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**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

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THOMAS D. SIMPSON,

Appellant,

vs.

Supreme Court No. 34368

B.O.R. No. 76478

Claim No. 2003016770

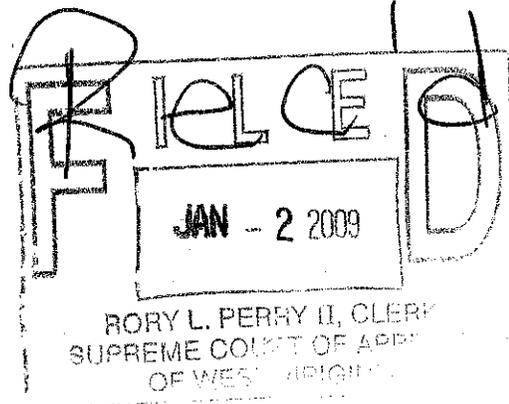
Order Date: January 23, 2007

**THE INSURANCE COMMISSIONER
OF WEST VIRGINIA, IN HER CAPACITY AS
ADMINISTRATOR OF THE OLD FUND,**

and

INDEPENDENCE COAL COMPANY, INC.,

Appellees.



**RESPONSE BRIEF OF APPELLEE, THE INSURANCE COMMISSIONER OF
WEST VIRGINIA, IN HER CAPACITY AS ADMINISTRATOR OF THE OLD FUND**

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I. STATEMENT OF THE CLAIM

This workers' compensation claim comes now before this Honorable Court pursuant to the Court's October 14, 2008, Order granting the Petition for Appeal of the claimant, Thomas D. Simpson, from the January 23, 2007, order of the Workers' Compensation Board of Review. The Board of Review's order affirmed the June 22, 2006, decision of the Workers' Compensation Office of Judges, which had itself affirmed a March 24, 2005, order of the Workers' Compensation Commission granting the claimant a thirteen percent (13%) permanent partial disability award for a low back injury. The claimant asserts that he is entitled to a twenty percent (20%) permanent partial disability award.

The claimant's permanent partial disability award in this claim was determined by the Workers' Compensation Commission pursuant to the provisions of 85 C.S.R. 20 ("Rule 20"). The claimant's appeal is premised upon the assertion that Rule 20, an exempt legislative rule promulgated by the former Workers' Compensation Board of Managers¹ pursuant to West Virginia Code § 23-4-3b(b) (2003), is invalid because the enabling statute under which the rule was promulgated represents an "improper delegation of legislative authority [by the Legislature] to the executive branch in violation of the Separation of Powers Doctrine" found at Article 5, Section 1 of the West Virginia Constitution.

The Insurance Commissioner disagrees. As a multitude of cases previously decided by this Court make clear, the delegation of power at issue in this appeal is entirely proper and in no way violates the Separation of Powers Doctrine. Furthermore, while the claimant has advanced a constitutional argument and has provided numerous correct statements of law, he has failed to establish the applicability of the cited law to the case at hand, and provides no cognizable basis for the conclusion he wishes this Court to reach. Accordingly, the Insurance Commissioner requests that this Honorable Court find the delegation of rulemaking authority set forth in West Virginia Code § 23-4-3b(b), as well as Rule 20 promulgated thereunder, to be constitutional, and affirm the January 23, 2007, order of the Board of Review.

II. STATEMENT OF FACTS

The claimant, a dozer operator, injured his low back on September 25, 2002, when, while exiting his dozer, he slipped off the last step and fell to the ground. The claimant

¹ The Board of Managers, created by the Legislature through the enactment of West Virginia Code § 23-1-1a (2003), replaced the former Performance Council as the rulemaking body for workers' compensation matters. In the 2005 legislation that provided for the privatization of workers' compensation in West Virginia, the Industrial Council was created to supplant the Board of Managers, and rules previously promulgated by the Board of Managers were statutorily ratified by the Legislature at the time of this transition to remain in effect until amended or repealed by the Industrial Council. W. Va. Code § 23-2C-22 (2005).

fell approximately three feet and landed on his back. On October 2, 2002, the claimant filed a claim for workers' compensation benefits.

Following several years of treatment for his back injury, including microdiskectomy surgery performed on December 20, 2002, as well as the subsequent implantation of a spinal cord stimulator, the claimant was referred by the Workers' Compensation Commission to Dr. George Orphanos for an independent medical evaluation. Dr. Orphanos examined the claimant on February 1, 2005; finding the claimant to have reached his maximum degree of medical improvement, Dr. Orphanos proceeded to evaluate the claimant for permanent whole person impairment. Using the range of motion model set forth in Section 3.3j of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition ("*Guides, Fourth*"), Dr. Orphanos found the claimant to have a whole person impairment of twenty percent (20%).

Dr. Orphanos then applied the criteria set forth in Rule 20 to his findings; Part VII of Rule 20 imposed ranges for permanent partial disability awards for common injuries or diseases. Section 64.1 of Rule 20 provides:

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:

85 C.S.R. 20 § 64.1. With regard to injuries to the lumbar spine, § 64.2 of Rule 20 provides:

Lumbar Spine Impairment: The range of motion methodology for assessing permanent impairment shall be used. However, a single injury or cumulative injuries that lead to a permanent impairment

to the Lumbar Spine area of one's person shall cause an injured worker to be eligible to receive a permanent partial disability award within the ranges identified in Table §85-20-C ["PPD Ranges for Lumbar Spine Impairments"]. The rating physician must identify the appropriate impairment category and then assign an impairment within the appropriate range designated for that category.

85 C.S.R. 20 § 64.2. Based upon his evaluation of the claimant, Dr. Orphanos opined that the claimant fell within "Lumbar Category III" on Table §85-20-C, which provides for a permanent partial disability award within the range of ten percent (10%) to thirteen percent (13%). Because the claimant's range of motion impairment, at least as asserted by Dr. Orphanos, was twenty percent (20%), Dr. Orphanos reduced his impairment rating to thirteen percent (13%) as provided for by Rule 20.^{2,3}

² The lumbar impairment ranges set forth on Table §85-20-C are taken from the Diagnosis-Related Estimates ("DRE") model for whole person impairment as found in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (the "*Guides, Fifth*") which, as this Court noted in Repass v. Workers' Compensation Division, 212 W. Va. 86, 569 S.E. 2d 162, n. 8 (2002), "contains a much modified version of the DRE Model, with broader ranges for each category of spine impairment."

³ It must be noted that there are significant problems with Dr. Orphanos' range of motion findings under the *Guides, Fourth* criteria, and that the twenty percent (20%) impairment recommended by Dr. Orphanos under the range of motion model set forth in the *Guides, Fourth* is plainly erroneous. First, as Dr. Orphanos notes both in his narrative report and on the Low Back Examination form, the claimant's range of motion performance was curtailed due to the claimant's reports of pain. As noted in the *Guides, Fourth* section discussing the range of motion model for determining spinal impairment (p. 122), "[p]ain . . . may limit mobility by diminishing the patient's effort, leading to inaccurately low and inconsistent measurements and inflated impairment estimates."

Additionally, while Dr. Orphanos indicated on the Low Back Examination form that the "Examinee passed invalidity test," Dr. Orphanos' actual findings, as set forth in both in his narrative report and on the Low Back Examination form, establish that the claimant did not come close to satisfying the validity test for lumbosacral flexion and extension. Specifically, the validity test set forth in the *Guides, Fourth* (p. 127) provides that range of motion measurements for lumbosacral flexion and extension are invalid if the tightest straight-leg-raising measurement exceeds the sum of sacral flexion and extension measurements by more than fifteen degrees (15°). If the validity test is not satisfied, "the examiner should either repeat the test or disallow impairment for lumbosacral spine flexion and extension." In this case, Dr. Orphanos obtained sacral flexion and extension measurements of ten degrees (10°) and five degrees (5°) respectively, for a total sacral range of motion of fifteen degrees (15°). The tightest straight-leg-raising measurement obtained by Dr. Orphanos was ninety degrees (90°), which exceeds the sacral range of motion total by seventy-five degrees (75°). As such, Dr. Orphanos' lumbosacral range of motion findings were plainly, and grossly, invalid, and impairment related to lumbosacral spine flexion (ten percent (10%)) and extension (five percent (5%)) should have been disallowed by the examiner. If this impairment is excluded from Dr. Orphanos' impairment recommendation – as it must be under the *Guides, Fourth* criteria – the claimant's total impairment under the range of motion model is only five percent (5%), and not the twenty percent (20%) Dr. Orphanos asserted in his report. Had Dr. Orphanos correctly applied the criteria set forth in the *Guides, Fourth* for determining whole person impairment under the range of motion model, the claimant would have been found to

Finally, Dr. Orphanos considered scarring related to the claimant's surgery and the implantation of the spinal cord stimulator, and based upon these factors recommended an additional whole person impairment of two percent (2%), for a total whole person impairment of fifteen percent (15%).

By order dated March 24, 2005, the Workers' Compensation Commission granted the claimant a thirteen percent (13%) permanent partial disability award based upon the report of Dr. Orphanos, holding:

Based upon the IME physician findings, the claimant is classified under the Lumbar, Category III of Table 85-20-C.

It is clear from this decision that the Workers' Compensation Commission agreed with Dr. Orphanos' assessment of the claimant's permanent partial disability entitlement under the criteria of 85 C.S.R. 20 § 64.2, but did not agree with the additional two percent (2%) impairment recommended by Dr. Orphanos for scarring related to the claimant's surgery and the implantation of the spinal cord stimulator.

The claimant protested the order of the Workers' Compensation Commission to the Office of Judges; the basis for the claimant's protest was an assertion by the claimant that he was entitled to a twenty percent (20%) award premised upon Dr. Orphanos' finding of twenty percent (20%) impairment under the range of motion model. By decision dated June 22, 2006, the Office of Judges affirmed the Workers' Compensation Commission's order; in so doing, the Office of Judges held:

It is found that Dr. Orphanos, who recommended 2% additional from the AMA Guides, instead of basing his entire rating upon Rule 20, was not proper. It is found that Dr. Orphanos was, in fact, restricted to the Rule 20 impairment ratings for a lumbar category

have a five percent (5%) whole person impairment, which, under the provisions of Rule 20, would have been adjusted upwards to a ten percent (10%) permanent partial disability award under Lumbar Category III.

III injury. Therefore, it is found that the Commission was correct in granting the claimant 13% based upon Rule 20.

The claimant appealed the decision of the Office of Judges to the Board of Review, which, by order dated January 23, 2007, summarily affirmed the Office of Judges' decision. Thereafter, the claimant petitioned this Court for appeal from the Board of Review's January 23, 2007, order; by Order dated October 14, 2008, this Court granted the claimant's petition and agreed to hear this appeal.

III. QUESTION PRESENTED

DOES WEST VIRGINIA CODE § 23-4-3b(b) REPRESENT AN IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY BY THE LEGISLATURE TO THE EXECUTIVE BRANCH IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE FOUND AT ARTICLE 5, SECTION 1 OF THE WEST VIRGINIA CONSTITUTION?

IV. STANDARD OF REVIEW

West Virginia Code §23-5-15(c) provides the Standard of Review when an appeal is made from the Board of Review to the West Virginia Supreme Court, and the Board of Review's decision – as it does in this case – represents an affirmation of a prior ruling by both the Workers' Compensation Commission and the Office of Judges:

If the decision of the board represents an affirmation of a prior ruling by both the commission and 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 provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record.

W. Va. Code §23-5-15(c) (2003). In this case, there is no dispute between the parties with regard to the material facts, and the question presented to the Court is purely a question of

constitutional law. As such, the decision of the Board of Review is subject to *de novo* review by this Court. *See, e.g., Lovas v. Consolidation Coal Co.*, 222 W.Va. 91, 95, 662 S.E.2d 645, 649 (2008) (purely legal questions are subject to *de novo* review).

V. ARGUMENT

A. Background: *Repass v. Workers' Compensation Division*, the 2003 Legislative Reforms, and the Promulgation of Rule 20.⁴

1. Before *Repass*: The 1995 Legislative Amendments and the Adoption of Standards by the Performance Council.

In 1995, the Legislature passed and enacted comprehensive amendments to West Virginia's workers' compensation law; the goal of these sweeping reforms was the alleviation of the Workers' Compensation Fund's fiscal crisis and restoration of its financial integrity. As part of these reforms, the Legislature amended § 23-4-6(i) of the Code to provide as follows:

The 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 The workers' compensation division shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment. Once the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant.

W. Va. Code 23-4-6(i) (1995). In accordance with the provisions of this section, the Workers' Compensation Commission's Performance Council promulgated a rule requiring that a

⁴ The history of the 1995 amendments to this State's workers' compensation law and the adoption by the Performance Council of the *Guides, Fourth* as the standard to be used for the determination of a claimant's level of permanent disability are set forth comprehensively in *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E. 2d 162, *passim* (2002).

claimant's degree of whole body medical impairment – and thus the claimant's permanent partial disability award – be determined under the criteria set forth in the *Guides, Fourth*.⁵

With regard to rating impairment resulting from injuries to the lumbar, thoracic and cervical regions, the *Guides, Fourth* sets forth two distinct models which can be used by an examiner in determining impairment. One, the range of motion model, determines impairment by comparing a claimant's measured ranges of motion against what the *Guides, Fourth* considers to be normal ranges of motion; impairment is then assigned based upon the difference between the two. The second model, the diagnosis-related estimate ("DRE") model, determines impairment by assigning a claimant to one of a number of categories of impairment based upon the nature and diagnosis of the claimant's injury; each category provides a range of impairment percentages for that category. Under the criteria set forth in the *Guides, Fourth*, the DRE model is strongly preferred; due to its relative unreliability, the *Guides, Fourth* states that the range of motion model should only be used in cases where the DRE model is not applicable or the evaluator needs more clinical data to properly categorize the claimant's impairment. *Guides, Fourth*, p. 112. Accordingly, in the vast majority of cases the rule promulgated by the Performance Council incorporating the *Guides, Fourth* criteria required the use of the DRE

⁵ Prior to the enactment of the 1995 amendment to 23-4-6(i) and the subsequent adoption of the *Guides, Fourth* by the Performance Council:

To determine impairment, a doctor would examine the claimant and render a scientific opinion regarding how much a claimant's physical functions were impaired by a work-related injury. The Workers' Compensation Commissioner would then determine disability by looking at the doctor's opinion on impairment, and mix that opinion with the evidence of the claimant's earning capacity, the effect of the impairment on the claimant's efficiency at work, and the effect of the impairment on the claimant's pursuit of normal everyday living. From a mix of these factors, the Commissioner would compute the claimant's percentage of permanent partial disability. The Commissioner's permanent partial disability award would, in theory, only partially take into account the doctor's determination of impairment.

Repass v. Workers' Comp. Div., 212 W. Va. 86, 94-95, 569 S.E. 2d 162, 170-171 (2002).

model to determine whole person impairment, and thus the subsequent permanent partial disability award to be granted a claimant.

2. *Repass*: This Court Rejects the use of the *Guides, Fourth's* DRE Model for Determining a Claimant's Whole Person Impairment as Being Inconsistent with Statutory Law.

In *Repass v. Workers' Compensation Division*, 212 W. Va. 86, 569 S.E. 2d 162 (2002), two claimants challenged the use of the DRE model for determining whole person impairment for spinal injuries, arguing that it conflicted with the workers' compensation statute. In finding for the claimants, the Court noted:

A rule promulgated by the Workers' Compensation Division that mandates the use of a non-legislatively created guide for the examination of certain injuries is valid only to the extent that the mandated guide does not conflict with the specific dictates of the Legislature as expressed by statute. Those aspects of the mandated guide that are in conflict are invalid.

Repass v. Workers' Comp. Div., Syl. pt. 8. The Court then found that the use of the DRE model conflicted with a number of statutory provisions:

The DRE Model for the evaluation of spinal injuries conflicts with our law in several areas. The DRE disagrees with statutes that control: the proper time for making an impairment rating, the proper treatment of progressive injuries, the procedure for reopening a claim, and the consideration of a second injury. Any aspect of the *Guides, Fourth* that conflicts with these statutes must fail.

Id., 212 W. Va. at 103, 569 S.E. 2d at 179.

3. *After Repass*: The 2003 Legislative Amendments and the Promulgation of Rule 20.

While the *Repass* decision invalidated the use of the DRE model for determination of a claimant's permanent partial disability award under the law as it existed at that time, it did not rule that the use of an injury-based model was forever impermissible; indeed,

this Court expressly stated in Repass that such a model could be adopted by the Workers' Compensation Commission so long as the Legislature permitted it to do so:

Of course, the Legislature can adopt any system it wants, within the ambit of our constitution, to evaluate injuries, impairments, or disabilities.

Repass, supra, 212 W. Va. at 102, 569 S.E. 2d at 178. And:

In short, the Commissioner, in concert with the Performance Council may, within the bounds of their authority, adopt the standards of their choosing, but we must remember that the introduction of the *Guides, Fourth* into our workers' compensation system was not accompanied by a burning bush, or even direct action of the Legislature. Thus, when we find it to be in conflict with our existing statutory law, we must adhere to the law.

Id. Also:

Any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

Id. (citations omitted). This Court further stated:

It is fundamental law that the Legislature may delegate to an administrative agency power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.

Id., 212 W. Va. at 103, 569 S.E. 2d at 179 (citations omitted). Finally:

Though the courts have the power to harmonize a rule with an ambiguous statute, we must follow the will of the Legislature when expressed with clarity.

Id.

In 2003, the year following the entry of the Repass decision, the Legislature once again enacted comprehensive amendments to West Virginia's workers' compensation law, and, once again, the goal of those 2003 reforms was the alleviation of the Workers' Compensation Fund's fiscal crisis and restoration of its financial integrity; the Legislature set forth with specificity both its findings and its intent with regard to these amendments:

The Legislature finds that a deficit exists in the Workers' Compensation Fund of such critical proportions that it constitutes an imminent threat to the immediate and long-term solvency of the fund and constitutes a substantial deterrent to the economic development of this state. The Legislature further finds that addressing the workers' compensation crisis requires the efforts of all persons and entities involved and resolution of the crisis is in the best interest of the public. Modification to the rate system, *alteration of the benefit structure*, improvement of current management practices and changes in perception must be merged into a unified effort to make the workers' compensation system viable and solvent through the mutualization of the system and the opening of the market to private workers' compensation insurance carriers. It was and remains the intent of the Legislature that the amendments to this chapter enacted in the year two thousand three be applied from the date upon which the enactment was made effective by the Legislature. The Legislature finds that an emergency exists as a result of the combined effect of this deficit, other state budgetary deficits and liabilities and other grave social and economic circumstances currently confronting the state and that unless the changes provided by the enactment of the amendments to this chapter, as well as other legislation designed to address the problem are made effective immediately, the fiscal stability of this state will suffer irreparable harm. Accordingly, the Legislature finds that the need of the citizens of this state for the protection of the State Treasury and the solvency of the Workers' Compensation Funds requires the limitations on any expectations that may have arisen from prior enactments of this chapter.

W. Va. Code § 23-1-1(a) (2003) (emphasis added).⁶ One element of these 2003 reforms was the enactment of West Virginia Code § 23-4-3b(b) – the enabling statute for Rule 20 – which states in relevant part:

[O]n or before the thirty-first day of December, two thousand three, the board of managers shall promulgate a rule establishing the process for the medical management of claims and awards of disability which includes, but is not limited to, reasonable and standardized guidelines and parameters for appropriate treatment, expected period of time to reach maximum medical improvement and *range of permanent partial disability awards for common injuries and diseases* or, in the alternative, which incorporates by reference the medical and disability management guidelines, plan or program being utilized by the commission for the medical and disability management of claims, with the requirements, standards, parameters and limitations of such guidelines, plan or program having the same force and effect as the rule promulgated in compliance herewith.

W. Va. Code § 23-4-3b(b) (2003) (emphasis added).

In accordance with this express directive from the Legislature, the Board of Managers promulgated Rule 20; the effective date of the Rule was June 14, 2004. *See* 85 C.S.R. 20 § 1.6.⁷ It must be emphasized that while Rule 20 adopts the *categories* set forth in the revised DRE model of the *Guides, Fifth*, to determine permanent partial disability ranges, it is *not* the

⁶ In the *Repass* decision, this Court noted that “it is for the Legislature, not the Commissioner, or the courts, to make the difficult and sometimes unpopular decisions necessary to fund the system or limit its expenses.” *Repass, supra*, 212 W. Va. at 93, 569 S.E. 2d at 169. The Court further held:

The ultimate responsibility for the fiscal health of the West Virginia Workers’ Compensation system rests with the Legislature. Balancing the conflicting goals of minimizing premiums while providing full and fair compensation to injured workers is the exclusive province of our publicly elected legislators, and is not to be invaded by the Commissioner, or the Courts.

Id., Syl pt. 3.

⁷ Among other things, Rule 20 specifies that the *Guides, Fourth* are to be used in evaluating permanent disability; establishes the range of permanent partial disability awards to be granted for spinal injuries, carpal tunnel syndrome, and psychiatric impairment claims; and prohibits a claimant from receiving a permanent partial disability award for an injury to an arm or leg that exceeds the statutory award for amputation of the same body part.

DRE model. Under Rule 20, claimants with spinal injuries are evaluated using all of the criteria of the range of motion model set forth in the *Guides, Fourth*: the model mandated by this Court in Repass. As such, Rule 20 does not disagree with any of the controlling statutory issues addressed by the Repass Court: the proper time for making an impairment rating, the proper treatment of progressive injuries, the procedure for reopening a claim, or the consideration of a second injury. Under Rule 20, all of these issues are determined pursuant to the range of motion model. Rule 20 simply applies to these range of motion findings the permanent partial disability ranges that the Legislature commanded the Board of Managers to establish for common injuries and diseases.

Additionally, it must be noted that Rule 20 is also in complete accord with both West Virginia Code § 23-4-6(i) – which expressly commanded the Workers’ Compensation Commission to “adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment” – and this Court’s assurance in Repass that, “within the bounds of their authority,” the Workers’ Compensation Commission could “adopt the standards of their choosing.” The Workers’ Compensation Commission chose the standards reflected in Rule 20, and the enabling statute for that rule – West Virginia Code § 23-4-3b(b) – expressly authorized the Workers’ Compensation Commission to impose ranges of permanent partial disability for common injuries and diseases.

B. West Virginia Code § 23-4-3b(b) Does Not Represent an Impermissible Delegation of Legislative Authority by the Legislature to the Executive Branch in Violation of the Separation of Powers Doctrine Found At Article 5, Section 1 Of The West Virginia Constitution.

In his appellate brief, the claimant discusses at length the provisions of the Administrative Procedures Act (the “APA”), found at Chapter 29A of the West Virginia Code,

but there is no question that the provisions of the APA are not applicable to this case.⁸ The claimant sets forth numerous complaints about the standards set forth in Rule 20, but, as discussed above, the Board of Managers had express statutory authority to promulgate those standards. As such, the sole cognizable issue in this appeal is whether that express statutory authority, set forth at West Virginia Code § 23-4-3b(b), constitutes an unconstitutional delegation of legislative power by the Legislature to the executive branch in violation of the Separation of Powers Doctrine found at Article 5, Section 1 of the West Virginia Constitution.⁹ Plainly, as discussed below, under well-settled law it does not.

⁸ As the claimant correctly points out in his appellate brief, Rule 20 was not promulgated under the legislative rulemaking process set forth in the Administrative Procedures Act (“APA”), found at Chapter 29A of the West Virginia Code. This is because administrative rules promulgated under Chapter 23 of the Code are exempt from this process. Article 3 of the APA sets forth a prescribed framework for the adoption of legislative rules which requires that proposed administrative rules be enacted by the Legislature itself, and prescribes that agency rules subject to the APA “shall have force and effect only when authority for promulgation of the rule is granted by an act of the Legislature.” W. Va. Code § 29A-3-9 (2003). While the claimant is correct that the APA governs the promulgation of agency rules generally, the APA also recognizes that legislative review is not a prerequisite for the promulgation of all administrative rules. West Virginia Code § 29A-1-3(d) states:

Nothing herein shall be construed to affect, limit or expand any express and specific exemption from this chapter contained in any other statute relating to a specific agency, but such exemptions shall be construed and applied in accordance with the provisions of this chapter to effectuate any limitations on such exemptions contained in any other statute.

W. Va. Code § 29A-1-3(d) (2005). Further, § 29A-3-1 provides that administrative rules be submitted to the Legislature for enactment “except to the extent specifically exempted by . . . this chapter or other applicable law.” W. Va. Code § 29A-3-1 (2005). With regard to rules regulating the administration of workers’ compensation claims in this State, a specific statutory exemption exists; West Virginia Code § 23-1-1a(j) expressly excludes workers’ compensation regulations from the legislative enactment process set forth at West Virginia Code §§ 29A-3-9 through 16 and sets forth the procedure to be followed by the former Board of Managers for the promulgation of such rules. *See* W. Va. Code § 23-1-1a(j)(3) (2005).

⁹ The Court’s analysis of the claimant’s appeal must begin with a presumption that West Virginia Code § 23-4-3b(b)’s delegation of power to the Board of Managers is constitutional. *See State ex rel. Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724 (1974). Further:

When the constitutionality of a statute is challenged, every reasonable construction must be resorted to by the courts to sustain its validity and any reasonable doubt must be resolved in favor of the constitutionality of the legislative act in question.

Woodring v. White, 161 W. Va. 262, 242 S.E.2d 238, Syl pt. 4 (1978); *State ex rel. Metz v. Bailey*, 152 W. Va. 53, 159 S.E. 2d 673, Syl. pt. 2 (1968). Also:

1. Delegation of Rulemaking Authority by the Legislature to an Executive Agency is Generally Constitutional So Long as the Agency Does Not Exceed the Authority Granted to it By the Enabling Statute, and So Long as the Power Delegated is Not a "Purely Legislative Power."

Article 5, § 1 of the West Virginia Constitution provides, in pertinent part:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others.

This Court has had opportunity to interpret the meaning of this clause on numerous occasions.

At its most tautological, the doctrine means:

Generally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder.

State ex rel. Barker v. Manchin, 167 W. Va. 155, 168, 279 S.E.2d 622, 631 (1981). Furthermore, as a constitutional provision:

Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.

Id., Syl. pt. 1 (1981). *See also*: State ex rel. West Virginia C.A.G. v. Econ. Dev. Grant Committee, 213 W. Va. 255, 580 S.E. 2d 869 (2003); State ex rel. Rist v. Underwood, 206 W. Va. 258, 524 S.E. 2d 179 (1999); State ex rel. State Bldg. Comm'n v. Bailey, 151 W. Va. 79, 150 S.E. 2d 449 (1966).

The negation of legislative power to delegate rule-making authority to the executive must appear beyond a reasonable doubt.

State ex rel. Hous. Dev. Fund v. Copenhaver, 153 W. Va. 636, 171 S.E. 2d 545, Syl. pt. 5 (1969).

As fundamental as this doctrine is, however, this Court has also recognized that it is constitutionally permissible for the Legislature to delegate to an administrative agency the power to promulgate rules necessary and proper for the enforcement of a statute without violating the separation of powers. *See, e.g., State ex rel. Callaghan v. Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E. 2d 72 (1980). Indeed:

The delegation by the legislature of broad discretionary powers to an administrative agency body, accompanied by fitting standards for their exercise, is not of itself unconstitutional.

State ex rel. Hous. Dev. Fund v. Copenhaver, 153 W. Va. 636, 171 S.E. 2d 545, Sy. Pt. 1 (1969);

Chapman v. Huntington Hous. Auth., 121 W. Va. 319, 3 S.E. 2d 502, Syl. pt. 8 (1939).¹⁰

Furthermore (as previously noted):

It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.¹¹

¹⁰ The standards set forth in West Virginia Code § 23-4-3b(b) are plainly sufficient under applicable law:

[I]t has been held that great leeway is allowed the legislature in setting forth guidelines or standards. State of Iowa v. Steenhoek, Iowa, 182 N.W. 2d 377 (1971). That court, citing Zilm v. Zoning Board of Adjustment, 260 Iowa 787, 150 N.W. 2d 606, said: 'the trend of modern decisions is toward greater liberality in the setting of standards and to require less exactness in them in legislative enactments.' In Gilman v. City of Newark, 73 N.J. Super. 562, 180 A.2d 365 (1962), the following succinct language is found: 'The mere fact that the standards set forth are general rather than specific does not militate against their acceptance and validity. The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards...' *See Dickerson v. Commonwealth*, 181 Va. 313, 24 S.E. 2d 550 (1943)."

State ex rel. Hous. Dev. Fund v. Waterhouse, 158 W. Va. 196, 213-214, 212 S.E. 2d 724, 734 (1974).

¹¹ It cannot be seriously suggested that the Board of Managers, in setting the range of permanent partial disability benefits to be awarded for back and neck injuries – the most common class of workers' compensation claims – somehow exceeded the scope of its authority under a statute that expressly commanded the Board of Managers to establish the "range of permanent partial disability benefits to be awarded for common injuries and diseases."

Lovas v. Consolidation Coal Co., 221 W. Va. 91, 662 S.E.2d 645, Syl. pt. 5 (2008); Repass, *supra*, Syl. pt. 5.

However, the Legislature's power to delegate rulemaking authority is not absolute; the Separation of Powers Doctrine prohibits the delegation by the Legislature of a "purely legislative power."

Purely legislative power, which can never be delegated, has been described as the authority to make a complete law – complete as to the time when it shall take effect and as to whom it shall be applicable – and to determine the expediency of its enactment.

State ex rel. Hous. Dev. Fund v. Copenhaver, 153 W. Va. 636, 649, 650, 171 S.E. 2d 545, 553 (1969), *citing* 16 Am. Jur. 2d, Constitutional Law, Section 242, pp. 493-94.

2. The Power to Establish a "Range of Permanent Partial Disability Benefits for Common Injuries and Diseases" is Not a "Purely Legislative Power" and, as Such, May be Permissibly Delegated by the Legislature.

The claimant's argument that West Virginia Code § 23-4-3b(b) constitutes an unconstitutional delegation of power rests on a single assertion: that the establishment of a "range of permanent partial disability benefits for common injuries and diseases" is a "purely legislative power," and as such, may not be delegated by the Legislature to an executive agency. The claimant bases this argument on the proposition that the "Legislature alone has the power and the authority to provide workers' compensation benefits." Terry v. State Comp. Comm'r, 147 W. Va. 529 at 532, 129 S.E. 2d 529 at 533 (1963).¹² And that, as such, *any* determination of the rate, level, nature and extent of benefits is a "purely legislative" act affecting the "legal rights" of the claimant. In support of this argument, the claimant points to the fact that, in other

¹² The full quote reads: "The Legislature alone has the power and authority to provide benefits for the dependents of a deceased employee. In providing for such benefits it may impose the conditions upon which that may be allowed and whatever conditions is imposes must be satisfied before an allowance may be made." 147 W. Va. at 532-533, 129 S.E. 2d at 533-534.

instances, the Legislature has established specific levels of benefits to be awarded. *See, e.g.*, W. Va. Code §§ 23-4-1; 23-4-5; 23-4-6.

The Claimant is in error in this proposition. While the claimant asserts that the establishment of ranges for permanent partial disability awards is a “purely legislative function,” he cites no law that actually supports this contention. The claimant cites State v. Grinstead, 157 W. Va. 1001, 206, S.E.2d 912 (1974) to assert a plainly correct statement of the law, that the “authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others,” but fails to note that Grinstead concerned not an administrative determination of workers’ compensation benefits, but rather the delegation, to an administrative agency, of the power to create criminal sanctions. The claimant cites a quotation from Terry, *supra*, to support the proposition that “the Legislature alone has the power and the authority to provide workers’ compensation benefits,” but fails to acknowledge that the Court was referring to the *creation* of an entire class of benefits – dependant’s benefits – and not the mere establishment of standards to be applied to determining the extent of a limited class of benefits for a limited number of conditions, as is the case here.

Most importantly, the claimant has failed to establish that the power at issue in this case is a “complete law” as contemplated by Copenhaver, *supra*. It plainly is not; it is merely an administrative element of a vast and complex workers’ compensation statutory scheme. The power vested by West Virginia Code § 23-4-3b(b) does not create a class of benefits. It does not eliminate a class of benefits. It merely empowered the Board of Managers to create and apply a standard for determining the extent of those benefits – precisely as this Court instructed the Legislature and the Workers’ Compensation Commission to do in the Repass decision. Given the Legislature’s undisputed power to delegate rulemaking authority

generally, the mandatory presumption that such delegation is constitutional, and the claimant's abject failure to establish – or even cite authority that would suggest – that the power to establish a “range of permanent partial disability benefits for common injuries and diseases” is a “purely legislative power,” the decision of the Board of Review below must be affirmed.

3. Ratification: The Legislature has Expressly Adopted and Ratified Rule 20.

In closing, the Insurance Commissioner would further note that the standards set forth in Rule 20 have, in fact, been favorably passed upon by the Legislature. Rule 20 became effective on June 14, 2004.¹³ See 85 C.S.R. 20 § 1.6. Subsequently, during the 2005 legislative session, the Legislature enacted West Virginia Code § 23-2C-22:

Except as otherwise provided in this chapter, *all rules applicable to the former workers' compensation commission are hereby adopted and made effective* as to the operation of the workers' compensation insurance market to the extent that they are not in conflict with the current law. Authority to enforce the existing rules and the regulatory functions of the commission as set forth in chapter twenty-three [§§23-1-1 et seq.] of the code shall transfer from the commission to the insurance commissioner effective upon termination of the commission.

W. Va. Code 23-2C-22 (2005) (emphasis added). In Repass, this Court made a distinction between statutes which attempt to incorporate future changes of another statute, code, regulation, standard, or guideline and statutes which incorporate an established standard, noting:

The distinction is that *when an existing standard is incorporated by reference, there is the presumption that a legislature is familiar with that standard in its entirety and approves of it*. However, by attempting to incorporate a standard, plus any modifications it might undergo, a legislature is delegating its authority to the non-elected authors of the standard, who could then change the standard in some way not contemplated by the legislature.

Repass, *supra*, 212 W. Va. at 101, 569 S.E. 2d at 177 (emphasis added).

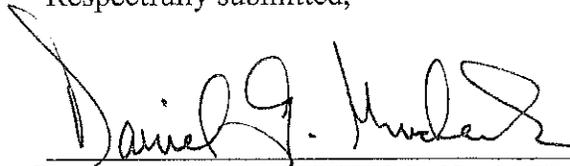
¹³ Amendments to portions of Rule 20 which are not at issue in this appeal were passed upon by the Board of Managers in late 2005, and became effective on January 20, 2006. See 85 C.S.R. 20 § 1.4.

Accordingly, because the Legislature, in the 2005 amendments to the workers' compensation law, expressly stated that all of the rules applicable to the former Workers' Compensation Commission – including Rule 20 – were “hereby adopted and made effective,” Rule 20 has been, in effect, ratified by the Legislature through subsequent legislation, and as such we must presume that the Legislature was familiar with the standards set forth in Rule 20 *in their entirety*, and that the Legislature *approved* of those standards.

VI. CONCLUSION

For all the foregoing reasons, the West Virginia Offices of the Insurance Commissioner respectfully requests that this Honorable Court affirm the January 23, 2007, order of the Board of Review.

Respectfully submitted,



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