

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARK FARMER)	
Claimant)	
V.)	
)	
SOUTHWIND DRILLING, INC.)	AP-00-0466-095
Respondent)	CS-00-0449-651
AND)	
)	
BITCO GENERAL INSURANCE CORP.)	
Insurance Carrier)	

ORDER

Claimant, through Scott Mann, requested review of Administrative Law Judge Bruce Moore's Award dated April 21, 2022. P. Kelly Donley appeared for Respondent and its Insurance Carrier. The Board heard oral argument on August 11, 2022.

RECORD AND STIPULATIONS

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

- (1) deposition transcript of Jill N. Suchy, taken November 2, 2021, with exhibits;
- (2) deposition transcript of Terrence Pratt, M.D., taken November 10, 2021, with exhibits;
- (3) regular hearing transcript, held January 5, 2022;
- (4) deposition transcript of Chris Fevurly, M.D., taken January 20, 2022, with exhibits;
- (5) deposition transcript of Pedro Murati, M.D., taken January 21, 2022, with exhibits;
- (6) deposition transcript of Steve Benjamin, taken January 25, 2022, with exhibits;
- (7) deposition transcript of Daniel Prohaska, M.D., taken March 3, 2022, with exhibits; and
- (8) documents of record filed with the Division.

ISSUES

1. What is the nature and extent of Claimant's disability, including whether Claimant is entitled to compensation for a scheduled or whole person impairment? If whole person impairment is awarded, is Claimant entitled to work disability compensation?

2. What is Claimant's average weekly wage?
3. Is Claimant entitled to an underpayment of TTD benefits?
4. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Respondent is an oil drilling contractor. Claimant began working as a “floor hand” for Respondent on April 4, 2019. He worked the second shift from 3:00 p.m. to 11:00 p.m.

On April 5, 2019, Claimant was throwing a chain on an oilfield drilling rig when the chain became wrapped around his right wrist, yanking his upper extremity. He immediately experienced extreme pain in his right forearm and wrist. Claimant notified Respondent of his accident and self-transported to Rooks County Health Center. He was transferred to Hays Medical Center, where he came under the care of Dr. Cheema.

On April 6, 2019, Dr. Cheema performed ORIF (open reduction internal fixation) surgery to repair a fracture of the radius bone in Claimant’s forearm, and applied a splint to Claimant’s wrist. Claimant was discharged the same day. Claimant continued seeing Dr. Cheema for his right forearm and wrist injuries.

Following surgery, Claimant received conservative treatment for his right shoulder from Dr. Wright. Claimant began experiencing symptoms in the right side of his neck and upper back. He testified, “Every time I . . . tried to lift my shoulder up past my head, it would just get stuck right at my shoulder length, and my neck would go over at the same time on the right side.”¹ Claimant denied prior problems involving his neck or back.

After being released to return to work by Dr. Cheema and Dr. Wright, Claimant returned to work for Respondent on first shift from September 13 through September 26, 2019. He worked 74 hours at \$21 per hour or \$1,743. He also worked from September 27 through October 1, 2019. Although Claimant only worked through October 1, the pay period ran through October 10. He worked 40 hours at \$21 per hour or \$840.

Claimant was referred to Dr. Hildebrand for right shoulder treatment on October 2, 2019. Dr. Hildebrand took Claimant off work. When Dr. Hildebrand released Claimant to return to work without restrictions on February 26, 2020, there was no work available because the rig Claimant worked had shut down. Claimant did not work for Respondent again.

¹ R.H. Trans. at 21.

At his attorney's request, Claimant was evaluated by Pedro Murati, M.D., on March 10, 2020. Dr. Murati is board certified in pain medicine, physical medicine and rehabilitation, and certified as an independent medical examiner. He diagnosed Claimant with: (1) status-post, open reduction and internal fixation of right radius shaft fracture and closed reduction and application of the splint or distal radioulnar joint subluxation; (2) right median nerve entrapment at the forearm; (3) right ulnar cubital syndrome; (4) right shoulder rotator cuff strain versus tear with impingement; (5) myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals; and (6) CRPS of the right upper extremity producing adhesive capsulitis. Dr. Murati imposed temporary work restrictions and recommended additional medical treatment.

Dr. Murati testified Claimant presented with muscle spasms and tenderness in the neck area and the right shoulder girdle. The doctor opined Claimant suffered an overuse injury to his neck and upper back as a "natural and direct consequence of his work-related injury to his right wrist, forearm, and shoulder[.]"²

At Respondent's request, Claimant was evaluated by Chris Fevurly, M.D., on March 30, 2020. Dr. Fevurly is board certified in internal medicine and preventative medicine with a certification in occupational medicine. He found no reference in the medical records to a cervical spine injury. Claimant denied any neck or upper back pain at the time of his examination. On exam, Dr. Fevurly noted tenderness along the muscles on the right side of Claimant's neck and testified:

. . . As you'll also note in my description there he had a little bit of atrophy of the right deltoid, which is consistent with his loss of range of motion in that right shoulder. As you may or may not know the deltoid's important in elevating the right arm. And, subsequently, if you have loss of range of motion in the shoulder joint it's really not uncommon for these so-called parascapular muscles to be tender, because you use these muscles in the neck and upper back to elevate the arm when the shoulder doesn't work completely smoothly. And so it's really common for people to have soreness in that side of their neck and upper back from the loss of range of motion in the right shoulder.³

Dr. Fevurly diagnosed Claimant with a distal mid shaft radius fracture requiring open reduction and internal fixation and a right distal radioulnar joint subluxation which required closed reduction and adhesive capsulitis in the right shoulder with an equivocal labral lesion on MRI. He found Claimant suffered loss of range of motion in his right shoulder and right wrist consistent with the injury he sustained. Based on the *American Medical Ass'n, Guides to the Evaluation of Permanent Impairment* (6th ed.) (hereinafter *Guides*), Dr. Fevurly assigned Claimant a 13% impairment to the right upper extremity at the

² Murati Depo. at 10.

³ Fevurly Depo. at 21.

shoulder level. He opined Claimant did not have impairment to the cervical spine as a result of the tenderness of the trapezius or other muscles. Dr. Fevurly opined Claimant would not require future medical treatment.

Claimant's right shoulder was evaluated by Daniel Prohaska, M.D., on June 18, 2020, for a Court-ordered independent medical evaluation. Dr. Prohaska is a board-certified orthopedic surgeon. Dr. Prohaska diagnosed Claimant with adhesive capsulitis with loss of range of motion and impingement syndrome. He recommended additional medical treatment. Dr. Prohaska was authorized to provide medical treatment for Claimant's right shoulder.

Dr. Prohaska recommended surgery at Claimant's first appointment on July 14, 2020. He performed diagnostic arthroscopy of the right shoulder with limited debridement of the subacromial bursa on August 10, 2020. Following surgery, Claimant began physical therapy and home exercises. Dr. Prohaska released Claimant at maximum medical improvement with no permanent restrictions for the right shoulder on September 29, 2020. He opined Claimant's right shoulder bursitis was the result of Claimant protecting the shoulder as he was undergoing treatment. Using the *Guides*, Dr. Prohaska assigned Claimant a 1% impairment to the right upper extremity. He opined Claimant would not require future medical treatment for the right shoulder.

Claimant has not worked or looked for work since he was released by Dr. Prohaska. Claimant testified, "I don't know exactly what my arm can do, or my shoulder."⁴ Claimant has not received any medical treatment for his injuries since he was released by Dr. Prohaska.

Dr. Murati evaluated Claimant for the second time on November 17, 2020. He noted the trigger points found in the cervical paraspinals during the first evaluation were still present and could now be found in the thoracic paraspinals. Dr. Murati diagnosed Claimant with: status post, (1) right shoulder examination under anesthesia, (2) diagnostic arthroscopy, (3) arthroscopic limited debridement; and status post, (1) open reduction and internal fixation of right radius shaft fracture, (2) closed reduction and application of the splint or distal radioulnar joint subluxation; (3) right median nerve entrapment at the forearm; (4) right ulnar cubital syndrome; (5) myofascial pain syndrome of the right shoulder girdle extending into the cervical and thoracic paraspinals; and (6) CRPS of the right upper extremity producing adhesive capsulitis - resolved.

Dr. Murati testified:

Q. And finally, with respect to the findings in the cervical spine, specifically myofascial pain syndrome of the right shoulder girdle extending into the

⁴ R.H. Trans. at 27.

cervical and thoracic paraspinal muscles, what is your opinion regarding prevailing factor?

- A. Again, it wouldn't have happened but for the initial injury.
- Q. And I think the way we need that under Kansas law is do you have an opinion as to whether the myofascial pain syndrome of the right shoulder girdle extending into the cervical and thoracic paraspinal muscles is a natural and direct consequence of the work injury he suffered in this case?
- A. Yes, it is.⁵

Using the *Guides*, Dr. Murati opined Claimant has a 23% whole person impairment, representing a 19% whole person impairment (31% impairment to the right upper extremity), a 2% whole person for the myofascial pain syndrome affecting the cervical paraspinals, and a 2% whole person impairment for the myofascial pain syndrome affecting the thoracic paraspinals. Dr. Murati imposed permanent work restrictions and opined it is "more probable than not" Claimant will require future medical treatment for his work injuries.⁶

Claimant was evaluated by Terrence Pratt, M.D. on March 5, 2021, for a Court-ordered independent medical evaluation. Dr. Pratt is board certified in physical medicine and rehabilitation. Dr. Pratt diagnosed Claimant with right radial shaft displaced, angulated and shortened fracture with distal radioulnar joint subluxation, status post open reduction and internal fixation right radial shaft fracture and closed reduction and application of a splint for the distance radioulnar subluxation; history of adhesive capsulitis and impingement right shoulder; status post limited debridement of the subacromial bursa; questionable labral involvement; and generalized spinal discomfort.

Dr. Pratt testified Claimant demonstrated discomfort on the right from the cervical paraspinal muscles to the lumbar paraspinal muscles with limited range of motion in the cervical spine, sensory loss in the right upper extremity and giveaway weakness in the right shoulder. He found tenderness in the muscles on the right side of the neck. Dr. Pratt opined Claimant's spinal discomfort was not caused by or the natural and direct result of his work accident.

Dr. Pratt stated in his initial report, "I cannot state to a reasonable degree of medical certainty that his generalized spinal involvement relates to the reported event in April 2019. . . . There is no significant evidence that he had an injury involving the spine with the 2019

⁵ Murati Depo. at 16.

⁶ *Id.* at 19.

event as the prevailing factor for the involvement.”⁷ In forming his opinion, Dr. Pratt testified, “I could not tell you the etiology of the involvement, only that the involvement was not noted to the degree that it was assessed with diagnostic testing or treated in spite of his prolonged course of care.”⁸

Using the *Guides*, Dr. Pratt assigned Claimant a 20% impairment to the right upper extremity. Dr. Pratt opined Claimant would have an additional 2% whole person impairment for the cervical spine if it was found to be work-related. Dr. Pratt testified combining the 20% upper extremity impairment (12% whole person), with the 2% impairment for the cervical spine results in a 14% whole person impairment.

Dr. Pratt opined Claimant would require future medical if there was progression of the distal upper extremity or wrist symptoms on the right. The doctor declined to provide any permanent restrictions because he was not asked to do so. Dr. Pratt testified he would need additional information regarding the activities Claimant performed when he returned to work after his injury and possibly a functional capacity evaluation.

At Claimant’s attorney’s request, Steve Benjamin, a vocational rehabilitation consultant, interviewed Claimant on September 9, 2021. Mr. Benjamin prepared a list of 31 tasks Claimant performed in the five years preceding the accident. He opined Claimant was capable of earning between \$342.40 and \$642 per week post-injury or an average of \$430.86 per week in the open labor market. Mr. Benjamin testified Claimant would be unable to return to work in the oil field as a floor hand based on Dr. Murati’s restrictions. Dr. Murati opined Claimant could not perform 19 of the 31 tasks identified by Mr. Benjamin, resulting in a 61% task loss.

Jill Suchy is the vice-president of operations for Respondent. She is responsible for Respondent’s payroll. Claimant was hired as a floor hand for Rig 1, evening tower (3-11 p.m.). When the rig is operating, three crews work eight hour shifts, seven days per week until the project is completed, unless the rig breaks down. If the rig is down, for any reason, employees are not paid for the down time. Respondent’s employees were paid in two week time frames. The work week ran from Friday to the following Thursday. Due to a high turnover rate, Respondent increased floor hands’ pay from \$15 per hour to \$21 per hour, effective January 17, 2019.

She testified had Claimant not been injured, he would have been able to work eight hours a day, earning \$21 an hour. She calculated Claimant would have earned \$1,092 from April 5 through April 10, 2019. For the two weeks Claimant returned to work from September 13 through September 26, 2019, Ms. Suchy testified Claimant earned \$1,743.

⁷ Pratt Depo., Ex. 2 at 7.

⁸ *Id.* at 15.

Claimant grossed \$840 from September 27, 2019 through October 1, 2019. (The pay period went through October 10, but Claimant was taken off work).⁹

The ALJ found: (1) Claimant's work accident was the prevailing factor causing his injuries; (2) Claimant's average weekly wage was \$634.16, making Claimant entitled to an underpayment of TTD; (3) Claimant suffered a 20% impairment of function to the right upper extremity at the level of the shoulder; and (4) Claimant failed to rebut the statutory presumption and is not entitled to future medical treatment.

Claimant argues he sustained a neck injury as the direct and natural result of his original injuries, making him entitled to a 14% whole person functional impairment and work disability compensation. Claimant asserts his average weekly wage is \$861 per week. Lastly, Claimant contends he rebutted the statutory presumption and is entitled to future medical treatment. Respondent argues the ALJ should be affirmed regarding average weekly wage, underpayment of TTD and denial of future medical treatment. Respondent argues Claimant should be awarded compensation based upon a combination of the ratings provided by Dr. Fevurly to the forearm and Dr. Prohaska to the shoulder.

PRINCIPLES OF LAW AND ANALYSIS

- 1. What is the nature and extent of Claimant's disability, including whether Claimant is entitled to compensation for a scheduled or whole person impairment? If whole person impairment is awarded, is Claimant entitled to work disability compensation?**

The ALJ found:

The court has before it four opinions as to Farmer's residual functional impairment. Dr. Prohaska, Farmer's treating physician, rates Farmer's upper extremity at a 1% impairment, but just rates the shoulder and does not address the forearm or wrist. Dr. Fevurly does include the wrist, forearm and shoulder in his assessment of a 13% impairment of function to the upper extremity. Dr. Murati rates not only the wrist, forearm and shoulder, but also includes impairment ratings for the cervical, thoracic and lumbar regions of the spine. Dr. Pratt, the court-ordered neutral examiner also assessed Farmer and arrived at an impairment rating of 20% to the upper extremity. Drs. Prohaska, Fevurly and Pratt agreed that Farmer did not require any permanent work restrictions.

Of all the physicians who have offered opinions in these proceedings, only Dr. Murati diagnosed myofascial pain syndrome in the cervical, thoracic and lumbar regions of the spine. **There is no contention that Farmer suffered an injury to the neck or back in the April 5, 2019 work accident.** Rather, Dr. Murati suggests

⁹ Suchy Depo., pp. 9-11.

that because Farmer has pain in his shoulder girdle, and the shoulder girdle attaches to the spine, there must be impairment in the spine. The other testifying physicians agree that Farmer's residual impairment is limited to the upper extremity.

The greater weight of the medical evidence establishes that Farmer injured his wrist and forearm on April 5, 2019. He developed adhesive capsulitis, resulting in pain in the shoulder, as a result of his disuse of the arm. Farmer did not injure his neck or back in, or as a result of, the April 5, 2019 work accident. The court adopts the opinion of Dr. Pratt, the court-ordered neutral examiner, and the court finds and concludes that **Farmer has suffered a 20% impairment of function to the right upper extremity at the level of the shoulder.**¹⁰ (emphasis in original)

Claimant argues the credible medical evidence establishes his cervical symptoms are the natural and probable consequence of his original work injury and therefore should be included in his award of permanent partial disability benefits. Dr. Fevurly's findings and opinions on this issue are not credible because they were provided prior to Claimant reaching maximum medical improvement (MMI). Dr. Prohaska's opinions were limited to Claimant's right shoulder.

Dr. Pratt, the Court-ordered evaluator, stated in his initial report, "I cannot state to a reasonable degree of medical certainty that his generalized spinal involvement relates to the reported event in April 2019. . . . There is no significant evidence that he had an injury involving the spine with the 2019 event as the prevailing factor for the involvement."¹¹ Dr. Pratt's opinion did not waiver during rigorous questioning at his deposition.

Dr. Murati stands alone in finding trigger points and diagnosing myofascial pain syndrome. Dr. Pratt was ordered by the Court to assist in resolving the issues regarding causation and impairment of function. His opinions are the most credible regarding the cervical spine involvement and are adopted by the Board. In this case, the greater weight of the credible evidence proves Claimant sustained a permanent injury and impairment to the right upper extremity at the shoulder level. There is insufficient evidence in the evidentiary record for the Board to overturn the ALJ's findings and award of compensation to the shoulder level and not the cervical spine.

Regarding the issue of functional impairment, a similar evaluation of the medical evidence results in similar findings. The opinions of Dr. Fevurly and Dr. Prohaska are not credible for the reasons set forth above. This leaves Dr. Pratt's (20%) and Dr. Murati's (31%) rating opinions to the right shoulder level. The Board finds the rating provided by Dr. Pratt, as the neutral, Court-ordered evaluator, to be more credible than Dr. Murati's

¹⁰ ALJ Award at 12.

¹¹ Pratt Depo., Ex. 2 at 7.

rating and awards a 20% permanent partial functional impairment to the right upper extremity at the shoulder level.

2. Claimant's average weekly wage is \$1,092.

K.S.A. 44-511(b)(2) states:

If actually employed by the employer for less than one calendar week immediately preceding the accident or injury, the average weekly wage shall be determined by the administrative law judge based upon all the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average weekly wage so determined shall not exceed the actual average weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation.

The ALJ found Claimant's average weekly wage is \$634.16. The ALJ looked at the wages actually earned by floor hands for the 26 week period prior to Claimant's injury. This fails to take into consideration the hourly pay increase, from \$15 per hour to \$21 per hour, implemented by Respondent in an attempt to halt their high turnover rate. A \$6 per hour pay increase is significant and cannot be ignored. For example, assuming a 40 hour work week, an individual would earn \$240 more per week at \$21 per hour as opposed to \$15 per hour. Under the ALJ's analysis, over one-half of the 26 week time frame would be paid at the \$15 per hour wage.

Ms. Suchy testified, had Claimant not been injured, he would have worked eight hours a day, earning \$21 an hour, and 8 hours of overtime earning \$31.50, or \$1,092 from April 5 through April 10, 2019 (immediately following Claimant's injury). Various employees worked Claimant's floor hand position during this time frame. They were paid the amount set forth above.

K.S.A. 44-511(b)(2) grants the trier of fact wide latitude in determining an injured worker's average weekly wage when the worker has been employed for less than one calendar week. The ALJ chose to look at the wages earned by other floor hands for the 26 week time frame prior to Claimant's injury. The statute does not require a finding based on pre-injury wages. The Board disagrees with the ALJ's analysis because it disregards the significant hourly wage increase made on January 17, 2019. The Board finds the earnings made by Claimant's co-workers the week following his injury, and confirmed through the testimony of Ms. Suchy, is more representative of what Claimant could reasonably expect to earn for an average weekly wage. The Board finds Claimant's average weekly wage is \$1,092.

3. Claimant is entitled to an underpayment of TTD benefits in the amount of \$12,550.08.

Claimant's average weekly wage has been found to be \$1,092, which qualifies him for the maximum compensation rate of \$645. Respondent paid 51 weeks of TTD at the rate of \$366.45 resulting in a weekly underpayment of \$278.55. There is an underpayment of TTD benefits in the amount of \$14,206.05 (\$278.55 x 51).

4. Claimant is entitled to future medical treatment.

K.S.A. 44-510h presumes an employer's obligation to provide medical benefits terminates when the employee reaches maximum medical improvement (MMI). The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement.

The ALJ denied Claimant's request for future medical treatment. Dr. Fevurly, Respondent's evaluator, opined Claimant would not require future medical treatment. Approximately four months after providing his opinion, Dr. Prohaska performed surgery and provided aftercare for Claimant's right shoulder. Dr. Prohaska opined Claimant would not require future medical treatment, but his opinion was limited to the right shoulder. These opinions are not credible given one was provided before medical treatment was completed and one was limited to a single part of the injured upper extremity.

Dr. Pratt, the Court-ordered evaluator, opined Claimant would require future medical if there was progression of the distal upper extremity or wrist symptoms on the right. Dr. Murati, Claimant's evaluator, opined Claimant would require future medical treatment. Claimant suffered a significant injury to his right upper extremity resulting in two separate surgical procedures to his wrist and shoulder. To suggest Claimant will not require additional treatment to cure or relieve him from the effects of his injury is not credible. Dr. Pratt's and Dr. Murati's opinions Claimant will require future medical, given the seriousness of Claimant's injuries, are the most credible. Claimant is entitled to an award of future medical treatment.

AWARD

WHEREFORE, the Board affirms the ALJ's award of 20% permanent impairment of function to the right upper extremity at the shoulder level; modifies the average weekly wage and underpayment of TTD; and reverses the denial of future medical treatment.

Claimant is entitled to 51.09 weeks of temporary total compensation at the rate of \$645 per week or \$32,953.05 followed by 34.78 weeks of permanent partial compensation at the rate of \$645 per week or \$22,433.10 for a 20% impairment of function to the right

MARK FARMER

11

AP-00-0466-095
CS-00-0449-651

shoulder, making a total award of \$55,386.15, which is all due and owing, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Scot Mann
P. Kelly Donley
Honorable Bruce Moore