

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>CLAUDE LEMON</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0464-688
<b>UNIFIED SCHOOL DISTRICT 489</b>	)	CS-00-0448-290
Respondent	)	
AND	)	
	)	
<b>UNITED WISCONSIN INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the March 31, 2022, Award issued by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on July 21, 2022.

**APPEARANCES**

Michael L. Snider appeared for Claimant. Matthew J. Schaefer appeared for Respondent and its insurance carrier (Respondent).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held January 19, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of George Fluter, M.D., from January 4, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of John P. Estivo, D.O., from February 22, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Claude Thomas Lemon from May 22, 2020, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

The issues for the Board's review are:

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to future medical treatment?

**FINDINGS OF FACT**

Claimant worked for Respondent as a mechanic. On Thursday, May 30, 2019, Claimant was walking across the shop, carrying a case of oil in each hand, when he slipped on some water on the floor, fell to the ground and landed on his back on the concrete floor. Claimant was stunned after the fall, but eventually returned to his work duties and completed his shift.

Claimant began experiencing pain in his shoulders, back, buttocks, and legs that evening. The following morning, Claimant called Respondent and said he would not work that day due to pain from the fall. Claimant rested over the weekend and reported to work the following Monday, when he was advised to complete an accident report and present to Worksmart, an occupational health clinic. Claimant was treated conservatively and released with no restrictions.

Claimant returned to Worksmart one week later with continued pain and underwent x-rays of his entire spine, neck, and hips. The x-rays did not show any fractures or acute injuries. Claimant was referred to orthopedic surgeon, Dr. Max DeCarvalho. Dr. DeCarvalho ordered MRIs of Claimant's cervical, thoracic, and lumbar spine. The lumbar spine MRI, taken on July 10, 2019, was deemed essentially normal. The cervical spine MRI, taken on August 14, 2019, was also essentially normal. The thoracic spine MRI, taken July 10, 2019, was read by the radiologist to reveal:

The thoracic vertebrae exhibit normal signal and normal body height. The spinal cord exhibits no signal abnormality. All neural foramina are widely patent. Paraspinous soft tissues are normal.

...  
Narrow-based posterior disc protrusion at both T7-T8 and T8-T9 with mass effect on the anterior aspect of the spinal cord at these levels despite [no] central canal stenosis.<sup>1</sup>

Dr. DeCarvalho also ordered electrodiagnostic studies due to Claimant's complaints of neck pain radiating to both arms with intermittent numbness in his hands. The studies were interpreted as normal. Dr. DeCarvalho treated Claimant conservatively, including physical therapy.

After physical therapy, Claimant continued having pain in his shoulders, back, neck, and upper legs. He sought a second opinion with Dr. Scott Boswell, neurosurgeon, on November 26, 2019. Claimant's complaints were interscapular back pain radiating into the

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<sup>1</sup> Claimant Depo., Ex. 5 at 1-2.

neck and a small amount of low back pain. Dr. Boswell provided temporary restrictions on December 3, 2019, of no bending, twisting, or lifting greater than 20 pounds. Dr. Boswell also supplied two cervical epidural steroid injections, with no relief. On March 10, 2020, Dr. Boswell reported Claimant suffers from chronic neck, back, arm, and leg pain. Dr. Boswell did not consider Claimant a surgical candidate. He released Claimant to work without restrictions because he did not see any acute findings on MRI to explain Claimant's symptoms. Dr. Boswell prescribed gabapentin, with the understanding spinal cord stimulation could be a possibility if the gabapentin was unhelpful. When Claimant returned for a follow-up visit, Dr. Boswell prescribed an additional six months of gabapentin. Taking gabapentin helped relieve Claimant's pain.<sup>2</sup>

Dr. John Estivo examined Claimant on February 18, 2021, at Respondent's request. Claimant's chief complaint was pain to the cervical, thoracic, and lumbar spine. Dr. Estivo reviewed Claimant's history, medical records, and performed a physical examination. He concluded Claimant sustained cervical spine strain, lumbar spine strain, and thoracic spine bulging discs at T7-8 and T8-9 as a result of the work-related accident. Dr. Estivo noted:

It is difficult to explain this patient's continued complaints of diffuse discomfort involving the entire spine, given the treatment that he has undergone and the fact that it has been almost 2 years, since the slip and fall. This patient's diffuse subjective complaints do not correlate with any objective findings [*sic*].<sup>3</sup>

Dr. Estivo found Claimant at maximum medical improvement. Dr. Estivo did not see any benefit to Claimant's taking gabapentin due to no evidence of neurological injury or nerve impingement, and he recommended Claimant wean himself from its use. Instead, Dr. Estivo suggested Claimant utilize home physical therapy exercises and over-the-counter medication. Dr. Estivo concluded Claimant did not require permanent restrictions.

Dr. Estivo was authorized by Respondent to wean Claimant from long-term use of gabapentin. This treatment was successful, and Claimant has not used gabapentin since approximately November 10, 2021. Claimant's pain became more intense after he was weaned from gabapentin.<sup>4</sup>

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<sup>2</sup> R.H. Trans. at 33.

<sup>3</sup> Estivo Depo., Ex. 3 at 6.

<sup>4</sup> See R.H. Trans. at 37.

Using the *AMA Guides*,<sup>5</sup> Dr. Estivo determined Claimant sustained a combined 8 percent whole person impairment as a result of the work incident. He assigned 2 percent whole person impairment for cervical spine strain, 4 percent whole person impairment for asymptomatic bulging discs at T7-8 and T8-9, and 2 percent whole person impairment for lumbar spine strain. Dr. Estivo used zero grade modifiers in his rating assessment. Dr. Estivo testified the *AMA Guides* provided a sufficient basis for him to competently assess Claimant.

Dr. George Fluter evaluated Claimant on August 2, 2021, at Claimant's counsel's request. Dr. Fluter reviewed Claimant's medical records, history, and performed a physical examination. Dr. Fluter assessed:

1. Status post work-related injury; 05/30/19.
2. Neck/upper back, middle back, and lower back pain.
3. Cervicothoracic strain/sprain.
4. Thoracolumbar strain/sprain.
5. Thoracic discopathy at T7-T8 and T8-T9.
6. Lumbosacral strain/sprain.
7. Probable sacroiliac joint dysfunction.<sup>6</sup>

Dr. Fluter recommended additional conservative treatment, including the use of gabapentin. Dr. Fluter stated gabapentin, while used for nerve pain, can be beneficial to those with mechanical back pain. He explained soft tissue structures can generate pain symptoms, including nerve-type pain symptoms, for which gabapentin should be beneficial. Dr. Fluter testified his treatment recommendations would be helpful for Claimant's conditions, but are not required. He did not provide permanent restrictions.

Using the *AMA Guides*, Dr. Fluter opined Claimant sustained a combined 11 percent whole person impairment as a result of the work injury. For Claimant's cervical spine, Dr. Fluter attributed 3 percent whole person impairment. Dr. Fluter applied a grade modifier of two for clinical studies related to the cervical spine. Because the clinical studies were essentially normal, Dr. Fluter acknowledged the argument for a zero grade modifier. A zero grade modifier reduces Dr. Fluter's cervical spine rating to 1 percent whole person impairment.

When assessing Claimant's thoracic spine, Dr. Fluter rated 5 percent whole person impairment. He used a grade modifier of two, which requires evidence of alteration of motion segment integrity. Dr. Fluter agreed there is no evidence of instability in Claimant's

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

<sup>6</sup> Fluter Depo., Ex. 2 at 7.

thoracic spine, and he based his modifier on Claimant's symptoms and structural changes seen on MRI. A zero grade modifier reduces Dr. Fluter's thoracic spine rating to 3 percent whole person impairment.

Dr. Fluter's impairment rating with zero grade modifiers is a combined 7 percent whole person impairment. Dr. Fluter also provided a rating using the Fourth Edition *AMA Guides* of 17 percent whole person impairment. Dr. Fluter wrote:

The Kansas Supreme Court has ruled that referencing the Sixth Edition of the *Guides* can reasonably be interpreted as a guideline rather than a mandate. Due to [Claimant's] ongoing pain and dysfunction resulting from the work-related injury, it is my opinion that deviating from the Sixth Edition of the *Guides* is reasonable. Given the circumstances of this particular case, it is my opinion that the impairment rating calculated under the Fourth Edition of the *Guides* better represents his degree of functional impairment (whole person impairment of 17%).<sup>7</sup>

Dr. Fluter was asked which edition of the *AMA Guides* most accurately reflected Claimant's impairment:

Q. Okay. And based upon your professional expertise, your familiarity with the *AMA Guides*, Fourth Edition and Sixth Edition, do you have an opinion as to which section of the guides and which edition more appropriately reflect the amount of permanent functional impairment that Mr. Lemon has as a result of this slip and fall at work on May 30th, 2019?

A. Well, sure. Looking at it – and I kind of preface that in the report that I wrote, as far as it's been kind of a – generally been a principle that if there is more than one method of determining an impairment rating, then the method resulting in the higher value should be used.<sup>8</sup>

Claimant feels he cannot work due to his pain and is on an agreed indefinite leave of absence from Respondent. Claimant continues to have pain in his neck, upper back, low back, upper extremities, and lower extremities. He uses over-the-counter medication as needed.

The ALJ found Claimant sustained 8 percent impairment of the whole body as a result of the work accident. The ALJ determined Claimant is not entitled to future medical treatment.

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<sup>7</sup> Fluter Depo., Ex. 2 at 9.

<sup>8</sup> Fluter Depo. at 11.

**PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues he sustained 12.5 percent permanent functional impairment of the whole body and he is entitled to future medical treatment.

Respondent asserts Claimant sustained 7.5 percent impairment of the whole body as a result of the accident. Alternatively, Respondent argues the ALJ's Award should be affirmed.

**1. What is the nature and extent of Claimant's disability?**

The ALJ awarded 8 percent impairment of the whole body as a result of the work accident. In his award, the ALJ wrote:

The court has before it two ratings based on the sixth edition of the Guides, one from Dr. Flutter at 11% to the body as a whole, and one from Dr. Estivo, at 8% to the body as a whole. Dr. Flutter acknowledges that, strictly speaking, his use of the grade modifiers for the neck and thoracic spine was not supported by the testing that was done. He also rated for sacroiliac joint dysfunction, a diagnosis not made by any other examining or treating physician. If the unsupported use of the grade modifiers is excluded, his rating under the sixth edition of the Guides drops to 7% to the body as a whole. The court finds and concludes that Dr. Estivo's 8% whole body functional impairment rating is better supported by the evidence. Lemon has sustained his burden of proof and has established that he suffered an 8% impairment of function to the body as a whole.

The Board agrees. Dr. Flutter assessed an impairment rating of 17 percent based upon the Fourth Edition *AMA Guides*. Dr. Flutter testified he generally used the method resulting in the higher value when assessing impairment. The Board finds this reasoning inadequate to show the deviation from the Sixth Edition *AMA Guides* was based upon competent medical evidence as required in *Johnson v. U.S. Food Service*.<sup>9</sup>

Using the Sixth Edition *AMA Guides*, Dr. Flutter opined Claimant sustained a combined 11 percent whole person impairment. Dr. Flutter acknowledged the clinical studies were essentially normal. This reduces Dr. Flutter's cervical spine rating to 1 percent whole person impairment. Dr. Flutter also agreed there is no evidence of instability in Claimant's thoracic spine, which reduces his thoracic spine rating to 3 percent. After applying these reductions, Dr. Flutter's impairment rating is reduced to 7 percent of the body as a whole. Dr. Flutter's reliance on the application of the Fourth Edition *AMA Guides*

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<sup>9</sup> *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 478 P.3d 776 (2021).

is contrary to the Kansas Court of Appeals' directive in *Zimero* which states: "Based on *Johnson*, the Fourth Edition is irrelevant after January 1, 2015."<sup>10</sup>

The Board gives more weight to Dr. Estivo and finds Claimant suffers 8 percent whole body impairment based upon the Sixth Edition *AMA Guides*.

## 2. Is Claimant entitled to future medical treatment?

It is the employer's duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of a compensable injury.<sup>11</sup> It is presumed the employer's obligation to provide medical treatment terminates upon the employee's 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. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.<sup>12</sup>

The ALJ relied on the opinions of Drs. DeCarvalho and Estivo in denying future medical treatment. Dr. DeCarvalho did not testify and his medical opinions are not considered evidence pursuant to K.S.A. 44-519.

Claimant testified he was prescribed gabapentin by Dr. Boswell and his family physician. Claimant testified the gabapentin helped relieve the pain symptoms and his pain became more intense after he was weaned off gabapentin. Dr. Fluter agreed the use of gabapentin can be beneficial to those with mechanical back pain.

Based upon Dr. Fluter's opinions, the Board finds Claimant overcame the presumption and additional medical treatment will be necessary. Future medical treatment should be awarded herein.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board the Award of Administrative Law Judge Bruce E. Moore dated March 31, 2022, is reversed in regard to Claimant's entitlement to future medical treatment, but affirmed regarding the nature and extent of Claimant's functional impairment.

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<sup>10</sup> *Zimero v. Tyson Fresh Meats, Inc.*, \_\_\_ Kan. App. 2d \_\_\_, 499 P.3d 1153, 2021 WL 4501808 (Oct. 1, 2021).

<sup>11</sup> See K.S.A. 44-510h(a).

<sup>12</sup> See K.S.A. 44-510h(e).

**IT IS SO ORDERED.**

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

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

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

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

c: (Via OSCAR)

Michael L. Snider, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Hon. Bruce E. Moore, Administrative Law Judge