomatic

Because the allowed range for Category III is 10-13%, and the *Guides* rating was 12% and falls within the allowed range, no adjustment of the impairment was necessary. Dr. Bailey then found that one-third of claimant's impairment should be allocated to the pre-existing condition, so she deducted 4%, leaving 8% which she assigned to the compensable injury.

Dr. Guberman agreed with Dr. Bailey as to claimant's categorization under Table 75 of the AMA *Guides*. Therefore, he reached the same 12% impairment rating. However, unlike Dr. Bailey, he found that the restrictions in claimant's various ranges of motion were valid and reproducible and were not pain-restricted. He found a total of 13% impairment in various range of motion restrictions, but he "allocated" one-half of the impairment for ranges of motion to claimant's pre-existing conditions, and rounded 6.5% up to 7%, which he allocated to the claim. He then "combined" 12% under Table 75 with 7% for range of motion for a total of 18%, but because this falls beyond the allowed range for Rule 20, Table 85-20-C, he reduced the final rating to 13%. Note that this is the same maximum award to which claimant would have been entitled whether he had a pre-existing condition or not. Note also that Dr. Guberman "allocated" for the specific range of motion deficits claimant suffered, but did not allocate the impairment under Table 75, nor did he explain why he failed to do so.

C. Rule 20 was adopted following the 2003 reforms to the Workers' Compensation statute, and was intended to address the fiscal crisis which had arisen in Workers' Compensation.

As this Court knows, the State found itself in a serious financial crisis⁴ and enacted

or

fractures: (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture with displacement disrupting the spinal canal; in both cases, the fracture has healed without alteration of structural integrity

⁴ W.Va. Code § 23-1-1 (a) (2003) states: "The Legislature finds that a deficit exists in the workers' compensation fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund. The Legislature further finds that addressing the workers' compensation crisis requires the efforts of all persons and entities involved. Modification to the rate system, alteration of the benefit structure, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers' compensation system viable and solvent. It is the intent of the Legislature that the amendments to this chapter

sweeping changes to the Workers' Compensation system in 2003. One of these changes was West Virginia Code Section 23-4-3b (b), which states:

In addition to the requirements of subsection (a) of this section, on or before the thirty-first day of December, two thousand three, the board of managers shall 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.

What followed was the adoption of Rule 20 effective June 14, 2004. The impairment tables at issue in this appeal were adopted as the allowed "range of permanent partial disability awards for common injuries," *i.e.* back injuries. Among other provisions, the Rule 20 impairment tables were already challenged and found to be a valid exercise of legislative power. *See Simpson v. West Virginia Office of Ins. Comm'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009).

West Virginia Code Section 23-4-9b and the regulatory provisions at issue in this appeal are unambiguous, and therefore it is unnecessary and inappropriate to resort to canons of statutory construction to derive their intent,⁵ but even to the extent there is any ambiguity, the intent of the 2003 legislative reforms could not be clearer. Given the fiscal crisis in which the

enacted in the year two thousand three be applied from the date upon which the enactment is made effective by the Legislature. The Legislature finds that an emergency exists as a result of the combined effect of this deficit, other state budgetary deficits and liabilities and other grave social and economic circumstances currently confronting the state and that unless the changes provided by the enactment of the amendments to this chapter, as well as other legislation designed to address the problem are made effective immediately, the fiscal stability of this state will suffer irreparable harm. Accordingly, the Legislature finds that the need of the citizens of this state for the protection of the state treasury and the solvency of the workers' compensation funds requires the limitations on any expectations that may have arisen from prior enactments of this chapter."

⁵ "Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syl. pt. 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Id.* at Syl. pt. 2.

State found itself, the adoption of Rule 20, among other reforms, was intended to contain costs and benefits to reasonable levels. It is therefore both illogical and contrary to this obvious intent to manipulate Rule 20 in such a way as to allow claimants to circumvent the allocation and exclusion of pre-existing impairment.

D. Although “impairment” and “compensation” are not synonymous, a claimant’s permanent partial disability award must be based upon his or her whole-body medical impairment.

The ALJ reasoned that “impairment and compensation are not synonymous.” 11/7/13 decision of Office of Judges, at 5. “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.” *Id.* Strictly speaking, the ALJ was correct that the terms “impairment” and “disability” are defined differently. “Impairment is defined in the *Guides* as an alteration of an individual’s health status.” *Guides* at 1. “Disability may be defined as an alteration of an individual’s capacity to meet personal, social, or occupational demands, or statutory or regulatory requirements, because of an impairment.” *Id.* at 2. “An ‘impaired’ individual is not necessarily ‘disabled.’” *Id.* Thus, the ALJ and Board of Review made no error in finding that impairment and disability are not the same thing.

However, the ALJ completely misapprehended applicable law regarding the nature of permanent partial disability awards in West Virginia Workers’ Compensation claims. West Virginia Code Section 23-4-6 (i) (2003) states as follows:

For the purposes of this chapter, with the exception of those injuries provided for in subdivision (f) of this section and in section six-b [§ 23-4-6b] of this article, the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered...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.

It is well-settled that “Workers’ Compensation statutes dealing with the same subject matter are to be read *in pari materia*.” *Nelson v. Merritt*, 176 W.Va. 485, 345 S.E.2d 785, fn. 3 (1985), *citing Hudson v. State Workmen’s Comp. Comm’r*, 162 W.Va. 513, 515, 256 S.E.2d 864, 865 (1979). Thus, W.Va. Code Sections 23-4-9b and 23-4-6 (i), when read together, stand for the proposition that all awards are based upon the claimant’s whole-body medical impairment and that any pre-existing impairment must be excluded from the final award.

Therefore, the ALJ’s decision drawing a distinction between the terms “impairment” and disability was factually accurate, but legally incorrect.

E. The final result after applying the Rule 20 impairment tables is an impairment rating, which statutorily stands as claimant’s permanent partial disability rating.

Next, the ALJ reasoned that West Virginia Code Section 23-4-9b “provides for the apportionment of impairment related to a pre-existing injury, not the apportionment of permanent partial disability.” 11/7/13 decision of Office of Judges, at 6. Again, this is factually accurate. West Virginia Code Section 23-4-9b does indeed require the exclusion of pre-existing impairment, and does not state that pre-existing “disability” should be excluded. However, Section 23-4-9b states that “[c]ompensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment.” Legally, the ALJ was wrong again. Claimant cannot receive “compensation” for a non-compensable pre-existing impairment.

The ALJ rationalized that the final rating after applying Table 85-20-C is a final “PPD rating,” and not an “impairment” rating. *Id.* at 5. This was incorrect both factually and legally. W.Va. C.S.R. Section 85-20-64 states:

64.1 Pursuant to W. Va. Code §23-4-3b(b), the Commission or Insurance Commissioner, whichever is applicable, hereby adopts the following ranges of permanent partial disability for common injuries and diseases. 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 forth below:

64.2. Lumbar Spine Impairment: 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. (Emphasis added).

The unambiguous terminology of 85-20-64.2 states that the tables, including Table 85-20-C, are “impairment” tables and not “disability” tables, which is consistent with the statute, West Virginia Code Section 23-4-6 (i).⁶ Thus, the ALJ’s finding that the rating which results from Table 85-20-C is not an impairment rating subject to allocation of pre-existing impairment was clearly wrong.

In summary, permanent partial disability ratings must be entirely based upon whole-body medical impairment, and Rule 20, including Table 85-20-C, are “impairment” tables. The ALJ’s finding that West Virginia Code Section 23-4-9b requires the allocation of pre-existing impairment but not permanent partial disability ratings was illusory and clearly wrong.

F. The proper method to allocate pre-existing impairment is to subtract or exclude the pre-existing impairment after determining claimant’s impairment under Rule 20’s impairment tables.

The only way to give proper effect to the unambiguous statutes and regulations as well as obvious legislative intent is to allocate impairment after applying the Rule 20 impairment tables, not before. This case illustrates the point.

⁶ Note also that Table 85-20-C itself is entitled “PPD Ranges for Lumbar Spine **Impairments**” and “Criteria for Rating **Impairment** Due to Lumbar Spine Injury.” (Emphasis added).

Both Dr. Guberman and Dr. Bailey agree that claimant has a Category III impairment based upon Table 85-20-C. Thus, both doctors agree that the *maximum* impairment which claimant suffers is 13%. Dr. Bailey actually found 1% less, at 12%, while Dr. Guberman found 13%, and Dr. Bailey found that one-third of the impairment (4%) was pre-existing, while Dr. Guberman found that one-half of the impairment was pre-existing.⁷

There is no dispute that claimant suffers a significant pre-existing condition. There is no dispute that this pre-existing condition, even if claimant never suffered a compensable injury, caused claimant to suffer whole-body medical impairment. Claimant already suffered impairment before the compensable injury occurred. If claimant is granted the same award that he would have received even if he did not have the pre-existing impairment, W.Va. Code Section 23-4-9b would be, in effect, a nullity. Dr. Guberman's method is a sham. It results in no deduction. Claimant's compensable impairment is the same either way, as if he never had a pre-existing condition and a pre-existing impairment. This cannot and was not the legislature's intent, nor is it consistent with the plain meaning of the unambiguous statute, 23-4-9b.

G. The method utilized by Dr. Guberman and adopted by the ALJ and Board of Review would essentially allow a claimant to receive at least a 5% permanent partial disability award in every compensable claim.

Despite the ALJ's holding to the contrary, Dr. Guberman's method could allow an award each time a claimant has a compensable claim, even where claimant received a prior permanent

⁷ It should again be noted that the first difference between the opinions of Drs. Bailey and Guberman is not the sequencing of when pre-existing impairment is deducted. It is in whether impairment from Table 75, page 113 of the AMA *Guides* should be deducted/allocated. Dr. Guberman offered no explanation why impairment derived from this Table should not be allocated when such impairment or a portion thereof was pre-existing. Again, the very title of this Table is "Whole-person Impairment Percents Due to Specific Spine Disorders." (Emphasis added). Thus, it is clear that the figures in Table 75 serve as a component of an impairment rating, and are therefore subject to allocation to eliminate any pre-existing component. Dr. Guberman's failure to allocate Table 75 impairment is unexplained and inexplicable and renders his report completely unreliable. Similarly, as noted by the employer in its original brief, Dr. Guberman found an astonishing amount of impairment for ranges of motion, even though claimant himself told his treating physician, Dr. Caraway, that he remains healthy and active for his age and walks up to eight miles per day.

partial disability award. Under the Guberman method, consider the example of a claimant with a series of compensable lumbar spine claims. In the first claim, imagine that he receives a 5% PPD award for a lumbar strain/sprain. Then, in the second claim, the Guberman method would say we rate claimant's impairment at the same 5% under the Range of Motion Model, "allocate" or deduct the prior 5% which he was awarded, then apply Rule 20 so that he would receive the minimum award of 5% again, and so on for Claims 3, 4, 5, and for each subsequent claim. So even where a claimant receives a prior *award*, let alone simply a pre-existing impairment, the Guberman method could allow award-after-award, with no deduction.

The ALJ disagreed with this point, citing this Honorable Court's pronouncements in *Gillispie v. State Workmen's Comp. Comm'r*, 205 S.E.2d 164 (1974) and *Linville v. State Comp. Comm'r*, 165 S.E. 803 (1932).⁸ The *Gillispie* and *Linville* decisions stand for the proposition that a claimant can only receive one award for the same disability. Thus, the ALJ reasoned, there is a difference between a pre-existing *impairment* and a previous *award*. In other words, under the ALJ's interpretation, as adopted by the Board of Review, if a person's pre-existing impairment is due to a non-compensable injury, he can receive an award for it, but if the person's pre-existing impairment is due to a compensable injury, he cannot receive an award for it. This interpretation is absurd on its face.

Linville simply stands for the proposition that once a claimant receives the maximum award for a particular body part, he cannot receive another award for the same body part. "Otherwise, the petitioner would be compensated twice for the same loss." *Linville*, 112 W.Va. 522, 165 S.E. 803 (1932). While the cases do stand for the proposition that a claimant cannot receive an award twice for the same disability, they did not contemplate the problem presented

⁸ The ALJ's decision provided an incorrect citation for the *Linville* decision, citing 165 S.E.2d 803 (1932). The decision was reported at 165 S.E. and not 165 S.E.2d.

by the case at bar, *i.e.* a method of calculating *impairment* which requires the deduction of pre-existing impairment before the final award is calculated. Therein lies one reason why the Guberman method *must* fail. It is illogical that our law would require one method to calculate impairment where the pre-existing impairment was due to a previous compensable injury, thereby not allowing an award, but a second method to calculate impairment where the pre-existing condition was not due to a compensable injury, but *does* allow an award.⁹ The ALJ and Board of Review's interpretation is that if a person has a pre-existing condition which resulted from a prior injury and compensable claim and they already received an award, they cannot receive a second award for the same disability, but if the pre-existing condition came from a NON-COMPENSABLE injury or condition, they *can* receive an award. This clearly shows that the Guberman method is a sham and results in no allocation or exclusion of a non-compensable pre-existing condition, and is illogical and contrary to West Virginia law.

H. Standard of Review

If 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.

W.Va. Code § 23-5-15 (d) (2005).

⁹ In addition, the ALJ and Board of Review failed to note that Dr. Guberman himself did not make any distinction between a prior award and a prior non-compensable impairment in his method of allocation. In some of the Memorandum Decisions discussed *infra*, such as *Preece v. Health Management Associates of WV, Inc.*, No. 11-1749 (February 6, 2014), **Dr. Guberman still allocated the prior award before applying Rule 20.** Obviously, the Guberman method would, if applied as Dr. Guberman reasons it should, allow repeat awards in each compensable claim a claimant may file.

“While a finding of fact by the [Board of Review] is not to be disturbed unless shown to be clearly wrong, such rule is not applicable where the facts are undisputed....” *Pirlo v. State Workmen’s Compensation Comm’r*, 242 S.E.2d 452, 454 (W.Va. 1978). “Where the finding of the [Board of Review] is contrary to undisputed evidence, or at variance with a clear preponderance of the whole evidence, [its] finding will be reversed.” *McGeary v. State Compensation Director*, 135 S.E.2d 345, 347 (W.Va. 1964) (citations omitted).

The Board of Review’s decision should be reversed because it is undisputed that claimant has preexisting lumbar impairment and the decision is in direct violation of the plain language and obvious intent of West Virginia Code Section 23-4-9b. Accordingly, the employer respectfully asks this Honorable Court to reverse the decision of the Workers’ Compensation Board of Review and reinstate the claims administrator’s order of November 15, 2011, granting an 8% PPD award.

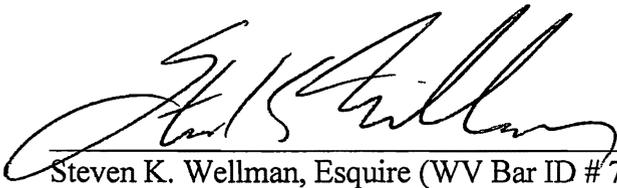
VII. CONCLUSION

WHEREFORE, the Petitioner, SWVA, Inc., respectfully prays that this Honorable Court reverse the Board of Review's order of April 18, 2014 and reinstate the claims administrator's order of November 15, 2011, granting an 8% PPD award.

Respectfully submitted,

SWVA, INC.

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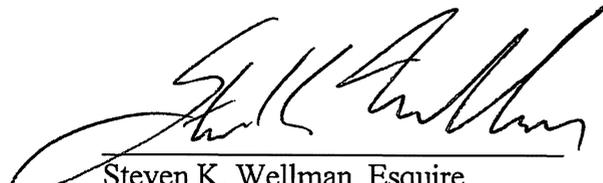
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CERTIFICATE OF SERVICE

I, Steven K. Wellman, hereby certify that on the 30th day of November 2015, a copy of the foregoing “**SUPPLEMENTAL BRIEF ON BEHALF OF SWVA, INC.**” was mailed, postage prepaid, by First Class Mail to the following:

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