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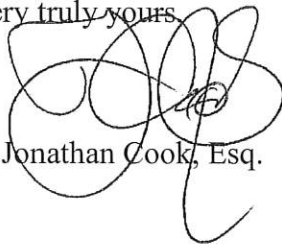
Edythe Nash Gaiser, Clerk of Court
State Capitol Room E-317
1900 Kanawha Blvd. East
Charleston, WV 25305

RE: Jobie Howard v. Arch Coal, Inc.
Appeal No.:
JCN: 2010134954
Claim No.: 709-8447874

Dear Ms. Gaiser:

Enclosed please find the "Brief on Behalf of Appellant, Arch Coal, Inc.," in the above claim. I also included an appendix. Thank you for your attention to this matter.

Very truly yours,


T. Jonathan Cook, Esq.

Enclosures

cc: Edward G. Atkins, Esquire
Arch Coal, Inc.
AIG

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

ARCH COAL, INC.,

Appellant,

v.

JOBIE HOWARD,

Appellee.

Appeal No.:

JCN No.: 2010134954

Carrier No.: 709-8447874

**BRIEF ON BEHALF OF APPELLANT,
ARCH COAL, INC.**

**T. Jonathan Cook, Esq.
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II. ASSIGNMENTS OF ERROR

Errors were committed by the West Virginia Intermediate Court of Appeals (WVICA) in its decision dated May 1, 2023 (June 1, 2023 is the mandate order). Specifically, the WVICA erred in finding the Workers’ Compensation Board of Review (BOR) correctly determined the claimant had 50% whole body medical impairment for further consideration of a permanent total disability award. In this regard, the WVICA erred by finding the finder of fact had authority to substitute its own calculation of the amount of the claimant’s whole person impairment for that of a calculation performed by a physician. This error was magnified by permitting the finder of

fact to rely on a report where the evaluating physician rated noncompensable body parts. Therefore, the employer, Arch Coal, Inc (Arch or employer), moves this Court to reverse the WVICA's decision.

III. STATEMENT OF THE CLAIM

The claimant submitted the medical records of Michael A. Krasnow, M.D., Ph.D., dated May 30, 2012. *Exhibit 1*. The claimant presented with blurred vision in the right eye. It was reported that on May 12, 2010, the claimant suffered from an electrical explosion with burns to his face, arms, and torso. It was reported that the trauma triggered a herpes simplex infection in his right eye. The claimant's medical history consisted of a bilateral refractive surgery in 2004 resulting in correction of vision and thinned cornea. Dr. Krasnow reported that 50% of the claimant's visual field of his right eye was impacted.

The claimant submitted the addendum report of Dr. Krasnow dated August 22, 2012. *Exhibit 2*. Based upon the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition (Guides), Dr. Krasnow opined that the claimant had a whole person impairment (WPI) of 21 % from his right eye injury.

The claimant submitted his Petition for PTD Award dated September 9, 2015, which was considered by the workers' compensation carrier for the employer, Arch Coal, Inc. (Arch or employer). *Exhibit 3*.

The employer submitted the medical report of Ghassan Dagher, M.D., dated May 17, 2017. *Exhibit 4*. The claimant presented for an ophthalmological examination. The diagnosis was s/p burn, left side of face, shoulder, and left arm; history of recurrent herpes simplex keratitis; resolved superficial corneal scars OD; keratitis sicca; s/p LASIK surgery, bilateral; corneal endothelial dystrophy (corneal guttata), bilateral; and exophoria with poor depth

perception. Dr. Oagher reported that the claimant had LASIK surgery in 2004 which involves ablating part of the cornea resulting in central thinning to achieve correction of the visual acuity. Dr. Oagher opined that the claimant's right eye condition was multifactorial and not solely related to the compensable injury. The right eye pre-existing conditions consisted of corneal endothelial dystrophy, LASIK surgery, herpes simplex virus, and exophoria (extraocular muscle imbalance). Regarding the visual impairment recommended by Dr. Krasnow, Dr. Oagher reported that Dr. Krasnow misapplied the Guides. Dr. Oagher reported that the Guides require the physician to determine the visual impairment of both eyes in determining impairment of the overall visual system. Based upon the Guides, Dr. Oagher opined that the claimant had a 2% WPI of the visual system, and that if the claimant's pre-existing eye conditions were to be considered, then the impairment related to the compensable injury would be 1%.

The employer submitted the medical report of Prasadarao B. Mukkamala, M.D., dated June 20, 2017. **Exhibit 5.** The allowed conditions were noted to be burns mostly affecting the left upper extremity and to some extent over the neck, face, and back. The claimant presented with loss of motion of the left upper extremity. The diagnosis was electrical burns mostly affecting the left upper extremity. Based upon the Guides, Dr. Mukkamala opined that the claimant had an upper extremity impairment (UEI) of 35% of the left hand due to range of motion (ROM) loss; 8% UEI of the left shoulder due to ROM loss; 8% UEI of the left elbow due to ROM loss; 11 % UEI of the left wrist due to ROM loss; 1 % UEI of the right upper extremity for scarring; and 5% WPI of the back for scarring. Dr. Mukkamala combined the values for a total WPI of 39% for the physical/orthopedic/neurological issues due to the compensable injury.

The employer submitted the PTD Review Board Initial Recommendations dated September 10, 2018. **Exhibit 6.** Based upon the reports of Dr. Mukkamala and Dr. Dagher, it

was concluded that the claimant had a 31 % WPI of the left upper extremity; 15% WPI of the left upper extremity from scarring; 5% WPI for back scarring; 2% WPI of the eye; and 1 % WPI for right upper extremity scarring. The Board found a total WPI of 46%.

The claimant submitted the medical report of Bruce A. Guberman, M.D., dated October 15, 2018. **Exhibit 7.** The claimant presented with a burn injury. The claimant reported that in 1998 he suffered a fracture of his left middle and ring fingers which required surgery; the claimant reported stiffness of those fingers. Dr. Guberman's impression was history of multiple burns with scarring over the face, neck, thorax, upper chest, left arm, left hand, and to a lesser extent, the right arm and right hand; status post multiple debridements, skin grafting and fasciotomy; widespread symptomatic and disfiguring scarring; multiple ROM abnormalities in the left upper extremity and left hand; and history of burn injuries to the eyes with surgery x2. Based upon the Guides, Dr. Guberman opined that the claimant had a 47% UEI of the left hand due to ROM loss and sensory deficit; 10% UEI of the left wrist due to ROM loss; 13% UEI of the left elbow due to ROM loss; 17% UEI of the left shoulder due to ROM loss; and a 17% WPI due to scarring. Dr. Guberman combined the values for a total WPI of 50% due to the compensable injury.

The employer submitted the PTD Review Board Final Recommendations dated October 5, 2020. The Board found a total WPI of 46%. **Exhibit 8.**

The claimant submitted the medical records of Jitander S. Dudee, M.D., dated December 23, 2020. **Exhibit 9.** The claimant presented with corneal scarring and nonexclusive age-related Macular Degeneration. The impression was dystrophies primarily involving the retinal pigment epithelium and corneal scarring. Dr. Dudee reported that the attack of corneal herpes simplex virus (HSV) was likely caused by the compensable injury which activated the dormant HSV.

The claimant submitted the medical report of Dr. Dudee dated February 19, 2021.

Exhibit 10. Dr. Dudee reported that the claimant had a 44% loss of central vision of the right eye and a 5% loss of the left eye. It was reported that the claimant had a 37% loss of right visual field and no loss of the left eye. It was reported that the claimant sees multiple images when his right eye is open due to his corneal irregularities. Dr. Dudee found the claimant to have 100% impairment of the right eye due to diplopia. Considering the 100% impairment of the right eye and the **5% for the left eye**, Dr. Dudee opined that the claimant had a 29% impairment of the visual system which converts to a WPI of 27% due to the compensable injury.

The claimant submitted the addendum report of Dr. Guberman dated April 28, 2021.

Exhibit 11. Dr. Guberman concluded that combining his 40% WPI for ROM abnormalities and 17% WPI for scarring with Dr. Dudee's finding of 27% WPI of the visual system rendered a total WPI of 63% due to the compensable injury.

The claimant submitted the medical report of Robert B. Walker, M.D., dated March 5, 2021. **Exhibit 12.** The claimant reported that he had a work-related injury in 1998 to his left ring and middle fingers. The claimant reported that those fingers were stiff before the compensable injury. Dr. Walker reported that the claimant was found to have sustained an electrical injury and flash burns to approximately 25% of his body. Based upon the Guides, Dr. Walker opined that the claimant had a 44% UEI of the left hand due to ROM loss and sensory deficit; 7% UEI of the left wrist due to ROM loss; 13% UEI of the left elbow due to ROM loss; 17% UEI of the left shoulder due to ROM loss; and a 20% WPI due to scarring. Dr. Walker combined the values along with Dr. Dudee's 27% WPI of the visual system for a total WPI of 64% due to the compensable injury. Photographs were submitted with the report, and such were reviewed and considered.

The claimant submitted the addendum report of Dr. Walker dated May 20, 2021. *Exhibit*

13. Dr. Walker noted that excluding Dr. Dudee's visual system impairment, the total WPI due to the ROM and sensory abnormalities as well as scarring was 50%.

The employer submitted the medical report of David L. Soulsby M.D., dated June 8, 2021. *Exhibit 14.* The claimant presented for an IME. The claimant reported that he sustained a prior injury to his left hand which resulted in a fracture. The claimant reported that he underwent ORIF of the long and ring fingers and that he could not make a full fist prior to the compensable injury. Dr. Soulsby's assessment was electrical burns involving both upper extremities and the right eye. Based upon the Guides and apportioning the prior impairment of the ring and middle fingers of the left hand, Dr. Sou Isby opined that the claimant had a 39% U EI of the left hand due to ROM loss; 16% UEI of the left wrist due to ROM loss; 10% UEI of the left elbow due to ROM loss; 16% UEI of the left shoulder due to ROM loss; and a 3% WPI due to scarring. Dr. Soulsby combined the values for a total WPI of 39% due to the compensable injury. Dr. Soulsby reported that Dr. Guberman failed to apportion for the prior left-hand injury. Dr. Soulsby also reported that in finding a WPI of 17% due to scarring, Dr. Guberman attributed ROM loss to two different impairment methods (ROM and skin disorder) and therefore, double-dipped.

The employer submitted the medical report of ChuanFang Jin, M.D., dated April 14, 2022. *Exhibit 15.* The compensable diagnosis was noted to be burns on the upper extremities, face, neck, and back. The claimant presented with severe burns. The claimant reported that he had fractures in his left ring and middle fingers in 1998 and had surgical fusion involving the fingers. The clamant further reported that he had residual stiffness and reduced ROM from the 1998 injury. Dr. Jin's impression was severe electrical burns to the left upper extremity with scar contracture with reduced ROM in the left shoulder, elbow, wrist, and fingers; multiple electrical

burns involving the face, left neck, trunk, and right hand with skin grafts; and right eye injury with surgical debridement. Based upon the Guides and apportioning the prior impairment of the ring and middle fingers of the left hand, Dr. Jin opined that the claimant had a 28% U EI of the left hand due to ROM loss; 12% U EI of the left wrist due to ROM loss; 10% UEI of the left elbow due to ROM loss; 12% UEI of the left shoulder due to ROM loss; and a 7% WPI due to scarring. Dr. Jin combined the values for a total WPI of 37% due to the compensable injury. Regarding the right eye, Dr. Jin relied upon the report of Dr. Dagher who found a 2% WPI of the visual system. In combining her WPI of 37% with Dr. Dagher's 2% WPI, Dr. Jin opined that the claimant sustained a total WPI of 38% due to the compensable injury. Regarding the findings of Dr. Guberman and Dr. Walker, Dr. Jin stated that their reports failed to apportion impairment for the claimant's prior left-hand injury and misused Table 2 on page 80 of the Guides in determining scarring impairment.

The claimant submitted the addendum report of Dr. Dudee dated June 6, 2022. Dr. Dudee noted that combining his finding of 27% WPI of the visual system with Dr. Jin's 37% for orthopedic and dermatological injury renders a combined WPI of 54% due to the compensable injury. ***Exhibit 16.***

By Order dated November 14, 2022, the Workers' Compensation Board of Review reversed the Claims Administrator's order dated October 13, 2020, which denied the claimant's application for a PTD award. ***Exhibit 17.*** The Board stated:

It is determined that the claimant sustained more than a 50% impairment from the compensable injury.

Accordingly, it is hereby ORDERED that the Claim Administrator's Order dated October 13, 2020, denying the claimant's application for a PTO award because he had failed to meet the whole-body medical impairment threshold of 50%, be REVERSED and the claimant found to have met the threshold. It is

further ORDERED that the claim be REMANDED to the claim administrator with instructions to refer the claim to the PTO Review Board to determine entitlement of a PTO award.

In reversing the order, the Board concluded:

The evidence also indicates that the claimant had a prior injury to his left hand in 1998 which occurred at work. The claimant reported to multiple physicians that he underwent surgery for the 1998 injury and had residual stiffness of the left ring and middle fingers. The claimant reported to Dr. Jin that he had reduced ROM of the fingers prior to the compensable injury. However, no claim was filed for the injury and therefore, it cannot be included in his PTO threshold WPI, and the non-compensable pre-existing ROM impairment is to be apportioned from his total WPI of the left upper extremity. Because Dr. Mukkamala, Dr. Guberman, and Dr. Walker all failed to apportion for the prior left-hand injury, their findings of WPI are unreliable for WPI threshold purposes.

Regarding the two remaining reports, it is determined that Dr. Soulsby's finding of an orthopedic and dermatological WPI of 39% and Dr. Jin's 37% are of equal evidentiary weight and therefore, per W. Va. Code §23-4-1 g, the resolution that is most consistent with the claimant's position will be adopted. The evidence establishes that the claimant has a WPI of 39% due to his orthopedic and dermatological injuries as per Dr. Soulsby.

Regarding impairment of the visual system, the claimant was evaluated by three ophthalmologists: Dr. Krasnow opined that the claimant had a 21 % WPI of the visual system due to the compensable injury; Dr. Dagher opined that the claimant had 1 % due to the compensable injury; and Dr. Dudee opined that the claimant had a 27% WPI due to the compensable injury. Dr. Dagher's finding of a 1 % WPI due to the compensable injury is clearly not in accord with the other two physicians and is unreliable for WPI determination.

Regarding the reports of Dr. Krasnow and Dr. Dudee, it is determined that they are of equal evidentiary weight and therefore, per W. Va. Code §23-4-1 g, the resolution that is most consistent with the claimant's position will be adopted. The evidence establishes that the claimant has a WPI of 27% of the visual system due to the compensable injury.

The evidence establishes that the claimant has a WPI of 39% due to his compensable orthopedic and dermatological injuries, and a

27% from his compensable visual system injury. Per the Combined Values Chart on page 322 of the Guides, these values render a total combined WPI of 55%. Thus, the evidence establishes that the claimant has exceeded the 50% WPI threshold.

Exhibit 17 at 7-8.

A WVICA memorandum decision was issued on May 1, 2023, and affirmed the following decision by the BOR:

The Board found the reports of Drs. Soulsby and Jin were equally reliable and also that the reports of Drs. Dudee and Krasnow were equally reliable and adopted the findings that were most consistent with Mr. Howard's position under West Virginia Code § 23-4-1g. The Board combined the impairment ratings of Drs. Soulsby and Dudee and found that Mr. Howard had a total 55% WPI. The Board further remanded the claim back to the claim administrator with instructions to refer the claim back to the PTD Board for determination of entitlement of a PTD award. Arch now appeals the Board's order.

Exhibit 18 at 3. A mandate order was issued by the WVICA on June 1, 2023¹. ***Exhibit 19.***

IV. SUMMARY OF ARGUMENT

Under the law of this state, a fact finder is not permitted to pick and choose different the impairment recommendations of physicians to determine whole body medical impairment. In this case, the Board aptly found both Dr. Jin and Dr. Soulsby's examinations were the reliable. The Board then incorrectly combined Dr. Soulsby's dermatological impairment recommendation with Dr. Dudee's visual system impairment to create a new impairment recommendation not recommended by any evaluator of record. Pursuant to the holdings of this Court in Repass v. Workers' Compensation Div., 569 S.E.2d 162, 171, 212 W.Va. 86, 95 (2002) and Magnetech Industrial Services v. York, No. 14-0386 (Memorandum Decision), a fact-finder is not permitted to substitute its own calculation of the amount of a claimant's whole person impairment for that

¹ Pursuant to Rule 39, this brief is being filed the next day which is not a Saturday, Sunday, or legal holiday. July 3, 2023, was declared a holiday by the governor and a judicial holiday by the Court.

of a calculation performed by a physician. Thus, the order issued by the Board and subsequently affirmed by the WVICA is wrong and must be reversed. Moreover, even if the WVICA's finding that a fact-finder is permitted to pick and choose ratings from different evaluators, Dr. Dudee's visual system impairment recommendation is unreliable as a matter of law because he impermissibly included an impairment recommendation for an uninjured body part. Therefore, the WVICA's decision cannot stand as written and must be reversed.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument before the Court is requested as this matter involves one or more of the following:

- (1) A case involving assignments of error in the application of settled law;
- (2) A case claiming an unsustainable exercise of discretion where the law governing that discretion is settled;
- (3) A case claiming insufficient evidence or a result against the weight of the evidence;
- (4) A case involving a narrow issue of law; and
- (5) A case in which a hearing is required by law.

VI. ARGUMENT

A. Standard of Review.

West Virginia Code § 23-5-15(b) provides states that in this Court's review of a final Order by the BOR that it shall consider the record before the BOR and give deference to the BOR's findings, reasoning and conclusions, in accordance with the following:

- (c) 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.

With due regard to this standard of review, the decision issued by the WVICA is due to be reversed as same is wrong factually, and more importantly, legally. A fact-finder is not permitted to substitute its judgement of impairment for that of a physician. Moreover, even if a fact-finder is permitted to pick and choose ratings from different sources to calculate impairment, it is not permitted to rely upon reports which are inaccurate which was done here. Specifically, Dr. Dudee rated a body part which is not covered by this claim. Accordingly, his report cannot

be used to assess impairment. Thus, the WVICA permitting the Board to rely on an inaccurate report is reversible error.

B. The WVICA decision is clearly wrong because its decision impermissible allows a fact finder to substitute its own calculation of the amount of a claimant's whole person impairment for that of a calculation performed by a physician.

It is well settled by now that the claimant is obligated to prove by a preponderance of the evidence each element of a workers' compensation claim. Syl. pt. 3, Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) ("In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment"). Evidence considered by the finder of fact must be weighed pursuant to W. Va. Code § 23-4-1g:

(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 § 23-4-1g. In a claim for PTD benefits, a claimant must prove that he or she either had 50% whole body medical impairment or a 35% statutory award for additional consideration regarding entitlement to the benefits². Specifically, W. Va. Code § 23-4-6(n)(1) states, in pertinent part, the following:

. . . in order to be eligible to apply for an award of permanent total disability benefits for all injuries incurred and all diseases, including occupational pneumoconiosis, regardless of the date of last exposure, on and after the effective date of the amendment and reenactment of this section during the year two thousand three, a claimant: (A) Must have been awarded the sum of fifty percent in prior permanent partial disability awards; (B) must have suffered a single occupational injury or disease which results in a finding by the commission that the claimant has suffered a medical impairment of fifty percent; or (C) has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. Upon filing an application, the claim will be reevaluated by the examining board or other reviewing body pursuant to subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of fifty percent or more resulting from either a single occupational injury or occupational disease or a combination of occupational injuries and occupational diseases or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. A claimant whose prior permanent partial disability awards total eighty-five percent or more shall also be examined by the board or other reviewing body and must be found to have suffered a whole body medical impairment of fifty percent in order for his or her request to be eligible for further review. The examining board or other reviewing body shall review the claim as provided for in subdivision (j) of this section. If the claimant has not suffered whole body medical impairment of at least fifty percent or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section, the request shall be denied.

In this case, the PTD Review Board analyzed the record and concluded the claimant did not meet the “second threshold” set forth above.

Pursuant to W. Va. Code § 23-4-6(j)(6):

Except as noted below, objections pursuant to section one, article five of this chapter to any order shall be limited in scope to matters within

² It is undisputed that the claimant does not have a 35% statutory award.

the record developed before the Workers' Compensation Commission and the board or other reviewing body and shall further be limited to the issue of whether the board or other reviewing body properly applied the standards for determining medical impairment, if applicable, and the issue of whether the board's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The preponderance of the evidence set forth in article one of this chapter shall apply to decisions made by reviewing bodies other than the commission instead of the clearly wrong standard. If either party contends that the claimant's condition has changed significantly since the review conducted by the board or other reviewing body, the party may file a motion with the administrative law judge, together with a report supporting that assertion. Upon the filing of the motion, the administrative law judge shall cause a copy of the report to be sent to the examining board or other reviewing body asking the board to review the report and provide comments if the board chooses within sixty days of the board's receipt of the report. The board or other reviewing body may either supply comments or, at the board's or other reviewing body's discretion, request that the claim be remanded to the board for further review. If remanded, the claimant is not required to submit to further examination by the employer's medical specialists or vocational rehabilitation specialists. Following the remand, the board or other reviewing body shall file its recommendations with the administrative law judge for his or her review. If the board or other reviewing body elects to respond with comments, the comments shall be filed with the administrative law judge for his or her review. Following the receipt of either the board's or other reviewing body's recommendations or comments, the administrative law judge shall issue a written decision ruling upon the asserted change in the claimant's condition. No additional evidence may be introduced during the review of the objection before the office of judges or elsewhere on appeal: Provided, That each party and the commission may submit one written opinion on each issue pertinent to a given claim based upon a review of the evidence of record either challenging or defending the board's or other reviewing body's findings and conclusions. Thereafter, based upon the evidence of record, the administrative law judge shall issue a written decision containing his or her findings of fact and conclusions of law regarding each issue involved in the objection. The limitation of the scope of review otherwise provided in this subsection is not applicable upon termination of the commission and any objections shall be subject to article five of this chapter in its entirety.

This statutory provision is clear that the claimant must submit evidence to establish the PTD Review Board's findings were incorrect. Here, the claimant's evidentiary submissions did

not support PTD benefits. First, it is by now settled law that PPD awards are to be made solely on the basis of a physician's impairment evaluation. See Repass v. Workers' Compensation Div., 569 S.E.2d 162, 212 W. Va. 86 (2002). In Magnetech Industrial Services v. York, No. 14-0386 (Memorandum Decision), this Court addressed this issue head-on. Independent medical evaluations prepared by Dr. Prasadarao Mukkamala, Dr. Bruce Guberman, and Dr. Marsha Bailey were introduced into evidence by the parties regarding York's PPD from an upper extremity injury. The Workers' Compensation Office of Judges (OOJ)³ concluded each report contained an error or errors.⁴ After discrediting portions of all three reports, the OOJ utilized Dr. Guberman's physical examination findings and recalculated York's whole person impairment. The decision was affirmed by the Workers' Compensation Board of Review which acted as an administrative appellate body. That decision was then appealed to this Court. After considering the appeal, the Magnetech Court held:

We find that the decisions of the Office of Judges and Board of Review are the result of erroneous conclusions of law. In Repass v. Workers' Compensation Div., 569 S.E.2d 162, 171, 212 W.Va. 86, 95 (2002), this Court held that permanent partial disability awards are to be made solely on the basis of a physician's impairment evaluation. None of the physicians of record opined that Mr. York sustained a total of 14% whole person impairment; therefore, the permanent partial disability award totaling 14% granted by the Office of Judges is not based on a physician's impairment rating. Further, by discrediting portions of all three independent medical evaluation reports of record, it was not possible for the Office of Judges to enter an award based upon one of the three independent

³ The Workers' Compensation Office of Judges was eliminated by the Legislature and was replaced by the Workers' Compensation Board of Review July 1, 2022.

⁴ The OOJ found Mukkamala did not apportion his rating for pre-existing obesity and osteoarthritis despite noting the presence of both conditions in his report. The OOJ found Guberman failed to apportion for York's pre-existing conditions; failed to apply W. Va. C.S.R. § 85-20-64.5 when calculating the PPD for left-sided carpal tunnel syndrome; and failed to provide separate impairment recommendations for impairment arising from carpal tunnel syndrome and impairment arising from cubital tunnel syndrome. The OOJ determined Bailey excessively apportioned for pre-existing conditions when calculating the amount of whole person impairment derived from work-related carpal tunnel syndrome.

medical evaluation reports of record. The **Office of Judges erred** in failing to remand the claim for an additional independent medical evaluation after determining that none of the three reports of record accurately represented the amount of Mr. York's whole person impairment arising from his compensable injuries, and instead **substituted its own calculation of the amount of Mr. York's whole person impairment for that of a calculation performed by a physician.** Likewise, the Board of Review erred in affirming the Office of Judges' Order.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of an erroneous conclusion of law. Therefore, the decision of the Board of Review is reversed and the claim is remanded with instructions to authorize an additional independent medical evaluation.

Id. at 3. (Emphasis added).

Turning now to this case, the record below included independent medical evaluations performed by Drs. Mukkamala, Walker, Guberman, Soulsby, and Jin. The BOR aptly found

The evidence also indicates that the claimant had a prior injury to his left hand in 1998 which occurred at work. The claimant reported to multiple physicians that he underwent surgery for the 1998 injury and had residual stiffness of the left ring and middle fingers. The claimant reported to Dr. Jin that he had reduced ROM of the fingers prior to the compensable injury. However, no claim was filed for the injury and therefore, it cannot be included in his PTO threshold WPI, and the non-compensable pre-existing ROM impairment is to be apportioned from his total WPI of the left upper extremity. Because Dr. Mukkamala, Dr. Guberman, and Dr. Walker all failed to apportion for the prior left-hand injury, their findings of WPI are unreliable for WPI threshold purposes.

See Exhibit 17 at 7-8. Arch does not take issue with this finding and agrees all three reports should not be considered as they are not reliable. After accurately excluding those three reports, the BOR then made a series of errors. First, the BOR took Dr. Soulsby's recommendation of 39% impairment and combined that value with Dr. Dudee's 27% visual system rating to reach 55% whole person impairment. Pursuant to the holdings in Repass and Magnetech, the BOR is not permitted to select values from different physicians' reports and combine those into a new

impairment rating not recommended by an evaluating physician. In other words, the BOR is not permitted to “[substitute] its own calculation of the amount of [a claimant’s] whole person impairment for that of a calculation performed by a physician.” Second, the BOR was obligated, as a matter of law, to select Dr. Jin’s medical report to be the most reliable as her report is the only complete report on record as she included both impairment for the dermatological injury and the visual system injury. Examining physicians must examine all of the relevant information available to them and clearly identify in their respective reports what they have examined and considered and how they have arrived at their conclusions. Dr. Jin’s report authored the only opinion taking into account all of the claimant’s compensable injuries. All other reports are flawed for failing to apportion or including impairment for noncompensable body parts.

Third, even if a fact-finder is permitted to pick and choose impairment recommendations from various reports contrary to Repass and Magnetech, Dr. Dudee’s impairment recommendation, on its face, is unreliable because Dr. Dudee rated the claimant’s *uninjured left eye and included that rating in his overall impairment recommendation*. See W. Va. Code § 23-4-6(i). As described above, Dr. Dudee found 100% impairment of the right eye and the *5% for the left eye which is not covered by this claim*. Dr. Dudee, *using including the impairment from the left eye which is not covered by this claim*, that the claimant had a 29% impairment of the visual system which converts to a WPI of 27% due to the compensable injury. Thus, the BOR essentially selected Dr. Dudee’s visual system impairment recommendation over Dr. Dagher’s report even though Dr. Dudee impermissibly included impairment for a noncompensable body, the left eye. Moreover, the AMA Guides, Fourth Edition, instructs physicians to “realize that change may have occurred” when evaluating

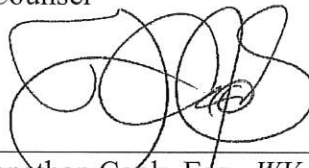
impairment. Page 2-9. Thus, impairment may improve which is the case here with respect to the visual system impairment. Id. The BOR discounting Dr. Dagher's report because he found less impairment than the other two doctors who rated the eye is not permissible. Moreover, the BOR was not permitted to assign more weight to Dr. Dudee's report because Dr. Dudee included impairment for a noncompensable body part. Thus, the WVICA's decision, which essentially permits physicians to rate noncompensable body parts as well as fact-finders to disregard this Court's Repass and Magnetech decisions, is wrong factually and legally and should be reversed.

VII. CONCLUSION

Based on the facts of this claim, the evidence of record, and the arguments as set forth REVERSE the WVICA decision dated May 1, 2023, and mandate order dated June 1, 2023.

Respectfully submitted,

Arch Coal, Inc.,
By Counsel

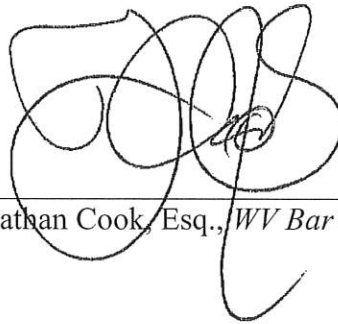
A handwritten signature in black ink, appearing to be 'T. Jonathan Cook', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, T. Jonathan Cook, Esq., attorney for the Appellant, Arch Coal, Inc., hereby certify that a true and exact copy of the foregoing “Appellant Brief on Behalf of Arch Coal, Inc.”, was served upon the Appellee by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 5th day of July 2023, addressed as follows:

Edward Garth Atkins, Esq.
1337 Morningside Drive
Charleston, WV 25314

A handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke extending downwards.

T. Jonathan Cook, Esq., *WV Bar ID #9057*