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 §23-4-14 of this code except for the purpose of computing temporary total disability benefits for part-time employees pursuant to the provisions of §23-4-6d of this code.

(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 66 and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee, at the date of injury, not to exceed 100 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*, 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 subsection which was in effect at the time the injury occurred. The minimum weekly benefits paid under this subdivision shall not be less than 33 and one-third percent of the average weekly wage in West Virginia, except as provided in §23-4-6d and §23-4-9 of this code. 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 208 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 104 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 104 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

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former workers' compensation division of the Bureau of Employment Programs 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 66 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 100 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. A single or aggregate permanent disability of 85 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*, That the claimant must also be at least 50 percent medically impaired upon a whole body basis or has sustained a 35 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 Insurance Commissioner, 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, however*, 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: 66 and two-thirds percent of the average weekly wage earnings, wherever earned, of the injured employee at the date of injury, not to exceed 70 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.

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(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 10 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 25 percent disability.

The loss of forepart of foot shall be considered a 30 percent disability.

The loss of a foot shall be considered a 35 percent disability.

The loss of a leg shall be considered a 45 percent disability.

The loss of thigh shall be considered a 50 percent disability.

The loss of thigh at hip joint shall be considered a 60 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 10 percent disability.

The loss of thumb (one phalanx) shall be considered a 12 percent disability.

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The loss of thumb shall be considered a 20 percent disability.

The loss of thumb and index fingers shall be considered a 32 percent disability.

The loss of index and middle fingers shall be considered a 20 percent disability.

The loss of middle and ring fingers shall be considered a 15 percent disability.

The loss of ring and little fingers shall be considered a 10 percent disability.

The loss of thumb, index and middle fingers shall be considered a 40 percent disability.

The loss of index, middle and ring fingers shall be considered a 30 percent disability.

The loss of middle, ring and little fingers shall be considered a 20 percent disability.

The loss of four fingers shall be considered a 32 percent disability.

The loss of hand shall be considered a 50 percent disability.

The loss of forearm shall be considered a 55 percent disability.

The loss of arm shall be considered a 60 percent disability.

The total and irrecoverable loss of the sight of one eye shall be considered a 33 percent disability. For the partial loss of vision in one or both eyes, the percentages of disability shall be determined by the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, 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 22 and one-half percent disability. The total and irrecoverable loss of hearing of both ears shall be considered a 55 percent disability.

For the partial loss of hearing in one or both ears, the percentage of disability shall be determined by the Insurance Commissioner, 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 Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, makes the proper award for the injury, the Insurance Commissioner, private carrier, or self-insured employer 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

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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 §23-4-6b of this code, 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 §23-4-6b of this code, the degree of disability shall be determined exclusively by the provisions of said subdivision and said section. The Occupational Pneumoconiosis Board created pursuant to §23-4-8a of this code shall premise its decisions on the degree of pulmonary function impairment that claimants suffer solely upon whole body medical impairment. The Insurance Commissioner 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 former workers' compensation 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) The Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, shall establish a reviewing body to review applications for permanent total disability. The reviewing bodies shall employ or otherwise engage adequate resources, including medical professionals.

(1) The Insurance Commissioner shall establish requirements for the proper completion and support for an application for permanent total disability benefits, and no issue of permanent total disability may be referred to a reviewing body unless a properly completed and supported application for permanent total disability benefits has been first filed. Prior to a reviewing body's adjudication of a permanent total disability application, the 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. The claimant may furnish all pertinent information to the reviewing body and shall furnish to the

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reviewing body any information requested. The claimant may submit no more than one report and opinion regarding each issue present in a claim. The reviewing body may request that those persons who have furnished reports and opinions regarding a claimant provide it with additional information considered necessary. The claimant 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) In the event a reviewing body elects to examine a claimant, the 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 reviewing body and the reasons for the findings. Copies of the reports of all examinations made by the reviewing body shall be served upon the parties. Each shall be given an opportunity to respond in writing to the findings and conclusions stated in the reports.

(3) A reviewing body shall state its initial recommendations in writing with an explanation for each recommendation setting forth the reasons for each. The recommendations shall be served upon the claimant and the claimant shall be afforded a 30-day opportunity to respond in writing to the reviewing body regarding its recommendations. The 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 Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable. 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 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: *Provided*, That upon notification to the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, by a claimant or his or her representative that the claimant seeks to be evaluated for permanent total disability, the Insurance Commissioner, private carrier, or self-insured employer shall send the claimant or his or her representative the proper application form. The Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, shall set time limits for the return of the application. A properly completed and supported application returned within the time limits set by the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, shall be treated as if received on the date the Insurance Commissioner, private carrier, or self-insured employer 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.

Any objection filed in regard to a decision on an application for permanent total disability

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benefits shall be subject to the review provisions of §23-5-1 *et seq*. of this code.(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 50 percent in prior permanent partial disability awards; (B) must have suffered a single occupational injury or disease which results in a finding that the claimant has suffered a medical impairment of 50 percent; or (C) has sustained a 35 percent statutory disability pursuant to the provisions of subdivision (f) of this section. Upon filing an application, the claim will be reevaluated by the reviewing body pursuant to subdivision (i) of this section to determine if the claimant has suffered a whole body medical impairment of 50 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 35 percent statutory disability pursuant to the provisions of subdivision (f) of this section. A claimant whose prior permanent partial disability awards total 85 percent or more shall also be examined by the reviewing body and must be found to have suffered a whole body medical impairment of 50 percent in order for his or her request to be eligible for further review. The 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 50 percent or has sustained a 35 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 50 percent whole body medical

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impairment or has sustained a 35 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 85 percent or more and who have been found to have a whole body medical impairment of at least 50 percent or have sustained a 35 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 75 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 the age of 70 years.

(3) In the event that a claimant, who has been found to have at least a 50 percent whole body medical impairment or has sustained a 35 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 §23-4-9 of this code, 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 §23-4-6d and §23-4-14 of this code:

(A) 80 percent for the first year;

(B) 70 percent for the second year;

(C) 60 percent for the third year; and

(D) 50 percent for the fourth year: *Provided*, That in no event shall the benefits exceed 100 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

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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 Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable, may elect to have any recipient of a permanent total disability award undergo one medical examination during each of the first five years that the permanent total disability award is paid and one medical examination during each three-year period thereafter until the claimant reaches the age of 70 years: *Provided*, That the Insurance Commissioner, private carrier, or self-insured employer may elect to have any recipient of a permanent total disability award under the age of 50 years undergo one medical examination during each year that the permanent total disability award is paid until the recipient reaches the age of 50 years, and thereafter one medical examination during each three-year period thereafter until the claimant reaches the age of 70 years.

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