

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW**

IN THE MATTER OF:

JCN: 2021000333

Michael L. Eden,
CLAIMANT

D.O.I.: 06/18/2020

and

KGPCO, Inc.,
EMPLOYER

ORDER

PARTIES:

Claimant, Michael L. Eden, by counsel, Reginald D. Henry
Employer, KGPCO, Inc., by counsel, Daniel G. Murdock

ISSUE:

The claimant protested an Order of the Claim Administrator dated March 19, 2021, granting the claimant a 10% permanent partial disability award.

DECISION:

It is ORDERED that the Order of the Claim Administrator dated March 19, 2021, be REVERSED, and the claimant is hereby granted a 27% permanent partial disability award, representing an increase in permanent partial disability of 17%.

RECORD CONSIDERED:

See attached.

FINDINGS OF FACT:

1. According to the Report of Injury dated June 18, 2020, the claimant was employed as a warehouse man. On June 18, 2020, he sustained a compensable injury involving his cervical spine, left shoulder, and right leg.
2. The claimant has introduced into the record an operative report dated July 10, 2020, reflecting that the claimant underwent a debridement procedure for his right lower extremity as a result of a crush injury.

3. The claimant introduced into the record a cervical MRI report dated November 12, 2020, reflecting multilevel neural foraminal stenosis. The examiner commented that the test was somewhat degraded due to excessive patient motion.

4. The claimant introduced into the record an MRI of his left upper extremity dated November 12, 2020. It revealed a partial bursal surface infraspinatus tendon tear and mild supraspinatus tendinopathy. The examiner believed these findings could be acute in nature, with the remainder of the findings being chronic.

5. The claimant underwent an independent medical evaluation from Dr. Joseph E. Grady II on March 10, 2021. Dr. Grady took a medical history from the claimant. The claimant indicated that he had undergone two surgical procedures involving his right leg. Dr. Grady described the claimant's right leg injury as a complex wound. After reviewing the claimant's clinical history and performing a physical examination, he concluded that the claimant had reached his maximum degree of medical improvement with residual impairment. Addressing the claimant's cervical spine, Dr. Grady indicated there was no specific gradable impairment pursuant to table 75 of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Functionally, the claimant demonstrated 3% impairment. Referring to Rule 20, Dr. Grady placed the claimant in the cervical category II with 5% impairment. He attributed half of the claimant's impairment to pre-existing conditions and, rounding up, assigned 3% whole-person impairment for the claimant's cervical spine. With regard to the claimant's left shoulder, Dr. Grady found 2% impairment for loss of range of motion. With regard to the claimant's right ankle, he found 3% impairment for loss of range of motion. Addressing the claimant's right leg scarring, Dr. Grady placed the claimant into class I and, referring to table 2 on page 280 of the Guides, recommended a 2% whole-person impairment rating for the claimant. His combined recommendation of impairment was 10%.

6. By Order of the Claimant Administrator dated March 19, 2021, the claimant was granted a 10% permanent partial disability award. The claimant protested this Order.

7. The claimant introduced into the record an independent medical evaluation report by Michael Kominsky, DC, dated August 18, 2021. Dr. Kominsky concurred with Dr. Grady that the claimant had reached his maximum degree of medical improvement but disagreed with him regarding the degree of residual whole-person impairment. Dr. Kominsky took a work history from the claimant, which revealed that the claimant had worked as either a forklift operator or warehouse man for over 30 years. The claimant complained of persistent pain in his right leg and has not returned to employment. The claimant further reported significant reduction in his activities of daily living since the compensable injury. Referring to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Kominsky assigned 4% impairment for the claimant's cervical spine pursuant to table 75. For the claimant's abnormal motions, he assigned 5% impairment for a total of 9% whole-person impairment. Referring to Rule 20 guidelines, he placed the claimant in cervical category II and adjusted the claimant's impairment to 8%, from which 2% was subtracted for pre-existing degenerative changes. With regard to the claimant's left shoulder, his range of motion deficits equaled 4% impairment. With regard to the claimant's right ankle, his range of motion deficits equaled 5% impairment. Dr. Kominsky placed the claimant in class II for the claimant's right leg grafting and

recommended a 17% whole-person impairment. His total recommendation of impairment was 29%.

8. The claimant introduced into the record an independent medical evaluation report by Dr. Robert B. Walker, dated October 13, 2021. Dr. Walker noted in his report that the claimant represented that he has to apply skin lubricants to his legs several times per day to avoid severe drying and cracking and that he has to apply sunblock whenever the affected areas are exposed to sunlight. The claimant further stated that his activities of daily living had been restricted since the compensable injury. Dr. Walker concurred that the claimant had reached his maximum degree of medical improvement with residual impairment. Addressing the claimant's cervical spine, Dr. Walker placed the claimant into Class IIB pursuant to Table 75 for 4% impairment, with an additional 7% impairment for loss of range of motion resulting in 11% whole person impairment. Referring to Rule 20, he placed the claimant into cervical category II and adjusted the claimant's impairment to 8%. He subtracted 2% impairment for the claimant's pre-existing conditions, leaving 6% impairment. Addressing the claimant's left shoulder, he found 5% impairment. In addressing the claimant's right ankle, he found 4% impairment for loss of range of motion. Dr. Walker placed the claimant into class 2 from Table 2 on page 280 in addressing the right leg scarring. He recommended a 15% impairment. His combined recommendation of impairment was 27%.

9. The employer introduced into the record an independent medical evaluation report by Dr. Marsha Bailey, dated April 5, 2022. Dr. Bailey, after reviewing the medical history and performing a physical examination of the claimant, concurred that the claimant had reached his maximum degree of medical improvement. Addressing the claimant's cervical spine, pursuant to the range of motion model, she placed the claimant in category IIB under Table 75 for 4% impairment. She indicated that all of the claimant's measurements were pain-restricted and therefore invalid. She indicated that, under the range of motion model, the claimant had 4% impairment. She placed the claimant in the Cervical Category II pursuant to 85 C.S.R. 20 and adjusted his impairment to 5%, but apportioned the entire 5% impairment to the claimant's pre-existing conditions. Addressing the claimant's left shoulder complaints, she indicated that the claimant's range of motion deficits represented 4% whole person impairment, but apportioned all of the impairment to pre-existing conditions. Addressing the claimant's right ankle, Dr. Bailey indicated that the claimant's range of motion was normal and assigned no impairment. For the claimant's right leg, she placed the claimant into Class I, stating there was no limitation in the performance of a few activities of daily living for the claimant, and no intermittent treatment was required. She indicated that the claimant's present complaints were neuropathic in nature and solely the result of his pre-existing conditions. She recommended 5% whole-person impairment. Her total recommendation of impairment for the compensable injury was 5%.

10. Counsel for the claimant submitted a closing argument on October 19, 2021.

DISCUSSION:**Standard of Review**

W. Va. Code § 23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon 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. No issue may 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. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

Permanent Partial Disability

The issue is the amount of claimant's permanent partial disability. This award is for residual disability, which will remain with the claimant after his or her recovery. It is referred to as "partial" because, even though it may affect an individual's ability to work and enjoy life, the individual is not totally disabled because of it.

If a party protests the Order pertaining to an award, the parties have an opportunity to present evidence concerning the claimant's disability. Evidence of permanent partial disability in the form of testimony and reports by physicians and other experts may be submitted. The fact that a particular expert may find a certain percentage of permanent partial disability does not mean the Board of Review is required to accept it. All reliable, probative and substantial evidence will be weighed and considered in determining if the permanent partial disability awarded is correct.

For injuries occurring after May 12, 1995, under W. Va. Code § 23-4-6 and W.Va. C.S.R. § 85-20-1, *et seq.*, permanent partial disability awards are based on medical impairment. The Commission has adopted the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, as the measure of whole body medical impairment. In cases where the examination upon which the award was based was conducted

on or after June 14, 2004, range of motion limitations, as set forth in W.Va. C.S.R. § 85-20-1, *et seq*, apply to some types of injuries.

Analysis

In evaluating the four independent medical evaluation reports of record, Dr. Bailey's report is clearly an outlier. In assessing the claimant's cervical impairment, Dr. Bailey alone attributed all of the claimant's impairment to his pre-existing conditions, notwithstanding that Dr. Grady assigned only half of the claimant's impairment to pre-existing conditions, while Drs. Kominsky and Walker only assigned 25%. Similarly, although Dr. Bailey found 4% impairment to the claimant's left shoulder for loss of range of motion, she once again assigned all of the impairment to pre-existing conditions. She was alone in finding that the claimant had a normal range of motion in his right ankle. For the purposes of this decision, the report of Dr. Bailey is not found to be credible.

The greatest disagreement between the other evaluators involves the placement of the claimant into a class under Table 2 regarding his right leg skin graft. For a class I placement, which has an impairment range of 0% to 9%, the following findings must be made:

Signs and symptoms of skin disorder are present or only intermittently present, and there is no limitation in the performance of few activities of daily living, although exposure to certain chemical or physical agents might increase limitation temporarily, and no treatment or intermittent treatment is required.

For placement in class II with an impairment range of 10% to 24%, the following findings must be made:

Signs and symptom of skin disorder are present or intermittently present, and there is limitation in the performance of some of the activities of daily living, and intermittent to constant treatment may be required.

The designated record clearly reflects that the claimant's activities of daily living have been substantially reduced due to his compensable injury. Dr. Grady even indicated that he did not believe the claimant could return to his former employment, and the claimant in fact does not presently work. According to Dr. Walker, the claimant requires ointments and sunscreen to prevent additional damage to his right leg. Placement of the claimant in class II is supported by the credible medical evidence.

The report of Dr. Walker, recommending 27% impairment is the best supported report of record. With regard to the cervical spine, left shoulder, and right ankle, his measurements are comparable to the other reports, and his recommendation of right leg impairment is supported by the report of Dr. Kominsky.

CONCLUSIONS OF LAW:

1. As a result of the compensable injury of June 18, 2020, the claimant sustained injuries to his cervical spine, left shoulder, and right leg.
2. A preponderance of credible medical evidence establishes that the claimant has reached his maximum degree of medical improvement with residual impairment.
3. A preponderance of credible medical evidence establishes that the claimant has sustained a 27% whole-person impairment attributable to the compensable injury.

Accordingly, it is ORDERED that the Order of the Claim Administrator dated March 19, 2021, be REVERSED and the claimant be granted a 27% permanent partial disability award, representing an increase of 17% permanent partial disability benefits.

APPEAL RIGHTS:

Under the provisions of West Virginia Code § 23-5-12a, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or final action of the Board of Review. **The appeal shall be filed with the West Virginia Intermediate Court of Appeals (304-558-3258).**

Date: October 7, 2022


Nick Casey, Chairperson

cc: MICHAEL L EDEN
REGINALD D HENRY - COUNSEL FOR CLAIMANT
KGPCO INC
DANIEL G MURDOCK - COUNSEL FOR EMPLOYER
LIBERTY INSURANCE CORPORATION

JCN: 2021000333

Date: October 7, 2022

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of March 19, 2021, regarding PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified
Document Date: 6/18/2020
Submit Date: 8/31/2021
Author: EMPLOYEES AND PHYSICIANS REPORT OF INJURY

Document Type: Not Specified
Document Date: 7/10/2020
Submit Date: 8/31/2021
Author: PRINCETON COMMUNITY HOSPITAL/OPERATIVE REPORT

Document Type: Not Specified
Document Date: 11/12/2020
Submit Date: 8/31/2021
Author: COMMUNITY RADIOLOGY MRI/UPPER EXTREMETY

Document Type: Not Specified
Document Date: 11/12/2020
Submit Date: 8/31/2021
Author: COMMUNITY RADIOLOGY MRI/CERVICAL SPINE

Document Type: Not Specified
Document Date: 8/18/2021
Submit Date: 8/31/2021
Author: DR. MICHAEL KOMINSKY, D.C./IME REPORT

Document Type: Not Specified
Document Date: 10/13/2021
Submit Date: 10/19/2021
Author: DR. ROBERT WALKER, MD./IME REPORT

Employer Evidence

Document Type: Not Specified
Document Date: 3/10/2021
Submit Date: 6/28/2022
Author: IME/JOSEPH GRADY MD

Document Type: Not Specified
Document Date: 4/5/2022
Submit Date: 6/28/2022
Author: REPORT OF MARSHA BAILEY MD

CLOSING ARGUMENTS:

Party Submitted: Claimant
Letter Date: 10/19/2021