

22-0275



BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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IN CHARLESTON  
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LOGAN-MINGO AREA MENTAL HEALTH, INC.,

Petitioner,

v.

CARRIER REF. NO.: 2017009680  
JURISDICTION CLAIM NO.: 2017024206  
BOR APPEAL NO.: 2057470  
SUPREME COURT NO.: 22-\_\_\_\_\_

DAVID LESTER,

Respondent.

BRIEF OF PETITIONER, LOGAN-MINGO AREA MENTAL HEALTH, INC.,  
REGARDING WORKERS' COMPENSATION  
BOARD OF REVIEW DECISION OF MARCH 23, 2022

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## **I. TABLE OF AUTHORITIES**

[T]he degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered. W.Va. Code § 23-4-6 (i) (2005). Cited on page 11.

Pursuant to W. Va. Code §23-4-3b(b), the Commission or Insurance Commissioner, whichever is applicable, hereby adopts the following ranges of permanent partial disability for common injuries and diseases. Permanent partial disability assessments shall be determined based upon the range of motion models contained in the Guides Fourth. Once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth below. 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. W.Va. C.S.R. § 85-20-64.1 (2006). Cited on page 11.

'Permanent impairment' means a permanent alteration of an individual's health status and is assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning. An injured worker's degree of permanent whole body medical impairment is to be determined in keeping with the determination of whole person permanent impairment as set forth in the applicable Guides. For the purposes of this Rule, the Guides' use of the term 'whole person' impairment is the equivalent of the term 'whole body' impairment. W.Va. C.S.R. § 85-20-3.10 (2006). Cited on page 11.

Except as provided for in section 66 of this Rule, on and after the effective date of this rule 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," (4<sup>th</sup> ed. 1993), as published by the American Medical Association. W.Va. C.S.R. § 85-20-65.1 (2006). Cited on pages 11-12.

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. Notwithstanding the foregoing provisions of this section, if the definitely ascertainable preexisting impairment resulted from an injury or disease previously held compensable and the impairment had not been rated, benefits for the impairment shall be

payable to the claimant by or charged to the employer in whose employ the injury or disease occurred. The employee shall also receive the difference, if any, in the benefit rate applicable in the more recent claim and the prior claim. W.Va. Code § 23-4-9b (2003). Cited on page 13.

In fixing the amount of a permanent partial disability award for a compensable injury suffered by a workers' compensation claimant who has a noncompensable preexisting definitely ascertainable impairment, the correct methodology pursuant to W. Va. Code § 23-4-9b (2003) is to deduct the impairment attributed to the preexisting injury from the final whole person impairment rating as determined under West Virginia Code of State Rules § 85-20. Syl. pt. 3, *SWVA, Inc. v. Birch*, 787 S.E.2d 664 (2016). Cited on page 13.

The purpose of W.Va. Code § 23-4-9b (2003) is to disallow any consideration of any preexisting definitely ascertainable impairment in determining the percentage of permanent partial disability occasioned by a subsequent compensable injury, except in those instances where the second injury results in total permanent disability within the meaning of W.Va. Code § 23-3-1 (2005). *Id.* at Syl. pt. 2. Cited on page 14.

Upon filing an application, the claim will be reevaluated by the examining board or other reviewing body pursuant to subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. A claimant whose prior permanent partial disability awards total eighty-five percent or more shall also be examined by the board or other reviewing body and must be found to have suffered a whole body medical impairment of fifty percent in order for his or her request to be eligible for further review. The examining board or other reviewing body shall review the claim as provided for in subdivision (j) of this section. If the claimant has not suffered whole body medical impairment of at least fifty percent or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section, the request shall be denied. W.Va. Code § 23-4-6 (n)(1) (2005). Cited on pages 14-15.

It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of 'liberal construction' based on any 'remedial' basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by [applicable law]. W.Va. Code § 23-1-1 (b) (2007). Cited on page 16.

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter 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. Under no circumstances will an issue 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. W.Va. Code § 23-4-1g (a) (2003). Cited on page 16.

Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter. W.Va. Code § 23-4-1g (b) (2003). Cited on page 16.

Where the issue on an appeal is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Pioneer Pipe, Inc. v. Swain*, 791 S.E.2d 168, 170 (2016) (citations omitted). Cited on page 16.

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 16-17.

## **II. ASSIGNMENT OF ERROR**

Although the Workers' Compensation Office of Judges affirmed the 10% permanent partial disability award in this workers' compensation claim, the Board of Review reversed and increased the award to 19%. This award is contrary to law and results in significant overpayment of benefits. Claimant received a 20% permanent partial disability award in a prior workers' compensation claim, meaning that he has now received a total of 39% in awards, while no physician has ever rated claimant's impairment at more than 30%. This error results from a misapplication of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, as well as W.Va. Code § 23-4-9b and this Honorable Court's holding in *SWVA, Inc. v. Birch*, 787 S.E.2d 664

(2016).

### **III. STATEMENT OF THE CASE**

There are no disputed facts in this workers' compensation claim, so far as the employer is aware. As a result of the Board of Review's decision, claimant has now received two permanent partial disability awards in two workers' compensation claims which cover the same parts of claimant's body. He received a 20% permanent partial disability award in Claim Number 200013220, and he has now received a 19% permanent partial disability award in the claim now pending before this Honorable Court, meaning that he has received awards totaling 39%. However, it is also undisputed that claimant has never been found to have more than 30% whole-person impairment for his compensable injuries.

This appeal involves purely a legal question as to the proper application of the American Medical Association ("AMA") *Guides to the Evaluation of Permanent Impairment*, Fourth Edition (AMA *Guides*) and the proper apportionment for preexisting impairment and awards.

The claim now pending before the Court was accepted for injuries to claimant's lumbar spine and thoracic spine, as well as several other conditions, as discussed below. In claimant's previous claim, Claim No. 200013220, claimant received a 20% permanent partial disability ("PPD") award, which included 14% whole-person impairment for the lumbar spine and 7% whole-person impairment for the thoracic spine. Under the AMA *Guides*' Combined Values Chart, a copy of which is attached in the Appendix as Exhibit 1, this results in a calculation of 20% impairment of the whole person. These facts are established in the medical reports discussed below, and are undisputed.

Dr. Bruce Guberman conducted an evaluation on February 19, 2019 in which he opined that claimant had reached his maximum degree of medical improvement in relation to

compensable cervical spine, thoracic spine, lumbar spine, and left shoulder injuries in this claim. Appendix, Ex. 2. However, he further opined that claimant had *not* reached maximum medical improvement in relation to bilateral knee injuries. Dr. Guberman recommended that claimant be evaluated by an orthopedic specialist and undergo physical therapy for those injuries. Because he found that the knee injuries were not yet at maximum medical improvement, he deferred any impairment rating.

Although the parties did not submit the report, Dr. Guberman conducted a second evaluation on March 23, 2020. In that report, Dr. Guberman found claimant at MMI for the bilateral knee injuries and calculated 4% whole-person impairment for each knee. He did not provide an impairment rating for the other conditions. The claim administrator issued an order on April 2, 2020, granting an 8% PPD award based upon Dr. Guberman's calculation of impairment for both knees. Appendix, Ex. 3. The claim administrator requested a supplemental report from Dr. Guberman to address the impairment for the other body parts.

Dr. Guberman then authored a report dated April 16, 2020, providing an impairment rating based upon his February 19, 2019 evaluation of the cervical, thoracic, and lumbar spine, left shoulder, as well as a head injury. Appendix, Ex. 4. For the left shoulder, Dr. Guberman found 4% whole-person impairment. For the cervical spine, Dr. Guberman calculated 8% whole-person impairment. In the thoracic spine, Dr. Guberman found a total of 7% whole-person impairment, but claimant had already received a 7% PPD award for the thoracic spine in Claim No. 2000013220, so Dr. Guberman found no additional impairment. As to the lumbar spine, Dr. Guberman calculated a total of 8% impairment, and noted that claimant received a previous 14% PPD award for the lumbar spine in Claim No. 2000013220, and thus, he again calculated 0% impairment for the lumbar spine in this claim. Finally, as to head contusion, Dr.

Guberman found no impairment. Dr. Guberman combined the impairments for all the above body parts under the Combined Values Chart for a total impairment rating of 19%. To be clear, Dr. Guberman deducted the previous PPD awards *before* applying the Combined Values Chart.

Dr. Rebecca Thaxton reviewed the claim and issued a report on May 15, 2020. Appendix, Ex. 5. She noted that the correct impairment rating under the Combined Values Chart of the AMA *Guides* is 30%, before any prior awards are deducted/apportioned.<sup>1</sup>

The claim administrator then issued an order on May 18, 2020, granting an additional 2% PPD award, for a total of 10% in this claim. Appendix, Ex. 6. The order stated:

We are in receipt of Dr. Bruce Gubermans [sic] addendum dated 4/15/2020, in which he found 19% whole-person impairment from all compensable injuries in this claim. You were already granted an 8% permanent partial disability award in this claim by order dated April 2, 2020. This consisted of 4% for each knee. Dr. Rebecca Thaxton reviewed Dr. Gubermans [sic] 4/15/2020 report and issued a report dated 5/15/2020. She noted that if Dr. Guberman had combined the impairment rating for each compensable injury and body part in this claim before subtracting preexisting impairment and awards, his final impairment rating would be 30%. You were previously granted a 20% permanent partial disability award for compensable lumbar and thoracic spine injuries in Claim No. 200013220. Accordingly, 30% minus the 20% already awarded leaves 10% due in this claim. Since you were already granted 8% by order dated April 2, 2020, you are due an additional 2% permanent partial disability award.

Claimant protested both the original 8% award and the additional 2% award.

The parties took Dr. Guberman's deposition on September 25, 2020. Appendix, Ex. 7. Importantly, Dr. Guberman acknowledged that a person cannot have more than 100% impairment, as that is "death, loss – total loss of use of the body." Depo. of Dr. Guberman, at 12. He explained the purpose of the AMA *Guides*' Combined Values Chart, noting that a person with a 10% impairment, for example, who then suffers a second 10% impairment, "it would be then ten percent of the remaining – nine percent of functioning you still have, so it will drop your

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<sup>1</sup> This is based on 14% for the lumbar spine, combined with 8% for the cervical spine, 7% for the thoracic spine, and 4% each for the left shoulder, left knee, and right knee. Under the Combined Values Chart, this equals 30%.

overall level of functioning to 81%. Because, you know, ten percent of 90 is obviously nine.” *Id.* at 13. He further confirmed that the *AMA Guides* requires the evaluator to apply the Combined Values Chart if multiple bodily systems are involved in an impairment calculation. *Id.* at 13-14.

Dr. Guberman was then asked to provide his impairment rating had there been no prior injuries or impairments, since the current claim includes all the same body parts as claimant’s prior claim and prior award. **He agreed with Dr. Thaxton that all of the impairments combine for a total rating of 30% under the AMA Guides’ Combined Values Chart.** *Id.* at 16. Notably, Dr. Guberman conceded that in claims for permanent total disability (“PTD”) benefits, even where the applicant has 50% or more in previous PPD awards, all compensable impairments from multiple claims are considered to determine whether the claimant/application has 50% or more impairment after application of the Combined Values Chart to determine whether the claimant meets the PPD threshold of 50% or more, as set forth at W.Va. Code § 23-4-6. *Id.* at 23. In addressing why he did not apply the Combined Values Chart in the manner utilized by the claim administrator in this claim, his only explanation was “**honestly, you know, that in all the years I’ve done them, we only combine for that particular injury**” and “**I’ve never seen them done the way you’re suggesting.**” *Id.* at 17; 18.

The Office of Judges issued its decision on October 1, 2021. Appendix, Ex. 8. The ALJ reviewed and recited the entire record, noting that Dr. Guberman defended his 19% impairment calculation on the grounds that “we’ve always done it this way.” ALJ Decision, at 5. She found that if claimant is awarded 19% in this claim, considering the 20% he received in a prior claim, he would receive a total of 39%, when no impairment calculation ever performed exceeds 30%. *Id.* She also correctly noted that Dr. Guberman’s method, in a more extreme case, could lead to

“a calculation of greater than 100% impairment,” even though per Dr. Guberman’s own testimony, 100% impairment is the greatest possible impairment, “a state which is equivalent to death or complete loss of use of the body.” *Id.* at 6. Accordingly, the ALJ affirmed the 10% PPD awards in this claim. Claimant appealed.

The Board of Review issued a decision on March 23, 2022, reversing the ALJ’s decision and granting the 19% PPD award. Appendix, Ex. 9. The Board’s reasoning was the PPD award in a workers’ compensation claim must be based upon the opinion and report of a single medical evaluator, pursuant to *Repass v. Workers’ Comp. Div.*, 569 S.E.2d 162 (2002), and since Dr. Guberman conducted the only evaluation in this claim, the award must be based upon his report.

#### **IV. SUMMARY OF ARGUMENT**

The Board of Review’s decision is clearly wrong as a matter of law. Claimant should not receive 39% in awards for 30% impairment. The Board of Review’s decision would allow a claimant to receive more than 100% in PPD if there are enough claims and impairments, which is directly contrary to the *AMA Guides*, and thus, West Virginia law. The *Birch* decision established that deduction of prior PPD/impairment is the last step, not an intermittent step, in the calculation of impairment. The Board of Review’s decision establishes one method for calculating impairment for PPD, and another rule for calculating impairment for PTD, a distinction for which there is no support in the law. And finally, there is no reason that the Combined Values Chart should not be applied to determine the whole-person impairment of claimant’s body, taking into account all claims and impairments.

#### **V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case is suitable for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because it represents an issue of fundamental public importance, and to

some extent, represents an issue of first impression as to the application of the Combined Values Chart with multiple workers' compensation claims. Insofar as there was a split between the Office of Judges and Board of Review on the important issues in this claim, there is also the risk of inconsistency and conflict among the lower tribunals. Therefore, the employer requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. Alternatively, the Board of Review's decision is contrary to the *Birch* decision, which is settled law, and also pertains to a narrow issue of law, and thus oral argument would also be appropriate under Rule 19 of the West Virginia Rules of Appellate Procedure.

## VI. ARGUMENT

It cannot be overemphasized...claimant is being granted 39% in awards for injuries which produced only 30% impairment. The Board of Review's decision is obviously wrong on its face.

### A. No physician has ever opined that claimant has 39% impairment

The Board of Review relied upon this Honorable Court's holding in *Repass v. Workers' Comp. Division*, 569 S.E.2d 162 (2002), in its statement that "the Commissioner is to make permanent partial disability awards solely on the basis of the doctor's impairment evaluation." *Repass*, 569 S.E.2d at 172. The Board reasoned that Dr. Guberman was the "sole independent medical evaluator in this claim," and thus, his impairment calculation must control. The Board's reasoning is flawed.

*Repass* did not address the impairment calculation when there are multiple claims and impairments. *Repass* addressed the issue of multiple impairment ratings in one claim, for one injury, and thus, is not applicable in the situation presented in this appeal.

The Board either missed or did not find pertinent that a 19% award in this claim results in claimant's receipt of 39% in awards for a 30% impairment. The employer reiterates that this is

undisputed. Dr. Guberman himself testified that claimant's whole-person impairment for all compensable injuries is 30%.

**B. PPD awards are to be based upon the AMA Guides, Fourth Edition**

“[T]he degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered.” W.Va. Code § 23-4-6 (i) (2005). “Pursuant to W. Va. Code §23-4-3b(b), the Commission or Insurance Commissioner, whichever is applicable, hereby adopts the following ranges of permanent partial disability for common injuries and diseases. Permanent partial disability assessments shall be determined based upon the range of motion models contained in the Guides Fourth. Once an impairment level has been determined by range of motion assessment, that level will be compared with the ranges set forth below. 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.” W.Va. C.S.R. § 85-20-64.1 (2006). “‘Permanent impairment’ means a permanent alteration of an individual’s health status and is assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning. An injured worker’s degree of permanent whole body medical impairment is to be determined in keeping with the determination of whole person permanent impairment as set forth in the applicable Guides. For the purposes of this Rule, the Guides’ use of the term ‘whole person’ impairment is the equivalent of the term ‘whole body’ impairment.” W.Va. C.S.R. § 85-20-3.10 (2006). Except as provided for in section 66 of this Rule, on and after the effective date of this rule 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,” (4<sup>th</sup> ed. 1993), as published by the American Medical Association. W.Va. C.S.R. § 85-20-65.1 (2006).

The ALJ, the Board of Review, and Dr. Guberman all acknowledged the applicability of the AMA *Guides*, including the Combined Values Chart, in rating claimant’s impairment. Dr. Guberman acknowledged at page 12 of his deposition that a person cannot have more than 100% impairment under AMA *Guides* principles, and thus, by extension, a person also cannot have more than 100% in PPD awards. Dr. Guberman explained that 100% impairment is equivalent to the state of death or total loss of use of the body. Dr. Guberman also acknowledged that if claimant’s prior PPD award is not properly accounted for in the calculation of his current impairment, *i.e.*, if the Combined Values Chart is not applied to account for prior awards, then he could receive an impairment rating in excess of 100%. It would take an extreme case, with very large impairments and awards, but the mere fact that Dr. Guberman’s method, as adopted by the Board of Review, would allow this to happen is conclusive proof that the method is contrary to the AMA *Guides* and by definition, contrary to West Virginia law. If a person cannot have more than 100% impairment under the AMA *Guides*, then they cannot have more than 100% in PPD awards under West Virginia law, whereas Dr. Guberman’s method would allow this to occur. Dr. Guberman himself acknowledged that this cannot happen, yet that is exactly what the Board of Review’s decision could allow to occur.

**C. The Board of Review’s decision is contrary to established case law**

This Honorable Court has already reached the issue of the sequence for apportionment of previous claims, awards, and impairment should be apportioned, and the Board of Review’s decision is incorrect under that established case law.

As an initial matter, there is no question regarding the duty to apportion or exclude preexisting impairment that is definitely ascertainable, and there is no better or more definitely ascertainable determination of preexisting impairment than a preexisting award.

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease or any other cause, whether or not disabling, and the employee thereafter receives an injury in the course of and resulting from his or her employment, unless the subsequent injury results in total permanent disability within the meaning of section one, article three of this chapter, the prior injury, and the effect of the prior injury, and an aggravation, shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury. Compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment. Nothing in this section requires that the degree of the preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from the employee's employment or that benefits must have been granted or paid for the preexisting impairment. The degree of the preexisting impairment may be established at any time by competent medical or other evidence. Notwithstanding the foregoing provisions of this section, if the definitely ascertainable preexisting impairment resulted from an injury or disease previously held compensable and the impairment had not been rated, benefits for the impairment shall be payable to the claimant by or charged to the employer in whose employ the injury or disease occurred. The employee shall also receive the difference, if any, in the benefit rate applicable in the more recent claim and the prior claim. W.Va. Code § 23-4-9b (2003).

The statute's obvious intent is to fairly allocate non-compensable impairment so that claimant is not overcompensated for a work-related injury. Claimant receives an award for the impairment caused by compensable work-related injuries, nothing less, and nothing more.

In *SWVA, Inc. v. Birch*, 787 S.E.2d 664 (2016), this Honorable Court faced the question of when, in the sequence of calculating a PPD award for a compensable spine injury, a preexisting impairment or award is deducted or apportioned. Is this apportionment/deduction taken before application of the spine impairment tables in W.Va. C.S.R. § 85-20 *et seq.*, or *after* application of those tables? This Court answered conclusively that the deduction of preexisting impairment occurs after application of the Rule 20 impairment tables. *Birch*, 787 S.E.2d at Syl.

pt. 3. In so holding, the Court held that the “purpose of W.Va. Code § 23-4-9b (2003) is to disallow any consideration of any preexisting definitely ascertainable impairment in determining the percentage of permanent partial disability occasioned by a subsequent compensable injury, except in those instances where the second injury results in total permanent disability within the meaning of W.Va. Code § 23-3-1 (2005).” *Id.* at Syl. pt. 2.

Precisely the same principles apply here as did in *Birch*. By deducting previous permanent partial disability awards before applying the Combined Values Chart, claimant was allowed to receive total awards of 39%, which is 9% more than Dr. Guberman calculated. This is exactly why this Court held that the spine impairment tables in Rule 20 are to be applied before deducting the preexisting impairment or awards. The purpose is to give effect to W.Va. Code § 23-4-9b and to exclude previous impairment, *especially* previous awards. Thus, the Board of Review’s decision is directly contrary to this Court’s holding in *Birch*.

Furthermore, there is no logical reason that preexisting impairment should be deducted after applying the spine impairment tables in Rule 20, but before applying the Combined Values Chart for multiple injuries/body parts. The legal principle is exactly the same. In order to give effect to W.Va. Code § 23-4-9b, the preexisting impairment must be deducted as the final step in the impairment calculation.

**D. The Board of Review’s decision creates an arbitrary distinction between permanent partial disability and permanent total disability**

In order to be considered for a permanent *total* disability (“PTD”) award in workers’ compensation, the statute provides:

Upon filing an application, the claim will be reevaluated by the examining board or other reviewing body pursuant to subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases or has sustained

a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. A claimant whose prior permanent partial disability awards total eighty-five percent or more shall also be examined by the board or other reviewing body and must be found to have suffered a whole body medical impairment of fifty percent in order for his or her request to be eligible for further review. The examining board or other reviewing body shall review the claim as provided for in subdivision (j) of this section. If the claimant has not suffered whole body medical impairment of at least fifty percent or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section, the request shall be denied. W.Va. Code § 23-4-6 (n)(1) (2005).

Dr. Guberman acknowledged that the correct procedure in an application for permanent total disability is for all claims/awards/impairments to be reviewed under the AMA *Guides*, including application of the Combined Values Chart. In other words, the Combined Values Chart is applied across multiple claims and impairments in consideration of a PTD application. The Board of Review's decision is contrary to this principle. Why would there be a different rule and a different method for permanent partial disability than there is for permanent total disability? In a PTD claim, the threshold question is whether the claimant has 50% or more whole-person impairment due to his or her compensable injuries, or 35% or more whole-person impairment if claimant received a scheduled permanent partial disability award under W.Va. Code § 23-4-6 (f). In a PPD claim, the threshold question is also how much whole-person impairment the claimant has. It is the same question and ought to be answered by the same methodology. The distinction created by the Board of Review is arbitrary and capricious, not to mention inconsistent with the clear intent and language of W.Va. Code § 23-4-6b, and illogical. On what basis should the law allow the claimant to receive 39% in awards for 30% impairment? There is none. Again, the total impairment of 30% is undisputed.

**E. Weighing the evidentiary record**

Workers' Compensation claims are no longer subject to a "rule of liberality." There is no principle which grants any inference or presumption regarding a disputed award, nor is there any

provision which requires the courts to construe the law liberally in the claimant's favor. Rather, the courts are to grant only those awards which are supported by a preponderance of the evidence.

It is the specific intent of the Legislature that workers' compensation cases shall be decided on their merits and that a rule of 'liberal construction' based on any 'remedial' basis of workers' compensation legislation shall not affect the weighing of evidence in resolving such cases. Accordingly, the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction that alters in any way the proper weighing of evidence as required by [applicable law]. W.Va. Code § 23-1-1 (b) (2007).

For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter 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. Under no circumstances will an issue 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. W.Va. Code § 23-4-1g (a) (2003).

Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter. W.Va. Code § 23-4-1g (b) (2003).

**F. Standard of review**

Where the issue on an appeal is clearly a question of law or involving an interpretation of a statute, the court applies a *de novo* standard of review. *Pioneer Pipe, Inc. v. Swain*, 791 S.E.2d 168, 170 (2016) (citations omitted).

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-weighting 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).

When the Court reviews the plain language and intent of W.Va. Code § 23-4-9b and the holding in the *Birch* decision, as well as the reasoning behind it, it is obvious that the Board of Review acted in clear violation of the statute and made erroneous legal conclusions. The employer asks the Court to correct a grave error, in that claimant's total awards should equal his total impairment, nothing less, and nothing more. In awarding 39%, whereas no physician has ever found more than 30% impairment, the Board of Review exceeded its authority and failed to give proper application to W.Va. Code § 23-4-9b. The claim administrator and the Office of Judges did not act in a manner contrary to the "single-physician rule" in *Repass* and other cases because those cases did not implicate multiple impairments from multiple claims, and the Board of Review was clearly wrong in so holding. Finally, in allowing a PPD rating scheme which could result in awards exceeding 100%, the Board of Review's decision is contrary to the *AMA Guides*, and therefore by definition, contrary to West Virginia law.

**VII. CONCLUSION**

WHEREFORE, the Petitioner, Logan-Mingo Area Mental Health, Inc., respectfully prays that this Honorable Court reverse the Workers' Compensation Board of Review's order of March 23, 2022 and reinstate the Office of Judges' decision of October 1, 2021, which affirmed the claim administrator's orders granting a total award of 10% permanent partial disability in this workers' compensation claim.

Respectfully submitted,

LOGAN-MINGO AREA MENTAL HEALTH, INC.

By counsel



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**CERTIFICATE OF SERVICE**

I, Steven K. Wellman, hereby certify that on the 7<sup>th</sup> day of April 2022, a copy of the foregoing "BRIEF OF PETITIONER, LOGAN-MINGO AREA MENTAL HEALTH, INC." was mailed, postage prepaid by First Class Mail to the following:

Donald C. Wandling, Esquire  
Wandling Law Office, L.C.  
Post Office Box 417  
Logan, West Virginia 25601



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Steven K. Wellman, Esquire  
W.Va. Bar ID No. 7808

**APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE**

**WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT**



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Complete Case Title: Logan-Mingo Area Mental Health, Inc. vs. David Lester  
Petitioner: Logan-Mingo Area Mental Health, Inc. Respondent: David Lester  
Counsel: Steven K. Wellman Counsel: Donald C. Wandling  
Claim No.: 2017009680 Board of Review No.: 2057470  
Date of Injury/Last Exposure: 4/6/17 Date Claim Filed: 4/6/17  
Date and Ruling of the Office of Judges: 10/1/21, affirmed CAO orders 4/2/20 and 5/18/20 both granting PPD awards  
Date and Ruling of the Board of Review: 3/23/22, reversed the OOJ decision and granted 19% PPD award  
Issue and Relief requested on Appeal: Reverse the BOR order and reinstate the OOJ decision of 10/1/21 total of 10% PPD

**CLAIMANT INFORMATION**  
Claimant's Name: David Lester  
Nature of Injury: Lumbar and thoracic spine  
Age: 63 Is the Claimant still working?  Yes  No. If yes, where: \_\_\_\_\_  
Occupation: \_\_\_\_\_ No. of Years: \_\_\_\_\_  
Was the claim found to be compensable?  Yes  No If yes, order date: \_\_\_\_\_

**ADDITIONAL INFORMATION FOR PTD REQUESTS**  
Education (highest): \_\_\_\_\_ Old Fund or New Fund (please circle one)  
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: \* see attached  
(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.

**Appendix B – Revised Rules of Appellate Procedure**

Logan-Mingo Area Mental Health, Inc. vs. David Lester

Claim Number: 2017009680

Board of Review Number: 2057470

**Compensable conditions:** acute cervical/dorsal and lumbar strains and sprains to both shoulders, both knees and an acute head contusion.