

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

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ARCH COAL, INC.,

Petitioner/Employer,

V.

Supreme Court No. 23-391

JOBIE HOWARD,

Respondent/Claimant.

**RESPONSE BRIEF ON BEHALF OF RESPONDENT/CLAIMANT  
JOBIE HOWARD**

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## TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES.....	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CLAIM.....	1
IV.	SUMMARY OF ARGUMENT.....	4
V.	STATEMENT REGARDING ORAL ARGUMENT.....	5
VI.	ARGUMENT.....	5
VII.	CONCLUSION.....	12

## **I. Table of Authorities**

W.Va. Code 23-4-6(n)(1).....	4, 5, 7
W.Va. Code 23-4-1g(a).....	4, 9
W.Va. Code 23-5-12a(c)(2) .....	6
W.Va. Code 51-11-10 .....	6
W.Va. Code 23-5-15 .....	6
W.Va. Code 23-5-12(b) .....	6
W.Va. Code 23-5-12(b)(5).....	6
<u>Rhodes v. Workers Compensation Division and Anchor Glass Container</u> , 543 S.E.2d 289, 293 (WV 2000) .....	7
<u>Conley v. Workers Compensation Division and Hercules, Inc.</u> , 199 W.Va. 196, 202, 483 S.E.2d 542, 548 (1997).....	7
<u>Repass v. Worker’s Compensation Division</u> , 212 W.Va. 86, 569 S.E.2d 162 (2002) .....	10
<u>Magnetech Industrial Services v. York</u> , No. 14-0386 .....	10
<u>Miller v. Dynamic Energy, Inc.</u> , 2021 WV Lexis 576, 2021 WV 5150025, Appeal No. 20-0550, 11/5/21 .....	11

## **II. Assignments of Error**

The Petitioner/Employer asserts that the decision of the West Virginia Intermediate Court of Appeals dated May 1, 2023 was entered in error. Respondent/Claimant asserts there is no error, and the Intermediate Court of Appeals decision is supported by the facts and the law.

## **III. Statement of the Claim**

Mr. Jobie Howard (Claimant/Respondent) was working for Arch Coal Company on 05/12/2010. While working on a panel box, a wrench came in contact with a bus bar and sent a ball of fire out that burned the left side of his face, his ear, his left arm and shoulder. Mr. Howard

also suffered a burn injury to his right eye. He was transported by helicopter to Cabell Huntington Hospital where he was treated in the burn unit for twenty-seven days.

Following treatment Mr. Howard was evaluated for physical impairment. For the eye injury a 21% WPI was recommended by Michael A. Krasnow, D.O., Ph.D by report dated 8/22/12 (Exhibit 2). Overall for burn injuries, including the right eye, the claimant was awarded a 57% whole person impairment. *See* award letter of January 8, 2015 (Exhibit 3).

Based upon the award letter of January 8, 2015, claimant filed a petition for a permanent total disability award on September 9, 2015 (See Exhibit 3), and the claim was referred to the Permanent Total Disability Review Board for disability determination. Submitted before the Permanent Total Disability Review Board were the reports of P. B. Mukkamala, MD of June 20, 2017 (Exhibit 5), Ghasson Y. Dagher, MD of May 17, 2017 (Exhibit 4) and Bruce A. Guberman of October 15, 2018 (Exhibit 7). In its final recommendation of October 5, 2020 (Exhibit 8) the Board determined the Claimant/Appellee sustained a total of 46% WPI. In its final recommendation the Board observed “This is a very close case for the Board.”

Thereafter the Claim Administrator entered an order denying the claimant’s application for a permanent total disability, and the claimant filed a protest. The claim was thereafter referred to the Workers’ Compensation Board of Review (formerly the Office of Judges) for further determination. Relevant evidence before the Board included the following:

(1) Michael A. Krasnow, D.O., Ph.D. report dated 5/30/2012 (Exhibit 1) (for the Claimant/Respondent)

(2) Michael A. Krasnow, D.O., Ph.D. report dated 8/22/2012 (Exhibit 2) (for the Claimant/Respondent)

(3) Jitander S. Dudee, M.D. report dated 2/19/21 (Exhibit 10) (for the Claimant/Respondent)

(4) Jitander S. Dudee, M.D. report dated 6/6/22 (Exhibit 16) (for the Claimant/Respondent)

(5) David L. Soulsby, M.D. report dated 6/8/21 (Exhibit 14) (for Employer/Petitioner)

(6) Chuan Fang Jin, MD. Report dated 2/14/22 (Exhibit 15) (for the Employer/Petitioner)

Claimant submitted reports from Bruce A. Guberman, MD (Exhibit 7 and Exhibit 11) and Richard B. Walker, MD. (Exhibit 13). Those reports were determined unreliable by the Board of Review, a finding with which the claimant disagrees but will not pursue.

There are two distinct injuries in this claim, residuals of a burn injury to the upper body and right eye injury. For the injury to the eye, Dr. Krasnow offered an opinion of 21% WPI; for the eye Dr. Dudee reached a conclusion of 27%. For the injury to the upper body Dr. Soulsby offered an opinion of 39% WPI; Dr. Jin opined 38% WPI. It should be noted that Dr. Dudee in his report of June 6, 2022, Exhibit 16, combined his finding of eye impairment with the physical injury findings of Dr. Jin for a total WPI of 54% using the Combined Values Table. Specifically, Dr. Dudee responded as follows:

3. The whole person impairment from orthopedic and dermatological injury as calculated by Dr. Jin on page 11 of his report dated April 24, 2022 is 37%.

4. The whole person impairment from combining the above two values in the combined values chart on Page 322 of the Guide gives a value of 54% for whole person impairment due to the visual, orthopedic and dermatological injury. (Exhibit 16)

Rather than combining the opinions of Dr. Jin and Dr. Dudee, the Board of Review combined Dr. Dudee's opinion of impairment with that of Dr. Soulsby. The Board of Review in its decision found Dr. Soulsby's impairment of 39% was the most reliable physical impairment

and combined that rating with that of Dr. Dudee's opinion of 27% for a total whole person impairment of 55% using the Combined Values Table. (Exhibit 17)

The employer appealed the Board of Review's decision to the Intermediate Court of Appeals. In upholding the Board of Review's decision, the Intermediate Court stated:

After review, we conclude that the Board did not err in combining the valid impairment ratings of two physicians to determine Mr. Howard's total WPI. Dr. Soulsby is not an ophthalmologist and was not qualified to rate Mr. Howard's visual impairment. Similarly, Dr. Dudee specializes in ophthalmology and was not qualified to rate Mr. Howard's physical impairment. Since neither physician could rate the impairment to both the physical injury and visual injury, it was reasonable for the Board to combine the reports of the two physicians to determine the total WPI. Further the Board did not err in adopting the findings of Drs. Soulsby and Dudee. (Exhibit 18)

#### **IV. Summary of Argument**

Evidence in the form of medical reports from David L. Soulsby, M.D. dated 9/8/21 (Exhibit 14), Chuan Fang Jin, M.D. (Exhibit 15) and Dr. Jitander Dudee (Exhibit 16) state that the claimant has sustained a permanent total disability greater than 50% in accordance with W.Va. Code 23-4-6(n)(1).

W.Va. Code 23-4-6(n)(1) establishes elements for a permanent total disability. One requirement is that the claimant must establish a 50% whole person impairment.

There are conflicting medical reports of disability. According to W.Va. Code 23-4-1g (a) when a conflict exists:

If, after weighing all of the evidence regarding an issue in when 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.

The Board of Review and the Intermediate Court of Appeals weighed the evidence and found in favor of the claimant when there is a conflict of the evidence. The Board and the Intermediate Court of Appeals found that the claimant suffered an impairment greater than 50%.

## **V. Statement Regarding Oral Argument**

The case before the Court has been thoroughly briefed and claimant believes oral argument is not necessary.

## **VI. Argument**

W.Va. Code 23-4-6(n)(1), relating to eligibility for a permanent total disability award, states as follows:

. . . 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.

Whether Dr. Dudee's opinion of WPI of 54% (Exhibit 16), the Board of Review Decree of 55% (Exhibit 17) or the Intermediate Court of Appeals decision (Exhibit 18) is immaterial. The evidence fully supports a WPI greater than 50%.

**A. Standard of Review**

The basis for an appeal of a decision of the West Virginia Intermediate Court of Appeals to the West Virginia Supreme Court of Appeals in Worker' Compensation case is found in W.Va. Code 23-5-12a(c)(2) which provides as follows:

(2) A decision of the Intermediate Court of Appeals is binding upon the Insurance Commissioner, other private insurance carriers, and self-insured employers, whichever is applicable, with respect to the parties involved in the particular appeal. The Insurance Commissioner, other private insurance carriers, and self-insured employers, whichever is applicable, shall have the right to seek judicial review of a final decision of the Intermediate Court of Appeals, pursuant to § 51-11-10 of this code, irrespective of whether the party appeared or participated in the appeal to the Intermediate Court of Appeals.

W.Va. Code 51-11-10 provides as follows:

§ 51-11-10. Discretionary review by Supreme Court of Appeals by petition

(a) A party in interest may petition the Supreme Court of Appeals for appeal of a final order or judgment of the Intermediate Court of Appeals in accordance with rules promulgated by the Supreme Court of Appeals.

(b) Upon the proper filing of a notice of appeal in the Supreme Court of Appeals, the order of judgment of the Intermediate Court of Appeals may be stayed pending the appeal, in accordance with rules promulgated by the Supreme Court of Appeals.

(c) The Supreme Court of Appeals has discretion to grant or deny the petition for appeal or certiorari of a decision by the Intermediate Court of Appeals.

Acts 2021, c.,80, eff. June 30, 2021.

Before June 20, 2021 W.Va. Code 23-5-15 dealt with appeals to the Supreme Court of Appeals of Workers' Compensation cases. Whether the provisions of W. Va. Code 23-5-12(b) apply is unclear but it is assumed that the "clearly wrong" standard still applies on appeal.

This Court is required to reverse a final order of the West Virginia Intermediate Court of Appeals when the substantial rights of the petitioner/appellant have been prejudiced because that final order is clearly wrong in view of the reliable, probative, and substantial evidence on the whole



record or is wrong as a matter of law. W.Va. Code § 23-5-12(b)(5). The West Virginia Supreme Court of Appeals addressing the prior identical standard stated in Rhodes v. Workers' Compensation Division and Anchor Glass Container, 543 S.E.2d 289, 293 (W.Va. 2000), that

When the Workers' Compensation Appeal Board reviews a ruling from the West Virginia Office of Judges it must do so under the standard of review set out in W.Va. Code § 23-5-12(b), and failure to do so will be reversible error.

The Rhodes court further stated that W.Va. Code § 23-5-12(b) also states, in relevant part, that:

[The WCAB] shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Rhodes v. Workers' Compensation Division and Anchor Glass Container, 543 S.#.2d 289, 293 (W.Va. 2000), citing Conley v. Workers' Compensation Division and Hercules, Inc., 199 W.Va. 196, 202, 483 S.E.2d 542, 548 (1997). In the instant claim the decision of the BOR and the Intermediate Court of Appeals is not affected by other error of law nor is clearly wrong in view of reliable, probative and substantial evidence on the whole record; and is not arbitrary or capricious or characterized by abuse of discretion.

**B. The WV Intermediate Court of Appeals decision is not clearly wrong because the fact finder impermissibly substituted its own calculation of the amount of the claimant's whole person impairment for that of a calculation performed by a physician.**

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 benefits. See W.Va. Code § 23-4-6(n)(1) supra. In this case, the Board of

Review and the Intermediate Court of Appeals analyzed the record and concluded the claimant/respondent met the 50% threshold.

There are two main areas of impairment: the burns to claimant's body and the injury to his right eye.

There are a number of reports on the claimant's body impairment. For the claimant/respondent the reports of Bruce Guberman, MD (Reports dated 10/15/18 (Exhibit 7) and 4/28/21 (Exhibit 11) were tendered. Also tendered on behalf of the claimant/respondent were the reports of Robert B. Walker, MD dated 3/5/21 (Exhibit 12) and 5/20/21 (Exhibit 13). For the petitioner/employer were tendered the reports of P. B. Mukkamala, MD dated 6/20/17 (Exhibit 5), the report of David Soulsby, MD of June 8, 2021 (Exhibit 14) and Chuan Fang Jin, MD of 4/14/22 (Exhibit 15). The reports of P. B. Mukkamala, MD, Bruce Guberman, MD and Robert Walker, MD were determined to be unreliable by the Board of Review because they did not take into consideration a pre-existing injury. This left the reports of David Soulsby, MD and Chuan Fang Jin, MD presumably reliable with regard to the physical injury.

The eye impairment is the subject of three opinions. In the report of Michael A. Krasnow, MD dated May 30, 2012, that physician summarized the injury to the claimant's right eye (Exhibit 1). In a supplemental report of August 22, 2012, Dr. Krasnow offered the opinion that the burn injury to the claimant's right eye resulted in an impairment of 21% (Exhibit 2). It is to be noted that an award of 21% permanent partial disability was initially based on that report. See Exhibit 3.

The claimant offered the records of Dr. Jitander S. Dudee, the claimant's treating physician (See Exhibit 9) in support of his IME (Exhibit 10). In his report of February 19, 2021 (Exhibit 10) Dr. Dudee summarized claimant's right eye impairment at 27%. In his report of June 6, 2022 Dr.

Dudee combined claimant's eye impairment with to Dr. Jin's opinion of 37% for a total physical impairment of 54%. (See Exhibit 16)<sup>1</sup> It is not true, as argued by the employer/petitioner in its brief, that Dr. Dudee rated impairment to the left eye. Dr. Dudee observed:

Mr. Howard has significant visual impairment in his right eye caused by corneal scarring resulting directly from his burn injury suffered on May 12<sup>th</sup>, 2010.

The employer/petitioner offered the report of Ghassan Dagher, MD of 5/17/17 (Exhibit 4). Dr. Dagher offered the opinion that the burn to claimant's right eye resulted in a 1% whole person impairment and any additional impairment is the result of a pre-existing eye condition.

In its decision the Board of Review acknowledged the conflict of opinions as to the impairment to the claimant's right eye. In resolving this conflict and applying W.Va. Code 23-4-1g(a) the Board of Review decision of 11/14/22 (Exhibit 17) states as follows:

Regarding the 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 §23-4-1g, 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 15 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 §23-4-1g, 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.

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<sup>1</sup> Combining Dr. Soulsby's opinion of 39% WPI with Dr. Krasnow's finding of 21% WPI for the eye injury results in a combined impairment of 52% using the Combined Values Table. See Guides, p. 322. Combining Dr. Jin's opinion of 38% WPI with Dr. Krasnow's opinion of 21% WPI results in a 51% WPI. See Guides, p 322. No matter whether one uses Dr. Krasnow's report or Dr. Dudee's report the result is the same – the claimant/respondent has a WPI greater than 50%.

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.

The Intermediate Court of Appeals affirmed the decree of the Board of Review and stated:

After review, we conclude that the Board did not err in combining the valid impairment ratings of two physicians to determine Mr. Howard's total WPI. Dr. Soulsby is not an ophthalmologist and was not qualified to rate Mr. Howard's visual impairment. Similarly, Dr. Dudee specializes in ophthalmology and was not qualified to rate Mr. Howard's physical impairment. Since neither physician could rate the impairment to both the physical injury and visual injury, it was reasonable for the Board to combine the reports of the two physicians to determine total WPI. Further, the Board did not err in adopting the findings of Drs. Soulsby and Dudee.

The employer/petitioner asserts in its brief that it is impermissible for the Board of Review to combine Dr. Soulsby's assessment of physical disability of 39% and Dr. Dudee's opinion of 27% for a total impairment of 55%, citing Repass v. Worker's Compensation Division, 212 W.Va. 86, 569 S.E.2d 162 (2002) and Magnetech Industrial Services v. York, No. 14-0386. Respondent disagrees.

Repass, supra, is a decision that deals with the evaluation model of Range of Motion (ROM) and Diagnostic Related Estimate (DRE) model and when they are to be used in evaluating whole person impairment. It does not say that the Appeal Board cannot come to a conclusion using findings from different examiners within these models. Repass, supra, does not stand on the proposal that differing medical findings over different examiners cannot be used to determine impairment.

In Magnetech, supra, there were three physicians who offered opinions of impairment. All of the three opinions were partially discredited. This opinion did not apply the Guides Combined Value Table.

The case of Miller v. Dynamic Energy, Inc., 2021 WV Lexis 576, 2021 WV 5150025, Appeal No. 20-0550, 11/5/21 applies to the case at bar. In Miller, *supra*, Bruce Guberman, MD, determined that the claimant had a 9% permanent partial disability to claimant's cervical and lumbar spine. Joseph Grady, MD, determined the claimant had 7% permanent partial impairment for injury to right shoulder. The Intermediate Court applied the combined values table as follows:

After review, we agree with the reasoning and conclusions of the Board of Review. For the compensable injury, Dr. Guberman found 9% impairment for the cervical and lumbar spines. Dr. Grady found 7% right shoulder impairment. Both evaluations are reliable assessments of Mr. Miller's impairment. The American Medical Association's *Guides*, and by extension the Combined Values Chart, have been adopted as the basis for calculating workers' compensation impairment in West Virginia. When Dr. Guberman's 9% impairment rating is combined with the 7% impairment that Dr. Grady found, the result is 15% impairment, as the Board of Review found. Therefore, the decision of the Board of Review is affirmed.

In the case at bar the Board of Review and the West Virginia Intermediate Court of Appeals based their decisions on the opinions of whole person impairment of Dr. Soulsby and Dr. Dudee and then applied the Combined Values Table, a completely ministerial step, to reach a conclusion of 55% whole person impairment.

In the case at bar the Board of Review and the West Virginia Intermediate Court of Appeals merely completed the determination of impairment by applying the Combined Values Table. It did not change the opinions of Dr. Soulsby and Dr. Dudee.

However, should this Court determine that the combination of the opinions of Dr. Dudee and Dr. Soulsby and the application of the Combined Values Table by the Board of Review were impermissible then this Court, using its power to modify a decision, can find that the combination of Dr. Dudee's opinion and Dr. Jin's opinion applies and the evidence supports a decision of 54% whole person impairment thus establishing claimant's claim to a permanent disability award. (See Exhibit 16)

## **VII. Conclusion**

There is no error of law associated with this appeal. The issue is the application of the facts to the law. Applying the facts to the law establishes that the claimant has an impairment greater than 50% and is eligible for a permanent total disability finding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Edward Garfield Atkins, counsel for Respondent/Claimant, hereby certify that a true and exact copy of *Response Brief on Behalf of Respondent/Claimant Jobie Howard* was served via U.S. Mail on this 2<sup>nd</sup> day of August, 2023 to counsel of record:

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