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WEST VIRGINIA SUPREME COURT OF APPEALS  
AT CHARLESTON

In the Matter of:  
Logan-Mingo Area Mental Health, Inc.,

Petitioner

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SUPREME COURT NO.:	22-0275
BOARD OF REVIEW NO.:	2057470
JCN NO.:	2017024206
DOI:	4-6-2017
ALJ DECISION:	10-1-2021
BOARD OF REV. ORD.:	3-23-2022
CA ORDERS:	4-2-2020; 5-18-2020

vs.


David M. Lester,

Respondent

RESPONSE ON BEHALF OF DAVID LESTER, CLAIMANT,  
IN OPPOSITION TO LOGAN-MINGO AREA MENTAL HEALTH'S  
PETITION FOR APPEAL

Respectfully submitted,

David Lester, Claimant/Respondent  
By Counsel

  
\_\_\_\_\_  
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## TABLE OF AUTHORITIES

1. *W.Va. Code §23-4-1g*;
2. *W.Va. Code CSR 85-16-4*;
3. **AMA Guides, 4<sup>th</sup> Edition, Section 2-2**;
4. **Rule 20**;
5. *W.Va. Code §23-4-9d*
6. *W.Va. Code §23-5-12(b)*

## QUESTIONS PRESENTED

Whether the office of Judges Order of October 1, 2021 was clearly wrong in not granting the Claimant a 19% permanent partial disability award in this claim; and whether the Board of Review Order correctly reversed the OOJ Order on March 23, 2022 and granted a 19% permanent partial disability (PPD) award.

## STATEMENT OF CASE & ARGUMENT

On April 2, 2020, the Claim Administrator granted the Claimant an 8% permanent partial disability (PPD) award in this claim; on May 18, 2020, the Claim Administrator granted a 10% PPD award for an additional 2% for a total of 10%.

Following the Claimant's protest, the Office of Judges issued an Order on October 1, 2021 which affirmed the earlier orders; and the Claimant filed an appeal to the Board of Review which reversed the OOJ Order on March 23, 2022 and granted a 19% permanent partial disability award. The employer has appealed from the Board of Review Order and requested that the ALJ Order of 10-1-2021 be reinstated.

The Claimant's position is that the preponderance of the evidence indicates that the Claimant is entitled to a 19% PPD award in this claim.

The preponderance standard is found in *W. Va. §23-4-1g* which provides:

### **“§23-4-1g. Weighing of evidence**

(a)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 processes 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. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.”

Preponderance of the evidence means proof is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered 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.

The issue is whether the 19% award granted to the Claimant for injuries resulting from the April 6, 2017 compensable injury should be affirmed.

The Claimant was injured at work on April 6, 2017 when he fell off a ladder. His claim was held compensable for injuries to his left shoulder, cervical spine, thoracic spine, lumbar spine, right knee, left knee and head.

The Claimant had a history of previous workers' compensation awards for injuries to his thoracic and lumbar spine.

Dr. Bruce Guberman performed the IME evaluation on behalf of Brickstreet.

Dr. Guberman's various reports show that he performed an evaluation of each of the covered injuries in this claim and that he considered the Claimant's previous awards in making

his impairment recommendations for each of the covered injuries.

Based upon his evaluation and using the AMA Guides, including the Combined Values Chart, Dr. Guberman recommended a 19% impairment award for the Claimant's injuries in this claim.

Brickstreet had his report reviewed by a staff physician who was of the opinion that Dr. Guberman had not properly used the Combined Values Chart in making his PPD recommendations. No additional IME was performed. Based upon the recommendations of the staff physician Brickstreet granted the Claimant a 10% PPD award for all of his injuries.

Dr. Guberman in his deposition testified that he was Board Certified as an independent medical evaluator and that he had attended multiple courses in regards to the use of the AMA Guides 4<sup>th</sup> edition.

*WV CSR 85-16-4* requires that all IME evaluations be done in compliance with the AMA Guides 4<sup>th</sup> edition.

AMA Guides 4<sup>th</sup> edition in Section 2.2 sets forth the "Rules for Evaluations." That Section of the Guides directs the evaluator that each organ system evaluated is to be expressed as a whole person impairment and that the whole person impairments should be combined using the combined values chart. Dr. Guberman testified that he performed his evaluation based upon this section of the Guides.

He further testified that he evaluated each covered injury and that in regards to the thoracic and lumbar injuries that due to the Claimant's previous workers' compensation awards that he would not be entitled to any additional award in this claim for those injured body parts. Dr. Guberman was required by Rule 20 and *WV Code 23-4-9d* to consider the Claimant's pre-

existing impairment in his recommendations.

Dr. Guberman's reports and his testimony show that based upon his physical findings and the AMA Guides that his recommendation was that the Claimant receive a 19% PPD award for all of his injuries.

Brickstreet had his report reviewed by Dr. Thaxton, staff physician, who prepared a report without any further IME stating that the Claimant should only receive a 10% PPD award.

Her report dated May 15, 2020 does not refer to any specific provision of the AMA Guides to support her opinion. There is nothing in her report or any other evidence showing her qualifications to interpret the AMA Guides.

It would appear that her report is contrary to *WV Code 23-4-9d* in that she did not apply *WV Code 23-4-9d* to the impairment award for the thoracic and lumbar spine. If she had properly reduced the current impairment recommendations by the previous award she would have obtained the same result as Dr. Guberman.

Section 2.2 of the AMA Guides clearly states that the evaluator shall first determine the whole person impairment for each body part. Dr. Guberman did this but Rule 20 and *23-4-9d* then requires him to reduce his current recommended award by any previous award. Dr. Thaxton did not do this in her recommended award. Dr. Thaxton would say that the Claimant receives no award in his current claim for the thoracic and lumbar spine but the previous awards would have to be used when applying the current recommendations to the Combined Values Chart. This results in Brickstreet receiving a double benefit for his previous awards. He first receives nothing in this claim for those injuries but the previous awards in previous claims are used in the Combined Values Chart.

## CONCLUSIONS

The only report of record which is based upon a correct use of the AMA Guides and *W.Va. Code 23-4-9d* is the report of Dr. Guberman. Therefore, the 19% PPD award recommended by Dr. Guberman and granted to the Claimant by the Board of Review should be affirmed.

The opinion of the Office of Judges to the contrary was clearly wrong and not supported by the evidence; and was correctly reversed under *W.Va. Code 23-5-12(b)* which provides:

“The board may affirm the order or decision of the administrative law judge or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petition or petitioners have been prejudiced because the administrative law judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

The Claimant therefore requests that the March 23, 2022 Decision of the Workers' Compensation Board of Review which correctly reversed the October 1, 2021 Decision of the Office of Judges and correctly increased the PPD to 19% be affirmed.

**Respectfully submitted,**

**David Lester**

**By Counsel**

*Anne L. Wanding*

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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing document by First Class United States Mail, postage prepaid, on the following persons at the address listed below on the 25th of April 2022.

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