

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JAMES MORRIS</b>	)	
Claimant	)	
V.	)	
	)	
<b>SHILLING CONSTRUCTION CO., INC.</b>	)	CS-00-0434-953
Respondent	)	AP-00-0450-807
AND	)	
	)	
<b>MIDWEST BUILDERS CASUALTY</b>	)	
<b>MUTUAL COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

The Kansas Court of Appeals decided *Morris v. Shilling Construction*,<sup>1</sup> and remanded this matter to the Board concerning two issues: (1) determining the nature and extent of the claimant’s impairment, absent right wrist impairment, and (2) determining the claimant’s average weekly wage (AWW).

On April 14, 2022, the Board held oral argument. Mitchell Rice appeared on behalf of the claimant. Danielle R. Farha appeared on behalf of the respondent and its insurance carrier (the respondent).

**RECORD**

The Board considered the entire record, including the Board’s prior Order dated September 9, 2020, the Memorandum Opinion of the Court of Appeals, the parties’ briefs to the Court of Appeals and the respondent’s brief to the Board.

**ISSUE**

Should the claimant’s request this matter be remanded to the ALJ be granted regarding: (1) the nature and extent of his disability and (2) the calculation of his average weekly wage (AWW)?

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<sup>1</sup> No. 123,297, 2021 WL 5751704 (Kansas Court of Appeals unpublished opinion filed Dec. 3, 2021).

FINDINGS OF FACT

The Board adopts the detailed factual findings and procedural overview in the Board's prior Order, as well as the factual findings in the Memorandum Opinion. The following facts pertain to the claimant's average weekly wage and the nature and extent of his disability.

The claimant sustained a compensable injury which arose out of and in the course of his employment on June 22, 2018.

At his attorney's request, the claimant saw Dr. Pedro Murati on January 23, 2019. Using the *Guides to the Evaluation of Permanent Impairment*, 6th ed., (*Guides*, 6th ed.), Dr. Murati opined the claimant sustained 8% whole person impairment (2% for the right lower extremity, 2% for a low back sprain and 4% for right wrist instability). Dr. Murati assigned 12% whole person impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*, 4th ed.). Dr. Murati provided work restrictions and opined the claimant had 80% task loss. Dr. Murati testified all of his opinions were stated in terms of reasonable medical certainty. Dr. Murati was not asked if his opinions were based on competent medical evidence, after using the *Guides*, 6th ed., as a starting point.

On June 6, 2019, the claimant saw Dr. David Hufford for a court-ordered independent medical examination. Using the *Guides*, 6th ed., Dr. Hufford rated the claimant 5% whole person impairment for his right lower extremity and low back. He assigned 9% whole person impairment under the *Guides*, 4th ed. The doctor did not assign any impairment for the claimant's right upper extremity. Dr. Hufford stated the claimant's low back had not been fully evaluated; he suggested a lumbar MRI. Dr. Hufford's report indicated his opinions were offered within reasonable medical probability and he testified his opinions were stated in terms of reasonable medical probability and also certainty. Dr. Hufford was not asked if his opinions were based on competent medical evidence, after using the *Guides*, 6th ed., as a starting point.

The ALJ issued an Award dated April 27, 2020, concluding:

- The claimant's AWW was \$695.55 by dividing the claimant's earnings over 11 calendar weeks. The ALJ did not mention the week the claimant earned \$88 in from March 11-17, 2018. Such week had a line hand-drawn through it.
- The claimant sustained 6.5% whole body functional impairment based on a split of the ratings. The judge concluded the claimant had right wrist impairment.

The claimant appealed to the Board. In an Order dated September 9, 2020, the Board determined the claimant's AWW was \$782.56.

The Board Majority affirmed the ALJ's conclusion the claimant sustained 6.5% functional impairment to the body as a whole using the *Guides*, 6th ed., on account of his work injury. The rating included impairment for the claimant's low back, left leg and right wrist. Nothing in the Board's decision indicated it found the claimant's impairment was based on using the *Guides*, 6th ed., as a starting point and thereafter relying on more important competent medical evidence. One Board Member dissented regarding the nature and extent of the claimant's impairment.

The claimant appealed to the Court of Appeals and the respondent cross-appealed. In a Memorandum Opinion dated December 3, 2021, the Court of Appeals reversed and remanded the Board's Order because it held: (1) the Board actually reversed the ALJ's finding of right wrist impairment, but still awarded the claimant permanent partial disability benefits based on 6.5% impairment, and (2) the Board miscalculated the claimant's AWW.

The respondent argues the claimant's average weekly wage is \$695.55, based on the claimant earning \$7,651.05 over 11 weeks. The respondent argues the ratings of Drs. Hufford and Murati should be averaged, without accounting for Dr. Murati's right wrist rating, resulting in 4.5% whole person impairment.

At oral argument, the claimant requested a remand to the ALJ because *Johnson*<sup>2</sup> and *Garcia*,<sup>3</sup> decided after the Board initially decided this matter, hold the *Guides*, 6th ed., is a starting point to assess impairment, but stress an impairment rating opinion must be based on competent medical evidence, which is a more important consideration. Also, at oral argument, the claimant's counsel stated he probably drew a line through one of the weeks listed on the wage statement, the week of March 11-17, 2018, because he believed including the week was legally irrelevant to determine his client's AWW. The respondent objected to a remand to the ALJ. The respondent's counsel was unaware the claimant's counsel drew a line through the first week. Despite this information, the respondent still asserted at oral argument the claimant's AWW should be based on 11 weeks.

#### PRINCIPLES OF LAW AND ANALYSIS

- 1. The Board remands these proceedings to the ALJ to determine the nature and extent of the claimant's disability, consistent with *Johnson* and *Garcia*.**

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<sup>2</sup> *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 478 P.3d 776 (2021).

<sup>3</sup> *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 506 P.3d 283 (2022).

The claimant alleges a nonscheduled injury.<sup>4</sup> The claimant was pursuing permanent partial disability benefits based on injuries to the body as a whole, including alleging entitlement to a work disability award.

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

The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

*Johnson* held a worker's impairment rating starts by using the *Guides*, 6th ed., as a starting point and "more important and decisive 'competent medical evidence'" thereafter is used to formulate a physician's rating opinion.<sup>5</sup> *Garcia* held an impairment determination regarding the body as a whole could not be solely based on the *Guides*, 6th ed.

Calculating impairment requires consideration of competent medical evidence. The evidence contains no medical opinion based on *Johnson* or *Garcia*. There are no impairment ratings using the *Guides*, 6th ed., as a "starting point only," and thereafter relying on "competent medical evidence." Without using the *Guides*, 6th ed., as a starting point and thereafter relying on the more important aspect of competent medical evidence, the determination of the claimant's impairment of function is contrary to the Kansas Supreme Court's directive in *Johnson*, as well as any clarification provided in *Garcia*. The claimant's request for a remand to the ALJ for the taking of additional evidence on the nature and extent of impairment concerning the claimant's low back and left lower extremity is granted.

**2. The issue of determining the number of calendar weeks the claimant worked before his accident is also remanded to the ALJ.**

The Court of Appeals found Morris actually worked during 11 or 12 weeks, instead of nine calendar weeks as found by the Board. The Court noted the Legislature eliminated any distinction between full-time and part-time employees and all weeks worked must be included in the wage calculation. The Court noted the record was unclear why a line was drawn through the first week listed on the wage statement. The Court remanded this matter to the Board to determine the claimant's AWW based on either 11 or 12 weeks.

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<sup>4</sup> See R.H. Trans., pp. 5, 7.

<sup>5</sup> *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 602, 478 P.3d 776 (2021).

At oral argument, the respondent contended the claimant’s wages should be calculated based on 11 calendar weeks. Thereafter, counsel for the claimant stated he probably was the person who drew a line through the week dated March 11 to March 17, 2018, on the wage statement, based on his opinion the time frame did not represent a calendar week worked by his client and was therefore irrelevant. Given this information, counsel for the respondent reiterated 11 weeks should be used to compute the claimant’s average weekly wage.

The Board remands the determination of the claimant’s AWW to the ALJ, including for development of factual findings regarding whether the claimant worked the week of March 11-17, 2018. The Board finds the determination of this issue may be stipulated to by the parties in writing or decided by the ALJ.

**ORDER**

The Board remands this matter to the ALJ for two determinations: (1) the nature and extent of the claimant’s disability attributable to the back and left lower extremity under the *Johnson* standard using the *Guides*, 6th ed., as a starting point, and, more importantly, when considering competent medical evidence; and (2) the claimant’s AWW after determining the number of weeks the claimant actually worked.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2022.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (via OSCAR)  
Mitchell Rice  
Jodi Fox  
Danielle R. Farha  
Hon. Steven Roth