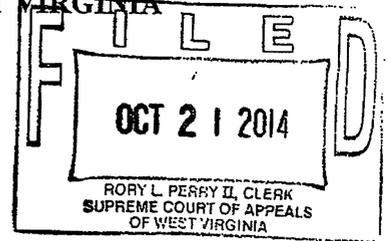


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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

14-0977



KEVIN GOFF,

Petitioner,

CCN: 2011002265

DOI: 02/06/2011

v.

**WV DIVISION OF
NATURAL RESOURCES,**

Respondent.

**RESPONSE TO
PETITION FOR APPEAL OF
WV DIVISION OF NATURAL RESOURCES**

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TABLE OF CONTENTS

I.	STATEMENT OF THE CASE.....	1
II.	STATEMENT OF THE FACTS.....	1
III.	ALLEGED ERROR.....	4
IV.	ARGUMENT.....	4
V.	CONCLUSION.....	8
VI.	CERTIFICATE OF SERVICE.....	9

TABLE OF AUTHORITIES

Cases Cited:

<i>Conley v. Workers' Compensation Division</i> 199 W. Va. 196, 483 S.E.2d 542 (1997).....	7
<i>Gibson v. State Comp. Comm'r.</i> 127 W. Va. 97, 31 S.E.2d 555 (1944).....	8
<i>Linville v. State Comp. Comm'r.,</i> 112 W. Va. 522, 165 S.E. 803 (1932).....	5
<i>Rasmus v. Workmen's Comp. Appeal Bd.</i> 117 W. Va. 55, 184 S.E. 250 (1936).....	7

Statutes Cited:

W. Va. Code § 23-4-6.....	1
W. Va. Code § 23-4-1g.....	4
W. Va. Code § 23-4-6(i).....	5
W. Va. Code § 23-5-12(b).....	7
W. Va. Code § 23-5-15(c).....	7

STATEMENT OF THE CASE

Claimant has petitioned this Honorable Court for a review of the Board of Review Order issued August 26, 2014. The Board of Review affirmed the February 11, 2014 Decision of Administrative Law Judge, which affirmed an order of December 21, 2012, granting no additional permanent partial disability award. The employer asserts that there was no error in the Board of Review's affirmation of the administrative law judge decision, and that the Petition for Appeal must be denied.

STATEMENT OF THE FACTS

Claimant was granted a 33% permanent partial disability award in an order of August 9, 2011. This 33% award was issued after receipt of the July 8, 2011 report of Dr. Kevin Cox, a Board-certified ophthalmologist. Dr. Cox evaluated claimant's eye injury, and reported on the history of claimant's treatment, before and after removal of his right eye. Dr. Cox opined in his July 8, 2011 report that he believed claimant had reached his maximum medical improvement, and was left with a 24% whole person impairment, according to the *Guides to the Evaluation of Permanent Impairment, 4th Ed.*

An order then issued on August 9, 2011, granting claimant a 33% permanent partial disability award, after a review of the impairment substantiated a raise in the level of impairment. Pursuant to W. Va. Code § 23-4-6, "the total and irrecoverable loss of the sight of one eye shall be considered a 33% disability." Thus, instead of being granted the 24% that would have been appropriate under the *Guides*, claimant was granted the statutory award of 33%.

Claimant was then re-evaluated after some additional temporary total disability benefits were issued to him. This re-evaluation occurred with Dr. Michael A. Krasnow, a Board-certified Ophthalmologist at Marshall University School of Medicine.

In his December 12, 2012 report, Dr. Krasnow determined that claimant was at his maximum medical improvement, and by his own words, claimant indicated he had adapted to his monocular status. An order then issued granting claimant no additional permanent partial disability award. Claimant protested.

Claimant submitted a report from Dr. Bruce Guberman at Tri-State Occupational Medicine, Inc. dated April 25, 2013. Dr. Guberman examined claimant and reviewed his medical history with regard to this injury. Dr. Guberman assessed that claimant had developed chronic conjunctivitis and blepharitis of the right eye and required on-going medical treatment. Dr. Guberman indicated that this also caused slight disfigurement around the right eye. Furthermore, claimant had a prosthetic right eye. Although Dr. Guberman concurred that claimant had reached his maximum medical improvement, Dr. Guberman was not satisfied that the 33% statutory award compensated claimant appropriately. Dr. Guberman recommended additional impairment under the *Guides*. Dr. Guberman referred to page 22 of the *Guides* wherein a claimant could receive an additional 10% of the whole person for disfigurement and symptoms. Combining this 10% with the statutory award already granted, Dr. Guberman assessed that claimant had a total of 40%, and recommended that an additional 7% award be granted to claimant.

The employer then had the claimant evaluated by Dr. Christopher Martin at West Virginia Institute of Occupational and Environmental Health. Again, as the doctors before had done, Dr. Martin recounted claimant's injury and his treatment as a result of his right eye injury. Dr. Martin believed that claimant was entitled to the 33% statutory award for a loss of an eye, in accordance with W. Va. Code § 23-4-6. Dr. Martin believed this to be the correct impairment overall for this claim. Dr. Martin pointed out that Dr. Cox had provided an impairment rating in accordance with the *Guides*, which equated to a 24% impairment, by assessing the actual

impairment the loss of the eye causes. However, due to the statutory assessment for the loss of an eye, claimant has already been compensated more than what a Board-certified ophthalmologist had opined is the physical impairment from the loss of eye injury. Dr. Martin explained that the 33% disability provided by state law is a complete replacement for the *Guides* calculation of impairment for loss of an eye. Dr. Martin opined that the two impairment methods cannot be combined for eye injuries, and to do so would be duplicative.

Further, Dr. Martin pointed out that he did not believe claimant had the type of deformity of orbit, scar or cosmetic deformities which would have warranted any additional impairment over the statutory provision for loss of an eye. Dr. Guberman had equated the presence of the right ocular prosthesis as a disfigurement. Aside from the lack of conjugate gaze, Dr. Martin opined, however, that the presence of the prosthesis is not apparent.

Claimant submitted an addendum report from Dr. Guberman. Dr. Guberman basically indicated again, why he disagreed with Dr. Martin, and again restated the reasons why he thought claimant was entitled to the additional impairment.

When the administrative law judge reviewed the evidence of record on impairment, the order granting no additional impairment was affirmed. The administrative law judge found that the 33% statutory award for loss of vision of the right eye is a total and complete grant of impairment for that eye, and that any additional impairment for the eye would compensate claimant twice for the same loss. Claimant has appealed the decision, and the Board of Review affirmed. The employer asserts that there was no error in the Board of Review's affirmation of the administrative law judge decision, and that claimant's appeal must be denied.

ALLEGED ERROR

**WHETHER THE BOARD OF REVIEW WAS CLEARLY WRONG
IN AFFIRMING THE ADMINISTRATIVE LAW JUDGE DECISION,
WHICH AFFIRMED THE ORDER GRANTING CLAIMANT NO
ADDITIONAL IMPAIRMENT FOR HIS EYE INJURY OVER THE 33% STATUTORY
AWARD ALLOWED BY LAW FOR LOSS OF AN EYE?**

ARGUMENT

**THE BOARD OF REVIEW DID NOT ERR IN AFFIRMING THE ADMINISTRATIVE
LAW JUDGE DECISION AFFIRMING THE
ORDER GRANTING CLAIMANT NO ADDITIONAL IMPAIRMENT
FOR HIS EYE INJURY OVER THE 33% STATUTORY AWARD
ALLOWED BY LAW. THE STATUTORY AWARD FOR LOSS OF
AN EYE FULLY COMPENSATED CLAIMANT FOR HIS EYE
INJURY IN THIS CLAIM.**

West Virginia Code § 23-4-1g provides that resolution of an issue in a workers' compensation claim is to be determined by a weighing of all the evidence and a finding that the preponderance of the evidence supports the chosen manner of resolution. Evidence shall be weighed to determine its relevance, credibility, materiality, and reliability. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and most favorable to a party's interests. Only if all the evidence is weighed, and it is determined that there is at least an equal amount of reliable evidence supporting the claimant's position, may claimant prevail. There is no more "rule of liberality" which would allow claimant to prevail, simply because some evidence was presented to support his position.

Here, the issue is the amount claimant is entitled to receive for his compensable eye injury. Claimant was granted a 33% statutory award for the loss of his eye, in which he had a prosthetic implant. There are opinions from three physicians on the level impairment claimant is entitled to receive. Dr. Cox had rated claimant at 24% in accordance with the *Guides*, but when claimant's award was granted, the claimant was granted the full statutory award of 33%. Thus, claimant was actually granted *more* for his impairment than he would have if his injury

had not had a scheduled impairment. Dr. Guberman then rated claimant, in addition to the loss of his eye, an additional 10% for facial disfigurement from the prosthetic eye, chronic blepharitis and conjunctivitis. Dr. Martin agreed with the ruling that claimant should get no more impairment than the amount allowed by statute for the loss of his eye. As Dr. Martin pointed out, claimant was already compensated more than he would have been in the *Guides* had been utilized to calculate his impairment, as Dr. Cox found claimant to have a 24% whole person impairment, but claimant was still granted the 33% statutory award for loss of an eye.

The administrative law judge found that claimant is simply not allowed any additional impairment other than what is provided for in the statutory 33% award. As the judge quoted from the statute: W. Va. Code § 23-4-6(i) indicates that “the degree of permanent 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. (Emphasis added).” As the judge pointed out, the early case of *Lirville v. State Comp. Comm’r.*, 112 W. Va. 522, 165 S.E. 803 (1932), supports that a claimant cannot be compensated in addition to the maximum amount allowed under statute for the injury at issue. To do so, would be compensating twice for the same loss, and that is a consequence not contemplated by the compensation code.

Dr. Cox had determined that claimant’s eye injury actually equated to a 24% if the *Guides* were utilized. Dr. Guberman, however, took advantage of the statutory impairment, which was more than what the *Guides* would have allowed, then added the other impairment of 10% on top of the statutory award. If the 24% impairment claimant would have been granted, (absent the statutory scheduled award), was **combined** with the 10% additional impairment advocated by Dr. Guberman, and Dr. Guberman alone, then the combined value under the

Guides would only be 32%. Thus, claimant was *still* compensated for any conceivable type of whole person impairment from his eye injury, as the 33% he was granted was more than he would have received if a straight *Guides* impairment rating would have been the appropriate method by which to assess impairment. Moreover, the preponderance of the evidence favors the 33% statutory award, and the statutory award alone.

Claimant theoretically “wants it both ways.” He does not want to give back his 33% permanent partial disability he received for the complete loss of his eye pursuant to the statutory award, and instead receive the 24% recommended initially by the Board-Certified ophthalmologist, Dr. Cox. He seeks to take advantage of the statutory award, which provided him more impairment than he would have received without it, and then add impairment on top of that, still for conditions of the eye. Along those lines, it should be pointed out that the claimant lists the conditions which are compensable in this claim, but a more detailed view of the eye-related diagnoses, reveal that those are for conditions of his eye that existed *before* his eye was surgically removed. Those conditions were the conditions that developed that caused his eye to need to be removed. Those conditions are not permanent, and not subject to a rating for a permanent impairment. He cannot have a continuing corneal or iris injury, as his prosthetic eye replaced his entire eye. Claimant’s argument that *Linville* is outdated because it is an old case, is not persuasive either. The premise underlying *Linville* still exists, and that is that there cannot be duplicative impairment awards for the same injury. Claimant argues unpersuasively that by using the administrative law judge’s reasoning, a claimant could not receive a separate psychiatric award. This is of course, not the case. The psychiatric element to this claim does not fall subject to the statutory award for the loss of an eye, and it is possible that claimant could be evaluated and determined to have a psychiatric impairment, apart from his physical eye injury. That, however, is not at issue in this claim at this time.

The Board of Review may only reverse a decision of administrative law judge if the judge has committed a legal error, a clear error in reviewing the evidence in terms of its reliable, probative or substantial nature, or an abuse of discretion in deciding the claim.

W. Va. Code § 23-5-12(b). In accordance with *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997), the Board of Review must accord deference to decisions from the Office of Judges, and can only reverse decisions if the type of error set forth in § 23-5-12(b) is established. Here, the administrative law judge committed no error in affirming the order granting no additional impairment. Claimant was granted the statutory award of 33% for the loss of one eye, which is to be the exclusive method by which a scheduled injury is to be rated for permanent impairment. Claimant is not entitled to receive an additional award over and above the scheduled injury amount, as that would be compensating him twice. Moreover, if impairment were based on the *Guides* and not for the scheduled statutory injury, claimant would still not be entitled to an increased award, as the impairment for the loss of an eye under the *Guides* combined with the additional impairment only Dr. Guberman found, still does not equal more than claimant has been granted for his injury.

Pursuant to W. Va. Code § 23-5-15(c), if the original order was affirmed by the Office of Judges and by the Board of Review, "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." There was no such error in this claim. All of the tribunals below complied with the applicable statutes and case law in upholding the original order.

Moreover, this Honorable Court will not disturb the findings of the Board of Review unless they are clearly wrong. *Rasmus v. Workmen's Comp. Appeal Bd.*, 117 W. Va. 55,

184 S.E. 250 (1936). Except for error of law or where the findings are clearly against the preponderance of the evidence, this Honorable Court will not reverse the Board of Review. *Gibson v. State Comp. Comm'r.*, 127 W. Va. 97, 31 S.E.2d 555 (1944). Herein, there was no error in the Board of Review's affirmation of the order granting claimant no additional impairment over the 33% statutory award he received for total loss of his eye. The claimant's petition must be denied.

CONCLUSION

Based on the evidence of record, and the foregoing argument, the employer respectfully requests that claimant's Petition for Appeal be denied.

Respectfully submitted,

WV DIVISION OF
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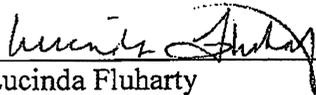
CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2014, I served the within *Response to Petition for Appeal of WV Division of Natural Resources*, by depositing a true and exact copy thereof in the United States Mail, postage prepaid, in an envelope addressed to the following:

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