



# West Virginia Workers' Compensation Law Notes

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***“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 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.”***

Edward Birch was moving a piece of metal when he slipped on some grease and injured his low back in March 2004.

He was examined by Dr. Marsha Bailey, who found him to be at maximum medical improvement. Using the 4th Edition of the AMA Guides, Dr. Bailey found him to have a whole person impairment of 12%. Dr. Bailey placed Mr. Birch under Lumbar Category III of the West Virginia Code of State Rules §85-20-C (“Rule 20”); however, Dr. Bailey found that some of Mr. Birch’s impairment should be apportioned for his preexisting conditions of degenerative joint and disc disease. As such, she apportioned 4% of his impairment to his pre-existing conditions and recommended 8% whole person impairment for the compensable injury. Based on Dr. Bailey’s findings, the claims administrator granted Mr. Birch an 8% PPD award.

Mr. Birch protested the award. Thereafter, he was evaluated by Dr. Bruce Guberman. Dr. Guberman, like Dr. Bailey, found Mr. Birch to have a 12% whole person impairment under the AMA Guides. Dr. Guberman, though, also found Mr. Birch to have 13% whole person impairment for abnormal range of motion of the lumbar spine. He determined that pre-existing degenerative changes likely had contributed to Mr. Birch’s range of motion abnormalities, and apportioned the preexisting conditions at 6%. Dr. Guberman then subtracted 6% from the 13% range of motion impairment for a total range of motion impairment of 7%. He then combined the diagnosis-

based 12% impairment with the 7% range of motion impairment using the AMA Guides to find a combined whole person impairment of 18%. Because this percentage exceeded the allowable impairment range under Category III of Rule 85-20-C, which is 10 to 13%, Dr. Guberman adjusted Mr. Birch’s impairment rating to 13%.

The Office of Judges reversed the claims administrator’s decision and, relying on Dr. Guberman’s recommendations, granted an additional 5% PPD for a total of 13% PPD. The Board of Review affirmed the OJ’s decision and the employer, SWVA, appealed to the Supreme Court of Appeals.

In its decision, which may be found at *SWVA, Inc. v. Edward Birch*, No. 14-0471, filed June 15, 2016, the Court defined the issue as: what is the correct methodology for apportioning the level of impairment in workers’ compensation cases involving preexisting conditions? Dr. Bailey, in her rating of the claimant’s whole person impairment, subtracted the preexisting impairment at the end of the process after applying Rule 20. The method utilized by Dr. Guberman, and adopted by the OJ, was to deduct any apportionment for preexisting impairment from the claimant’s whole person impairment as determined under the AMA Guides or range of motion model earlier in the process and then determine the final permanent partial disability award under Rule 20.

SWVA argued that a plain reading of W.Va. Code §23-4-9b dictates that the proper method of alloca-



tion is to subtract the preexisting impairment last *after* applying Rule 20, not *before* applying Rule 20. The Court agreed.

The pertinent language of W.Va. Code §23-4-9b states:

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease or 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. Compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment.

Based upon this language in that statute, 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).

Here, Dr. Guberman's methodology is inconsistent with the purpose and language of W.Va. Code §23-4-9b, which is to disallow any consideration of any preexisting definitely ascertainable impairment in arriving at the percentage of disability occasioned by a subsequent injury. Dr. Guberman's methodology was deemed incorrect by the Court.

The correct methodology is to deduct the impairment attributable to the preexisting injury from the final whole person impairment rating as determined under West Virginia Code of State Rules §85-20. Because Dr. Bailey's methodology conformed to the Court's holding, the claims administrator's order granting the claimant an 8% PPD award was reinstated.

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Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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