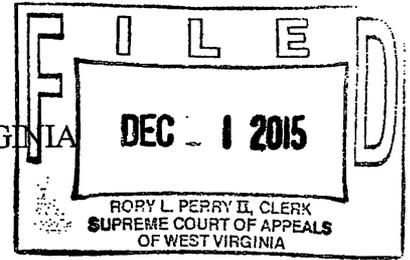


In the
SUPREME COURT OF APPEALS OF WEST VIRGINIA
Charleston, West Virginia



SWVA, INC.,

Petitioner,

vs.

Supreme Court No.: 14-0471

Claim No. 2004040678

EDWARD D. BIRCH,

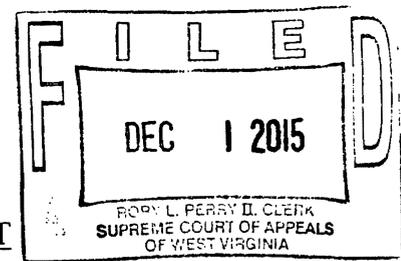
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT
EDWARD D. BIRCH

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December 1, 2015



SUPPLEMENTAL BRIEF OF CLAIMANT/RESPONDENT

Pursuant to the October 20, 2015, Order of the West Virginia Supreme Court of Appeals, the claimant/respondent, Edward D. Birch, respectfully tenders this supplemental brief to address the following question posed by the Court:

QUESTION

What is the correct methodology for apportioning the level of impairment in workers' compensation cases involving pre-existing conditions?

RESPONSE

The claimant/respondent, Edward Birch, asserts that the proper method of apportioning the level of impairment in claims which involve pre-existing conditions is that method undertaken by Dr. Bruce Guberman in the instant claim. That is, Dr. Guberman obtained valid range of motion measurements, and then applied his opinion of apportionment to those measurements.

In his findings, Dr. Guberman calculated 13% impairment for range of motion deficits under the AMA Guides of Permanent Impairment, Fourth Edition, of which he then allocated approximately half (6%) to the claimant's pre-existing back condition, and allowed 7% to the compensable injury. Dr. Guberman then combined the 7% with 12% from his other findings directly related to the surgeries for this compensable injury as directed by the Guides. Under the Combined Values Chart, this equaled 18% impairment of the whole person.

As required, Dr. Guberman then considered the allowable range of impairment pursuant to the Lumbar Spine Categories from Table 85-20-C. Dr. Guberman found that the claimant appropriately fit Category III, which limited the claimant to a 10% to 13% impairment rating. Because his 18% finding exceeded the maximum for this category, Dr. Guberman adjusted his impairment rating to 13%. (These calculations ultimately lead to apportioning approximately 50% to preexisting conditions since the findings substantiated 25% permanent impairment prior to apportionment and category placement per 85-20-C.)

Dr. Guberman's method of apportionment was obviously different from the method employed by Dr. Marsha Bailey. Dr. Bailey had some findings very similar to those of Dr. Guberman, but stated in her report that she was unable to allow any impairment rating for range of motion since she believed that range of motion measurements had been "invalid." Therefore, she was limited under the AMA Guides to a total of 12% whole person impairment resulting from the two surgeries.

At that point Dr. Bailey then determined the claimant best fit in Category III of Table 85-20-C, the same category found by Dr. Guberman. Her 12% whole person impairment was within that range and really needed no adjustment since it did not include any impairment for range of motion deficits.

However, Dr. Bailey then chose to apportion the 12% whole person impairment by attributing 4% of the claimant's impairment to pre-existing conditions, and allowing 8% whole person impairment for the compensable injury. By delaying her apportionment to the final impairment rating allowed under the category, she was able to greatly reduce the claimant's award.

On appeal the Administrative Law Judge determined that Dr. Bailey's method of apportionment was improper under the facts, and the Administrative Law Judge increased the claimant's permanent partial disability award to 13%, which was upheld by the Workers' Compensation Board of Review. The Administrative Law Judge and Board of Review deemed Dr. Guberman's method of apportionment to be correct.

ANAYLSIS

Pursuant to W.Va. Code §23-4-3 b(b), the Legislature directed the former Workers' Compensation Commission to adopted ranges of permanent partial disability for common injuries and diseases. Among those injuries for which the Commission established ranges of impairment were back injuries. Additional ranges were established for carpal tunnel syndrome and arm and leg injuries which did not contain amputation as a component.

(Impairment resulting from amputation is determined by statute and is contained in W.Va. Code §23-4-6.)

The Workers' Compensation Commission also adopted rules for the evaluation of impairment and then also established categories for lumbar spine injuries (Table 85-20-C), thoracic spine (85-20-D) and cervical spine (85-20-E) of Rule 20, Section VII. The Commission also adopted the Fourth Edition of the Guides to the Evaluation of Permanent Impairment as its basis for determining impairment. (85-20-64.2) In adopting this Rule; 85-20-64.1 also stated “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.” The Rules then direct that the Tables be consulted for the final category for the assignment of impairment within the range allowed by the category. These tables also act as an apportionment tool.

The administrative rules concerning the determination of permanent impairment also anticipate that there may be other factors contributing to the findings of impairment. According to 85-20-66.4, “to the extent of factors other than the compensable injury may be affecting the injured workers whole body medical impairment, the opinion stated in the report must, to the extent medically possible, determine the contribution of those other impairments whether resulting from an occupational or a non-occupational injury, disease, or any other cause.” The key language in this Rule is that the degree to which these others factors are contributing to the impairment findings must be determined **“to the extent medically possible.”** The issue remains, however, of the proper methodology of apportionment which results in a medically sound opinion that reasonably determines the contribution of other pre-existing components.

Perhaps for some guidance on this issue Dr. Randal Short, a former Workers' Compensation Commission Associate Medical Director, issued a Memorandum to independent medical providers dated June 25, 2004, concerning the application of the Rule 20, Section VII

Tables with regard to disability evaluations. Dr. Short observed that a single injury or cumulative injuries may lead to permanent impairment to the lumbar, thoracic or cervical spine area of one's person may cause an injured worker to be eligible to receive a permanent partial disability award within the ranges identified in Tables 85-2-C, 85-2-D and 85-2-E of Rule 20, Section VII.

Dr. Short stated that the rating physician must perform an examination using the range of motion model as well as determining whole person impairment. Then, the physician must identify the appropriate impairment category from the applicable table, and assign impairment within the range designated for that category. If the lumbar spine impairment category meets the criteria for Category II, then the claimant is eligible for 5%-8% impairment of the whole person. Therefore, if the range of motion whole person impairment is recommended to be 12% and the claimant was assigned to Lumbar Spine Category II, then the claimant's whole person impairment would be capped at a total 8% whole person impairment pursuant to Rule 20, Section VII.

Dr. Short then went on to give the opposite example where range of motion may lead a physician to recommend 4% whole person, but if the injured worker was assigned Category II, his award would be increased to 5%. (This memorandum was not tendered into the record but can be provided upon request.) There was no provision for modifying, adjusting or otherwise apportioning the final award as rating after placement in the appropriate spinal category.

While preexisting degenerative changes in one's spine are certainly not unusual, and normally occur with age, each individual may exhibit somewhat different impairment due to preexisting degenerative changes, if they have any. Most likely, the impairment will be reflected in the range of motion deficits. Because of this, the only reasonable way to apportion preexisting impairment would be to apportion the impairment reflected in the claimant's range of motion. This is precisely the method used by Dr. Guberman, and is the only method that is logical or

reasonable. That is because this preexisting impairment, if any, would necessarily be reflected in restriction to one's range of motion, and not necessarily be reflected in the criteria used to place on injured worker in a specific spine category. In fact, neither range of motion nor pain is even considered in determining the appropriate category for impairment.

Although Rule 85-20-66.4, allows for an opinion regarding apportionment between the impairment caused by the occupational injury and preexisting impairment, it must be determined "to the extent medically possible." What has commonly occurred is an evaluating physician assigning a subjective, arbitrary figure to his/her findings to assess preexisting impairment in determining the ultimate disability rating. Absent some prior examination, this preexisting impairment will always be somewhat arbitrary on the part of the examiner.

The spinal categories contained in 85 CSR 20 were adopted and designed to eliminate this arbitrary speculation, since the different categories are based on objective findings exhibited by a claimant following an injury. It is quite common for a claimant to exhibit significantly more impairment under the AMA Guides and will be allowed in the appropriate category of the Rule 20, Section VII Tables. This reduction essentially acts as its own apportionment. (Occasionally, however, an injured worker is awarded a permanent partial disability award in an amount higher than that justified by his/her range of motion impairment, but this is rare compared to those who receive an award less than that justified by their range of motion deficits.)

Because any preexisting impairment is normally reflected by impaired range of motion, any apportionment must only be applied to the range of motion findings. Once that impairment is apportioned, then the examiner can place the claimant in the appropriate category for a comparison and final rating. If there are no valid range of motion findings reflected in the initial evaluation pursuant to the Guides, then no apportionment should be made and the other findings from the Guides should then be compared to the appropriate Rule 20 medical category.

In the instant claim, since Dr. Bailey stated she was unable to use any range of motion measurements because she felt they were “invalid” due to being pain restricted, this should have eliminated any need for apportionment or modification to her opinion. This is because the claimant qualified for the 12% impairment under the AMA Guides as found by Dr. Bailey without any consideration of preexisting conditions. That is, the claimant qualified under the AMA Guides due to his two surgeries which he underwent as a result of this claim, the first surgery being worth 10% whole person, with 2% added as a result of the second surgery. (Table 75, pg. 13). There is absolutely no evidence that the claimant needed any surgery for his low back injury prior to suffering this compensable injury. Clearly, Dr. Bailey’s opinion of 12% reflects the impairment according to the Guides due to the two surgeries undergone by the claimant for this injury. Because the Guides direct for this finding solely for the surgeries undergone by the claimant, no apportionment should have been made at all.

Although the employer/petitioner states that the only injury held compensable was a sprain/strain of the low back, this statement is somewhat misleading. It is misleading because the claimant received authorization for his first lumbar microdiscectomy by an order of the same date as the order holding the claim compensable for a lumbar sprain/strain. The Administrator also subsequently authorized the second surgery by order dated November 19, 2004. While it is true that no order was ever entered finding the herniated disc compensable, all treatment has been approved by the Administrator throughout the existence of the claim.

What is also true in the instant claim is that nearly four years elapsed between the time the claimant first requested a permanent partial disability evaluation and the time the referral was actually made by the Administrator. Surely with such a serious back injury, there would likely have been some additional impairment caused by the passage of time. The employer should not now receive the benefit of this delay.

The two medical reports tendered in this claim exhibit the methods which can be used to apportion impairment between preexisting and that which is related to the compensable

injury. By apportioning the range of motion findings before comparing the objective findings pursuant to the Guides to those included in the spinal tables, any preexisting impairment is appropriately accounted for, even though it is by necessity somewhat speculative.

As the Administrative Law Judge found and the Board of Review upheld, the apportionment as performed by Dr. Bailey was incorrect since it was applied to the final impairment rating allowed under the appropriate category Table 85-20-C. The Administrative Law Judge correctly noted that W.Va. Code §23-4-9b provided for the apportionment of impairment related to a preexisting condition, not the apportionment of permanent partial disability. By incorrectly applying her subjective apportionment to the permanent partial disability rating allowed under the appropriate category, Dr. Bailey's opinion was flawed and resulted in the incorrect disability award being granted by the Administrator.

CONCLUSION

WHEREFORE, the claimant/respondent, Edward D. Birch, respectfully asserts that the most reasonable, logical and correct method of apportionment was that method applied by Dr. Guberman in which the physician's opinion of the contribution of preexisting conditions is reflected in the apportionment of the range of motion findings.

Respectfully yours,

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By  _____

WV State Bar ID No: 5767
December 1, 2015

CERTIFICATE OF SERVICE

I, Edwin H. Pancake, counsel for Respondent herein, do hereby certify that I served the foregoing Supplemental Brief upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 1st day of December, 2015.

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