BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MANUEL A. GUERRERO	)	
Claimant	)	
V.	)	
	)	AP-00-0464-333
DENO'S TRUCKING	)	CS-00-0149-215
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund (Fund), through Travis Ternes, requested review of Administrative Law Judge Thomas Klein's Award dated March 10, 2022. Matthew Bretz appeared for the claimant. The uninsured and unrepresented respondent did not appear. The Board heard oral argument on July 14, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of:

1. Preliminary hearing transcript, held April 19, 2017, with exhibits;
2. Deposition transcript of Chris Short, taken January 13, 2017, with exhibits;
3. Deposition transcript of David Duncan, taken January 17, 2017;
4. Preliminary hearing transcript, held November 29, 2017;
5. Deposition transcript of Kenneth Jansson, M.D., taken March 9, 2020, with exhibits;
6. Regular hearing transcript, held May 6, 2020, with exhibits;
7. Deposition transcript of David Hufford, M.D., taken May 8, 2020, with exhibits;
8. Deposition transcript of Robert Barnett, Ph.D., taken May 29, 2020, with exhibits;
9. Deposition transcript of Pedro Murati, M.D., taken June 29, 2020, with exhibits; and
10. Documents of record filed with the Division.

ISSUES

1. Did the respondent have the requisite payroll threshold of $20,000 to be subject to the Kansas Workers Compensation Act?

2. What is the nature and extent of the claimant's disability?

3. Is the claimant entitled to future medical?

FINDINGS OF FACT

The claimant testified he worked as a truck driver for the respondent in 2016, for about one and one-half months. David Duncan owns the respondent.

On July 23, 2016, the claimant injured his right knee while exiting a truck. The claimant was in a lot of pain and unable to stand or walk. He reported his accident to Mr. Duncan the next day. The claimant did not receive any treatment and continued working.

On or about July 27, 2016, the claimant stepped off a curb and his right knee gave out. He was transported by ambulance to an emergency room. An MRI showed a tear of the main muscle between his knee and thigh. The claimant did not return to work for the respondent and has not worked anywhere since.

Dr. Kenneth Jansson, an orthopedic surgeon, began treating the claimant on October 11, 2017, for right knee pain. The claimant testified he told Dr. Jansson about low back pain, but according to Dr. Jansson, the claimant made no mention of back pain. Dr. Jansson diagnosed a complete tear of the claimant's quadriceps tendon and performed surgery on November 14, 2017. At a follow-up appointment on November 26, 2018, the doctor noted the claimant was walking better without crutches, but had an antalgic gait.

On May 1, 2019, Dr. Jansson noted the claimant reported weakness and difficulty with prolonged standing, but stated he felt 80 percent better. The claimant was not taking any medications and rated his pain as a 1 on a 1-10 pain scale. Dr. Jansson released the claimant at maximum medical improvement and stated the claimant "cannot do full duty."[1] The doctor did not believe the claimant would require future medical treatment.

Dr. Jansson testified the claimant may experience difficulty with stair climbing, getting up from low positions and squatting. While he was not surprised the claimant has a limp, the doctor disagreed the claimant's limp caused him any back problems.[2]

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[1] Jansson Depo., Ex. 4.

[2] See Jansson Depo. at 26.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*, 4th ed.), Dr. Jansson assigned the claimant a 12% impairment to the lower extremity. The doctor testified this impairment would be "under any edition, 4th, 6th, whatever" and was rendered "within a reasonable degree of medical certainty."[3]

The claimant testified on three occasions, initially for a discovery deposition on November 4, 2016.[4] At this deposition, the claimant testified he worked for someone named Dave at the respondent, Deno's Trucking. The claimant testified he was never paid with a paycheck, but received cash advances on three to five occasions. The claimant did not know how much money he received from the respondent, stating he would "hate to guess" and was "not really sure."[5] The claimant testified he was paid by the mile, but he did not remember the rate. He testified he kept working because Dave kept telling him he would be paid. However, the claimant testified he was never paid for his mileage.

The claimant testified he drove both the respondent's truck and a truck owned by Chris Short, an owner-operator. The claimant phoned the respondent before and after every load and was given routes. The claimant testified he was an employee of the respondent. He filled out a job application, but never signed papers. He was never provided a 1099 or W-2 and had no contract or verbal agreement with the respondent.

The claimant's initial testimony also demonstrated he did not know the day or month of his accident, although he believed it occurred in August, and he did not know when his employment with the respondent ended.

After the claimant's initial testimony, David Duncan and Chris Short testified.

David Duncan, as mentioned, is the respondent's owner. He operated one truck of his own and had three or four contractors during the time the claimant worked for him. He testified his business contracted to pick up and deliver loads. He would then contact a contractor or some other driver to make a delivery. Once the delivery was made, the respondent would pay the contractor or owner of the truck. The respondent paid for gas and tolls. Mr. Duncan testified the claimant drove trucks belonging to Chris Short.

Mr. Duncan indicated the claimant drove sparingly for the respondent for about one month in 2016, but was never an employee of the respondent, and certainly was not a full-time worker. Mr. Duncan denied the respondent had any employees, but testified the respondent used three, four or five contractors. He acknowledged the respondent did not carry workers compensation insurance.

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[3] *Id*. at 21-22.

[4] This discovery deposition was admitted into evidence at the preliminary hearing on April 19, 2017.

[5] P.H. Trans. (Apr. 19, 2017), Fund Ex. 1 at 13.

Mr. Duncan testified:

> Q Did you guys have any - - did you and Mr. Guerrero have a verbal agreement about his work status?
>
> A The - - the only agreement we had was no forced dispatch, which if you come to work for me as a, as one of my company guys, I could tell them exactly what they're going to do. They had to do it and work a full-time week. With him, he was just take it as we go. If we need him over here, put him in this contractor's truck over there. There was no forced dispatch and he certainly wasn't full-time, even close.
>
> . . .
>
> There was no forced dispatch, so I couldn't - - I wouldn't tell him what he had to do. I would give him an option of what he would like to do. That's the difference in this business with contractors and company. Company guys, you can dictate exactly what they're going to do within legal guidelines, but contractors have the right of refusal.[6]

Mr. Duncan testified he did not set the claimant's routes, and the claimant chose from options. Mr. Duncan would tell the claimant where a load would be picked up and delivered. He did not require the claimant to work for him exclusively and the claimant was allowed to set his own hours. Mr. Duncan testified the claimant could pick and chose what work to do. Further, Mr. Duncan testified he provided no real training to the claimant.

Mr. Duncan did not recall paying the claimant cash, but testified some drivers requested an advance to cover costs of hotels and food.

Mr. Duncan testified the claimant told him he had hurt his knee, but declined any need for medical treatment. Shortly thereafter, according to Mr. Duncan, the claimant was terminated from his employment after beer bottles were discovered in trucks he had driven.

Mr. Short, the aforementioned owner-operator of two of the trucks used by the respondent, performed mechanical work for the respondent. Mr. Short had a contract or lease agreement with the respondent. Mr. Short did not testify to being an employee of the respondent. When the claimant drove Mr. Short's trucks, the claimant was considered the respondent's employee. Mr. Short testified the respondent told the claimant what truck to drive, where to pick up a load, and when and where to deliver a load. It was Mr. Short's understanding the claimant was a 1099 employee and was paid by the mile. Mr. Short testified the respondent terminated the claimant's working relationship before beer bottles were found in the trucks the claimant drove.

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[6] Duncan Depo. at 10.

Mr. Short testified the respondent had "[p]ossibly seven" trucks that it operated and there were two other owner-operators.[7] Owner-operators were paid percentages and drivers were paid by the mile. Mr. Short testified:

> Q Okay. And Mr. Guerrero, he was paid mileage; is that correct?
>
> A Yes, sir.
>
> Q How much was he paid a mile?
>
> A I believe 42 cents a mile. Like I said, that wasn't - - I wasn't in control of that, so - -
>
> Q Okay. But you believe it would have been 42 cents a mile?
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> A I believe so, yes, sir. It may have been a little more but I'm, I can't, don't quote me on it because I really couldn't tell you.
>
> Q Sure. And you would have expected him, if the employment had continued, would you have expected him to - - well, how many miles would you expect him to drive a year, if his employment had continued?
>
> A A year?
>
> Q Yes.
>
> A I would have expected at least 2500 miles a week so, boy, a lot.
>
> Q So 2500 miles a week times 52 weeks would be 130,000 miles a year?
>
> A Yes, sir, that sounds about right.
>
> Q And if he was paid 42 cents a mile, his payroll alone would have been about $54,600. Would that be about right?
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> A That sounds pretty accurate, yes, sir.[8]

Mr. Short believed the respondent's payroll would have been more than $20,000 a year. However, he admitted no personal knowledge of whether the respondent had a payroll over $20,000, or if the claimant was supposed to be paid based on mileage.[9]

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[7] Short Depo. at 12.

[8] *Id.* at 13-14.

[9] See *id.* at 23.

The claimant next testified on November 29, 2017, during a preliminary hearing. The claimant testified he drove in Kansas, Nebraska, Oklahoma and Texas, and averaged 3,000 miles a week, "more or less," when driving to Houston, Texas, based on his log books.[10] According to the claimant, he worked for the respondent for three to six weeks. The claimant testified Mr. Short represented he and Mr. Duncan were partners. The claimant testified Mr. Short told him he was to be paid 41¢ a mile. The claimant also testified the 41¢ a mile rate was based on Mr. Short's testimony and other drivers telling him they earned "ballpark" 47¢ a mile.[11] The claimant indicated there were a couple owner-operators and surmised there were three drivers employed by the respondent. The claimant did not know the names of these other drivers. The claimant testified he was never paid by either the respondent or Mr. Short.

The claimant last testified at the regular hearing on May 6, 2020. He reiterated he was an employee of the respondent and was supposed to be paid a varying mileage rate depending on what was hauled. The claimant testified he reported back problems to Dr. Jansson.

At the claimant's attorney's request, the claimant saw Dr. Pedro Murati, who is board certified in physical medicine and rehabilitation and certified as an independent medical examiner. The claimant complained of right knee pain and hip pain with prolonged standing. Dr. Murati diagnosed the claimant with: (1) status post, open repair of chronic quadriceps tendon rupture with Achilles tendon grafting and excision of accessory patella fragment avulsion from quadriceps; (2) lumbar sprain secondary to antalgic gait; (3) right SI joint dysfunction; (4) right trochanteric bursitis secondary to antalgic gait; (5) right patellofemoral syndrome; and (6) flexion contracture of the right knee.

Dr. Murati testified the claimant denied any significant preexisting low back complaints. The doctor noted the claimant was treated effectively with an epidural and his low back pain went away. Dr. Murati testified, "I don't believe that he has a pre-existing condition. I mean, if you don't have complaints to a body part, you can't say you have a pre-existing condition."[12] Dr. Murati opined the claimant's work accident was the prevailing factor in the development of his conditions.

Dr. Murati issued permanent restrictions and believed the claimant would require future medical treatment, including yearly follow-ups, physical therapy, injections, radiological studies, medications and possible surgical intervention.

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[10] P.H. Trans. (Nov. 29, 2017) at 15.

[11] *Id*.

[12] Murati Depo. at 30.

Using the *Guides*, 4th ed., Dr. Murati assigned the claimant a 38% right lower extremity impairment, which converts to a 15% whole person impairment, and a 5% whole person impairment for the lumbar sprain for a combined 19% whole person impairment. Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*, 6th ed.), Dr. Murati assigned the claimant a combined 21% right lower extremity impairment, which converts to an 8% whole person impairment, and a 2% whole person impairment for the lumbar sprain for a combined 10% whole person impairment. The doctor testified all of his opinions were within a reasonable degree of medical probability.

At the claimant's attorney's request, Dr. Robert Barnett, a rehabilitation counselor, interviewed the claimant by phone on September 18 and 19, and October 21, 2019. Dr. Barnett prepared a list of 11 tasks the claimant performed in the five years preceding the accident. Mr. Barnett opined the claimant was "essentially unemployable" due to his physical limitations, his age, lack of specific education or training and his residence.[13] Dr. Barnett admitted the claimant might be able to find a minimum wage job based on Dr. Jansson's restrictions. Out of the 11 tasks on Dr. Barnett's task list, Dr. Murati opined the claimant is unable to perform 9 of them for an 81.8% task loss.

The claimant saw Dr. David Hufford, a board-certified independent medical examiner, for a court-ordered independent medical examination. The claimant wore a knee brace and complained of continued pain and instability in his right knee. Dr. Hufford noted the claimant denied any other associated injury related to his occupational incident.

Dr. Hufford testified the claimant had a slight limp, which he attributed to the claimant's flexion contracture of the knee. The doctor diagnosed an occupational fall with disruption of the right quadriceps tendon requiring operative repair. Dr. Hufford opined the claimant's occupational injury was the prevailing factor causing his knee injury.

Dr. Hufford imposed permanent restrictions to avoid kneeling, squatting, crouching, crawling, ladders and any work on uneven terrain. The doctor agreed the claimant can no longer do full duty as a result of his injury.[14]

Using the *Guides*, 6th ed., Dr. Hufford assigned the claimant a 20% impairment to the right lower extremity, and a 22% under the *Guides*, 4th ed. The doctor testified the claimant will require periodic replacement of the knee brace, but will not require further surgery. Dr. Hufford testified his opinions were expressed within a reasonable degree of medical certainty.

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[13] Barnett Depo. at 6.

[14] See Hufford Depo. at 26.

The claimant testified he currently has loss of motion and strength compared to the other leg, causing him to limp consistently since the accident in July 2016. He denied having any low back symptoms between 2008 until he was injured in 2016, and stated the back problem he was having in 2008 was in a different area of the low back.

The ALJ issued the Award on March 10, 2022, as against the respondent and the Fund. The ALJ concluded:

- the claimant was the respondent's employee;
- the claimant's average weekly wage was $1,050 based on he was to be paid 42¢ a mile and would be expected to drive 2,500 miles a week;
- the respondent's witnesses were not credible;
- the respondent was insolvent;
- both Dr. Jansson and Dr. Hufford limited the claimant's permanent impairment to his right lower extremity, whereas Dr. Murati's opinion of whole body impairment was an outlier;
- the claimant was awarded permanent partial disability benefits based on the impairment rating of the court-ordered physician, Dr. Hufford;
- the claimant was not permanently and totally disabled; and
- the claimant was entitled to an award of future medical treatment.

This appeal followed.

PRINCIPLES OF LAW AND ANALYSIS

The Fund argues the claimant failed to prove the respondent had sufficient payroll to be subject to the Act. In the alternative, the Fund argues the Board should average all three physicians' ratings and the claimant's request for future medical should be denied, as based on the opinion of the treating physician, Dr. Jansson. The claimant argues he proved whole body impairment and is entitled to a 90.9% work disability (81.8% task loss and 100% wage loss) and the remainder of the Award should be affirmed.

K.S.A. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

While this matter was before the ALJ, the Fund challenged whether the claimant was an employee or an independent contractor. However, that issue is not before the Board on appeal, as it was not raised in the application for review and was not briefed or argued.

Coverage under the Workers Compensation Act is excluded pursuant to K.S.A. 44-505(a)(2).

The claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2),[15] which states:

> (a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> . . .
>
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection[.]

Under the facts, the preceding calendar year is 2015 and the current calendar year is the year of the accident, 2016.[16]

The claimant, on his own, initially could not testify as to his mileage rate. Mr. Short, who was not an owner of the respondent, speculated the claimant would have earned 42¢ a mile, but admitted no personal knowledge of what the respondent was to pay the claimant. The evidence does not credibly establish what other employees, if any, were paid. Mr. Short contended he was not an employee of the respondent. After Mr. Short testified, the claimant testified he was supposed to earn 41¢ a mile. The claimant's testimony was based on Mr. Short's testimony and unidentified people the claimant believed to be employed by the respondent. For his part, Mr. Duncan denied the respondent had any employees, only contractors. Mr. Duncan, the respondent's owner, did not testify as to how much money the respondent paid anyone, regardless of employee or independent contractor status.

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[15] See *Slusher v. Wonderful House Chinese Rest., Inc.*, 42 Kan. App. 2d 831, 833, 217 P.3d 11 (2009).

[16] See *id.* at 834.

The ALJ concluded the claimant had an average weekly wage of $1,050 based on driving 2,500 miles per week at the rate of 42¢ per mile. Given the claimant's testimony of working three to six weeks, he proved expected earnings of $3,150 to $6,300 in 2016.

The finding of average weekly wage was not appealed, although it is part of the evidence concerning the yearly payroll in 2016. The Fund argued the necessary payroll was not proven and should not be based on Mr. Short's speculation. The finding of the claimant's average weekly wage only concerned the "current calendar year" of 2016 and did not address the "preceding calendar year" of 2015. The payroll of more than $20,000 must be proven for both 2015 and 2016. Absent this proof, the evidence does not establish, on a more probably true than not true standard, the respondent had the statutorily required payroll for application of the Kansas Workers Compensation Act.

Given the evidentiary record does not prove sufficient payroll in both 2015 and 2016, the Kansas Workers Compensation Act does not apply. The ALJ's Award is reversed. All other issues are moot.

AWARD

WHEREFORE, the Board reverses the Award dated March 22, 2022, and denies an award of compensation. The cost of these proceedings shall be paid by the Fund.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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