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January 12, 2023

Honorable Edythe Nash Gaiser, Clerk
West Virginia Supreme Court of Appeals
State Capitol Building
Building 1, Room EW-317
1900 Kanawha Blvd. East
Charleston, West Virginia 25305

RE: David Duff, II, Petitioner, v. Kanawha County Commission, Respondent.
Supreme Court No.:
Intermediate Court No.: 22-ICA-10
JCN No.: 2021000317
Claim: 2020015225
BOR Order: 07/26/2022

Dear Clerk Gaiser:

Enclosed herewith in connection with the above-referenced workers' compensation claim, please find the original and three (3) copies of the Workers' Compensation Appeals Docketing Statement, the original and five (5) copies of the Brief on Behalf of Petitioner, David Duff, II, and one (1) copy of the Appendix.

By copy of this letter, I am providing a true and exact copy of the Workers' Compensation Appeals Docketing Statement and brief to all parties of record this date.

Very truly yours,

William B. Gerwig, III
WV State Bar ID No. 1375

WBG/wdh
Enclosures

cc: H. Dill Battle, III, Esquire
Kanawha County Commission
David Duff II
Encova Insurance

BEFORE THE STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

IN THE MATTER OF:

David Duff, II,

Petitioner,	**Supreme Court No.:**	
	Intermediate Court No.:	**22-ICA-10**
and	**Judicial Claim No:**	**2021000317**
	Claim No.	**2020015225**
	DOI:	**06/15/2020**
	BOR Order:	**07/26/2022**

Kanawha County Commission,

Respondent.

BRIEF ON BEHALF OF PETITIONER, DAVID DUFF, II

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West Virginia Code §23-3-1; p. 9;

West Virginia Code §23-4-9b; p. 9;

Martin v. Randolph Cnty. Bd. of Educ., 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995); p. 9;

Connecticut Natl' Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992); p. 9;

State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959); p. 9;

West Virginia Health Care Cost Review Auth. v. Boone Mem's Hosp., 196 W.Va. 326, 472 S.E.2d 411 (1996); p. 10;

Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996);

Minor v. West Virginia Division of Motor Vehicles, Memorandum decision No. 17-0077 dated December 19, 2017; p. 13;

Martin v. State Compensation Commissioner, 107 W.Va. 583, 149 SE 824 (1929); p. 16;

Scott v. Welded Construction, LP, No. 19-1164 (February 19, 2021); p. 17;

BEFORE THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

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BOR Order:	**07/26/2022**	

Kanawha County Commission,

Respondent.

I. ASSIGNMENT OF ERROR

The Intermediate Court of Appeals committed clear error using an unreliable and speculative rating of alleged preexisting impairment to reduce a permanent partial disability rating for surgical spinal fusion below the minimum level of compensation provided by rule. West Virginia Code §23-4-9b does not permit apportionment of a permanent partial disability rating unless preexisting impairment is "definitely ascertainable." Alleged preexisting impairment must be definitely ascertained using the Range of Model of Impairment found in the 4th Edition of the AMA Guides as required by West Virginia Code §23-4-6 and CSR Title §85-20-65.1. As a result of the Board's error, the claimant received a whole person medical impairment rating less than the minimum 25% award prescribed by CSR Title §85-20-C, Category V for claimants who have undergone surgical spinal fusion.

II. STATEMENT OF THE CASE

The claimant injured his low back on June 15, 2020, in the course of and resulting from his employment. The claims administrator ruled the claim compensable and by order dated September 24, 2020 authorized lumbar spinal fusion surgery. (Ex. A).

Dr. Robert Crow performed L3-4 posterior lumbar interbody fusion using autograft bone graft with a Medtronic Elevate expandable peek cage to address L3-4 radiculopathy related to a left L3-4 foraminal and extraforaminal disc herniation. (Ex. B).

Post-surgically, the claims administrator referred the claimant to Dr. Prasadarao Mukkamala for an independent medical examination. On June 9, 2021, Dr. Mukkamala reported that the claimant has an 8% whole person impairment for lost motion, a 12% impairment based upon diagnostic criteria found in AMA Table 75, Section IV D and an additional 3% impairment for weakness of the left quadriceps. Combining those impairments, Dr. Mukkamala diagnosed a 21% total AMA Range of Motion Model impairment rating. Dr. Mukkamala compared the claimant's AMA impairment rating with ratings permitted by CSR 20. Based upon the claimant's spinal fusion surgery, Dr. Mukkamala concluded that the claimant satisfied the diagnostic criteria for Lumbar Category V of CSR Table §85-20-C. The diagnostic criteria for placement in Category V is spinal fusion surgery for a herniated disc with a history of radiculopathy even if the claimant's radiculopathy is asymptomatic post-surgically. The minimum award for claimants who satisfy that diagnostic criteria is 25%. Because the claimant's 21% AMA impairment rating falls below the minimum rating permitted by CSR §85-20-C, Lumbar Category V, Dr. Mukkamala adjusted his rating to 25%. That 25% award, as a matter of rule, is based entirely upon the fact that the claimant had spinal fusion surgery to address radicular symptoms. Neither range of motion loss nor any other measurement of impairment was part of the analysis to calculate the 25% impairment rating, mandated by CSR §85-20-C. Dr. Mukkamala recommended apportioning 12% of the claimant's whole person impairment rating to preexisting degenerative changes and 13% to the compensable injury. The claimant had past episodes of back pain, but the record of those complaints did not include information upon which an AMA Range of Motion Model impairment rating could be reliably calculated. An MRI performed on July 14, 2020 demonstrated the disc protrusion at L3-4 for which the claims

administrator authorized spinal fusion surgery. Beyond that, the MRI demonstrated only mild generalized degenerative changes. (Ex. C). Dr. Mukkamala never explained exactly what preexisting impairment justified a 12% impairment rating. Range of motion loss is irrelevant to the minimum 25% permanent partial disability award. If range of motion loss does not add to the claimant's minimum 25% impairment rating, assumed range of motion loss certainly cannot be a basis for subtracting from that rating. Even a claimant without any lost motion is still entitled to no less than a 25% permanent partial disability rating based upon having had surgical fusion. That surgery had already been acknowledged as compensable and authorized by the claims administrator without protest. (Ex. D).

By Order dated June 17, 2021, the claims administrator granted the claimant a 13% permanent partial disability award. The claimant protested. (Ex. E).

Dr. Bruce Guberman examined the claimant on July 28, 2021. Examination of the claimant's back revealed a 14% whole person impairment for lost range of motion. The claimant also met the diagnostic criteria for placement in AMA Table 75, Category IV D with a corresponding impairment rating of 12%. Dr. Guberman also diagnosed a 1% impairment rating due to sensory abnormalities found primarily in the distribution of the left L4 nerve root. Dr. Guberman combined these impairment ratings for a total whole person impairment rating of 25%. Dr. Guberman compared that 25% AMA Range of Motion Model impairment rating with the range of acceptable ratings found in CSR Table §85-20-C, Lumbar Spine Category V. Placement in Category V is appropriate for claimants who have had lumbar spinal fusion surgery for radicular symptoms. Range of motion measurement are not part of the diagnostic criteria for placement in Category V. Claimants who satisfy the diagnostic criteria for Category V are to be compensated with no less than a 25% permanent partial disability award and no more than a 28% award. Dr. Guberman's 25% AMA impairment rating coincided with the minimum award permitted by rule. He recommended that the claimant receive that minimum 25% award without

apportionment. Dr. Guberman also addressed Dr. Mukkamala's proposal to attribute 12% of the 25% minimum award granted by rule to mild degenerative changes. He noted the record contains no evidence that the claimant would have been entitled to any impairment rating prior to the occupational injury. Degenerative changes themselves are not a basis to calculate an impairment rating using AMA or Rule 20 criteria. "Furthermore, Dr. Mukkamala does not offer any rationale for why he split the impairment rating in half (and then rounded up from 12.5 to 13 percent impairment of the whole person for the injury)." (Ex. F).

In another claim, Dr. Mukkamala previously explained his rationale for attributing total whole person impairment ratings in equal portion to preexisting degenerative changes and an occupational injury. At a deposition on August 10, 2016 in a prior claim, Dr. Mukkamala testified that "there is a paragraph in Rule 20 saying a reasonable physician can guess or opine on the preexisting range of motion even though it was never calculated and determined that way." (TR 8/10/2016, p. 8 lines 10-13). Of course, Rule 20 contains no such paragraph. When preexisting impairment cannot be calculated based upon historical data as instructed by the AMA Guides, Dr. Mukkamala uses 50% as an apportionment value (TR 8/10/2016, p. 10, lines 1-19). Dr. Mukkamala added that his method of apportioning awards 50/50 is "the fair way of calculating it when we don't have the accurate figures which was preexisting, splitting halfway is the reasonable method." (TR 8/10/2016, p. 11, lines 14-18). (Ex. G).

Dr. David Soulsby examined the claimant on December 1, 2021. Like each examiner before him, Dr. Soulsby acknowledged that the claimant satisfied the diagnostic criteria found in AMA Table 75, Section IV D. On that basis, the claimant was entitled to a 12% diagnosis based rating which would be combined with range of motion loss. Dr. Soulsby diagnosed an 11% range of motion loss and concluded the claimant had a "23% WPI using the AMA range of motion model." He also diagnosed a 2% impairment due to persistent radiculopathy. He concluded "the impairment using the range of motion model is combined with the impairment

from persistent radiculopathy resulting in a finding of 25% WPI." Dr. Soulsby is correct that 12% plus 11% plus 2% equals 25%; however the AMA Guides do not add impairments. Impairments are to be combined using the AMA Combined Values Chart found on pages 322-323. Had Dr. Soulsby properly utilized the AMA Guides, he would have reported that the claimant's total whole person AMA impairment was 24%. Dr. Soulsby's error, though embarrassing for him, is erased when the claimant's AMA impairment rating is compared with the minimum rating found in CSR Table §85-20-C, lumbar Category V. The range of acceptable impairment found in Category V is 25% to 28%. The 25% Dr. Soulsby thought he diagnosed coincides with the minimum award permitted by rule. Even if Dr. Soulsby had properly used the AMA Guides and diagnosed a 24% impairment rating, he would have adjusted that rating to 25% as a matter of rule. Rather than recommend the minimum award of 25%, Dr. Soulsby explained that "degenerative disc disease increases the probability that a disc herniation will occur." Dr. Soulsby speculated that "approximately 50% of the observed impairment should be apportioned to the pre-existing disease process." (Ex. H). Please note Dr. Soulsby failed to complete a Low Back Examination Form as required by CSR §85-20-66.2. The Board of Review acknowledged that §85-20-66.2 provides that "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." The Board properly disregarded Dr. Soulsby's opinion.

By decision dated July 26, 2022, the Board of Review affirmed the claims administrator's order granting the claimant a 13% permanent partial disability award. (Ex. I). The claimant appealed. By decision dated December 9, 2022, the Intermediate Court of Appeals of West Virginia affirmed the 13% permanent partial disability award (Ex. J). The claimant hereby petitions the West Virginia Supreme Court for review of that decision.

III. SUMMARY OF ARGUMENT

Apportionment of a permanent partial disability rating is permitted only when alleged preexisting impairment is definitely ascertained by independently calculating that impairment using the Range of Motion Model of Impairment found in the 4th Edition of the AMA Guides. In this claim, Dr. Mukkamala arbitrarily reduced the minimum award provided by rule for spinal fusion surgery by half without using the AMA Range of Motion Model to calculate alleged preexisting impairment and without referring to the AMA Guides in any respect even though West Virginia Code §23-4-6 and CSR §85-20-65.1 require use of the AMA Guides to calculate any impairment rating.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner does not request oral argument.

V. ARGUMENT

The standard of review applicable to appeal from a decision of the Intermediate Court of Appeals is set out in West Virginia Code §23-5-15(b). That section provides that deference shall be given to the Intermediate Court's "findings, reasoning, and conclusions." In the current matter, by affirming the Board of Review, the Intermediate Court effectively reversed the denial of the claim by the Claims Administrator. Thus, subsection (d) of the statute is applicable which provides a detailed basis for reviewing the Intermediate Court's decision:

> (d) If the decision of the [Intermediate Court] 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 conclusion 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 nova re-weighing of the evidentiary record.

Subsection (d) of W.Va. Code §23-5-15 [2005], provides further:

> If the court reverses or modifies a decision of the [Intermediate Court] 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 §23-4-1g provides that, for all awards made on or after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considering and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

West Virginia Code §23-4-6(i) provides "[t]he Workers' Compensation Commission shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment." The evaluation standards are contained in CSR Title 85. CSR §85-20-65.1 provides "all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the 'Guides to the Evaluation of Permanent Impairment' (4th ed. 1993), as published by the American Medical Association." Those Guides specifically dictate that whole person impairment determinations be based upon valid reproducible range of motion testing. Without consistent range of motion test results which pass AMA validity criteria, whole person impairment cannot be determined under West Virginia law. See AMA Guides, 4th Edition, p. 115.

In claims where an impairment rating is based upon the AMA Range of Motion Model, "the evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides". CSR §85-20-66.1 "The report must state the 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." CSR §85-20-66.2. "To the extent that factors other than the compensable injury may be affecting the injured worker's 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 nonoccupational injury, disease, or any other cause." CSR §85-20-66.4. "The opinion stated in the report as to the degree of permanent whole body medical impairment must reflect the process of calculation as stated in

the applicable Guides so as to demonstrate how the degree of permanent whole body medical impairment was arrived at and calculated." CSR §85-20-66.3.

The West Virginia Code provides for apportionment of an impairment rating only when preexisting impairment can be definitely ascertained. West Virginia Code §23-4-9b provides:

> 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 [§ 23-3-1], 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. (emphasis added)

West Virginia Code §23-4-9b permits apportionment of a whole person impairment rating only where preexisting impairment is "definitely ascertainable." Had the legislature intended to permit examiners to speculatively estimate a degree of preexisting impairment, not definitely ascertained using AMA criteria, it would have stated as much.

In matters of statutory interpretation, this Court must presume that the Legislature knows what it has said in its prior enactments and that it means what it has said therein. Martin v. Randolph Cnty. Bd. of Educ., 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995) ("'Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" (quoting Connecticut Natl' Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992))). As such, "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten." State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). Thus, "[i]f the language of an enactment is clear and within the constitutional authority of the lawmaking body which passed it, courts must read the relevant law according to

its unvarnished meaning, without any judicial embroidery." Syl. pt. 3, in part, West Virginia Health Care Cost Review Auth. v. Boone Mem's Hosp., 196 W.Va. 326, 472 S.E.2d 411 (1996). In other words, this Court is "obliged not to add to statutes something that Legislature purposefully omitted." Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citations omitted).

The Intermediate Court of Appeals reasoned that disagreement in this claim turns on what is meant for a preexisting impairment to be "definitely ascertainable" within the meaning of West Virginia Code §23-4-9b. That court concluded that "definitely ascertainable" and "definitely ascertained" refer to the existence of a preexisting condition and not to the precise degree of impairment to be apportioned. That conclusion is clearly wrong. The West Virginia Code does not require that an evaluator find a definitely ascertainable condition causing possible preexisting impairment. W.Va. Code §23-4-9b specifically requires an examiner to "definitely ascertain impairment" (emphasis added), before apportionment is permitted. The plain unambiguous language of W.Va. Code §23-4-9b makes perfectly clear that only if preexisting impairment can be definitely ascertained is apportionment permitted. Not all injuries and conditions cause the same, or in some cases any, whole person impairment. Definite ascertainment of impairment is achieved through the AMA evaluation process. It is not assumed from the presence of an identifiable diagnosis without examination results. The same is true of a diagnosed preexisting condition. This claimant had "mild" preexisting degenerative changes, but no evidence to definitely ascertain impairment using the AMA Guides. By West Virginia statute, apportionment with no way to definitely ascertain preexisting impairment is not appropriate.

Alleged preexisting impairment must be independently calculated using the AMA Range of Motion Model of Impairment. See West Virginia Code §23-4-6(i) and CSR §85-20-65.1. "The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the

applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides." CSR §85-20-66.1.

The AMA Guides describe the method used to definitely ascertain pre-existing impairment. See Chapter 2.3 and 3.3f of the AMA Guides, 4th Edition. Such allocation must be calculated from "historical information and previously compiled medical data." AMA Guides, 4th Edition, page 101. "[A]pportionment would require accurate information and data on both impairments" (preexisting impairment and post-injury impairment). See AMA Guides, 4th Ed., p. 10. Obviously, range of motion model impairment predating the claimant's injury on June 15, 2020, can be definitely ascertained only with range of motion test data performed prior to the June 15, 2020 injury. To reliably diagnose definitely ascertainable preexisting impairment, the AMA Guides require that historical data compiled prior to the claimant's subject injury lend itself to calculation of whole person medical impairment independent of impairment based upon testing performed after the claimant's occupational injury. Once both pre-existing and current impairment are reliably calculated using range of motion model impairment criteria, "[t]he percent based on the previous findings would be subtracted from the percent based on the current findings." AMA Guides, 4th Edition, p. 101. The AMA Guides do not permit an examiner to calculate whole person medical impairment based upon current test data, only to reduce that award based upon an estimated contribution of possible pre-existing impairment which cannot be independently corroborated by historical range of motion data or other criteria found in the AMA Guides.

The concept that whole person medical impairment can be apportioned only if preexisting impairment can be specifically calculated using AMA Guides criteria is so important to the drafters of the AMA Guides that the principle is recited in two different sections of the Guides.

In addition to the provisions sited above, instructions on pages 9 and 10 of the Guides read as follows:

> The physician should assess the current state of the impairment according to the criteria in the Guides. Valid assessment of a change in the impairment estimate would depend on the reliability of the previous estimate and the reliability of the evidence on which it was based. If there were no valid previous evaluation, information gathered earlier could be used to estimate impairment according to Guides criteria. However, if there were insufficient information to document the change accurately then the evaluator ought not to attempt to estimate the change, but should explain that decision. (emphasis added)

Please be clear. The AMA Guides and West Virginia law do not require, and the claimant is not arguing, that preexisting whole person medical impairment must have been calculated prior to the claimant's occupational injury. Preexisting impairment can be calculated at any time. However, the AMA Guides and West Virginia law do require that preexisting impairment be definitely ascertained based upon "historical information and previously compiled medical data" which lends itself to calculation of whole person medical impairment. In West Virginia, information used to calculate whole person medical impairment using the AMA Range of Motion Model is limited to actual valid range of motion measurements and diagnoses for which compensation is provided under AMA Table 75. (For example, a prior surgically treated lumbar disk lesion with residual signs or symptoms; including disk injection, supports a 10% impairment rating according to Table 75 Section II D). Historical information confirming such a procedure prior to an occupational injury would support reduction of total whole person medical impairment diagnosed after an injury by 10% even if that preexisting impairment had never been calculated prior to the occupational injury. The same is true of valid range of motion testing performed prior to an occupational injury. Prior surgery and prior range of motion testing is exactly the type of "historical information and previously compiled medical data" referenced in the AMA Guides which can be used to calculate preexisting whole person medical impairment.

Without specific reliable evidence to support a diagnosis based estimate of impairment using Table 75 or valid and reproducible range of motion testing to document definitive preexisting range of motion loss, no opinion regarding preexisting impairment is truly based upon an AMA calculation of impairment and specific preexisting impairment has not been definitely ascertained as required by West Virginia law.

Roentgenographic evidence of preexisting degenerative changes, by itself, is an inadequate basis to support apportionment of a diagnosed whole person medical impairment following an occupational injury. The AMA Guides express that very point on page 99. "[R]oentgenographic evidence of aging changes in the spine, called osteoarthritis, are found in 40% of people by age 35 years, and there is a poor correlation with symptoms ..." The West Virginia Supreme Court has also acknowledged that specific whole person medical impairment cannot be assumed or definitely ascertained based upon degenerative changes. In Minor v. West Virginia Division of Motor Vehicles, Memorandum decision No. 17-0077 dated December 19, 2017, the Court ruled that apportionment of a permanent partial disability award based upon x-ray evidence of degenerative changes would not be appropriate.

Dr. Mukkamala had no reliable evidence to definitely ascertain specific preexisting lumbar spine impairment. Instead, he completely ignored the AMA method of calculating possible preexisting impairment in favor of arbitrarily allocating impairment based upon supposition and speculation. Dr. Mukkamala reported no factual findings from any test, evaluation, or examination to support a conclusion that the claimant had a specific definitely ascertained preexisting impairment as required by CSR §85-20-66.2. Dr. Mukkamala reported no process of calculating preexisting impairment as stated in the AMA Guides and as required by CSR §85-20-66.3. "The evidentiary weight to be given a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of

permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides." CSR §85-20-66.1. Dr. Mukkamala failed to memorialize that his proposed apportionment was based upon an evaluation and examination conducted in accordance with the AMA Guides because in no way did Dr. Mukkamala recommend an apportionment value arrived at and composed in accordance with those Guides.

The Intermediate Court of Appeals committed clear error by affirming the Board of Review's Order allowing arbitrary apportionment of the claimant's whole person medical impairment in this claim. To reach that result, the Intermediate Court had to ignore the statutory requirement that apportionment is permitted only when preexisting impairment can be definitely ascertained. It also ignored CSR §85-20-65 and 66 which require that all impairment be calculated using the AMA Guides.

The Court noted that CSR §85-20-65.1 provides for deviation from the AMA Guides where "an impairment guide established by a recognized medical specialty group may be more appropriate applied" but "the examiner's report must document and explain the basis for that opinion." The Guide's permission to defer to "an impairment guide established by a recognized medical specialty group" is not a license to arbitrarily rely upon a preconceived percentage of apportionment with no support from a recognized medical specialty group.

The Intermediate Court itself recognized that Dr. Mukkamala's preconceived method of apportioning impairment in roughly equal shares to preexisting conditions and a compensable injury "might, in some instances, be considered arbitrary." That acknowledgement is an unintended admission that Dr. Mukkamala's method of apportionment is unreliable in the same sense that a broken clock is unreliable. Attempting to argue that the result of 50/50 apportionment could be reliable in a particular case is not different from arguing that a broken clock should be considered reliable because it will be correct for 1 minute twice a day even

though it will be incorrect the remaining 1438 minutes each day. An unreliable method produces unreliable results and it cannot reasonably be used to accurately assess whole person medical impairment in any claim.

When Dr. Mukkamala testified in August, 2016 that 50/50 apportionment is fair, he was effectively offering an opinion regarding preexisting impairment for a claimant who would not be injured for another four years. He could not anticipate the claimant's total whole person impairment, but no matter what it might be, Dr. Mukkamala was explaining that half of that total impairment would already be present before the claimant's future injury. A broken clock predicts future time in exactly the same manner.

The only impairment Dr. Mukkamala properly diagnosed based upon proper criteria was the 25% impairment for the claimant's compensable spinal fusion surgery. That 25% rating offers no insight regarding the existence of possible preexisting impairment. After all, knowing the total precis of fruit in a bowl does not indicate the percentage of apples. Assuming a 50/50 make-up of apples and other fruit based upon preconceived conjecture is not reliable. It certainly is not a method of evaluation permitted by the AMA Guides or West Virginia law because it leads to absurdities like treating preexisting mild degenerative changes as equal to a compensable spinal fusion surgery as in this claim.

In a very real sense, Dr. Mukkamala is treating the claimant's mild degenerative changes as worse than spinal fusion surgery. Dr. Mukkamala diagnosed a 21% AMA Range of Motion Model impairment. The final recommendation of 25% is based upon Table §85-20-C Category V, due to the claimant's compensable spinal fusion surgery. Any impairment the claimant could have had <u>prior</u> to his occupational injury and surgery could not be based upon having had surgery. It could only be calculated, if at all, based upon AMA criteria. (In this claim no more than 21%). When Dr. Mukkamala assigned 12% of the claimant's total impairment to a preexisting condition, he is actually apportioning part of the claimant's 25% surgery based rating

as though it preexisted the claimant's injury and compensable surgery. Certainly, a rating for having had surgery cannot predate the surgery. The only impairment the claimant could possibly have had prior to surgery was AMA based impairment which Dr. Mukkamala rated at 21%. If Dr. Mukkamala truly believes 50/50 apportionment is fair, after rounding, he would have concluded the claimant's preexisting impairment to have been 10% not 12%. The remaining 15% would be attributed to the claimant's occupational injury and compensable spinal fusion surgery.

Dr. Soulsby's report should be given no consideration as a matter of law, however, his opinion that degenerative disc disease could have made the claimant more susceptible to disc herniation was discussed in enough detail that the claimant feels compelled to respond to it. He is essentially arguing that the claimant's spinal fusion surgery should be considered only one half compensable. Compensability of the spinal fusion was resolved in favor to the claimant by final order dated September 24, 2020. Furthermore, there are no half measures regarding compensability. Either spinal fusion surgery is compensable, as in this claim, or it is not. Finally, susceptibility to injury is not equivalent to actual measurable impairment predating an occupational injury. Otherwise permanent partial disability awards would vary based upon a claimant's age, sex, weight, general health and a variety of other factors ignored by the AMA Guides, Rule 20, and the West Virginia Code. Susceptibility to injury is not an appropriate basis for apportioning impairment. The claimant is taken as found. No credit is given for possible greater significance from an injury due to a prior frailty. See Martin v. State Compensation Commissioner, 107 W.Va. 583, 149 SE 824 (1929) for the proposition that the Workers' Compensation act does not discriminate against "the weak and those imperfect physically."

Dr. Bruce Guberman, like Dr. Mukkamala, diagnosed a 25% whole person medical impairment based upon the diagnostic criteria found in CSR Table §85-20-C Lumbar Category V. Unlike Dr. Mukkamala, Dr. Guberman did not attempt to rationalize an unreliable and

unreasonable basis to recommend an impairment rating below the rating specified by rule as minimum compensation for having had spinal fusion surgery. Only the opinion of Dr. Guberman conforms with the AMA Guides, CSR 20, and the West Virginia Code.

In its decision, the Board of Review sited Scott v. Welded Construction, LP, No. 19-1164 (February 19, 2021) noting that the claimant had been placed into lumbar Category IV of Rule 20 due to a lumbar fusion at L1-L2 and diagnosed with a 20% whole person impairment rating. That claimant also had been previously granted a 10% permanent partial disability award for low back impairment. The Court affirmed apportionment for the 10% permanent partial disability award and granted the claimant an additional 10% award for a total of 20% rather than an additional 20% award for a total of 30%. That decision is entirely consistent with the claimant's argument. A whole person impairment rating can be reduced due to preexisting impairment, but only if that preexisting impairment is definitely ascertainable using the AMA Range of Motion Model of Impairment. In Scott the prior 10% award paid to the claimant had been calculated and definitely ascertained using the AMA Range of Motion Model of Impairment. It was not the product of speculation and assumption contrived without reference to the AMA Guides or specific AMA testing as in this claim. Siting Scott to support its decision merely highlights the Board's misunderstanding of the basic issue raised by the claimant. The claimant is not arguing that apportionment is never appropriate. Apportionment is permitted when a specific degree of preexisting impairment can be definitely ascertained using AMA protocols so that it can be subtracted from a specific total impairment value.

VI. CONCLUSION

For the foregoing reasons, please grant the claimant the minimum 25% permanent partial disability award intended for any claimant who has had spinal fusion surgery.

Respectfully Submitted

DAVID DUFF, II

By counsel:

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BEFORE THE STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

IN THE MATTER OF:

David Duff, II,

Petitioner,	**Supreme Court No.:**	
	Intermediate Court No.:	**22-ICA-10**
and	**Judicial Claim No:**	**2021000317**
	Claim No.:	**2020015225**
	DOI:	**06/15/2020**
	BOR Order:	**07/26/2022**

Kanawha County Commission,

Respondent.

CERTIFICATE OF SERVICE

I, William B. Gerwig, III, do hereby certify that the foregoing ***"Brief on Behalf of Petitioner, David Duff, II,"*** 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 to the claimant, and via electronic filing to all other parties of record, on this **12th day of January, 2023,** as follows:

Encova Insurance (via electronic filing)
PO Box 3151
Charleston, WV 25332

H. Dill Battle, III, Esquire (via electronic filing)
SPILMAN, THOMAS & BATTLE
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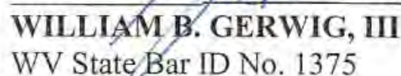
David Duff, II (Regular mail)
2510 Kay Lane
Charleston, WV 25302



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