BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MELVIN MARSHALL	)	
Claimant	)	
v.	)	
	)	AP-00-0464-143
MIDWEST EXPRESS CORP.	)	CS-00-0148-963
Respondent	)	
and	)	
	)	
KANSAS TRUCKERS RISK MGMT. GROUP	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the February 28, 2022, Award by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on July 7, 2022.

APPEARANCES

Zachary Kolich appeared for Claimant. Todd Cowell appeared for Respondent and its Insurance Carrier. Due to a conflict, Board Member William G. Belden, recused himself from this appeal. Joseph Seiwert was appointed as a Board Member Pro Tem.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing held November 17, 2021; Transcript of preliminary hearing held August 26, 2020; Transcript of preliminary hearing held August 14, 2019; Transcript of preliminary hearing held August 23, 2017, with Claimant's exhibit 1; Evidentiary deposition of Claimant taken on September 4, 2019; Continuation of preliminary hearing by evidentiary deposition of Claimant taken on September 11, 2020; Evidentiary deposition of John Scott Swango, M.D., taken September 17, 2020, with exhibits A-B; Continuation of regular hearing by evidentiary deposition of Claimant taken on November 19, 2021; Evidentiary deposition of George C. Fluter, M.D., taken on November 30, 2021, with exhibits 1-2; Evidentiary deposition of Pat Do, M.D., taken January 19, 2022, with exhibits A-B; Evidentiary deposition of Craig Satterlee, M.D., with exhibits A-C; and the documents of record filed with the Division.

ISSUES

1. Is the April 26, 2016, accident the prevailing factor in Claimant's right elbow and wrist medical conditions, need for medical treatment and resulting disability or impairment?

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

3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent for approximately one month as an over-the-road truck driver. He was parked in his sleeper cab during a storm. Either a strong straight wind or tornado blew his truck over. The truck came to rest with the cab upside down. Claimant suffered injury to his right shoulder.

Claimant was seen by Dr. Thomas B. Giel, III, an orthopedic surgeon, on June 30, 2016. Dr. Giel performed a right shoulder SLAP repair/subscapularis repair on August 6, 2016. Claimant was in an immobilizer for approximately eight weeks following his surgery. Dr. Giel performed a right shoulder debridement on February 3, 2017. Claimant was in an immobilizer for approximately four weeks following his surgery. Dr. Giel released Claimant at maximum medical improvement (MMI), without restrictions on March 2, 2017.

Due to ongoing shoulder complaints, Respondent referred Claimant to Charles Craig Satterlee, M.D., a board certified orthopedic surgeon, on December 11, 2017. Claimant reported numbness in his right arm. Dr. Satterlee performed right rotator cuff repair, a tenodesis of the long head of the biceps, with subacromial decompression on June 12, 2018. Claimant was in an immobilizer for approximately eight weeks following his surgery.

On July 26, 2018, approximately six weeks post-surgery and still in an immobilizer, Claimant reported to Dr. Satterlee he was having sharp, shooting pain down his humerus into his forearm and fingers. Two appointments later, on October 15, 2018, Claimant reported physical therapy had not been started, he had increased shoulder pain and pain radiating down into his forearm towards his thumb on the right side. The radiating pain had been present for approximately one week. At his next appointment with Dr. Satterlee on November 26, 2018, Claimant reported a 3-4 week history of pain down his arm, into his thumb and index finger with no new injury. Due to these complaints, Dr. Satterlee referred Claimant for a right upper extremity electrodiagnostic study (EMG) which was performed on January 14, 2019. The study revealed carpal tunnel syndrome. Dr. Satterlee recommended a cock-up splint and further evaluation. Respondent denied further

treatment for the carpal tunnel condition before Claimant's next appointment with Dr. Satterlee on February 11, 2019, Dr. Satterlee recommended Claimant pursue treatment for the carpal tunnel condition at his own expense.

Claimant did not work from the date of surgery, June 12, 2018, until late February or early March, 2019. During this time, Claimant developed pain, numbness, loss of feeling and grip strength in his right wrist and elbow.[1]

Dr. Satterlee preformed a second right shoulder surgery on July 31, 2019, to remove heterotopic ossification at his acromioclavicular joint. Claimant was in an immobilizer for approximately nine weeks following his surgery. Claimant returned to truck driving somewhere between appointments with Dr. Satterlee on September 16, 2019, and October 28, 2019. Claimant reported to Dr. Satterlee when he returned to truck driving, his whole arm would go numb from time to time. Dr. Satterlee noted Claimant had a positive Tinel's over the ulnar nerve at the elbow and a little weakness of grip. He recommended a second EMG which was provided on December 30, 2019. It revealed a right cubital tunnel syndrome. Dr. Satterlee recommended Claimant be evaluated by a hand specialist for the wrist and elbow complaints.

Dr. Satterlee's opined Claimant had reached MMI for his right shoulder and released him without permanent restrictions on December 30, 2019. Dr. Satterlee opined Claimant has a 12% right upper extremity impairment at the shoulder level based on the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment,* 6th Edition (*Guides*). He did not have any recommendations for future medical treatment. Claimant testified Dr. Satterlee advised he would probably need another surgery in the future.[2]

Dr. Satterlee testified he was not asked to address causation of Claimant's carpal tunnel or cubital tunnel syndromes until just prior to his deposition. Regarding causation of Claimant's wrist and elbow medical conditions, Dr. Satterlee testified:

> Q. Throughout the course of your care, you've seen cubital tunnel or carpal tunnel come on as a result of sequelae of shoulder surgery. Is that correct?
>
> A. It's mostly from having the elbow bent in the sling, not from the shoulder surgery per se.[3]

Regarding causation of the elbow condition, Dr. Satterlee testified:

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[1] *See* Cont. P.H. by Depo. Cl. (Sep. 11, 2020) at 17-18.

[2] *See* Cont. R.H. by Depo Cl. (Nov. 19, 2021) at 10.

[3] *See id*. at 31.

> Q. So after he had been out of the - - he was in a sling for about a month and after he was out of the sling for a month he developed complaints related to cubital tunnel condition?
>
> A. Correct.
>
> Q. Is there any significance to the fact that he developed the cubital tunnel a month after having been in the sling?
>
> A. Well, when you're in a sling, your elbow's bent and sometimes that'll put a little tension on the nerve, but usually the symptoms come on when it's bent. So it came on subsequent to that, a month afterwards.
>
> Q. So is that significant, the fact it didn't come on for a month, until he had been out fo the sling for a month, is that significant?
>
> A. Yeah, I think to me it would be significant, that is wasn't from the sling per se.[4]

Respondent referred Claimant to John Scott Swango, M.D., a board certified orthopedic surgeon, specializing in hand surgery, to perform an independent medical examination on March 31, 2020. Dr. Swango recommended right carpal tunnel release and decompression, with possible anterior transposition of the right ulnar nerve at the elbow. Dr. Swango requested additional medical records (Texas Hospital and from Dr. Giel) before providing his final causation opinion.

After reviewing the requested medical records, Dr. Swango prepared an addendum which stated:

> In conclusion, after review of these additional records, it appears as though the patient developed right carpal tunnel syndrome symptoms after he returned to work as a truck driver and while still in the care of Dr. Satterly (sic.). It appears as though the final surgical procedure to the right shoulder was done after the development of carpal tunnel syndrome symptoms, on 07/31/2019. Based on my review of the information, I think it is very difficult to know exactly what has caused the right carpal tunnel syndrome and the right cubital tunnel syndrome. I believe risk factors for this would be the multiple right shoulder surgeries, which are commonly associated with some degree of swelling and immobility following surgery. In addition, returning to truck driving, depending on the details of that driving, may be a risk factor as well.

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[4] *See* Satterlee Depo. at 12-13.

> Although it does require some speculation, it is my opinion most likely it is the history of multiple prior right shoulder surgeries and injury that predisposed him to the development of his right cubital tunnel and right carpal tunnel syndromes.[5]

Dr. Swango testified he had not handled any Kansas workers compensation cases and the prevailing factor for Claimant's right wrist and elbow medical conditions was not the truck accident. He testified:

> Q. So knowing that the accident did not - -the truck accident in 2016 did not, in and of itself, cause his right upper extremity conditions, and knowing all of these other risk factors, the multiple surgeries themselves, along with the course - - well, let me ask you this: Does part of the surgery that would predispose him to these conditions also include the various lengths of time where he was required to immobilize his shoulder and maintain wearing a sling, et cetera, things of that nature?
>
> A. Yes.
>
> Q. Okay. And so would it then be your opinion that the multiple surgeries, certainly up through the third surgery before he started experiencing or at least accounting right upper extremity neuropathic complaints, a consequence of the surgeries at best?
>
> A. Like my report says, it requires some speculation, but it is my opinion that probably that is the largest risk factor.
>
> . . .
>
> Q. Okay. And I think you just testified or responded just prior to that that it is the most significant risk factor? I don't want to misquote you, but could you repeat that opinion?
>
> A. Yeah, per my addendum, I would say, Although it does require some speculation, it is my opinion, most likely, it is the history of multiple prior right shoulder surgeries and any injury - - and an injury that predisposed him to the development of his right cubital and right carpal tunnel syndromes.
>
> . . .
>
> Q. And so within a reasonable degree of medical certainty, is it your testimony that the records do not support an affirmative conclusion that the tunnel syndromes we're taking about here were caused by either the work accident or the surgeries or the two together?

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[5] *See* Swango Depo. Ex. B at 4-5.

> A. It is my opinion the trucking accident is not the prevailing factor. Beyond that, the other items, the immobilization, the prior surgeries are risk factors, but I cannot conclude they are the prevailing factor.[6]

Claimant sought medical treatment for his right wrist and elbow at a preliminary hearing on October 5, 2020. The ALJ denied Claimant's requests. The Appeals Board reversed the ALJ and remanded the case back to the ALJ for determination of Claimant's preliminary hearing requests.

Respondent referred Claimant to Pat D. Do, M.D., a board certified orthopedic surgeon for treatment on January 14, 2021. Dr. Do preformed a right carpal tunnel release and a right ulnar nerve release on February 8, 2021. On May 12, 2021, Dr. Do found Claimant to be at MMI and released him to return to work, without restrictions. He opined Claimant has a 4% upper extremity impairment for the elbow and wrist and would not require additional medical treatment in the future.

Like Dr. Satterlee, Dr. Do testified he was not asked to address causation of Claimant's carpal or cubital tunnel until just prior to his deposition. Regarding causation, Dr. Do testified in his 22 years of practice, he had not seen a patient develop carpal tunnel and cubital tunnel following a shoulder surgery or due to the extremity being in a sling. Dr. Do further testified:

> A. if you are asking me is the cause of cubital tunnel and carpal tunnel from being in a sling or immobilized after shoulder surgery, it's possible but would be unlikely.
>
> Q. Okay. You can't - - is that for - is it more likely in the cubital tunnel or the carpal tunnel?
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> A. It's very low likelihood for the carpal tunnel, but theoretically, there's some possibility for cubital tunnel, because on of the possibilities for cubital tunnel is the elbow being in a hyperflexed position. For instance, some folks at night, when they sleep their elbows really really bent, they can wake up with some numbness down the ulnar innervated fingers because the nerve's been under tension overnight. So theoretically, it's possible.
>
> Q. Okay.
>
> A. But in a sling at 90 degrees, that's not that much tension. That's where we splint folks after a ulnar nerve surgery. So it would be possible but unlikely.
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> . . .

[6] *See id.* at 24-25, 27.

> A. If you are asking me if it's from a shoulder surgery or sling, I do not think it would pass the prevailing factor threshold.[7]

At his attorney's request, Claimant was evaluated by George Fluter, M.D., board certified by the American Board of Physical Medicine & Rehabilitation, on June 22, 2021. Dr. Fluter opined Claimant has a 37% impairment of function to the right upper extremity at the shoulder level. In arriving at this rating, he used the *Guides* as a starting point and found a 15% impairment. Dr. Fluter used the *Guides,* 4th Edition methodology to arrive at permanent partial impairment to the right upper extremity of 37%. Dr. Fluter opined Claimant will likely need future medical treatment in the form of medications, therapy, injections and ultimately, shoulder replacement surgery

Dr. Fluter noted Claimant had four shoulder surgeries, all of which required some degree of immobilization of his right upper extremity, post surgery. While immobilized, there is pressure over the ulnar nerve at the elbow and pressure at the wrist over the carpal tunnel. Dr. Fluter noted truck drivers, can develop carpal tunnel from the vibratory component of the steering column. Dr. Fluter opined the most likely scenario would be compression during the immobilization over the four times he was immobilized leading to dysfunction of the nerves

Based on the information available, Dr. Fluter opined there was a causal relationship between Claimant's medical condition and the injury in April of 2016. Specifically, the sequelae of issues related to shoulder surgeries and aftercare and the need for decompression of the ulnar nerve at the elbow and the median nerve at the wrist. Dr. Fluter opined that prevailing factor for the injury and conditions was the injury that occurred in April 2016.

The ALJ found the accident of April 26, 2016, to be the prevailing factor causing the medical condition and resulting disability/impairment for Claimant's right wrist and elbow conditions; awarded a 34% impairment of function to the right upper extremity at the shoulder level; and, awarded future medical benefits. Regarding the main issue of causation of the wrist and elbow conditions, the ALJ found:

> Only Dr. Fluter seems absolutely certain that the shoulder surgeries and subsequent immobilization caused the wrist and elbow conditions. The other physicians were less certain, but still allowed for the possibility. Dr. Do testified that immobilization at the 90 degree bend would possibly cause problems in an elbow, but is even less likely in the wrist. Dr. Satterlee indicates that carpal tunnel and cubital tunnel can come from immobilization or just having the elbow bent. Yet, Dr. Swango is of the opinion that the accident itself was not the prevailing factor in the writs and elbow condition *but* the multiple surgeries are the largest risk factor in the wrist and elbow conditions. Taken as a whole, the evidence indicates that Claimant

[7] *See* Do Depo. at 13-14.

> had multiple shoulder surgeries and then suffered an onset of his elbow and wrist conditions. Those same surgeries required immobilization of Claimant's right upper extremity. Between the immobilization and surgeries, the physicians all seem to agree, some with more certainty than others, that the surgeries and resulting immobilization can cause the wrist and elbow conditions and/or made Claimant more vulnerable to those conditions. (Citations omitted)[8]

Respondent requested review of the compensability of the wrist and elbow medical conditions, medical treatment and resulting disability/impairment. Respondent also seeks review of the award of future medical treatment. The Respondent does not believe Claimant sustained his burden of proving the prevailing factor for the wrist and elbow. Claimant asks the Board to affirm the ALJ's award.

PRINCIPLES OF LAW AND ANALYSIS

1. The April 26, 2016, accident is the prevailing factor in Claimant's right elbow and wrist medical conditions, need for medical treatment and resulting disability or impairment.

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.[9] The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[10] Establishing prevailing factor is based on all relevant evidence and is not dependent on medical opinions.[11]

In finding Claimant's wrist and elbow injuries compensable the ALJ stated:

> Taken as a whole, the evidence indicates that Claimant had multiple shoulder surgeries and then suffered an onset of his elbow and wrist conditions. Those same surgeries required immobilization of Claimant's right upper extremity. Between the immobilization and surgeries, the physicians all seem to agree, some with more certainty than others, that the surgeries and resulting immobilization can cause the

[8] *See* ALJ Award (Feb. 28, 2022) at 7.

[9] *See* K.S.A. 44-508(d).

[10] *See* K.S.A. 44-508(d),(g).

[11] *See Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, (Kan. WCAB Jul. 12, 2018).

> wrist and elbow conditions and/or made Claimant more vulnerable to those conditions.[12]

The Board agrees. Respondent argues the ALJ disregarded the prevailing factor opinions of three practicing orthopedic physicians. This is inaccurate. The only orthopedic surgeon who was unequivocal regarding his prevailing factor opinion not being the accident of April 2016 was Dr. Do. His opinion regarding a patient developing elbow symptoms following immobilization stands alone. Dr. Do later testified immobilization could cause elbow symptoms. This contradiction renders his opinion not credible. Both Dr. Satterlee and Dr. Swango testified wrist and elbow symptoms following immobilization was somewhat common, certainly not unusual. Dr. Swango described it as "the largest risk factor." Dr. Fluter was unequivocal in his opinion the resulting treatment, not the accident itself was the prevailing factor in causing the medical condition, need for treatment and resulting disability/impairment.

Claimant reported numbness to Dr. Satterlee at his first appointment. Claimant reported increasing symptoms in his right arm following his first surgery with Dr. Satterlee (third overall) and after he returned to work as an over the road truck driver. Respondent argues the return to truck driving is the cause of the onset of symptoms. The medical records of Dr. Satterlee and the testimony of Claimant indicate otherwise. Claimant has been an over the road truck driver since 1999. He has not suffered any upper extremity medical conditions or symptoms prior to the April 2016 accidental injury. It is undisputed Claimant's complaints in the right wrist and elbow began following his Claimant's return to work as a truck driver after three surgeries to his shoulder. It is unlikely the physical requirements of driving the truck standing alone was the cause of his new symptoms. It is more likely it was the return to work with a surgically repaired shoulder caused his symptoms.

The Board finds Claimant met his burden of proving the accident was the prevailing factor of the medical condition, need for medical treatment and resulting disability/impairment in the wrist and elbow was the medical treatment received in conjunction with the compensable injury to his right shoulder. The medical treatment received for the right shoulder causing the right wrist and elbow conditions were the natural and probable consequence of Claimant's compensable work accidental injury.[13]

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

Noting the parties did not dispute Claimant was entitled to an Award for permanent partial impairment for the right shoulder, the ALJ considered the opinions of Dr. Satterlee

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[12] *See* ALJ Award (Feb. 28, 2022) at 7.

[13] See *Buchanan v. JM Staffing, LLC*, 52 Kan.App.2d 943, 379 P.3d 428 (2016).

(12%) and Dr. Fluter (23%). The ALJ found "Claimant's true shoulder impairment is somewhere in between the two ratings offered by these physicians."[14] and awarded a 20% impairment. Regarding the elbow and wrist, the ALJ considered the opinions of Dr. Do (4%) and Dr. Fluter (37%) and awarded impairment between the two physician's opinions.

Respondent did not take issue with the ALJ's findings regarding the award for permanent partial impairment in their brief and at oral argument. Having found Claimant's medical treatment and resulting disability compensable, the Board affirms the ALJ's award of permanent partial disability benefits based on a 34% impairment of function to Claimant's right upper extremity at the shoulder level.

3. Claimant is entitled to future medical treatment.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or relieve the effects of the injury.[15] It is presumed the employer's obligation to provide medical treatment terminates upon the employee reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement.

The ALJ awarded future medical treatment based upon the opinions of Dr. Fluter who opined Claimant would be having ongoing problems. Simply put, the opinions of Dr. Satterlee and Dr. Do, Claimant will not need future medical treatment, in light of six surgeries to his right upper extremity, are not credible. Moreover, Claimant testified Dr. Satterlee advised he would need another surgery in the future. Dr. Fluter's opinions are the most credible of the testifying physicians.

Claimant provided sufficient medical evidence showing it is more probably true additional medical treatment will be necessary after Claimant is at maximum medical improvement, satisfying the prerequisite for awarding future medical benefits under K.S.A. 44-510h(e). The award of future medical benefits is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Julie A.N. Sample, dated February 28, 2022, is affirmed.

IT IS SO ORDERED.

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[14] *See* ALJ Award (Feb. 28, 2022) at 8.

[15] See K.S.A. 44-510h(a).

Dated this _____ day of July, 2022.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)

Zachary Kolich, Attorney for Claimant
Todd Cowell, Attorney for Respondent and its Insurance Carrier
Hon. Julie A.N. Sample, Administrative Law Judge