

No. \_\_\_\_\_

**BEFORE THE STATE OF WEST VIRGINIA  
INTERMEDIATE COURT OF APPEALS**

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**IN THE MATTER OF:**

**KGPCO, INC.,  
Petitioner,**

**v.**

**JCN: 2017003462**

**MICHAEL EDEN,  
Respondent.**

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**PETITION FOR APPEAL FROM A DECISION OF THE WORKERS' COMPENSATION  
BOARD OF REVIEW**

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Respectfully submitted,  
**KGPCO, INC.,**

By counsel:



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**November 15, 2022**

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**I. STATEMENT OF THE CASE**

This claim comes before the Court pursuant to the employer’s appeal from the October 7, 2022, Order of the Worker’s Compensation Board of Review. (**Ex. 1**). That Order reversed Claims Administrator’s March 19, 2021, order granting the claimant a ten percent (10%) permanent partial disability (“PPD”) award, and awarded the claimant an additional seventeen percent (17%) in PPD benefits. (**Ex. 2**). The Board’s Order is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, is arbitrary, and is characterized by error of law. Accordingly, the employer requests that the Board of Review’s October 7, 2022, Order be REVERSED, and the March 19, 2021, order of the Claims Administrator granting a ten percent (10%) PPD award be REINSTATED.

**II. SUMMARY OF ARGUMENT**

Under West Virginia law, PPD awards are required to be made in accordance with the criteria set forth in the AMA’s *Guides to the Evaluation of Permanent Impairment*, Fourth Edition (“the *Guides*”). In this case, the opinion of Dr. Walker, upon which the Board’s Order is premised, as well as the Board’s Order itself, were not rendered in accordance with the criteria set forth in the *Guides* for the determination of whole person impairment resulting from scarring. As such, they cannot form the basis for an award of benefits.

**III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This claim involves complicated medical issues, and the employer would request the opportunity to present oral argument on this matter.

**IV. STATEMENT OF FACTS**

The claimant, Michael Eden, was working in a warehouse on June 18, 2020, when he was injured when a large roll of metal cable rolled down a ramp and struck him; he sustained a

crushing injury to his legs, and a laceration on his right leg. He was taken by ambulance to the Emergency Room at Princeton Community Hospital immediately after the incident. X-rays of the right tibia and fibula noted some degenerative changes of the knee and ankle, but no acute abnormality was seen. An x-ray of the right ankle noted some degenerative changes, but no fracture or dislocation. Regarding the laceration on his right leg, the claimant underwent complex wound closure and debridement performed by Dr. Mullens. The claimant was discharged,

The claimant followed up with Dr. Mullens on July 10, 2020, and underwent split-thickness skin grafting on the medial and lateral aspects of the right lower extremity encompassing a 111 cm<sup>2</sup> region, with the donor tissue extracted from the anterior aspect of the right thigh.

The claimant also had complaints of neck and left shoulder pain. An MRI of the neck performed on November 12, 2020, indicated small disc osteophyte complexes at levels C5 to C7, and what appeared to be chronic neural foraminal stenosis. An MRI of the left shoulder that day noted a partial tear of the infraspinatus tendon and some mild supraspinatus tendinopathy, which appeared to be acute, and an age indeterminate labral tear and likely chronic changes with thinning of the glenohumeral joint cartilage and osteoarthritic changes of the AC joint. The claimant underwent 12 sessions of physical therapy for his neck and shoulder at Princeton Community Hospital from November 17, 2020, through December 21, 2020.

The claimant was evaluated for permanent impairment by Dr. Joseph Grady on March 10, 2021. **(EX 3)**. Dr. Grady found the claimant to have reached maximum medical improvement for his injuries, and that he required no additional treatment. Regarding permanent impairment for the cervical injury, Dr. Grady found no specific ratable impairment for the cervical strain on Table 75 on page 113 of the *AMA Guides*. Under Table 76 on page 118 of the *Guides*, he found a zero percent (0%) impairment rating for cervical flexion and extension. Under Table

77 on page 120 of the guides, he found a zero percent (0%) impairment rating for cervical right lateral flexion and a one percent (1%) whole person impairment for cervical left lateral flexion. Under Table 78 on page 122 of the Guides, he found a one percent (1%) whole person impairment for cervical right and left rotation. He noted no radiculopathy and found a total of three percent (3%) whole person impairment for the cervical strain utilizing the range of motion model. Applying Rule 20, he placed the claimant under Cervical Category II on Table 85-20-E and adjusted the impairment for the cervical strain to a five percent (5%) whole person impairment. Dr. Grady apportioned this impairment between the claimant's pre-existing multilevel degenerative changes of the cervical spine, finding a three percent (3%) whole person impairment of cervical spine resulted from the compensable injury.

Regarding impairment for the claimant's left shoulder injury, Dr. Grady found a two percent (2%) upper extremity impairment for left shoulder flexion and a zero percent (0%) impairment for extension under Figure 38 on page 43 of the *Guides*. Under Figure 41 on page 44 of the *Guides*, he found a one percent (1%) upper extremity impairment for left shoulder abduction and a zero percent (0%) upper extremity impairment rating for adduction. Using Figure 44 on page 45 of the *Guides*, he found a zero percent (0%) upper extremity impairment rating for internal and external rotation of the left shoulder. Three percent (3%) upper extremity impairment was converted under Table 3 on page 20 of the *Guides* to a two percent (2%) whole person impairment.

Regarding the crushing injury to the right leg, Dr. Grady found no specific ratable impairment under on Table 64 on page 86 of the *Guides*. Under Table 42 on page 78 of the *Guides*, Dr. Grady found a three percent (3%) whole person impairment for right ankle extension and a zero percent (0%) impairment for plantar flexion. Under Table 43 on page 78 of the *Guides*, Dr. Grady found a zero percent (0%) impairment rating for inversion and eversion of the right ankle.

Dr. Grady classified the scarring on the claimant's leg to be a Class I skin disorder under Table 2 on page 280 of the *Guides* and recommend a two percent (2%) impairment of the whole person for that scarring. Combining the three percent (3%) whole person impairment for the cervical injury with the two percent (2%) impairment of the whole person for the left shoulder injury, the three percent (3%) impairment of the whole person for the range of motion loss of the right ankle and the two percent (2%) impairment of the whole person for the scarring of the right leg Dr. Grady opined to a total compensable impairment of ten percent (10%).

The claimant was evaluated by Dr. Michael Kominsky on August 18, 2021. **(EX 4)**. Regarding cervical impairment, using Tables 76 (page 118), 77 (page 120), and 78 (page 122), Dr. Kominsky opined to a two percent (2%) impairment for cervical flexion, a zero percent impairment for cervical extension, a one percent (0%) impairment for right lateral flexion, a one percent (1%) impairment for left lateral flexion, a one percent (1%) impairment for right rotation, and a one percent (1%) impairment for left rotation, for a total whole person impairment of five percent (5%). Dr. Kominsky assigned an additional four percent (4%) impairment under Table 75, Class IIB, for a total impairment of nine percent (11%). Applying Rule 20, Dr. Kominsky assigned the claimant to Cervical Category II on Table 85-20-E and adjusted the impairment for the cervical strain down to an eight percent (8%) whole person impairment. Dr. Kominsky then apportioned two percent of that impairment to the claimant's pre-existing conditions, recommending a six percent (6%) compensable impairment for the claimant's cervical injury.

For the claimant's left shoulder injury, Dr. Kominsky relied on Figures 38, 41, and 44 on pages 43, 44, and 45 of the *Guides*, finding a four percent (4%) upper extremity impairment for flexion, a zero percent (0%) upper extremity impairment for extension, a four percent (4%) upper extremity impairment for abduction, a zero percent (0%) upper extremity impairment for

adduction, a one percent (1%) upper extremity impairment for internal rotation and a one percent (1%) upper extremity impairment for external rotation, for a total upper extremity impairment of nine percent (9%). Dr. Walker converted this to a five percent (5%) whole person impairment and apportioned one percent (1%) of that impairment to the claimant's pre-existing pathology, for a final compensable impairment of five percent (5%) [sic].

For the claimant's right leg scarring, Dr. Komindky recommended a seventeen percent (17%) whole person impairment under Table 2, page 280 of the *Guides*. For the claimant's right ankle injury, Dr. Kominsky recommended a three percent (3%) whole person impairment for plantar flexion, a one percent (1%) whole person impairment for inversion, and a one percent (1%) whole person impairment for eversion, for a total combined whole person impairment of five percent (5%). Combining the six percent (6%) whole person impairment for the cervical injury with the five percent (5%) impairment of the whole person for the left shoulder injury, the four percent (5%) impairment of the whole person for the range of motion loss of the right ankle and the seventeen percent (17%) impairment of the whole person for the scarring of the right leg Dr. Kominsky opined to a total compensable impairment of twenty-nine percent (29%).

On September 1, 2021, the claimant was evaluated for permanent impairment by Dr. Robert Walker. (**EX 5**). Regarding cervical impairment, using Tables 76 (page 118), 77 (page 120), and 78 (page 122), Dr. Walker opined to a two percent (2%) impairment for cervical flexion, a zero percent impairment for cervical extension, a one percent (1%) impairment for right lateral flexion, a one percent (1%) impairment for left lateral flexion, a one percent (1%) impairment for right rotation, and a 1.5 percent (1.5%) impairment for left rotation, for a total whole person impairment of 6.5 percent (6.5%). Dr. Walker rounded this impairment up to a total range of motion impairment of seven percent (7%). Dr. Walker assigned an additional four percent (4%)

impairment under Table 75, Class IIB, for a total impairment of eleven percent (11%). Applying Rule 20, Dr. Walker assigned the claimant to Cervical Category II on Table 85-20-E and adjusted the impairment for the cervical strain down to an eight percent (8%) whole person impairment. Dr. Walker then apportioned two percent of that impairment to the claimant's pre-existing conditions, recommending a six percent (6%) compensable impairment for the claimant's cervical injury.

For the claimant's left shoulder injury, Dr. Walker relied on Figures 38, 41, and 44 on pages 43, 44, and 45 of the *Guides*, finding a four percent (4%) upper extremity impairment for flexion, a zero percent (0%) upper extremity impairment for extension, a four percent (4%) upper extremity impairment for abduction, a zero percent (0%) upper extremity impairment for adduction, a one percent (1%) upper extremity impairment for internal rotation and a one percent (1%) upper extremity impairment for external rotation, for a total upper extremity impairment of nine percent (9%). Dr. Walker converted this to a five percent (5%) whole person impairment and apportioned one percent (1%) of that impairment to the claimant's pre-existing pathology, for a final compensable impairment of five percent (5%) [sic].<sup>1</sup>

For the claimant's right leg scarring, Dr. Walker recommended a fifteen percent (15%) whole person impairment under Table 2, page 280 of the *Guides*. For the claimant's right ankle injury, Dr. Walker recommended a seven percent (7%) lower extremity impairment for plantar flexion and a two percent lower extremity impairment for the hindfoot, for a total lower extremity impairment of nine percent (9%) using Table 42, page 78 of the *Guides*, which converted to a four percent (4%) whole person impairment. Combining the six percent (6%) whole person impairment for the cervical injury with the five percent (5%) [sic] impairment of the whole person

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<sup>1</sup> Dr. Walker's report is in error here; apportioning one percent (1%) impairment to the claimant's pre-existing pathology results in a final compensable impairment of four percent (4%) and not five percent (5%) as stated in the report.

for the left shoulder injury, the four percent (4%) impairment of the whole person for the range of motion loss of the right ankle and the fifteen percent (15%) impairment of the whole person for the scarring of the right leg Dr. Walker opined to a total compensable impairment of twenty-seven percent (27%).<sup>2</sup>

The claimant was evaluated for permanent impairment by Dr. Marsha Bailey on April 5, 2022. (**EX 6**). Dr. Bailey found that the claimant had reached maximum medical improvement. Regarding the claimant's cervical injury, Dr. Bailey assigned the claimant to Category IIB under Table 75, page 113 of the *Guides*, for a four percent (4%) impairment. Valid range of motion and upper extremity strength measurements were invalid. Applying Rule 20, Dr. Bailey assigned the claimant to Cervical Category II of Table 85-20-E, and adjuster the claimant's total cervical impairment to five percent (5%). Dr. Bailey apportioned all of this impairment to the claimant's pre-existing cervical pathology and recommended a total compensable cervical impairment of zero percent (0%).

For the left shoulder injury, Dr. Bailey opined to a three percent (3%) upper extremity impairment using Figure 38, page 43 of the *Guides*, and a two percent (2%) upper extremity impairment using Figure 41, page 44 of the *Guides*, for a total five percent (5%) upper extremity impairment which converted to a three percent (3%) whole person impairment. Comparing these findings to the claimant's uninjured right shoulder, Dr. Bailey found that the claimant had a four percent (4%) impairment of the uninjured right shoulder, and thus apportioned all of the claimant's left shoulder impairment to his pre-existing pathology.

For the claimant's right leg injuries, Dr. Bailey first relied on Table 41, page 78 of the *Guides* to address right and left knee flexion deficits. Dr. Bailey noted that the claimant's

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<sup>2</sup> If the error in Dr. Walker's report is corrected, the actual recommended impairment is twenty-six percent (26%).

bilateral knee flexion measurements were restricted by his girth at the time of her evaluation. The claimant's right knee flexion measurement of 105 qualified for 4 percent whole person impairment from Table 41. His uninjured left knee also qualified for 4 percent whole person impairment under Table 41. The claimant's right and left extension measurements were equal at 4 degrees. Dr. Bailey opined that the right and left knee range of motion measurements could not be used to measure impairment as a result of the compensable injury due to the claimant's preexisting and unrelated arthritis as well as his girth. Using Table 42, page 78 of the *Guides*. Dr, Bailey opined to a three percent (3%) whole person impairment, which she attributed to the claimant's pre-existing arthritis. Dr. Bailey found no range of motion deficit in the left hindfoot. Regarding the claimant's scarring, Dr. Bailey placed the claimant under Class I on Table 2, page 280 of the *Guides*, and recommended a five percent (5%) whole person impairment, which was her final recommendation for total compensable impairment in the claim.

## V. ARGUMENT

West Virginia Code § 23-4-1g provides that the resolution of any issue before the Office of Judges shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the decision reached by the Administrative Law Judge. W.Va. Code § 23-4-1g. The resolution of issues in claims for workers' compensation must be decided on the merits and not according to any principal that requires statutes covering the workers' compensation to be liberally construed because they are remedial in nature. Id.

Pursuant to 85 C.S.R. 20 § 3.10.:

“Permanent impairment” means a permanent alteration of an individual's health status and is assessed by medical means and is a medical issue. An impairment is a deviation from normal in a body part or organ system and its functioning. An injured worker's degree of permanent whole body medical impairment is to be determined in keeping with the determination of whole person permanent impairment as set forth in the applicable Guides [*AMA Guides*,

Fourth Edition] . For the purposes of this Rule, the Guides' use of the term "whole person" impairment is the equivalent of the term "whole body" impairment.

Furthermore, pursuant to 85 C.S.R. 20 § 64.1.:

Permanent partial disability assessments shall be determined based upon the range of motion models contained in the Guides Fourth.

Under 85 C.S.R. 20 § 66.1.:

The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides.

With regard to evaluating permanent impairment, the *AMA Guides* state:

The physician must utilize the entire gamut of clinical skill and judgment in assessing whether or not the results of measurements or tests are plausible and relate to the impairment being evaluated.

Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, at p. 8. Finally, West Virginia

Code § 23-4-9b states:

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease or any other cause, whether or not disabling, and the employee thereafter receives an injury in the course of and resulting from his or her employment, unless the subsequent injury results in total permanent disability within the meaning of section one, article three of this chapter, the prior injury, and the effect of the prior injury, and an aggravation, shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury. Compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment. Nothing in this section requires that the degree of the preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from the employee's employment or that benefits must have been granted or paid for the preexisting impairment. The degree of the preexisting impairment may be established at any time by competent medical or other evidence.

The opinions regarding the claimant's impairment vary between the evaluators, with the biggest variability being the difference in how the claimant's impairment resulting from the scar on his right leg. All of the physicians of record utilized Table 2 on page 280 of the *Guides* to rate the impairment resulting from that scar. Both Dr. Grady and Dr. Bailey placed the claimant under Class I on that table, which allows for an impairment rating of zero percent to nine percent (0% - 9%). Dr. Grady assigned a two percent (2%) impairment for that scarring, while Dr. Bailey recommended a five percent (5%) impairment. Dr. Kominsky and Dr. Walker both placed the claimant under Class II on Table 2, which allows for an impairment rating of ten percent to twenty-four percent (10% - 24%). As discussed below, the placement of the claimant under Class II on Table 2 is plainly wrong and not supported by the medical evidence. Accordingly, the Board erred in relying on the plainly unreliable report of Dr. Walker in awarding additional PPD benefits.

The criteria for classification under Class 1 is:

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.

Class 2 requires:

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 record contains no evidence that the claimant's scarring on his right calf interferes with any of the claimant's activities of daily living, and the claimant requires no treatment for that aspect of his injury. Dr. Grady based his recommendation of a two percent (2%) whole person impairment for this component of the claimant's injury on sensory loss in the areas of the scar. Dr. Bailey

found a five percent (5%) whole person impairment for this component of the claimant's injury because the scar was present and caused no or few limitations on the claimant's activities. She noted in her report:

Mr. Eden denied the need or requirement for any treatment for his right lower extremity scars. Mr. Eden's neuropathic complaints are solely the result of his preexisting conditions for which he sought and received treatment prior to his work accident.

Conversely, Dr. Walker and Dr. Kominsky erroneously evaluated the claimant under Class 2 on Table 2, recommending wildly inflated ratings for this component of the claimant's injury. Dr. Kominsky noted that the claimant had a loss of skin pigmentation on his calf and that the claimant was self-conscious of his scar. Dr. Kominsky noted the claimant's "required treatment" as pain medication, anti-inflammatories and nerve medication. However, Dr. Kominsky fails to describe how this "treatment" is related to the claimant's scarring as opposed to the claimant's pre-existing neuropathy or the other injuries in his claim. Regarding his rating of the claimant's scar impairment, Dr. Walker stated:

The claimant has skin impairment directly related to the work-related injury the [sic] results in limitations in activities of daily living and function, significant cosmetic deformity, symptoms, and the requirement of daily care. Cosmetic changes include discoloration, scarring and obvious areas of tissue loss and skin graft application; Interruption in function includes contraction and scarring restricting ankle movement, restriction in stooping, kneeling, crawling, interference with driving and dressing.

Dr. Walker noted that the claimant used skin lubricants to keep the scar from drying out, and sunblock when the scar was exposed to the sun. With regard the impact on the claimant's daily activities, Dr. Walker failed to address how the claimant's activities were limited by his scarring as opposed to his other injuries. Dr. Walker was also the only evaluator to attribute the claimant's scarring, as opposed

to the crush injury, to loss of range of motion in the ankle. As such, his opinion regarding the impact on daily living and on the claimant's need for treatment are plainly unreliable and inflated.

In finding Dr. Walker's opinion the most reliable, and basing its findings on his report, the Board's Order states:

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 evidence of record in the claim does not support this conclusion. In this claim, the claimant sustained injuries to his left shoulder and neck, and a crushing injury with a laceration to his right leg. The Order is arguably correct when it states that "the claimant's activities of daily living have been substantially reduced due to his compensable injury." However, there is no reliable medical evidence that the claimant's activities of daily living have been substantially reduced due to the scar on his leg. The Order is arguably correct that Dr. Grady did not believe that the claimant could return to his former employment – Dr. Grady actually stated that "the claimant would have difficulty returning to full duty in light of his injuries to the right lower leg, neck and left shoulder areas." However, the Board's conclusion that placement of the claimant in Class 2 is supported by the credible medical evidence is plainly wrong. As the Order notes, the claimant has scarring on his leg, and the claimant applies ointment and sunscreen to his scar. However, the Order conflates the effects of all the claimant's injuries with the effects of that scarring. Classes 1 and 2 both require that signs and symptom of skin disorder are present or intermittently present. Class 2 also requires that there is limitation in the performance of some of the activities of daily living, and

intermittent to constant treatment may be required.” The record does not establish any limitations in the activities of daily living, or any required future treatment as a result of the scarring component of the claimant’s injury. As such, the Board has erred in accepting the opinion of Dr. Walker that the claimant’s scarring injury falls under Class 2. As such, the Board was plainly wrong in basing its determination of the claimant’s impairment on the report of Dr.; Walker, and their decision should be reversed.

**V. CONCLUSION**

For the foregoing, the employer requests that the October 7, 2022, decision of the Board of Review be REVERSED, and the March 19, 2021, order of the Claims Administrator granting the claimant a ten percent (10%) PPD award REINSTATED.

Respectfully submitted,  
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