

West Virginia Supreme Court Establishes Method for Apportioning Impairment for Pre-Existing Conditions in Worker's Comp Claims

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Recently, the West Virginia Supreme Court addressed the proper method for deducting pre-existing impairment when calculating a claimant's permanent partial disability award. In *SWVA v. Edward Birch*, Mr. Birch sustained a compensable lower back injury, but he also suffered from pre-existing lumbar degenerative joint disease.

- Dr. Marsha Bailey found that Mr. Birch had a 12% impairment pursuant to the AMA Guides. She then applied Rule 20 to her findings, placing Mr. Birch in Lumbar Category III, which provides for an award of 10-13%. Dr. Bailey did not need to adjust her 12% impairment rating because it was within the range provided for Lumbar Category III. She then concluded that 4% of Mr. Birch's impairment was due to his preexisting degenerative joint disease. Therefore, she recommended an 8% PPD award.
- Mr. Birch was subsequently examined by Dr. Bruce Guberman, who agreed with Dr. Bailey that he had a 12% impairment pursuant to the AMA Guides. Dr. Guberman found an additional 13% impairment due to range of motion deficiencies, which he decreased by 6% due to Mr. Birch's pre-existing degenerative changes. Adding the impairments, Dr. Guberman found Mr. Birch to have an 18% whole person impairment. He then applied Rule 20, placing Mr. Birch in Lumbar Category III, which required Dr. Guberman to decrease the impairment rating to 13%, the maximum allowed for Lumbar Category III.
- The Claims Administrator's 8% PPD award based upon Dr. Bailey's report was reversed by the Office of Judges and Board of Review.

On appeal, the Supreme Court had to decide which physician's method of apportionment was proper: Dr. Bailey, who subtracted Mr. Birch's pre-existing impairment at the end of the process after applying Rule 20, or Dr. Guberman, who subtracted the pre-existing impairment from Mr. Birch's whole person impairment as determined under the Guides or range of motion earlier in the process, then determined the final PPD award under Rule 20.

The Court noted that the purpose of the apportionment provision in the West Virginia Worker's Compensation Act (W. Va. Code §23-4-9b) is to disallow consideration of any pre-existing definitely

ascertainable impairment in determining the percentage of PPD caused by a subsequent compensable injury, except in those circumstance where the second injury results in total permanent disability. The Court noted that Dr. Guberman's 13% impairment rating is the maximum award Mr. Birch would have been entitled to receive under Rule 20's Lumbar Category III whether or not he had a pre-existing condition - a result which is at odds with W. Va. Code §23-4-9b's purpose.

Accordingly, the Court held that in determining the amount of a PPD award for a compensable injury suffered by a worker's compensation claimant who has a non-compensable pre-existing definitely ascertainable impairment, the correct method is to deduct the impairment attributable to the pre-existing injury from the final whole person impairment rating as determined by Rule 20.

The Court's decision will have a favorable impact on employers, as subtracting pre-existing impairment at the end of the impairment evaluation process after Rule 20 is applied, is more likely to result in lower PPD awards.

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