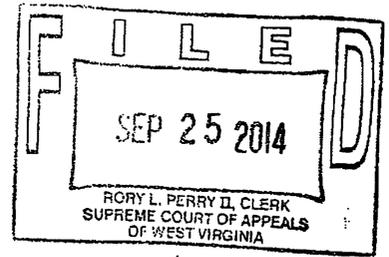


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SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

14-0977



Kevin S. Goff, ✓

Claimant-Petitioner,

vs.

WV Division of Natural Resources, ✓

Employer.

: SUPREME COURT NO.:
: CLAIM NO.: ~~2014002265~~ 2011027511
: DOI: 02/06/2011
: *appeal no. 2049243*
: ALJ Decision: 2/11/14
: Board of Review Decision: 8/26/14

PETITION AND SUPREME COURT BRIEF,
OF THE CLAIMANT-PETITIONER, KEVIN S. GOFF

Jonathan C. Bowman, Esquire (WVSB #7129)
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Wheeling, West Virginia 26003
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September 22, 2014

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West Virginia Supreme Court of Appeals

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I. ASSIGNMENTS OF ERROR

Petitioner-Appellant Kevin S. Goff (hereinafter "Claimant") respectfully submits that the reliable and probative medical evidence of record supported the granting of 40% permanent partial disability (hereinafter "PPD"), which opinion for such award was supported by the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition (the "Guides").

II. STATEMENT OF THE CASE

This is a Petition for Appeal by the Claimant to the Order dated August 26, 2014 (Claimant's Exhibit 1), from the Workers' Compensation Board of Review, which affirmed the Decision of Administrative Law Judge dated February 11, 2014 (Claimant's Exhibit 2), from the Workers' Compensation Office of Judges (the "OOJ") which affirmed the Order dated December 12, 2012 (Claimant's Exhibit 3), by the Claims Administrator ("CA"), granting no additional permanent partial disability ("PPD") award (the Claimant has received 33% PPD, the statutory award for the total and irrevocable loss of sight of his right eye).

The Claimant was born on August 29, 1966. The Claimant graduated from high school in 1984. He received a Board of Regents degree from West Liberty State College in 1998 and has worked for State of WV - DNR (the "Employer") for nearly 25 years as a police officer. The Claimant suffered the instant occupational injury on February 6, 2011, when he was struck in the right eye by a briar in the course of and resulting from his employment. He subsequently developed an infection and had to have his right eye removed.

The presently-recognized approved conditions in the claim are:

918.1	Superficial injury cornea
	Posttraumatic stress disorder
	depressive psychosis - severe
364.00	acute iridocyclitis NOS
	clinic anophthalmos NOS
E849.4	Place of occurrence place recreation and sport
376.01	orbital cellulitis
369.8	visual loss, one eye NOS

On July 1, 2011, the Claimant was evaluated at the CA's request by Dr. Kevin Cox, M.D. In his report from that date (Claimant's Exhibit 4), Dr. Cox rated the Claimant with a 33% whole person impairment, which is the statutory award pursuant to West Virginia Code Section 23-4-6(f), providing for a 33% PPD for "the total and irrevocable loss of the sight in one eye". The CA granted a 33% PPD award pursuant to Dr. Cox's recommendation.

Because the Claimant ultimately protested and succeeded in getting additional temporary total disability benefits paid following the evaluation with Dr. Cox above, the CA referred the Claimant out for a new evaluation to assess any additional PPD and on December 11, 2012, the Claimant was evaluated by Michael Krasnow, D.O., Ph.D. In his report from that date (Claimant's Exhibit 5), Dr. Krasnow opined that the Claimant had just the 33% statutory whole person impairment. Thereafter, by Order dated December 21, 2012, the CA granted no additional PPD per the recommendations of Dr. Krasnow and the Claimant timely protested this ruling.

During the litigation of the no additional PPD issue before the OOJ, the Claimant and the Employer had two additional examinations performed. In fact, these two doctors are the only evaluators addressing PPD who specifically addressed the issue of additional whole person impairment which may or may not exist beyond just the 33% statutory award.

Those examiners are Drs. Bruce Guberman and Christopher Martin (see Claimant's Exhibits 6 and 7). The findings of each physician will be discussed further below. Also, inasmuch as the current appeal is essentially a legal argument (and not necessarily a factual dispute), the Claimant would stipulate that the FINDINGS OF FACT depiction in the OOJ's ruling (at pages 2 through 7) is an accurate depiction of the evidence of record before the OOJ. As noted above, the OOJ affirmed the CA's granting of no additional PPD award, the Claimant appealed said ruling to the BOR, and the BOR affirmed as well. It is from this BOR ruling which the Claimant files this Petition to this Court.

III. SUMMARY OF ARGUMENT

The Claimant respectfully submits that the BOR's ruling should be reversed because the reliable and probative medical evidence of record performed in accordance with the Guides demonstrated that the Claimant should be awarded an additional 7% PPD.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Claimant respectfully submits that the decisional process would not be significantly aided by oral argument pursuant to Rule 18 (a) (4).

V. ARGUMENT

W. Va. Code §23-5-15 provides:

- (a) Review of any final decision of the board, including any order of remand, may be prosecuted by either party or by the Workers' Compensation Commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, to the Supreme Court of Appeals within thirty days from the date of the final order by filing a petition therefor with the court against the board and the adverse party or parties as respondents. Unless the petition for review is filed within the thirty-day period, no appeal or review shall be allowed, such time limitation is a condition of the right to such appeal or review and hence jurisdictional. The clerk of the Supreme Court of Appeals shall notify each of the respondents and the Workers' Compensation Commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, of the filing of such petition. The board shall, within

ten days after receipt of the notice, file with the clerk of the court the record of the proceedings had before it, including all the evidence. The court or any judge thereof in vacation may thereupon determine whether or not a review shall be granted. If review is granted to a nonresident of this state, he or she shall be required to execute and file with the clerk before an order or review shall become effective, a bond, with security to be approved by the clerk, conditioned to perform any judgment which may be awarded against him or her. The board may certify to the court and request its decision of any question of law arising upon the record, and withhold its further proceeding in the case, pending the decision of court on the certified question, or until notice that the court has declined to docket the same. If a review is granted or the certified question is docketed for hearing, the clerk shall notify the board and the parties litigant or their attorneys and the Workers' Compensation Commission, the successor to the commission, other private insurance carriers and self-insured employers, whichever is applicable, of that fact by mail. If a review is granted or the certified question docketed, the case shall be heard by the court in the same manner as in other cases, except that neither the record nor briefs need be printed. Every review granted or certified question docketed prior to thirty days before the beginning of the term, shall be placed upon the docket for that term. The Attorney General shall, without extra compensation, represent the board in such cases. The court shall determine the matter brought before it and certify its decision to the board and to the commission. The cost of the proceedings on petition, including a reasonable attorney's fee, not exceeding thirty dollars to the claimant's attorney, shall be fixed by the court and taxed against the employer if the latter is unsuccessful. If the claimant, or the commission (in case the latter is the applicant for review) is unsuccessful, the costs, not including attorney's fees, shall be taxed against the commission, payable out of the Workers' Compensation Fund, or shall be taxed against the claimant, in the discretion of the court. But there shall be no cost taxed upon a certified question.

- (b) In reviewing a decision of the board of review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning and conclusions, in accordance with subsections © and (d) of this section.
- © 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. 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 based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

- (d) 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-weighing 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 §23-4-1G (emphasis added), which provides:

- (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 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. **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.**
- (b) 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 or in determining the constitutionality of this chapter.

W. Va. Code § 23-4-6(l) (emphasis added) provides:

For the purposes of this chapter, with the exception of those injuries provided for in subdivision (f) of this section and in section six-b of this article, 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**. For those injuries provided for in subdivision (f) of this section and section six-b of this article, the degree of disability shall be determined exclusively by the provisions of said subdivision and said section. The occupational pneumoconiosis board created pursuant to section eight-a of this article shall premise its decisions on the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment. The [Claims Administrator] 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 [PPD] that shall be awarded to the claimant. This subdivision is applicable to all injuries incurred and diseases with a date of last exposure on or after the second day of February, one thousand nine hundred ninety-five, to all applications for an award of [PPD] made on and after that date and to all applications for an award of [PPD] that were pending before the [CA] or pending in litigation but not yet submitted for decision on and after that date. The prior provisions of this subdivision remain in effect for all other claims.

Notwithstanding the above, the Court has further held that an order dealing with an award of compensation based on percentage or otherwise, **which does not take into consideration all the factors to be considered in making an award is plainly wrong and will be reversed with direction to enter a proper order as indicated by the evidence**. Kamensky v. Comm'r., 148 W.Va. 258, 134 S.E.2d 582 (1964); Posey v. Comm'r., 157 W.Va. 285, 201 S.E.2d 102 (1973).

The Guides are to be “the standard by which permanent impairment shall be determined.” Repass v. Comm'r., 569 S.E.2d 162, 212 W.Va. 86 (2002). As the Court further explained in Repass, after 1995, physicians are to make impairment evaluations using a standardized, ‘whole body’ impairment rating system, and claims administrators are to make PPD awards solely on the basis of the doctor's impairment evaluation. Put another way, the percentage of medical impairment now directly equates to the percentage

of PPD to be awarded.

Because the BOR's ruling was a non-substantive affirmation of the OOJ's ruling, the Claimant will address the findings from the OOJ's ruling as it relates to his contentions in this Petition. Moreover, as noted above, the gist of the merits of the Claimant's Petition involve just two (2) medical examiners who specifically addressed whether any additional whole person impairment existed beyond just the 33% statutory award and those are found in the reports from Drs. Guberman and Martin (see again Claimant's Exhibits 6 and 7). In short, the Claimant would respectfully contend that the OOJ erred by not granting the additional 7% PPD recommended by Dr. Guberman.

Dr. Guberman, upon examination of the Claimant, found the 33% impairment for the loss of vision in his right eye to be appropriate. However, you will note that at page 6 in his report dated April 25, 2013 (Claimant's Exhibit 6), Dr. Guberman further found 10% additional impairment of the whole person to be warranted, based upon "facial deformities since [the Claimant] not only has loss of vision in the right eye, but has to have had the right eye removed as a result of this injury". Dr. Guberman noted that the prosthetic right eye causes disfigurement. Dr. Guberman also reported that the Claimant "has chronic blepharitis and conjunctivitis, which also causes further disfigurement and symptoms". Dr. Guberman cited to page 222 of the Guides (section 8.5) and opines that such warrants an additional 10% impairment, which Dr. Guberman clearly notes is "not duplicative of the 33% impairment" because of the other impairments of are of cosmetic effect and removal of the right eye. Dr. Guberman recommended a total of 7% additional PPD, with 40% whole person impairment per the Combined Values Chart of the Guides.

After the Claimant's time frame to submit evidence expired on the no additional PPD

protest, the Employer referred the Claimant to Dr. Martin, who offered a report dated September 9, 2013 (Claimant's Exhibit 7). Dr. Martin, as noted by the OOJ's ruling, disagreed with Dr. Guberman's recommendation of additional PPD as outlined above. Dr. Martin's disagreement with Dr. Guberman pertained to what Dr. Martin perceived as Dr. Guberman's finding the Claimant's prosthesis to be a "disfigurement", to which Dr. Martin apparently did not believe to be such. Dr. Martin's disagreements with Dr. Guberman are outlined in the OOJ's ruling at page 6.

Lastly, as noted by the OOJ's ruling, a two (2) page report dated October 16, 2013, from Dr. Guberman was offered to the OOJ as rebuttal in response to the report of Dr. Christopher Martin dated September 9, 2013.

The OOJ, not even addressing the discrepancies between the reports from Dr. Guberman and Dr. Martin, and even acknowledged that Dr. Cox and Dr. Martin concluded that the Claimant had conjunctivitis, specifically found that the Claimant was not entitled to any additional impairment for facial disfigurement, simply citing to W. Va. Code § 23-4-6(I) and Linville v. Comm'r, 112 W. Va. 522, 165 S.E. 803 (1932). **The Claimant respectfully contends that the OOJ's ruling reliance on Linville and the aforementioned statutory provision to find the Claimant fully compensated with a 33% PPD is wrong as a matter of law.**

It cannot be disputed that the Claimant just didn't lose his sight in his right eye, as the CA has held that the following conditions are included in the claim:

918.1	Superficial injury cornea
	Posttraumatic stress disorder
	depressive psychosis - severe
364.00	acute iridocyclitis NOS

	clinic anophthalmos NOS
E849.4	Place of occurrence place recreation and sport
376.01	orbital cellulitis
369.8	visual loss, one eye NOS

Each of these conditions, beyond that which would specifically included in the Claimant's statutory PPD award, are entitled to an assessment for any impairment from the compensable injury. And keep in mind that Linville was decided in 1932 and we're now talking about a more scientific approach to whole person impairment/ PPD determinations in West Virginia now **82 years later!!** With such noted, the Claimant respectfully contends that the OOJ's citation to this Court decision is fully misplaced. For that matter, it is obvious that this Court (in Linville, supra) was concerned with that claimant being compensated twice for the same injury. That is not, clearly, what we're talking about here, as there appears to be meritorious analysis worth consideration as far as what percentage of PPD is appropriate and what is not is fully addressed by Drs. Guberman and Martin. Taking the OOJ's analysis even a step further, such would preclude any impairment due to the psychiatric component of the claim, for which the Claimant is still actively treated for. Further, let us assume that the Claimant here had suffered an amputated finger as a result of his injury. Would the 33% PPD statutory award preclude any additional rating for the finger? Commonsense dictates that such additional PPD would not be precluded simply based upon the statutory PPD granted initially to the Claimant.

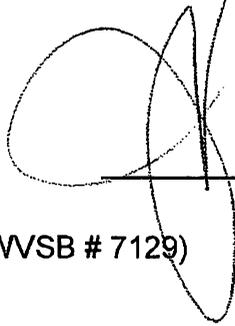
The reality is that Dr. Guberman's finding of an additional 7% PPD recommendation is fully traceable to the Guides. The reality is that Dr. Guberman's finding of an additional 7% PPD is fully warranted under W. Va. Code §23-4-1G. Lastly, the reality is that an award of an additional 7% PPD pursuant to Dr. Guberman's finding of the same is most

consistent with the all of the aforementioned case law, including Kamensky, supra, Posey, supra, Repass, supra, which case law has not been subsequently overturned by this Court to the best of the undersigned's knowledge and information. Accordingly, the Claimant respectfully requests that this Court grant the Claimant's Petition for Appeal.

VI. CLOSING

In closing, the Claimant respectfully submits that the BOR's affirmance of the OOOJ's ruling on the PPD issue protested by the Claimant is legally and factually improper, and should be reversed with a proper adjudication of an issue. The evidence before the OOOJ consisted entirely of a evidence supporting an additional 7% PPD. As such, it would be most appropriate for this Court to grant the Claimant's Petition and ultimately his appeal, and remand the matter to the agency below with instructions to award an additional 7% PPD consistent with the medical evidence of record.

Respectfully Submitted,

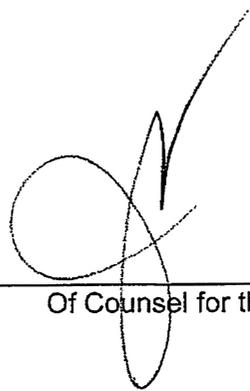


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CERTIFICATE OF SERVICE

Service of the foregoing Petition and Supreme Court Brief of the Claimant-Petitioner, Kevin S. Goff, was had upon the parties herein by mailing true and correct copies thereof by regular United States mail, postage prepaid and properly addressed this 22nd day of, September 2014, as follows:

Lucinda Fluharty, Esq.
Jackson & Kelly
PO Box 871
Wheeling, WV 26003
(Counsel for Employer)

A handwritten signature in black ink, consisting of a large loop on the left and a vertical stroke on the right that curves at the top.

Of Counsel for the Claimant

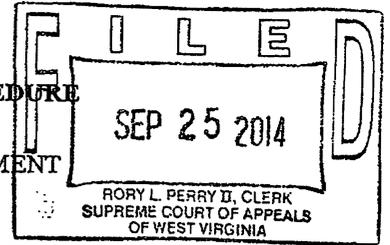
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APPENDIX B - REVISED RULES OF APPELLATE PROCEDURE



WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT

Complete Case Title: Kevin S. Goff v. WV Division of Natural Resources
 Petitioner: Kevin S. Goff Respondent: WV Div of Natural Resources
 Counsel: Jonathan C. Bowman, Esq. Counsel: Lucinda Fluharty, Esq.
 Claim No.: 2011002285 Board of Review No.: 2049210
 Date of Injury/Last Exposure: 2/6/11 Date Claim Filed: 2/6/11
 Date and Ruling of the Office of Judges: 2/11/14
 Date and Ruling of the Board of Review: 8/26/14
 Issue and Relief requested on Appeal: additional PPD

CLAIMANT INFORMATION

Claimant's Name: Kevin S. Goff
 Nature of Injury: right eye loss
 Age: 48 Is the Claimant still working? Yes No. If yes, where: _____
 Occupation: police officer No. of Years: 25
 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: 918.1, 364.00, E849.4, 376.01, 369.8

(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.

Supreme Court of Appeals of West Virginia
Office of the Clerk

Rory L. Perry II, Clerk of Court
State Capitol, Room E-317
Charleston, WV 25305

Statutory Notice of Filing Petition for Appeal
September 30, 2014

Kevin S. Goff v. WVOIC/WV Division of Natural Resources
Supreme Court No.14-0977
Petition for Appeal Filed: September 25, 2014

Board of Review Information
Claim Number: 2011027511
Appeal Number: 2049243
Order Date: August 26, 2014

Dear Interested Persons:

Statutory notice pursuant to W.Va. Code § 23-5-15 is hereby given that a petition for appeal from the final order of the Workers' Compensation Board of Review has been filed in the above-captioned case.

In future correspondence or filings, please refer to the Supreme Court case number. DO NOT use the claimant's social security number on any papers filed with the Court.

Refer to Rule 12 of the Rules of Appellate Procedure for more information.

Once the case is mature, the papers filed in this matter will be passed directly to the Court for consideration. You will be advised of the Court's decision in writing.

Sincerely, Rory L. Perry II, Clerk of Court

Notice Provided to: Workers' Compensation Commission, Workers' Compensation Board of Review and to the following counsel of record:

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