

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DERRICK JACKSON</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0467-239
<b>CITY OF LAWRENCE</b>	)	CS-00-0454-001
Self-Insured Respondent	)	

**ORDER**

Respondent appealed the April 18, 2022, Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on August 11, 2022.

**APPEARANCES**

Sally Kelsey appeared for Claimant. Kendra Oakes appeared for self-insured Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing from November 18, 2021; transcript of deposition of Derrick Johnson from January 10, 2022, with exhibits attached; transcript of deposition of Daniel Zimmerman, M.D., from January 18, 2022, with exhibits attached; transcript of deposition of Douglas Burton, M.D., from February 1, 2022, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

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

**FINDINGS OF FACT**

On September 16, 2020, Claimant worked a 10 hour shift driving a stand-up truck. During his shift, he started to feel pain in his back and legs. Claimant took frequent breaks, but as the day continued, he started feeling tightness in his legs and back. The truck

requires the driver to maintain his balance and only has a safety chain to keep the driver from being ejected from the truck.

The night of the accident, Claimant began having back spasms. The next day, Claimant reported his condition and symptoms to the operations manager/supervisor Craig Pruitt. Claimant was sent to Dr. Nichols on September 18, 2020. An MRI was ordered and Claimant was taken off work with restrictions.

Claimant's MRI of October 6, 2020, revealed bulging discs. Claimant was prescribed medication and physical therapy. Respondent denied Claimant further medical treatment after Dr. Nichols opined Claimant's back pain was due to an aggravation of a preexisting condition. Claimant continued with physical therapy at his own expense after Respondent discontinued treatment.

Claimant first saw Dr. Model on October 28, 2020. Claimant received two injections. The second injection provided some relief.

Claimant returned to work on March 15, 2021. Claimant was assigned a new job which was less physically demanding. Claimant is currently not under any restrictions, other than Dr. Burton has recommended Claimant not drive a stand-up truck.

Claimant continues to have back pain, but is able to perform his job duties at this time. Claimant claims sexual dysfunction and difficulty sleeping due to the injury. He believes he would benefit from pain management. Claimant has not seen a doctor since May 2021.

Dr. Daniel Zimmerman evaluated Claimant on June 9, 2021, at his attorney's request. Claimant complained of back pain. He reported he was unable to sit longer than 30 to 45 minutes before having to get up and walk around, and being unable to stand longer than 30 to 35 minutes before the back pain and discomfort caused him to have to get off his feet. Claimant did not know how far he could walk before he had to get off his feet. Claimant reported coughing and sneezing occasionally cause pain and discomfort affecting the lumbar spine and lumbar paraspinous musculature. Claimant reported trouble sleeping and some sexual dysfunction. Claimant also reported occasional numbness and tingling affecting his toes and both lower extremities.

Dr. Zimmerman diagnosed Claimant with chronic lumbar paraspinous myofasciitis with symptomatic lumbar disc bulging at L3-4 and L4-5. He found this to be a structural change altering the integrity of the discs at those levels. The prevailing factor for Claimant's condition and need for medical treatment was the September 16, 2020, work accident.

Dr. Zimmerman assigned 9 percent body as a whole impairment, instead of 5 percent, due to motion segment lesions, referencing *the American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition (The Guides)*. Applying the *Johnson v. U.S. Food Service*<sup>1</sup> analysis, Dr. Zimmerman found Claimant's actual impairment was 15 percent to the body as a whole referencing the *American Medical Association Guides to the Evaluation of Permanent Impairment 4th Edition* range of motion model and competent medical evidence. Dr. Zimmerman opined it was better to give more weight to factors impacting Claimant's ability, which was one factor in increasing Claimant's impairment rating. He also believed there was an alteration of the integrity of the discs due to Claimant's persistent symptoms since the date of the injury. The competent medical evidence Dr. Zimmerman relied on for his 15 percent rating was his medical training and background, his experience in doing impairment ratings, his review of Claimant's medical records and his exam findings.

Dr. Zimmerman recommended therapeutic restrictions of lifting 20 pounds occasionally; 10 pounds frequently; avoiding frequent flexing of the lumbosacral spine; avoiding bending, stooping, squatting, crawling, kneeling and twisting activities at the lumbar level.

Dr. Zimmerman found Claimant at maximum medical improvement and believed no further therapeutic intervention to be warranted. He opined Claimant should receive proprietary non-steroidal anti-inflammatory medication such as Celebrex and Mobic with trigger point injections in the right lumbar paraspinous musculature. This treatment would be therapeutic as needed.

Dr. Douglas Burton evaluated Claimant on February 23, 2021, Claimant complained of back pain with spasms. Dr. Burton diagnosed a lumbar strain status post work injury. Dr. Burton opined the prevailing factor in Claimant's symptoms and need for treatment was the work accident of September 16, 2020. He recommended Claimant continue with physical therapy. Claimant reported his condition 80 percent better from the accident with the treatment he received, physical therapy and epidural injections.

Dr. Burton saw Claimant again on April 6, 2021. Claimant was back to work performing his normal job duties without restrictions. Claimant showed improvement, but still had back pain. Claimant was told to continue with physical therapy.

Dr. Burton saw Claimant again on May 11, 2021, Claimant had been back to work for a couple of months. He reported being in pain, but was managing. Claimant was assigned a permanent restriction of no driving a stand-up trash truck. Dr. Burton found

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<sup>1</sup> *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

Claimant at maximum medical improvement. He did not have any additional treatment for Claimant. Claimant was told to keep doing the physical therapy.

On August 11, 2021, Dr. Burton assigned 2 percent body as a whole impairment rating based on *The Guides*. Dr. Burton used the lumbar spine section, soft tissue injury strain, specifically Table 17.4. Dr. Burton testified his rating was based on competent medical evidence. Dr. Burton opined over-the-counter anti-inflammatories were sufficient to treat Claimant's pain.

Dr. Burton reviewed Claimants MRI. It showed Claimant's spine was almost normal with one mild degenerative disc and no indication of motion segment lesions.

The ALJ found Claimant had an 8.5 percent functional impairment to the body as whole, which was an average of the opinions of Dr. Burton and Dr. Zimmerman. The ALJ ordered Respondent to pay medical bills totaling \$3,451.70, excluding the bill from January 14, 2021. The ALJ found Claimant entitled to future medical treatment.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Respondent argues the Board should adopt the 2 percent whole person functional impairment opinion of Dr. Burton, the treating physician, as it is based on competent medical evidence. Respondent also argues Claimant failed to prove the need for future medical treatment.

Claimant argues the Award should be affirmed or modified to reflect a 15 percent functional impairment.

K.S.A. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

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 there until January 1, 2015, but for injuries occurring on or 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.

The Kansas Supreme Court in *Johnson*<sup>2</sup> interpreted K.S.A. 44-510e(a)(2)(B) as requiring ratings to be established by competent medical evidence, using *The Guides* as a starting point.

Since the *Johnson* decision, the Kansas Court of Appeals addressed several cases dealing with the application of the *Johnson* decision. In *Zimero v. Tyson Fresh Meats*, the Kansas Court of Appeals observed, “Based on Johnson, the Fourth Edition is irrelevant after January 1, 2015. We start with the Sixth Edition and then use competent medical evidence to increase or decrease that guideline amount. Parties and courts do not choose between using the Fourth Edition or the Sixth Edition. The Sixth Edition is statutorily required.”<sup>3</sup>

In *Garcia v. Tyson Fresh Meats Inc.*, the Kansas Court of Appeals elaborated on the analysis in *Zimero* and the application of *The Guides* and *The Guides 4th Edition* in rating impairments. The Court stated:

The *Zimero* court simply clarified that under *Johnson II* “[w]e start with the *Sixth Edition*” then proceed to consideration of the other medical evidence available to arrive at an accurate, comprehensive rating. [citation omitted] (Emphasis added) Further under a fair reading of *Zimero*, the *Fourth Edition* is only irrelevant with respect to that specific foundational step, the starting point in the assessment process.<sup>4</sup>

The Court states the *AMA Guides, 6th Edition*, provides the starting point for the medical opinion, and the assessment then proceeds to consideration of any competent medical evidence the doctor determines to be relevant and reliable in calculating as accurate impairment rating. Examining physicians may incorporate whatever exams, patient reports, tests or research their training and experience directs them to use, including the use of information and guidance from the *AMA Guides, 4th Edition* or other sources they consider reliable or authoritative.

Dr. Zimmerman and Dr. Burton both provided ratings for Claimant’s permanent impairment. Dr. Burton rated Claimant’s permanent impairment as 2 percent to the body

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<sup>2</sup> *Id.*

<sup>3</sup> *Zimero v. Tyson Fresh Meats, Inc.* \_\_\_ Kan. App. 2d \_\_\_, 499 P.3d 1153, 1157, 2021 WL 4501808 (2021).

<sup>4</sup> *Garcia v. Tyson Fresh Meats, Inc.* 61 Kan. App.2d 520, 528, 506 P. 3d 283 (2022).

as a whole, stating it was based on *The Guides* and on competent medical evidence with no additional explanation. Dr. Zimmerman assessed Claimant's impairment by beginning with *The Guides* and concluding Claimant had motion segment lesions which resulted in 9 percent body as a whole impairment rating. Dr. Zimmerman found an additional 6 percent impairment to the body as a whole, taking into account the effects of the injury on Claimant's ability to function, his experience background and training, his experience in impairment ratings, his review of Claimant's medical records and examination findings. The 15 percent rating is the same as the rating for Claimant's type of impairment in *The Guides, 4th Edition*.

There are some problems with both doctors' ratings. Dr. Burton provided little or no explanation of why *The Guides* rating was based on competent medical evidence. Dr. Zimmerman's rating includes rating the condition, motion segment lesion, which is not documented by diagnostic testing, such as the Claimant's MRI. Dr. Zimmerman's rating should not wholly be disregarded because it is the same as is found in *The Guides 4th Edition*, because it is based on his analysis and competent medical evidence.

The Board agrees with the ALJ the best indicator of Claimant's permanent impairment is an averaging of the two ratings producing an impairment rating of 8.5 percent to the body as a whole.

With regard to future medical, K.S.A. 44-510(h)(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Claimant continues to have residual back pain from his September 2020 accidental injury. Claimant is working under a permanent restriction. Pain disturbs his sleep at night and interferes with sexual function. Claimant has benefitted from injections in treating his pain. Dr. Zimmerman recommended prescription anti-inflammatory medication to control his pain as well as additional injections. Dr. Zimmerman's medical opinion and Claimant's

current condition satisfies the burden of establishing future medical treatment should be allowed upon proper application.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth, dated April 18, 2022, is affirmed.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Sally Kelsey, Attorney for Claimant  
Kendra Oakes, Attorney for Self-Insured Respondent  
Hon. Steven M. Roth, Administrative Law Judge