

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CASE NO. 22-ICA-246

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KGPCO, INC.,

Petitioner,

JCN NO.2021000333

vs.

DOI: 06/18/2020

MICHAEL L. EDEN,

Respondent.

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RESPONDENT'S BRIEF

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BRIEF FILED ON BEHALF OF THE CLAIMANT  
FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW

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**INTRODUCTORY NOTE**

The Respondent will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as CA; KGPCO, Inc. will be referred to as Employer or Petitioner; maximum medical improvement will be referred to as MMI; whole person impairment will be referred to as WPI; permanent partial disability will be referred to as PPD; American Medical Association Guides to the Evaluation of Permanent Impairment, 4th edition will be referred to as the Guides; and range of motion will be referred to as ROM.

**TABLE OF AUTHORITIES**

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**ASSIGNMENT OF ERRORS**

1. THE BOR COMMITTED NO CLEAR ERROR REVERSING THE CA'S ORDER AND AUTHORIZING AN ADDITIONAL 17% PPD AWARD.

**STATEMENT OF THE CASE**

The Claimant, a warehouse manager for the Employer, sustained a crush injury to his cervical spine, left shoulder, and right leg on June 18, 2020, when a large roll of

metal cable weighing approximately 1,000 pounds rolled down a ramp and struck him. Due to the compensable injury, the Claimant underwent a complex debridement and wound closure procedure for this right lower extremity, and a 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. He further sustained a partial bursal surface infraspinatus tendon tear and mild supraspinatus tendonopathy in his left upper extremity, and multilevel neural foraminal stenosis at the cervical level.

The BOR decision of October 7, 2022, contains a "Findings of Fact" section that is incorporated by reference herein. **[See Petitioner's Exhibit 1, p. 1-3]**

At issue in this case is the Claimant's whole person impairment rating. There were four different reports entered into the record.

In the first report, Dr. Grady evaluated the Claimant on March 10, 2021, and opined Claimant had reached MMI. He stated that Claimant had no specific gradable impairment of the cervical spine pursuant to table 75 of the Guides, however, functionally the Claimant exhibited 3% impairment. Using Rule 20, he placed Claimant in cervical category II with 5% impairment, and attributed half of the impairment to pre-existing conditions. He rounded up for a 3% WPI for the cervical spine. For the left shoulder, he found 2% impairment due to ROM abnormalities. He found 3% impairment for loss of ROM of the Claimant's right ankle. For the right leg scarring, Dr. Grady placed Claimant in class I and, using table 2 on page 280 of the Guides, issued a 2% WPI rating. The combined total WPI rating was 10%. **[See Petitioner's Exhibit 3]**

By order dated March 19, 2021, the CA awarded Claimant a 10% PPD award based on Dr. Grady's report. The Claimant protested.

Next, Dr. Kominsky submitted a report dated August 18, 2021. He reported that the Claimant worked as a fork lift operator or warehouse man for over 30 years, but since the compensable injury had a significant reduction in his daily activities and could not go back to work. He reported Claimant had persistent pain in his right leg. Using the Guides, he recommended 4% impairment for the cervical spine using table 75, and 5% for abnormal ROM. Using Rule 20, he placed Claimant in cervical category II and adjusted down to 8%. He then subtracted 2% for pre-existing degeneration. For the left shoulder, he assigned 4% for ROM deficits, and assigned 5% for Claimant's right ankle ROM deficits. For the Claimant's right leg grafting, he placed Claimant in class II and assigned a 17% WPI. The total recommendation was 29%. **[See Petitioner's Exhibit 4]**

Dr. Walker then submitted a report dated October 13, 2021. He noted Claimant has to apply skin lubricants to his legs several times a day to avoid severe drying and cracking. Dr. Walker stated the Claimant reported his activities of daily living were restricted since the compensable injury. Using the Guides, Dr. Walker placed Claimant in Class IIB pursuant to Table 75 for the cervical spine and awarded 4% impairment. He gave an additional 7% impairment for loss of ROM, totaling 11% for the cervical spine, which he adjusted down to 8% after placing Claimant in cervical category II pursuant to Rule 20. He then subtracted 2% for pre-existing degenerative changes, leaving 6% total for the cervical spine. For the left shoulder, Dr. Walker found 5% impairment. He found 4% impairment for Claimant's right ankle due to ROM restrictions. He then placed

Claimant into class 2 from Table 2 on page 280 concerning the right leg scarring, for a 15% impairment. The total recommendation was 27% WPI. **[See Petitioner's Exhibit 5]**

Finally, Dr. Bailey issued a report dated April 5, 2022. She placed the Claimant in cervical category IIB under Table 75 for 4% impairment. She stated the Claimant's measurements were pain-restricted and therefore invalid. She awarded 4% for ROM restrictions. Using Cervical Category II pursuant to Rule 20, Dr. Bailey adjusted the cervical impairment to 5%, yet apportioned the entire amount to pre-existing changes. For the left shoulder, she assigned 4% impairment due to ROM deficits, but apportioned all to pre-existing conditions. Dr. Bailey found that ROM of Claimant's right ankle was normal and gave no rating. As for the Claimant's right leg, she placed him into class I, and said he had no limitation in the performance of activities of daily living, and no intermittent treatment was required. She opined Claimant's present complaints were neuropathic and solely the result of pre-existing conditions. She assigned 5% impairment to the right leg, and recommended the same as her final total. **[See Petitioner's Exhibit 6]**

By decision dated October 7, 2022, the BOR reversed the CA's order of March 19, 2021, and granted the Claimant a 27% PPD award based on Dr. Walker's report. **[Petitioner's Exhibit 1]** The Employer appealed.

### **SUMMARY OF ARGUMENT**

The preponderance of the evidence provides that Claimant sustained a 27% whole person impairment because Dr. Walker's report was the most consistent with the

evidence of record. The BOR decision included no clear errors. Thus, there is no basis to reverse the ruling of the BOR decision pursuant to West Virginia Code § 23-5-12a(b).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **ARGUMENT**

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are: (1) In violation of statutory provisions; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (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."

Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all 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.

For injuries occurring after May 12, 1995, PPD awards are based on medical impairment. The Commissioner has adopted the AMA's Guides to the Evaluation of Permanent Impairment, Fourth Edition, as the measure of whole body medical impairment. West Virginia Code § 23-4-6 and 85 CSR 20. In cases where the examination upon which the award was based was conducted on or after June 14, 2004, range of impairment limitations, as set forth in 85 CSR 20, apply to some types of injuries.

In this case, Employer argues that the BOR erred because the Claimant should not have been placed in Class 2 of Table 2 page 280 of the Guides for the scarring on his leg, stating there is "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." **[See Petition for Appeal, p. 10]** The Employer's assertion is unfounded, however, as all the evaluators described such restrictions in their reports. For reference, Class 2 criteria states:

"Signs and symptoms 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."

First, Dr. Grady stated the Claimant could not return to his former job because of the compensable injury, including the injury to his right lower leg. **[Petitioner's Exhibit 3, p. 9]** Dr. Grady described the extensive scarring with hypertrophic skin changes and significant' subcutaneous soft tissue loss, and diminished sensation to touch. **[Id. at 5]** He stated Claimant's ankle restrictions would make it difficult to walk on uneven surfaces, up or down ramps, or climb ladders **[Id.]**. He further noted the claimant has

difficulty with prolonged standing and walking, and now has a sedentary lifestyle. **[Id. at 3]**

Next, Dr. Kominsky, in his report, noted Claimant's extreme pain, persistent swelling, and persistent loss of feeling in the skin graft and debridement areas of his right leg. **[Petitioner's Exhibit 4, p. 2]** He reported Claimant's range of motion of his right ankle has been severely affected and it is hard for him to push off from his toes when walking. **[Id.]** He further noted numbness to the area, that Claimant has to keep the leg elevated frequently because of swelling, and that the leg pain interferes with Claimant's sleep. **[Id.]** Dr. Kominsky reported the Claimant was prescribed nerve medication and pain medication, and also took over the counter NSAIDs for his leg. **[Id.]** The report also stated the Claimant could hardly do any work since his injury, has a difficult time getting out of the bath due to his leg, difficulties with squatting, walking, and stairs. **[Id. at 3]** It stated that Claimant was unable to walk on uneven surfaces at all and his leg would give out. **[Id. at 3-4]** Dr. Kominsky stated Claimant has difficulty walking, weakness, paresthesia, and atrophy that is getting progressively worse in his right lower extremity, and that he is unable to work due to his compensable injuries. **[Id. at 10-11]** Dr. Kominsky explained that the lack of sensation of his lower extremity due to the grafting and scarring interferes with the Claimant's normal daily activities, and that he required intermittent treatment such as the pain, nerve, and anti-inflammatory medications. **[Id. at 13]**

Dr. Bailey noted Claimant's reports of difficulties walking on uneven surfaces, using stairs, or walking longer than 10 minutes. **[Petitioner's Exhibit 6, p. 1]** She

reported the Claimant's lack of mobility due to his right leg complaints was the most significant per the Claimant, and that he sometimes felt as if he was going to fall. **[Id.]** Dr. Bailey discussed symptoms of numbness in Claimant's foot, as well as a constant tugging type of pain in his right medial lower leg in the scar area. **[Id.]** She described the complex scarring on his leg. **[Id. at 13]**

Finally, Dr. Walker reported the Claimant has to apply skin lubricants to his legs several times a day to avoid severe drying and cracking, and had to protect against sun exposure. **[Petitioner's Exhibit 5, p. 1-2]** Regarding the Claimant's activities of daily living he stated the Claimant can not get in and out of the bathtub without assistance, has difficulty bending over and putting on shoes and socks, cannot drive a vehicle for more than short intervals, cannot stand or walk for extended periods of time, cannot squat, crawl, stoop, or do yard work, and had difficulty with house work. **[Id. at 2]** He noted the Claimant's constant tightness in the skin, and significant swelling with the inability to wear support hose due to the deformity. **[Id.]** Dr. Walker went on to describe "obvious deformity and discoloration of skin and soft tissue of the left lower leg..." and that "...The healed laceration with healed skin grating results in loss of motion at the left ankle and forefoot." **[Id. at 3]** He went further and stated: "Right ankle motion is restricted by local scarring, contraction, and tissue loss." **[Id.]**

Dr. Walker then very clearly explained how he arrived at placing Claimant's skin injury in Class 2. He wrote that page 279 section 13.4 of the Guides encourages use of color photographs to support findings and impairment, which he attached to his report. **[Id.]** He opined that the skin impairment directly related to the compensable injury

results in limitations in activities of daily living and function, significant cosmetic deformity, symptoms, and the requirement of daily care. **[Id. at 5]** He defined the limitations in function as contraction and scarring restricting ankle movement, restriction in stooping, kneeling, crawling, interference with driving and dressing. **[Id.]** He pointed to the treatment as being daily, including application of lubricant and sun block to avoid abrasion and damage. **[Id.]** He compared the colored photograph of Claimant's injury to the photograph examples 2 and 4 on pages 283-284 of the Guides, and explained that the Claimants was more severe than Example 2, but less severe than Example 4. **[Id.]** He detailed extensively in his report how he arrived at the classification and exact WPI rating for the skin component of the injury.

The record above reflects ample evidence that the Claimant's activities of daily living have been limited due to the skin component of the claim. All reports noted that Claimant was working up to the injury, yet after the injury he could no longer perform his former job duties. The record further supports that Claimant's skin injury requires daily treatment such as lubricants, pain medications, elevation, and anti-inflammatory medications. The BOR properly found that Dr. Walker's report was best supported by the record as a whole, and that Claimant's skin injury being classified as Class 2 was supported by the medical evidence as well.

Because there was no clear error contained in the BOR decision, there is no basis under West Virginia Code § 23-5-12a(b) for its reversal. Accordingly, the October 7, 2022 decision of the BOR should be affirmed.

**PRAYER**

**WHEREFORE**, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **AFFIRM** the BOR's decision of October 7, 2022.

Respectfully submitted,  
Michael Eden  
By Counsel



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**CERTIFICATE OF SERVICE**

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Respondent's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efileing, to the following:

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December 14, 2022



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