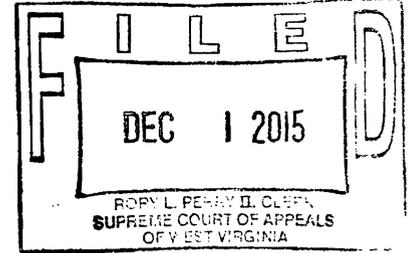


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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.

**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF
WEST VIRGINIA IN SUPPORT OF PETITIONER**

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II. STATEMENT OF INTEREST

The Defense Trial Counsel of West Virginia (DTCWV) is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar. Some DTCWV members represent employers in workers' compensation cases. In addition, and as relevant to this matter, DTCWV's goals include elevating the standards of legal practice within the state of West Virginia, working for elimination of Court congestion and delays in civil and administrative litigation in West Virginia, promoting involvement of the administration of justice in West Virginia, and increasing the quality of legal services provided to our citizens.

DTCWV is interested in the issue before the Court regarding the correct methodology for apportioning the level of impairment in workers' compensation cases involving pre-existing conditions, as applying the wrong methodology can lead to claimants receiving an impairment rating unaffected by whether or not they had any preexisting impairment. This would be contrary to W.Va. Code 23-4-9b, which clearly states that prior injuries and conditions shall not be taken into consideration in fixing the amount of compensation allowed by reason of the compensable injury. The statute expressly states that prior injuries or conditions shall not be taken into account when fixing impairment ratings. When calculating permanent impairment, the act of deducting for a prior permanent partial disability award or preexisting condition, and subsequently applying Rule 20, is in opposition with the statute's express directives. Calculating permanent impairment in that matter leads to an award that does not exclude calculation of symptoms related to preexisting conditions. In fact, it could lead to a claimant receiving a new

5-8% PPD award for every new injury until they have received 30% or more in PPD awards for injuries such as simple sprain/strains.

For these reasons, the DTCWV submits this *amicus curiae* brief in support of Petitioner, SWVA, Inc.

III. ARGUMENT

Pursuant to the West Virginia Code, and a significant amount of memorandum decisions authored by this Court in the last three years, apportionment of whole-person medical impairing ratings should occur in the following sequence: (1) rate the impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (“Guides”); (2) apply Table 85-20-B; and then (3) allocate or subtract preexisting impairment. Calculation of whole-person impairment in this matter allows for compliance with W.Va. Code § 23-4-9b and Rule 20, as amended in 2003 to deal with a Workers’ Compensation financial crisis. In support of this argument, the DTCWV state the following:

- A. **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.

W.Va. Code § 23-4-9b (2015 West). (emphasis added). In plain language, § 23-4-9b clearly indicates that a claimant may not be granted an award that includes credit for limitations related to a prior injury or condition, effect of prior injury or condition, or aggravation of a prior injury or condition, in relation to the compensable injury. Therefore, pursuant to the statute, a claimant's preexisting impairment, as established by competent medical evidence, shall be excluded from a calculation of whole-person impairment for the compensable injury, which is the basis for granting the claimant's permanent partial disability award.

The language of § 23-4-9b clearly states that a "compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment." In order to grant an award consistent with this statute, a medical professional must rate lumbar spine impairment under the "Guides"; (2) apply Table 85-20-B; and then (3) allocate or subtract preexisting impairment. Conforming to this process results in an award that excludes benefits provided for preexisting injuries or conditions that are unrelated to the compensable condition.

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

As this Court knows, the State of West Virginia found itself in a serious financial crisis and enacted sweeping changes to the Workers' Compensation system in 2003. This crisis was codified as follows:

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). (emphasis added). One of these changes was West Virginia Code § 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.

W.Va. Code §23-4-3b(b) (2003). (emphasis added). West Virginia Code § 23-4-6 (i) (2003) (emphasis added) 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.

What followed was the adoption of Rule 20, effective June 14, 2004. W.Va. CSR §85-20, et. seq. (2004). The impairment tables at issue in this appeal were adopted as the allowed

“range of permanent partial disability awards for common injuries.” As Rule 20 was established in response to a financial crisis affecting workers’ compensation litigation in West Virginia, it logically follows that its application should function as a limit on benefits, not a tool for granting an award that is contradictory to the unambiguous, plain language of § 23-4-9b. When read together, §§ 23-4-9b and 23-4-6 (i) stand for the proposition that all awards are based upon the claimant’s whole-body medical impairment (through application of the Guides and Rule 20) and that any pre-existing impairment must be excluded from the final award. Therefore, calculation of whole-person impairment must be completed in order to form the basis for a claimant’s disability benefits. This base figure is in turn reduced by any preexisting impairment in order to award an “amount that would have been allowable had the employee not had the preexisting impairment.” W.Va. Code § 23-4-9b.

C. 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 Court since 2013 specifically finding the Guberman method to be improper.

In numerous instances before this Court, Dr. Bruce Guberman’s method of calculating whole-person impairment and suggesting an award of permanent partial disability has been calculated as follows: (1) finding impairment for range of motion pursuant to the Guides; (2) deducting a percentage of impairment in regard to any preexisting injuries or conditions; and (3) finally, applying Rule 20. At least 19 Memorandum Decisions in the immediate past terms of Court have rejected the Guberman method, 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-

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“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). This Court has already found Dr. Guberman’s method of calculation improper. Further, his calculation is in direct contradiction to the plain language of W.Va. Code § 23-4-9b.

Dr. Guberman’s method of calculation actually allows the claimant to receive a maximum award regardless of his apportionment for preexisting injuries or conditions. Dr. Guberman’s method of subtracting impairment for preexisting conditions prior to applying Rule 20 allows a claimant to receive an impairment rating under the Rule 20 that fails to take into consideration the prior injury or condition for the same body part. However, it is the medical

professional's prerogative to suggest impairment anywhere within the permissive range of the specific Category and Table applicable to the compensable injury. This methodology is contrary to the cost cutting measures intended by the Legislature when ordering the Board of Managers to 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. It is also contrary to the West Virginia Code, which states that an award of impairment shall be based upon whole-body impairment related to the compensable injury. Dr. Guberman's method actually allows him to use the apportionment in a matter that appears detrimental to the claimant, but actually result in a more generous benefit through the use of Rule 20's Tables. This result is not supported by the law of this State or the 19 recent Memorandum Decisions this Court, all of which reject Dr. Guberman's method.

IV. CONCLUSION

For all of these reasons, the DTCWV asks that this Court hold that apportionment of whole-person medical impairing ratings should occur in the following sequence: (1) rate the impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition; (2) apply the applicable Rule 20 Table; and then (3) allocate or subtract preexisting impairment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Warner Hunter, hereby certify that on the 1st day of **December 2015**, a copy of the foregoing **“AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONER”** was mailed, postage prepaid, by First Class Mail to the following:

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