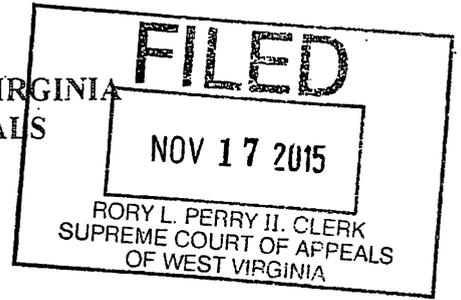


ARGUMENT
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BEFORE THE STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS



SWVA, INC.,

Petitioner,

vs.

Supreme Court No.: 14-0471
Claim No. 2004040678
BOR Appeal No. 2048996

EDWARD BIRCH,

Respondent.

AMICUS CURIAE BRIEF

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I. ISSUE ON APPEAL

Whether definitely ascertainable preexisting impairment for spinal injuries should be apportioned before referring to 85 CSR 20 and Tables 85-20-C, D, and E.

II. LEGAL AUTHORITIES

W.Va. Code §23-4-6;

W.Va. Code §23-4-9b;

85 CSR 20.

III. LEGAL DISCUSSION

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

A primary component of the whole person impairment evaluation process includes measurement of range of motion with documentation that the measured motion is reproducible

and valid. AMA validity criteria require that each motion be repeated 3 to 6 times to demonstrate reliability and consistency. Workers' Compensation Rule 85-20-66.2 provides that all independent medical examination reports:

must state factual findings of all tests, evaluations, and examinations that were conducted and must state the manner in which they were conducted so as to clearly indicate their performance in keeping with the requirements of the Guides... A report and opinion submitted regarding the degree of permanent whole body medical impairment as a result of a back injury without a completed back examination form shall be disregarded.

Definitely ascertainable pre-existing impairment due to a prior injury or condition "shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury." West Virginia Code Section 23-4-9b. "Compensation shall be awarded only in the amount that would have been allowable had the employee not had the pre-existing impairment." *Id.* Furthermore, the degree of pre-existing impairment must be established by "competent medical or other evidence." *Id.*

Although the West Virginia Code does not define "definitely ascertainable" or "competent medical or other evidence", the Code does require that impairment ratings comply with AMA Range of Motion Model criteria. Chapter 3.3f of those same Guides requires calculation of pre-existing impairment, if any, "from historical information and previously compiled medical data [I]f the previously compiled data can be verified as being accurate" AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, p. 101. "The percent based on the previous findings would be subtracted from the percent based on the current findings." *Id.* For purposes of a West Virginia Workers' Compensation claim, "previously compiled data" upon which an impairment rating can be based must be verifiably accurate range of motion testing which predates the claimant's Workers' Compensation injury. If historical information and previously compiled medical data is unavailable or inadequate for calculation of a specific percentage of whole person medical impairment, pre-existing impairment is not

definitely ascertainable and no allocation of impairment can be reliably attempted. Arbitrarily allocating impairment in an unexplained and undocumented manner falls short of truly ascertaining pre-existing impairment based upon previously compiled medical data, and ignores the method of allocation found in the AMA Range of Motion Model of Impairment.

Researchers and drafters of the AMA Guides to the Evaluation of Permanent Impairment spent considerable time and effort to develop the Range of Motion Model of Impairment. That model is specifically for the purpose of reliably calculating whole person impairment based upon precise measurements. Those measurements must be both reproducible and valid according to specific test criteria prominently set forth in the AMA Guides. By all accounts, the Range of Motion Model of Impairment reduces the calculation of whole person impairment to a mathematical formula. Each part of that formula contributes to a well-reasoned and reliable final impairment rating. That entire process of evaluating whole person impairment with mathematic precision would be rendered meaningless if physicians are allowed to arbitrarily reduce such ratings based entirely upon prejudice and speculation without following evaluation criteria found in the Range of Motion Model of the AMA Guides. In that regard, the AMA Guides require that any alleged pre-existing impairment must be calculated in the same manner using the same type of reliable data as any other whole person impairment rating. If reliable range of motion data demonstrating pre-existing impairment is not available, any alleged pre-existing impairment is not definitely ascertainable and allocation is not appropriate.

If reliable medical data to definitely ascertain pre-existing impairment is available, the claimant is entitled to compensation "in the amount that would have been allowable had the employee not had the pre-existing impairment." West Virginia Code Section 23-4-9b.

Even if a physician has reliable medical data to definitely ascertain specific pre-existing impairment, the method of allocation cannot deprive the claimant the benefit "amount he would have been allowed had the employee not had the pre-existing impairment." In order to ensure the

claimant is granted benefits for his occupational injury in the same amount as he would be entitled had he not had pre-existing impairment. the examining physician must allocate impairment before applying Rule 20.

By all accounts, this claimant was placed in lumbar spine Category III which has a pre-approved range of whole person medical impairment from 10% to 13%. (The acceptable range of impairment awards for Category II is 5% to 8%). Dr. Marsha Bailey examined the claimant and diagnosed a total whole person impairment of 12%. Dr. Bailey proceeded to allocate 4% of the claimant's 12% impairment rating to pre-existing degenerative changes. Dr. Bailey had no specific "historical information or previously compiled medical data" from which pre-existing impairment could be reliably calculated as required by the AMA Guides. See AMA Guides Chapter 3.3f p. 101. Furthermore, she could not site any factual finding or test result to support her contention that the claimant had a 4% pre-existing impairment. Without that documentation, Dr. Bailey's report lacks the fundamental basis upon which pre-existing impairment must be definitely ascertained. West Virginia Code Section 23-4-9b does not provide for allocation of impairment which cannot be definitely ascertained.

Even if Dr. Bailey could have produced historical data to support allocation of a 4% whole person medical impairment to a pre-existing condition, her method of allocation was flawed and inconsistent with the AMA Guides and West Virginia Code Section 23-4-9b which provides that a claimant with pre-existing impairment shall be compensated "in the amount that would have been allowable had the employee not had the pre-existing impairment."

West Virginia laws and regulations require that injury related whole person impairment be determined using the Range of Motion Model of Impairment found in the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. That AMA evaluation process includes both a method for calculating total whole person impairment and a method for calculating and allocating possible pre-existing impairment. Pre-existing impairment must be

“based on previously compiled data ... verified as being accurate.” See AMA Guides Chapter 3.3f. p. 101. Current total impairment is calculated based upon range of motion criteria derived from a clinical examination of the claimant. Once both of those calculations have been completed. “[t]he percent based on the previous findings would be subtracted from the percent based on the current findings.” Id. (Please note, the record in this case has no evidence of specific pre-existing impairment and Dr. Bailey made no attempt to calculate pre-existing impairment in the manner required by the AMA Guides.) Only after the AMA process for calculating whole person medical impairment has been completed, which includes allocation of pre-existing impairment, is the documented whole person impairment rating compared with Rule 20 Tables to determine whether additional adjustment to the rating must be made.

Dr. Bailey did not follow AMA instructions to calculate the claimant’s injury related impairment. Rather than subtract previous impairment from current impairment as required by AMA Chapter 3.3f, she calculated current impairment, reduced that impairment based upon Rule 20 Tables and reduced the claimant’s impairment rating a second time based upon speculation that the claimant had pre-existing impairment. Dr. Bailey’s method of prematurely referring to Rule 20 Tables before completion of the AMA process for calculating injury related impairment resulted in a recommended impairment rating which falls below the minimum award for Category III impairment. Furthermore, it denied the claimant the degree of compensation he would have been allowed had he not had pre-existing impairment. That result is in direct violation of West Virginia Code Section 23-4-9b.

The minimum award for Category III impairment is 10%. The maximum award is 13%. Claimants with impairment below 10% are rounded up to 10%. Claimants with impairment above 13% are rounded down to 13%. No claimant can be compensated with less than a 10% award and no claimant can be compensated with more than a 13% award. Dr. Bailey diagnosed a

total impairment of 12%. She proceeded to estimate that 4% of that 12% rating pre-existed the claimant's injury and that 8% was directly related to the claimant's current injury.

West Virginia Code Section 23-4-9b requires that this claimant be compensated as though his 4% pre-existing impairment did not exist. In other words, this claimant is to be treated like any other claimant with an 8% injury related occupational impairment. Every claimant who satisfies the diagnostic criteria for Category III impairment can receive no less than a 10% permanent partial disability award. Accordingly, every such claimant with an AMA Range of Motion Model impairment rating of 8% is entitled to have his whole person impairment recommendation rounded up to 10%.

By applying Rule 20 prior to allocation, Dr. Bailey ignored the method of allocation prescribed by the AMA Guides, recommended compensation below the minimum permitted by rule, and treated this claimant differently from any other claimant who has an 8% range of motion impairment without additional pre-existing impairment.

The AMA Guides, West Virginia Law, and common sense dictate that allocation of whole person impairment is part of the AMA Range of Motion Model calculation of injury related impairment. West Virginia Law requires completion of the AMA process for calculating whole person medical impairment prior to comparing that rating to Rule 20 to determine whether additional adjustment must be made. If complaints that employers often do not get full benefit of allocated impairment ratings because awards must be rounded up to the minimum permitted award are to prevail, then complaints that claimants with impairment in excess of maximum awards not receiving full compensation for physical loss must also prevail and Rule 20 awards limitations must be found unlawful and unenforceable.

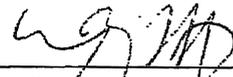
IV. CONCLUSION

West Virginia law requires that adjustment of whole person medical impairment based upon Rule 20 be made only after full evaluation of impairment, including allocation of pre-

existing impairment, based upon AMA criteria. Any attempt to allocate whole person medical impairment after application of Rule 20 impairment limitations is inconsistent with West Virginia law.

Additionally, any attempt to calculate pre-existing impairment must be based upon previously compiled reliable range of motion test results documented in a sufficiently clear manner to indicate testing was performed in keeping with the requirements of the AMA Guides. If no such test results are available, pre-existing impairment cannot be definitely ascertained and any attempt to allocate impairments is mere speculation and should be ignored.

Respectfully Submitted



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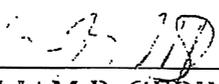
CERTIFICATE OF SERVICE

I, William B. Gerwig, III, do hereby certify that the foregoing "*Amicus Curiae Brief*," has been served upon all parties of record by depositing a true and exact copy thereof, via the United States mail, postage prepaid and properly addressed on this 11th day of November, 2015, as follows:

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