

# WEST VIRGINIA CODE: §23-4-6

## **§23-4-6. Classification of and criteria for disability benefits.**

Where compensation is due an employee under the provisions of this chapter for personal injury, the compensation shall be as provided in the following schedule:

(a) The terms "average weekly wage earnings, wherever earned, of the injured employee, at the date of injury" and "average weekly wage in West Virginia", as used in this chapter, have the meaning and shall be computed as set forth in section fourteen of this article except for the purpose of computing temporary total disability benefits for part-time employees pursuant to the provisions of section six-d of this article.

(b) For all awards made on and after the effective date of the amendment and reenactment of this section during the year 2003, if the injury causes temporary total disability, the employee shall receive during the continuance of the disability a maximum weekly benefit to be computed on the basis of sixty-six and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee, at the date of injury, not to exceed one hundred percent of the average weekly wage in West Virginia: Provided, That in no event shall an award for temporary total disability be subject to annual adjustments resulting from changes in the average weekly wage in West Virginia: Provided, however, in the case of a claimant whose award was granted prior to the effective date of the amendment and reenactment of this section during the year 2003, the maximum benefit rate shall be the rate applied under the prior enactment of this subsection which was in effect at the time the injury occurred. The minimum weekly benefits paid under this subdivision shall not be less than thirty-three and one-third percent of the average weekly wage in West Virginia, except as provided in sections six-d and nine of this article. In no event, however, shall the minimum weekly benefits exceed the level of benefits determined by use of the applicable federal minimum hourly wage: Provided further, That any claimant receiving permanent total disability benefits, permanent partial disability benefits or dependents' benefits prior to July 1, 1994, shall not have his or her benefits reduced based upon the requirement in this subdivision that the minimum weekly benefit shall not exceed the applicable federal minimum hourly wage.

(c) Subdivision (b) of this section is limited as follows: Aggregate award for a single injury causing temporary disability shall be for a period not exceeding two hundred eight weeks; aggregate award for a single injury for which an award of temporary total disability benefits is made on or after the effective date of the amendment and reenactment of this section in the year 2003 shall be for a period not exceeding one hundred four weeks. Notwithstanding any other provision of this subdivision to the contrary, no person may receive temporary total disability benefits under an award for a single injury for a period exceeding one hundred four weeks from the effective date of the amendment and reenactment of this section in the year 2003.

(d) For all awards of permanent total disability benefits that are made on or after February 2, 1995, including those claims in which a request for an award was pending before the division or which were in litigation but not yet submitted for a decision, then benefits shall be payable until the claimant attains the age necessary to receive federal old age retirement benefits under the provisions of the Social Security Act, 42 U.S.C. §§401 and 402, in effect on the effective date of this section. The claimant shall be paid benefits so as not to exceed a maximum benefit of sixty-six and two-thirds percent of the claimant's average weekly wage earnings, wherever earned, at the time of the date of injury not to exceed one hundred percent of the average weekly wage in West Virginia. The minimum weekly benefits paid under this section shall be as is provided for in subdivision (b) of this section. In all claims in which an award for permanent total disability benefits was made prior to February 2, 1995, the awards shall continue to be paid at the rate in effect prior to the effective date of the amendment and reenactment of this section in the year 2003: Provided, That the provisions of sections one through eight, inclusive, article four-a of this chapter shall be applied thereafter to all prior awards that were previously subject to its provisions. A single or aggregate permanent disability of eighty-five percent or more entitles the employee to a rebuttable presumption of a permanent total disability for the purpose of paragraph (2), subdivision (n) of this section: Provided, however, That the claimant must also be at least fifty percent medically impaired upon a whole body basis or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section. The presumption may be rebutted if the evidence establishes that the claimant is not permanently and totally disabled pursuant to subdivision (n) of this section. Under no circumstances may the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, grant an additional permanent disability award to a claimant receiving a permanent total disability award: Provided further, That if any claimant thereafter sustains another compensable injury and has permanent partial disability resulting from the injury, the total permanent disability award benefit rate shall be computed at the highest benefit rate justified by any of the compensable injuries.

(e) (1) For all awards made on or after the effective date of the amendment and reenactment of this section during the year 2003, if the injury causes permanent disability less than permanent total disability, the percentage of disability to total disability shall be determined and the award computed on the basis of four weeks' compensation for each percent of disability determined at the maximum or minimum benefit rates as follows: Sixty-six and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee at the date of injury, not to exceed seventy percent of the average weekly wage in West Virginia: Provided, That in no event shall an award for permanent partial disability be subject to annual adjustments resulting from changes in the average weekly wage in West Virginia: Provided, however, That in the case of a claimant whose award was granted prior to the effective date of the amendment and reenactment of this section during the year 2003, the maximum benefit rate shall be the rate applied under the prior enactment of this section which was in effect at the time the injury occurred.

(2) If a claimant is released by his or her treating physician to return to work at the job he or

she held before the occupational injury occurred and if the claimant's preinjury employer does not offer the preinjury job or a comparable job to the employee when a position is available to be offered, the award for the percentage of partial disability shall be computed on the basis of six weeks of compensation for each percent of disability.

(3) The minimum weekly benefit under this subdivision shall be as provided in subdivision (b) of this section for temporary total disability.

(f) If the injury results in the total loss by severance of any of the members named in this subdivision, the percentage of disability shall be determined by the percentage of disability, specified in the following table:

The loss of a great toe shall be considered a ten percent disability.

The loss of a great toe (one phalanx) shall be considered a five percent disability.

The loss of other toes shall be considered a four percent disability.

The loss of other toes (one phalanx) shall be considered a two percent disability.

The loss of all toes shall be considered a twenty-five percent disability.

The loss of forepart of foot shall be considered a thirty percent disability.

The loss of a foot shall be considered a thirty-five percent disability.

The loss of a leg shall be considered a forty-five percent disability.

The loss of thigh shall be considered a fifty percent disability.

The loss of thigh at hip joint shall be considered a sixty percent disability.

The loss of a little or fourth finger (one phalanx) shall be considered a three percent disability.

The loss of a little or fourth finger shall be considered a five percent disability.

The loss of ring or third finger (one phalanx) shall be considered a three percent disability.

The loss of ring or third finger shall be considered a five percent disability.

The loss of middle or second finger (one phalanx) shall be considered a three percent disability.

The loss of middle or second finger shall be considered a seven percent disability.

The loss of index or first finger (one phalanx) shall be considered a six percent disability.

The loss of index or first finger shall be considered a ten percent disability.

The loss of thumb (one phalanx) shall be considered a twelve percent disability.

The loss of thumb shall be considered a twenty percent disability.

The loss of thumb and index fingers shall be considered a thirty-two percent disability.

The loss of index and middle fingers shall be considered a twenty percent disability.

The loss of middle and ring fingers shall be considered a fifteen percent disability.

The loss of ring and little fingers shall be considered a ten percent disability.

The loss of thumb, index and middle fingers shall be considered a forty percent disability.

The loss of index, middle and ring fingers shall be considered a thirty percent disability.

The loss of middle, ring and little fingers shall be considered a twenty percent disability.

The loss of four fingers shall be considered a thirty-two percent disability.

The loss of hand shall be considered a fifty percent disability.

The loss of forearm shall be considered a fifty-five percent disability.

The loss of arm shall be considered a sixty percent disability.

The total and irrecoverable loss of the sight of one eye shall be considered a thirty-three percent disability. For the partial loss of vision in one or both eyes, the percentages of disability shall be determined by the commission, using as a basis the total loss of one eye.

The total and irrecoverable loss of the hearing of one ear shall be considered a twenty-two and one-half percent disability. The total and irrecoverable loss of hearing of both ears shall be considered a fifty-five percent disability.

For the partial loss of hearing in one or both ears, the percentage of disability shall be determined by the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, using as a basis the total loss of hearing in both ears.

If a claimant sustains a compensable injury which results in the total loss by severance of any of the bodily members named in this subdivision or dies from sickness or noncompensable injury before the commission makes the proper award for the injury, the commission shall make the award to the claimant's dependents as defined in this chapter, if any; the payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any surviving spouse of the claimant

after his or her remarriage and that this liability shall not accrue to the estate of the claimant and is not subject to any debts of, or charges against, the estate.

(g) If a claimant to whom has been made a permanent partial award dies from sickness or noncompensable injury, the unpaid balance of the award shall be paid to claimant's dependents as defined in this chapter, if any; the payment to be made in the same installments that would have been paid to claimant if living: Provided, That no payment shall be made to any surviving spouse of the claimant after his or her remarriage, and that this liability shall not accrue to the estate of the claimant and is not subject to any debts of, or charges against, such estate.

(h) For the purposes of this chapter, a finding of the occupational pneumoconiosis board has the force and effect of an award.

(i) For the purposes of this chapter, with the exception of those injuries provided for in subdivision (f) of this section and in section six-b of this article, the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered. For those injuries provided for in subdivision (f) of this section and section six-b of this article, the degree of disability shall be determined exclusively by the provisions of said subdivision and said section. The occupational pneumoconiosis board created pursuant to section eight-a of this article shall premise its decisions on the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment. The Workers' Compensation Commission shall adopt standards for the evaluation of claimants and the determination of a claimant's degree of whole body medical impairment. Once the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant. This subdivision is applicable to all injuries incurred and diseases with a date of last exposure on or after February 2, 1995, to all applications for an award of permanent partial disability made on and after that date and to all applications for an award of permanent partial disability that were pending before the commission or pending in litigation but not yet submitted for decision on and after that date. The prior provisions of this subdivision remain in effect for all other claims.

(j) From a list of names of seven persons submitted to the executive director by the health care advisory panel, the executive director shall appoint an interdisciplinary examining board consisting of five members to evaluate claimants, including by examination if the board elects. The interdisciplinary examining board shall terminate upon termination of the commission and all administrative and adjudicatory functions performed by the interdisciplinary examining board shall be performed by the following reviewing bodies for those claims over which they have administrative jurisdiction: (1) The Insurance Commissioner or his or her designated administrator of each of the funds set forth in this chapter; (2) private carriers; or (3) self-insured employers. The reviewing bodies shall employ or otherwise engage adequate resources, including medical professionals, to perform the functions of the interdisciplinary examining board. The board shall be composed of three qualified physicians with specialties and expertise qualifying them to evaluate medical

impairment and two vocational rehabilitation specialists who are qualified to evaluate the ability of a claimant to perform gainful employment with or without retraining. One member of the board shall be designated annually as chairperson by the executive director. The term of office of each member of the board shall be six years and until his or her successor has been appointed and has qualified. Any member of the board may be appointed to any number of terms. Any two physician members and one vocational rehabilitation specialist member shall constitute a quorum for the transaction of business. The executive director, from time to time, shall fix the compensation to be paid to each member of the board, and the members are also entitled to reasonable and necessary traveling and other expenses incurred while actually engaged in the performance of their duties. The board shall perform the duties and responsibilities assigned by the provisions of this chapter, consistent with the administrative policies developed by the executive director with the approval of the board of managers.

(1) The executive director shall establish requirements for the proper completion and support for an application for permanent total disability benefits within an existing or a new rule no later than January 1, 2004. Upon adoption of the rule by the board of managers, no issue of permanent total disability may be referred to the interdisciplinary examining board, or, any other reviewing body, unless a properly completed and supported application for permanent total disability benefits has been first filed. Prior to the referral of any issue to the interdisciplinary examining board, or, upon its termination, prior to a reviewing body's adjudication of a permanent total disability application, the commission, or reviewing body shall conduct examinations of the claimant that it finds necessary and obtain all pertinent records concerning the claimant's medical history and reports of examinations and forward them to the board at the time of the referral. The commission or reviewing body shall provide adequate notice to the employer of the filing of the request for a permanent total disability award and the employer shall be granted an appropriate period in which to respond to the request. The claimant and the employer may furnish all pertinent information to the board or other reviewing body and shall furnish to the board or other reviewing body any information requested. The claimant and the employer may each submit no more than one report and opinion regarding each issue present in a given claim. The employer may have the claimant examined by medical specialists and vocational rehabilitation specialists: Provided, That the employer is entitled to only one examination on each issue present in a given claim. Any additional examinations must be approved by the commission or other reviewing body and shall be granted only upon a showing of good cause. The reports from all employer-conducted examinations must be filed with the board or other reviewing body and served upon the claimant. The board or other reviewing body may request that those persons who have furnished reports and opinions regarding a claimant provide it with additional information considered necessary. Both the claimant and the employer, as well as the commission, or other reviewing body may submit or obtain reports from experts challenging or supporting the other reports in the record regardless of whether or not the expert examined the claimant or relied solely upon the evidence of record.

(2) If the board or a quorum of the board elects to examine a claimant, the individual

members shall conduct any examinations that are pertinent to each of their specialties. If a claim presents an issue beyond the expertise of the board, the board may obtain advice or evaluations by other specialists. In addition, if the board of managers determines that the number of applications pending before the interdisciplinary examining board has exceeded the level at which the board can review and make recommendations within a reasonable time, the board of managers may authorize the executive director to appoint any additional members to the board that are necessary to reduce the backlog of applications. The additional members shall be recommended by the health care advisory panel. The executive director may make any appointments he or she chooses from the recommendations. The additional board members shall not serve a set term but shall serve until the board of managers determines that the number of pending applications has been reduced to an acceptable level.

(3) Referrals to the board shall be limited to matters related to the determination of permanent total disability under the provisions of subdivision (n) of this section and to questions related to medical cost containment, utilization review decisions and managed care decisions arising under section three of this article.

(4) In the event the board members or other reviewing body elects to examine a claimant, the board or other reviewing body shall prepare a report stating the tests, examinations, procedures and other observations that were made, the manner in which each was conducted and the results of each. The report shall state the findings made by the board or other reviewing body and the reasons for the findings. Copies of the reports of all examinations made by the board or other reviewing body shall be served upon the parties and the commission until its termination. Each shall be given an opportunity to respond in writing to the findings and conclusions stated in the reports.

(5) The board or other reviewing body shall state its initial recommendations to the commission in writing with an explanation for each recommendation setting forth the reasons for each. The recommendations shall be served upon the parties and the commission and each shall be afforded a thirty-day opportunity to respond in writing to the board or other reviewing body regarding its recommendations. The board or other reviewing body shall review any responses and issue its final recommendations. The final recommendations shall be effectuated by the entry of an appropriate order by the commission, or, upon its termination, the private carrier or self-insured employer. For all awards for permanent total disability where the claim was filed on or after the effective date of the amendment and reenactment of this section in the year 2003, the commission or other reviewing body shall establish the date of onset of the claimant's permanent total disability as the date when a properly completed and supported application for permanent total disability benefits as prescribed in subdivision (1) of this subsection that results in a finding of permanent total disability was filed with the commission or other reviewing body: Provided, That upon notification of the commission or other reviewing body by a claimant or his or her representative that the claimant seeks to be evaluated for permanent total disability, the commission or other reviewing body shall send the claimant or his or her representative the proper application form. The commission or other reviewing body shall set time limits for the

return of the application. A properly completed and supported application returned within the time limits set by the commission or other reviewing body shall be treated as if received on the date the commission or other reviewing body was notified the claimant was seeking evaluation for permanent total disability: Provided, however, That notwithstanding any other provision of this section to the contrary, the onset date may not be sooner than the date upon which the claimant meets the percentage thresholds of prior permanent partial disability that are established by subsection (n) of this section as a prerequisite to the claimant's qualification for consideration for a permanent total disability award.

(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 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.

(k) Compensation payable under any subdivision of this section shall not exceed the



maximum nor be less than the weekly benefits specified in subdivision (b) of this section.

(l) Except as otherwise specifically provided in this chapter, temporary total disability benefits payable under subdivision (b) of this section shall not be deductible from permanent partial disability awards payable under subdivision (e) or (f) of this section. Compensation, either temporary total or permanent partial, under this section shall be payable only to the injured employee and the right to the compensation shall not vest in his or her estate, except that any unpaid compensation which would have been paid or payable to the employee up to the time of his or her death, if he or she had lived, shall be paid to the dependents of the injured employee if there are any dependents at the time of death.

(m) The following permanent disabilities shall be conclusively presumed to be total in character:

Loss of both eyes or the sight thereof.

Loss of both hands or the use thereof.

Loss of both feet or the use thereof.

Loss of one hand and one foot or the use thereof.

(n) (1) Other than for those injuries specified in subdivision (m) of this section, 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 2003, 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. Upon a finding that the claimant has a fifty percent whole body medical impairment or has sustained a thirty-five percent statutory

disability pursuant to the provisions of subdivision (f) of this section, the review of the application continues as provided for in the following paragraph of this subdivision. Those claimants whose prior permanent partial disability awards total eighty-five percent or more and who have been found to have a whole body medical impairment of at least fifty percent or have sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section are entitled to the rebuttable presumption created pursuant to subdivision (d) of this section for the remaining issues in the request.

(2) For all awards made on or after the effective date of the amendment and reenactment of this section during the year 2003, disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities which can be acquired or which are comparable to those of any gainful activity in which he or she has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability. The comparability of preinjury income to post-disability income will not be a factor in determining permanent total disability. Geographic availability of gainful employment within a driving distance of seventy-five miles from the residence of the employee or within the distance from the residence of the employee to his or her preinjury employment, whichever is greater, will be a factor in determining permanent total disability. For any permanent total disability award made after the amendment and reenactment of this section in the year 2003, permanent total disability benefits shall cease at age seventy years. In addition, the vocational standards adopted pursuant to subsection (m), section seven, article three of this chapter shall be considered once they are effective.

(3) In the event that a claimant, who has been found to have at least a fifty percent whole body medical impairment or has sustained a thirty-five percent statutory disability pursuant to the provisions of subdivision (f) of this section, is denied an award of permanent total disability benefits pursuant to this subdivision and accepts and continues to work at a lesser paying job than he or she previously held, the claimant is eligible, notwithstanding the provisions of section nine of this article, to receive temporary partial rehabilitation benefits for a period of four years. The benefits shall be paid at the level necessary to ensure the claimant's receipt of the following percentages of the average weekly wage earnings of the claimant at the time of injury calculated as provided in this section and sections six-d and fourteen of this article:

(A) Eighty percent for the first year;

(B) Seventy percent for the second year;

(C) Sixty percent for the third year; and

(D) Fifty percent for the fourth year: Provided, That in no event shall the benefits exceed one hundred percent of the average weekly wage in West Virginia. In no event shall the benefits be subject to the minimum benefit amounts required by the provisions of subdivision (b) of this section.

(4) Notwithstanding any provision of this subsection, subsection (d) of this section or any other provision of this code to the contrary, on any claim filed on or after the effective date of the amendment and reenactment of this section in the year 2003:

(A) No percent of whole body medical impairment existing as the result of carpal tunnel syndrome for which a claim has been made under this chapter may be included in the aggregation of permanent disability under the provisions of this subsection or subsection (d) of this section; and

(B) No percent of whole body medical impairment existing as the result of any occupational disease, the diagnosis of which is based solely upon symptoms rather than specific, objective and measurable medical findings, and for which a claim has been made under this chapter may be included in the aggregation of permanent disability under the provisions of this subsection or subsection (d) of this section.

(o) To confirm the ongoing permanent total disability status of the claimant, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may elect to have any recipient of a permanent total disability award undergo one independent medical examination during each of the first five years that the permanent total disability award is paid and one independent medical examination during each three-year period thereafter until the claimant reaches the age of seventy years: Provided, That the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, may elect to have any recipient of a permanent total disability award under the age of fifty years undergo one independent medical examination during each year that the permanent total disability award is paid until the recipient reaches the age of fifty years, and thereafter one independent medical examination during each three-year period thereafter until the claimant reaches the age of seventy years.