

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SUNDOWN JACOBS)	
Claimant)	
V.)	
)	AP-00-0461-809
STATE OF KANSAS)	CS-00-0444-106
Respondent)	
AND)	AP-00-0461-810
)	CS-00-0339-793
STATE SELF INSURANCE FUND)	
Insurance Carrier)	AP-00-0461-811
)	CS-00-0316-236

ORDER

Respondent appealed the October 22, 2021, Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on February 10, 2021.

APPEARANCES

William L. Phalen appeared for Claimant. Jeffery R. Brewer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Preliminary Hearing Order dated, December 18, 2017; the Preliminary Hearing Order, dated March 5, 2019; the Preliminary Hearing Order, dated May 6, 2020;¹ Transcript of the Regular Hearing from June 4, 2021; Regular Hearing by Deposition of Sundown Jacobs from June 9, 2021; Evidentiary Deposition of Lowry Jones, M.D., from June 29, 2021, with exhibits attached; Evidentiary Deposition of Pedro Murati, M.D., from August 11, 2021, with exhibits attached; Evidentiary Deposition of Pat Do, M.D., from September 15, 2021, with exhibits attached; and the documents of record filed with the Division.

¹ There are no transcripts from the preliminary hearings held on December 15, 2017, March 4, 2019 and May 6, 2020. There are orders issued as a result of the three scheduled preliminary hearings and those orders were considered by the Board.

ISSUES

1. Did the ALJ err in awarding permanent partial disability compensation based on a 17 percent rating to the body as a whole?
2. What is the nature and extent of Claimant's permanent impairment?

FINDINGS OF FACT

Three claims were filed in this case. The first claim alleged repetitive trauma injury to the right shoulder with a accident date of June 20, 2017, identified in the records as AP-00-0461-810. The second claim alleged repetitive trauma injury to both shoulders with a date of accident of June 28, 2017, identified in the records as AP-00-0461-811. The third claim alleges repetitive trauma to both shoulders with an accident date of June 26, 2019, identified in the records as AP-00-0461-809.

Claimant worked for Pittsburgh State University in the Housing Department as a maintenance technician for 11 years. His primary job duties are maintenance of heating and air conditioning in college buildings, but he also does maintenance of fire alarms plumbing, locks and building structures. Claimant's job requires repetitive use of his hands and arms in an overhead position.

In 2017, Claimant began to notice discomfort in his upper extremities, specifically in his shoulders. In the latter part of May 2017, Claimant reported the problems with his upper extremities to Mr. Jeff Burns. He reported pain in his right shoulder from working and requested to see a doctor. Claimant was told if the pain got worse, he would be sent to a doctor. Claimant continued to work and his shoulder pain worsened. Claimant saw a doctor on June 20.

Claimant was sent to the campus physician, Dr. Karen Sandness. Claimant was prescribed medication and was told he could return to work. Dr. Sandness recommended Claimant see a specialist for a labral tear revealed in an MRI of the right shoulder.

Claimant continued with his work duties despite the pain, using his left upper extremity more frequently to limit further injury to his right arm. Claimant's left upper extremity became painful. Claimant reported the bilateral shoulder problems to Mr. Jeff Burns.

Dr. Pat Do, an orthopedic surgeon, examined Claimant on February 7, 2018, at the request of the Court. Claimant had good shoulder range of motion, alignment, stability, and sensation. He had full range of motion in his neck, weakness in the right shoulder with

elevation and full passive motion. He had some signs of impingement and the AC joint was nontender.

Dr. Do diagnosed right shoulder pain and thought Claimant might have bursitis and possibly some labral and/or rotator cuff pathology. Dr. Do found within a reasonable degree of medical probability, Claimant's work activities, including repetitive use was the prevailing factor in the need for treatment for the right shoulder and any resulting impairment. He further found the left shoulder pain was no more than a temporary aggravation of Claimant favoring his right shoulder. His work activities were not the prevailing factor for the need for treatment of the left shoulder.

Dr. Do recommended x-rays and an MRI of the right shoulder. He recommended anti-inflammatory medication, physical therapy, cortisone injection and as a last resort, diagnostic right shoulder arthroscopy. On September 5, 2018, Dr. Do performed arthroscopic debridement of the glenohumeral joint, subacromial decompression and rotator cuff repair on Claimant's right shoulder.

Dr. Do found Claimant was at maximum medical improvement on November 27, 2018, with no permanent restrictions.

On December 19, 2018, Dr. Do assigned Claimant an 8 percent right upper extremity impairment (3 percent for lack of flexion; 3 percent for lack of abduction; 2 percent for lack of internal rotation). The impairment rating was done using the *American Medical Association Guides to the Evaluation of Permanent, 6th Edition*.² This impairment rating was status post right shoulder arthroscopy, extensive debridement of the glenohumeral joint, subacromial decompression, and rotator cuff repair.

Dr. Lowry Jones, an orthopedic surgeon, examined Claimant on May 6, 2019, at the request of the Court. Claimant reported as a result of treatment with Dr. Do, his right shoulder pain had become fairly minimal and he was working with no restrictions, but his left shoulder pain has become progressively worse.

Dr. Jones examined both of Claimant's shoulders and found the right shoulder had excellent range of motion, very good strength and little to no discomfort with range of motion. There was no significant tenderness over the acromioclavicular joint, over the biceps, or over the lateral acromion. Claimant had some minimal pain with loading the rotator cuff particularly in external rotation. For the left shoulder, Dr. Jones found good range of motion, pain with loading the glenohumeral joint at 45 degrees, pain with maximal loading, overhead particularly in resisted flexion and external rotation. Claimant had

² Hereinafter referred to as *The Guides*.

significant pain over the acromioclavicular joint and pain with maximal internal rotation and abduction/external rotation. Claimant's strength in his left shoulder was slightly weaker than the right shoulder. Claimant rated his pain at a 4 out of 10, 2 out of 10 at rest and 6 out of 10 with activity and on average. He reported having the left shoulder pain for 2 years.

Dr. Jones' diagnosis for the left shoulder was partial rotator cuff tear with chronic impingement and probable labral degenerative tear and probable glenohumeral early arthritic changes. The prevailing factor for Claimant's complaints were due to repetitive overhead activity for the multiple years he did HVAC work for Respondent. He opined medical treatment could include injections. However, Dr. Jones believed an MRI was appropriate and likely an arthroscopic evaluation with decompression, debridement of the glenohumeral joint and rotator cuff debridement or repair.

On June 15, 2020, Dr. Jones provided an amended report after he reviewed the MRI of the left shoulder. He recommended an arthroscopic evaluation of the left shoulder and to plan for an acromioplasty, debridement of the rotator cuff and assessment of a biceps anchor. On September 11, 2020, Dr. Jones performed arthroscopic surgery on Claimant's left shoulder.

On January 25, 2021, Dr. Jones issued an impairment rating of 4 percent to the left shoulder for a partial rotator cuff tear, left shoulder SLAP tear and shoulder impingement based on *The Guides*. He opined Claimant would not need future medical treatment. Dr. Jones was asked if his rating would be different based on his education, training and work experience or would it remain at 4 percent.

Dr. Jones testified:

It would have been—if I didn't look at the Sixth Edition it would have been 5 percent. He had no distal clavicle, he didn't have any significant labral findings. He had only some minimal rotator cuff findings. So the answer is off the top of my head I would have provided him a 5 percent rating.³

Dr. Jones also testified the rating under *The Guides* was very appropriate and consistent with his clinical exam.

Dr. Pedro Murati examined Claimant on March 5, 2021, at the request of Claimant's attorney. Claimant reported limited range of motion in both shoulders, but mainly the left; pain in the shoulders, constantly in the left and periodically on the right; and pain in the

³ Jones Depo. at 16.

bicep, mainly left and when the arm is bent 90 degrees or more causing shooting pain from the elbow up. Claimant denied any significant injuries to his shoulders, arms and elbows prior to the work injury.

Upon examination, Dr. Murati found the following diagnoses: 1. Status post right shoulder arthroscopy with extensive debridement of glenohumeral joint. 2. Right shoulder arthroscopic subacromial decompression. 3. Right shoulder arthroscopic rotator cuff repair with Dr. Do on 9/5/2018. 4. Status post left shoulder arthroscopy with debridement of the labrum debridement of the rotator cuff and decompressive acromioplasty with Dr. Jones on 9/11/2020. Dr. Murati opined these conditions were within all medical probability a direct result of the work-related injury each and every working day from June 20, 2017, and ending June 26, 2019, during his employment with Respondent.

Dr. Murati rated Claimant with 22 percent body as a whole impairment under the 4th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* and 13 percent to the body as a whole according to *The Guides*. He also opined using *The Guides* as a starting point, based on his education, training, experience and expertise, 22 percent whole person impairment more closely approximated Claimant's true impairment. Dr. Murati explained his rating:

A. Well, if you read my report, this was before the decision by the Supreme Court of using the 6th Edition as a guide. So I have looked at my impairment and have decided to modify it. For example, the 6th Edition says that you should only rate the most clinical significant part of a joint or regional area. I believe that this is not a scientific way of assessing impairment.

Why do I say this? Because having two parts in a regional area is worse than having one injured part. I tried to find medical literature that says so, that having one problem is just as bad as having two or three or four problems in the same regional area, and I could not find it. Actually what I found was the opposite, the more problems you have in a regional area, the worse the condition is overall.

So if you use the range of motion of the right shoulder, you come out with a ten percent right upper extremity. The functional modifier doesn't change that. However, that doesn't take into account the fact that for the right shoulder, he had a subacromial decompression, which is amputation of the distal part of the sub acromion, and the fact that he had extensive debridement of the glenohumeral joint. For that I will be assessing, let's see if I can find my deals here, a total of -- I'm going to give a total of -- let's see, ten, three, three and five, 20 percent left -- right upper extremity to the right shoulder. That converts to 12 percent whole person.

Now, if you see for the left shoulder, there is a debridement of the labrum. That is not an ideal thing to do, it was the necessary thing to do. And why is it not

ideal is because the labrum behaves just like the meniscus. You have a meniscectomy, you are going to accelerate the normal arthritic process of that joint which is going to lead to accelerated arthritis and the need for a total shoulder replacement, which this individual will need more probable than not as a result of these injuries.

So for the left shoulder, I came up with a number of -- let's see, 16 percent upper extremity, and that converts to ten percent. Now, if you combine 12 and 10, that comes to 21 percent whole person. If you see the permanent base of the 4th Edition, that comes out to 22 percent whole person. So as you see, it approximates a 22 as you start to include all of the injured parts in the body of this individual.

So I think 22 percent will be the ideal impairment here over the 21 percent. And, you know, this really is an understatement of this person's condition, because this person will need total shoulder replacements as he ages as a result of these injuries. And those ratings, of course, are much higher than what I have given him currently, so I will stick to a 22 percent whole person.⁴

Dr. Murati opined Claimant will need further medical treatment including yearly follow-ups his shoulders, arms, and elbows in case of complications. He recommended appropriate physical therapy, injections, radiological studies, and anti-inflammatory and pain medications and surgical intervention, in the form of bilateral total shoulder replacement.

The ALJ found Claimant suffered injury to both shoulders from repetitive trauma arising out of and in the course of his employment with Respondent and awarded 14 weeks temporary total disability, a 17 percent whole body impairment and future medical treatment. The ALJ calculated the 17 percent permanent partial disability by combining Dr. Do's rating of 8 percent for the right shoulder, Dr. Jones rating of 4 percent for the left shoulder and Dr. Murati's body as a whole rating of 22 percent. The award was entirely assigned to the accident date of June 26, 2019.

PRINCIPLES OF LAW AND ANALYSIS

Respondent appealed, arguing the ALJ failed to properly convert the scheduled impairment ratings of Drs. Do and Jones to whole body impairments before combining them with Dr. Murati's whole person impairment rating to come to the 17 percent body as a whole award. Respondent contends when the ratings of Dr. Do and Dr. Jones are properly converted to whole body rating and combined with Dr. Murati's whole body rating, Claimant's impairment would be 14.5 percent to the body as a whole.

⁴ Murati Depo. at 13-15.

Claimant argues the ALJ should not be allowed to convert the scheduled injury ratings of Dr. Do and Dr. Jones, and therefore the Board should use the only whole body rating available, that of Dr. Murati, which is 22 percent.

1. Did the ALJ err in awarding a 17 percent partial permanent functional impairment to the body as a whole?

The ALJ erred in his calculation of the 17 percent body as whole award. The calculation was based on combining ratings for two scheduled injuries or injuries specifically covered in K.S.A. 44-510d with a body as a whole rating covered in K.S.A. 44-510e.

In the recent Court of Appeals case of *Perez v. National Beef Packing Co.*⁵, the Court stated:

We see no reason why the Guides may not be judicially noticed as it is a standard reference widely used by physicians to assist in the determination of an impairment in workers compensation cases, is specifically referred to by the Act, and is to be used as starting point for calculating a worker's functional impairment. To require admission of the Guides into evidence in every single workers compensation hearing strikes us as completely unnecessary as there is no disputing their content. Admittedly, the ALJ did not take judicial notice of the Guides, meaning it was not technically part of the record presented to the Board for its review, but such an error, if any, is harmless in this instance.⁶

The Guides state: "If impairments from two or more organ systems are to be *combined* to express a whole person impairment, each must first be expressed as whole person impairment percent."⁷

The ALJ calculated the award by combining Dr. Murati's 22 percent impairment rating with Dr. Do's 8 percent impairment rating to the right shoulder and Dr. Jones' impairment rating of 4 percent to the left shoulder. This calculation is in error according to *The Guides* and will be disregarded by this Board.

⁵ *Perez v. National Beef Packing Co.*, 60 Kan. App. 2d 489, 494 P.3d 268 (2021).

⁶ *Id.* at 283.

⁷ *The Guides* at 604.

2. What is the nature and extent of Claimant's permanent impairment?

Claimant sustained a bilateral shoulder injury.

K.S.A. 44-510e(a)(2)(A) states:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

- (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
- (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
- (iii) the loss of or loss of use of both eyes.

Because Claimant suffered a bilateral shoulder injury, Claimant's permanent impairment shall be rated a body as a whole injury.

In rating body as a whole impairments the Kansas Supreme Court in *Johnson v. US Food Service*⁸ ruled the ratings calculations should begin with *The Guides*, coupled with analysis of whether the rating from *The Guides* comports with competent medical evidence. Dr. Murati is the only doctor who has done the *Johnson* analysis. Based on *The Guides* and competent medical evidence which included, the multiple areas of the right shoulder injured justified finding an impairment rating of 22 percent to the body as a whole.

The only ratings in evidence in this case are two separate ratings for each shoulder from two different doctors and Dr. Murati's body as a whole rating for both shoulders. It is speculation two different doctors would rate the opposite shoulder the same, which is what Respondent requests. It is speculation Dr. Do would rate the left shoulder at 4 percent and vice versa for Dr. Jones.

The Board finds Dr. Murati's rating more persuasive than combining two different doctors' ratings of two different body parts without the benefit of a *Johnson* analysis. For

⁸ *Johnson v. US Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

these reasons the Board is adopting the 22 percent body as whole rating for Claimant's permanent partial impairment as result of the June 26, 2019, accident (identified in the records as CS-00-0444-106 > AP-00-0461-809).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth dated October 22, 2021, is modified. Claimant is entitled to 14 weeks of temporary total disability at the rate of \$477.98 per week or \$6,691.72, followed by 91.3 weeks of permanent partial disability compensation at the rate of \$477.98 per week or \$43,639.57 which is ordered paid in one lump sum less amounts previously paid and less amounts which includes \$287.58 for an overpayment of temporary total disability, which is due and owing for a total award of \$50,331.29.

The ALJ Award is affirmed in all other particulars.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

William L. Phalen, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Steven M. Roth, Administrative Law Judge