

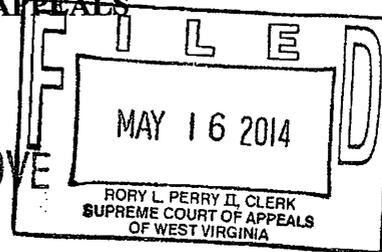
14-0471

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN CHARLESTON

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SWVA, INC., ✓

Petitioner,

v.

JCN: 2004040678 ✓

CRN: 2004040678

DOI: 3/9/04

APPEAL NO.: 2048996 ✓

^{D.}
EDWARD BIRCH, ✓

Respondent.

order date: 4/18/14

PETITION FOR APPEAL ON BEHALF OF SWVA, INC.

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I. TABLE OF AUTHORITIES

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 pages 8-9]

Co-morbidity (e.g., degenerative disc disease, spondylolisthesis, segmental instability, osteoporosis, spine deformity) may be associated with a higher incidence of persistent symptoms but are not compensable conditions. W. Va. Code R. § 85-20-37.8. [Cited on page 10]

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 pages 10-11]

“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 11]

“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 11]

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 issue presented for this Honorable Court's interpretation in this Workers' Compensation claim is purely one of law, specifically the application of West Virginia Code Section 23-4-9b. The facts are undisputed.

Claimant allegedly injured his low back on March 9, 2004 while working as a "No. 2 mill stringer operator" for SWVA, Inc. Claimant was 67 at time of the alleged injury and had significant evidence of preexisting degenerative disc disease in his low back. Claimant was able to finish his shift, and actually continued working for more than a week before seeking an evaluation at St. Mary's Medical Center on March 18, 2004. Appendix, Ex. 1. He was evaluated and diagnosed with a lumbar sprain/strain. The evaluating physician also observed that claimant had had at least one prior injury to his low back, which he suffered two years prior, in 2002.

The Workers' Compensation Commission held the claim compensable for a sprain/strain of the lumbar region, ICD-9 Diagnosis Code Number 847.2, by order dated April 21, 2004. Appendix, Ex. 2. No other condition was ever added to the claim as a compensable diagnosis.

Claimant's compensable lumbar sprain/strain was superimposed on advanced degenerative disc disease, which is consistent with his age at the time of the injury. For example,

an MRI dated March 19, 2004, showed degenerative disc disease throughout the lumbar spine from L1 to S1. Appendix, Ex. 3. Claimant did undergo two back surgeries in the claim, targeted primarily at his advanced degenerative disc disease, as identified on his initial lumbar MRI. As discussed below, Dr. Marsha Bailey conducted an independent medical evaluation and noted that the hospital admission history indicated claimant had been prescribed Lortab, a narcotic pain medication, to treat low back pain prior to the work-related injury, with an increase in dosage just six months before the alleged injury.

Dr. David Weinsweig, claimant's neurosurgeon, observed that a significant portion of claimant's ongoing complaints were clearly related more to his degenerative arthritis than to the compensable injury. Appendix, Ex. 4. Fortunately, claimant appears to have recovered well from the injury and surgeries directed at his advanced degenerative disc disease, as Dr. Bailey observed that claimant, who is now in his late 70s, had reported to Dr. David Caraway that he was walking eight miles a day for exercise and doing very well overall.

As noted, Dr. Bailey performed an independent medical examination in the claim. She issued a report dated October 27, 2011. Appendix, Ex. 5. Dr. Bailey diagnosed chronic lower back pain without true radiculopathy following two lumbar discectomies, but also observed that there was clear evidence that claimant had suffered from chronic low back pain related to degenerative disc disease and degenerative arthritis prior to the compensable injury.

Overall, Dr. Bailey found claimant had long since reached his maximum medical improvement ("MMI") in relation to the compensable lumbar sprain/strain, and concluded that no further treatment would be expected to improve claimant's symptoms. Under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition ("*Guides*"), Dr. Bailey found under Table 75, Category II, Subheading E, claimant is entitled to

10% impairment, and under Category II, Subheading G, claimant is entitled to an additional 2%. Dr. Bailey concluded that her range of motion measurements were all pain restricted, and thus invalid. Under the *Guides*, she found a total of 12% whole-person impairment. Dr. Bailey then applied the impairment tables set forth in Rule 20 as is required by W. Va. Code R. § 85-20-64.1-2.

After reviewing claimant's compensable injuries and current health status, Dr. Bailey classified claimant under Lumbar Category III for his "cumulative injuries that lead to a permanent impairment to the Lumbar Spine area." This categorization, which allows for a range of awards from 10% to 13%, included an assessment addressing both claimant's compensable lumbar sprain/strain and his ascertainable and preexisting lumbar degenerative arthritis and degenerative disease. As claimant was assigned to Lumbar Category III under Table 85-20-C, Dr. Bailey made no alterations to her 12% Range of Motion rating, and thus 12% was her final impairment rating, **before** apportionment for the preexisting condition.

After correctly ascertaining claimant's whole-person impairment utilizing both the *Guides* and applying the tables set forth in Rule 20, Dr. Bailey performed a third necessary function of an impairment rating, in particular apportionment of the impairment rating in a claim where the claimant is suffering from BOTH definitely ascertainable preexisting impairment, such as degenerative disc disease and degenerative arthritis of the lumbar spine, and a compensable injury, which in this case is a compensable lumbar sprain strain. In other words, she apportioned claimant's impairment between his compensable injury and the preexisting conditions. Dr. Bailey concluded that 4% of claimant's impairment is related to his preexisting degenerative disease, and that 8% of his impairment is secondary to his compensable lumbar sprain/strain.

Based on Dr. Bailey's findings, the claims administrator granted an 8% PPD award by order dated November 15, 2011. Appendix, Ex. 6. Claimant protested.

In support of his protest, claimant submitted the August 13, 2012 report of Dr. Bruce Guberman. Appendix, Ex. 7. Dr. Guberman observed that claimant underwent two surgeries that reportedly did not improve his condition, and was diagnosed with an L2-3 radiculopathy, resulting primarily from his degenerative disc disease and degenerative arthritis. It is notable again that the only compensable condition in the claim remains a lumbar sprain/strain. Although claimant underwent surgery, the L2-3 disc herniation diagnosed by Dr. Weinsweig was never added as a secondary condition, and claimant's alleged radiculopathy – which Dr. Bailey found was not actually a true radiculopathy – was related to clearly preexisting degenerative changes consistent with claimant's age, which was 67 on the date of injury.

Like Dr. Bailey, Dr. Guberman found that a significant portion of claimant's impairment was related to preexisting and non-compensable degenerative changes. Indeed, while Dr. Bailey estimated claimant's preexisting impairment at 4%, Dr. Guberman concluded that at least 6% of claimant's whole-person impairment was secondary to preexisting degenerative changes. Dr. Guberman's method was as follows: He first found 13% impairment for various range of motion deficits under the *Guides*. He then allocated 6% to claimant's preexisting condition, and 7% to the compensable injury. He then combined 7% with 12% from Table 75, page 113 of the *Guides*. However, under Category III of Table 85-20-C, he noted that the maximum allowed impairment is 13%, and thus he recommended 13% for this claim. In other words, Dr. Guberman apportioned the preexisting impairment *before* applying Rule 20, instead of *after*. Therefore, under this method, he was going to and did recommend payment of 13% in this claim, *regardless of whether claimant had any preexisting impairment or not.*

The Office of Judges issued its decision on November 7, 2013. Appendix, Ex. 8. The ALJ held that Dr. Guberman's method of calculating impairment and "apportioning" preexisting impairment was correct, despite the clear and unambiguous language of West Virginia Code Section 23-4-9b. Accordingly, the ALJ ordered that claimant be granted an additional 5% PPD award.

The Board of Review issued its decision on April 18, 2014. Appendix, Ex. 9. The Board essentially "passed the buck" to this Honorable Court, adopting the ALJ's erroneous conclusions of law and affirming the additional 5% PPD award without any discussion, independent analysis, or findings.

The Board of Review's decision must be found incorrect, as a matter of law, or W.Va. Code Section 23-4-9b is essentially a nullity, and would allow claimants to receive permanent partial disability awards for preexisting impairment despite the clear, unambiguous statutory prohibition of same. The employer asks this Honorable Court to reinstate the 8% PPD award in order to properly factor out claimant's **undisputed** preexisting impairment.

IV. SUMMARY OF ARGUMENT

The ALJ's decision, which was adopted by the Board of Review in its entirety, is clearly wrong and contrary to applicable law. West Virginia Code Section 23-4-9b unambiguously precludes an award for preexisting, unrelated impairment. The evidence is undisputed in showing that claimant has preexisting and unrelated lumbar spine impairment. The ALJ and Board of Review committed clear error of law and were clearly wrong in granting a PPD rating that fails to properly apportion any of claimant's present whole-person impairment to his **undisputed** preexisting impairment. For this reason, the Board of Review's decision of April 18, 2014 should be reversed and the claims administrator's order granting an 8% PPD award

should be reinstated.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The employer submits that oral argument is unnecessary pursuant to the criteria provided in Rule 18(a) of this Honorable Court's Rules of Appellate Procedure. The case does not present unique or complicated issues of law.

VI. ARGUMENT

Again, it is undisputed that claimant has a significant preexisting impairment. The medical evidence is unanimous on this point. Thus, this appeal is subject to *de novo* review. The only question presented is whether preexisting impairment is deducted before or after applying the impairment tables in Rule 20. If before, as Dr. Guberman did, claimant receives the same award either way, thereby defeating the purpose of the applicable statute. If after, as Dr. Bailey did, claimant will receive an award which will properly factor out his undisputed preexisting impairment.

Under Dr. Guberman's method, as adopted by the ALJ, claimant receives a 13% PPD award. Even if all of claimant's injuries, conditions, and impairment were compensable, which they are not, 13% is the maximum award to which he would be entitled under Rule 20. Dr. Guberman's "apportionment," therefore, is totally illusory.

West Virginia Code Section 23-4-9b is clear:

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).

In adopting 13% the ALJ rendered West Virginia Code Section 23-4-9b a nullity. With the decision, there is effectively no apportionment to claimant's preexisting condition, which is clearly documented, because 13% would have been awarded under Rule 20 with or without the preexisting condition. This is improper under the express language of the Code, as well as its clear intent. The obvious point of this section of the Code is to apportion awards between the compensable and the non-compensable. In this case, Dr. Bailey was actually generous to claimant, insofar as she allocated only one-third of claimant's impairment to the preexisting condition. 12% is the award she would recommend if claimant's condition had no preexisting component, and 8% is what she recommended. By contrast, Dr. Guberman recommends 13% if claimant's condition had no preexisting impairment, and yet, even though he found 6% preexisting impairment, his method still somehow produced a 13% final recommendation, even when "apportioned." Clearly, this kind of "apportionment" is a sham. Not only is it contrary to statute, it defies common sense.

The determination of a definitely ascertainable preexisting impairment is *essentially* a finding that claimant had a permanent partial disability in an amount certain prior to the compensable injury. In this case, Dr. Bailey concluded that claimant's preexisting PPD percentage was 4%, while Dr. Guberman concluded that claimant's preexisting PPD percentage was 6%. Nevertheless, Dr. Guberman ended up recommending an additional 5%.

It is NOT appropriate to deduct prior PPD awards in the *middle* of the impairment rating process and THEN apply Rule 20. This would result in the absurd process whereby claimants could conceivably receive a new 5-8% PPD award for every new lumbar spine sprain/strain injury until they had received 15, 20, or even 30% or more in PPD awards, all for simple lumbar sprain/strains that should be awarded in sum total no more than an 8% PPD award under Rule 20.

In this claim, claimant's condition developed as a result of the combined effects of his preexisting degenerative disc disease and degenerative arthritis – which under the applicable regulations cannot be considered compensable conditions (see generally W. Va. Code R. § 85-20-37.8) – and a compensable lumbar sprain/strain. In fixing claimant's PPD award, Dr. Bailey appropriately accounted for the impact of claimant's preexisting degenerative changes on his impairment rating. Dr. Guberman, by contrast, chose a method that functionally 'erased' the impact of claimant's preexisting impairment on his final impairment rating, which is at odds with both the letter and the spirit of West Virginia Code § 23-4-9b.

Even absent his error in apportioning *after* application of Rule 20, his findings are not credible in light of the evidence of record. Dr. Guberman reported that claimant had very limited range of motion in the lumbar spine, which is NOT consistent with claimant's self-report to Dr. Caraway that he is healthy and active despite his age, and still capable of walking up to eight miles per day. The evidence demonstrates relative improvement and success following surgery.

The Office of Judges and Board of Review reversed the decision of the claims administrator, meaning that the Court finds its statutory standard of review in West Virginia Code Section 23-5-15 (d), which states:

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).

“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.

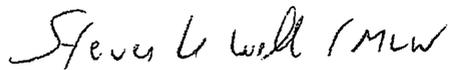
VII. CONCLUSION

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.

By counsel



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CERTIFICATE OF SERVICE

I, Steven K. Wellman, hereby certify that on the 16th day of May 2014, a copy of the foregoing "PETITION FOR APPEAL ON BEHALF OF SWVA, INC." was mailed, postage prepaid, by First Class Mail to the following:

Edwin H. Pancake, Esquire
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Steven K. Wellman /mww

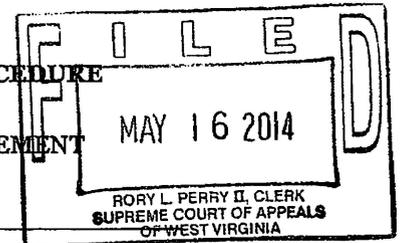
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APPENDIX B - REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT



Complete Case Title: SWVA, Inc. vs. Edward Birch
Petitioner: SWVA, Inc. Respondent: Edward Birch
Counsel: Steven K. Wellman Counsel: Edwin H. Pancake
Claim No.: 2004040678 Board of Review No.: 2048998
Date of Injury/Last Exposure: 3/9/04 Date Claim Filed: 3/18/04
Date and Ruling of the Office of Judges: 11/7/13, reversed CA's order of 11/15/11, granting additional PPD award
Date and Ruling of the Board of Review: 4/18/14, affirmed the 11/7/13 OJ decision
Issue and Relief requested on Appeal: Reverse the 4/18/14 BOR order and reinstate the CA's order of 11/15/11

CLAIMANT INFORMATION	
Claimant's Name	<u>Edward Birch</u>
Nature of Injury	<u>Slip/Fall</u>
Age	<u>49</u>
Is the Claimant still working?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, where: _____
Occupation	<u>Trucker operator</u> No. of Years: _____
Was the claim found to be compensable?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, order date: <u>4/21/04</u>

ADDITIONAL INFORMATION FOR PTD REQUESTS	
Education (highest)	_____
Date of Last Employment	_____
Total amount of prior PPD awards	_____ (add dates of orders on separate page)
Finding of the PTD Review Board	_____

List all compensable conditions under this claim number: _____
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?
 Yes No
(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? Yes No
(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? Yes No
If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

STATUTORY NOTICE of FILING of PETITION FOR APPEAL

May, 19, 2014

SWVA, Inc. v. WVOIC/Edward D. Birch

Supreme Court No. 14-0471

Petition for Appeal Filed: May 16, 2014

Board of Review Information

Claim Number:2004040678

Appeal Number: 2048996

Order Date: April 18, 2014

Dear Interested Persons:

Statutory notice pursuant to W.Va Code 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.

The Court has a mediation program for certain types of workers' compensation cases. You will be contacted if the Office of Counsel later determines that the case is appropriate for mediation.

The papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision to grant or refuse the petition for appeal by copy of an order.

Sincerely, RORY L. PERRY II, Clerk of Court

NOTICE PROVIDED TO: Workers' Compensation Commissioner and Workers' Compensation Board of Review
and to the following counsel of record, as indicated:

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