

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DEREK SWARTZ</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0469-063
<b>BOMBARDIER AEROSPACE HOLDINGS USA, INC.</b>	)	CS-00-0458-936
Respondent	)	
AND	)	
	)	
<b>ACE AMERICAN INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the July 14, 2022, Award issued by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on November 17, 2022.

**APPEARANCES**

Mitchell W. Rice appeared for Claimant. Vincent A. Burnett appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Independent Medical Examination report of Dr. David Hufford, dated January 28, 2022; the transcript of Regular Hearing from April 25, 2022; the Evidentiary Deposition of George G. Fluter, M.D., taken May 10, 2022, with exhibits attached; the Evidentiary Deposition of Daniel J. Prohaska, M.D., taken June 16, 2022, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

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

### FINDINGS OF FACT

On October 15, 2020, Claimant ruptured his left distal biceps tendon while he and another co-worker were lifting a heavy tire/wheel into a bed of a truck. Claimant experienced a pop in the left biceps, resulting in bruising the next day.

Claimant was examined by Dr. Daniel Prohaska at Respondent's request on November 5, 2020. Claimant presented with left shoulder and biceps pain. Claimant had numbness and tingling in his forearm and hand directly after the injury, but this subsided. Since the injury, Claimant's symptoms had improved, but he continued to complain of weakness, stiffness, swelling and bruising. Claimant rated his pain at a 1 out of 10 on the pain scale. He described the pain as achy in the medial aspect of the elbow and biceps region. It did not disturb his sleep. The pain was aggravated by lifting, overhead reaching, throwing and working, and is relieved with anti-inflammatories.

Examination revealed an obvious deformity of the biceps retracting proximally indicating a tear of the distal biceps tendon attachment. Dr. Prohaska diagnosed strain of muscle, fascia and tendon of other parts of biceps and left arm. Dr. Prohaska recommended left distal biceps tendon repair, which he performed on November 9, 2020.

From November 17, 2020, until February 9, 2021, Claimant was released to return to work with work restrictions. Claimant was treated with physical therapy and home exercises.

On February 9, 2021, Claimant met with Dr. Prohaska three months post-surgery. Claimant was doing 75 percent better. He complained of intermittent 1 out of 10 aching pain in the medial aspect of the elbow with rotation. Claimant continued to have weakness. He continued with his home exercises. Dr. Prohaska found Claimant to be at maximum medical improvement and he released Claimant with no permanent restrictions. Dr. Prohaska felt no further treatment was needed to resolve the work injury.

On March 4, 2021, Dr. Prohaska assigned 5 percent impairment to the left upper extremity based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (The Guides)* and competent medical evidence. He found no impairment to Claimant's left shoulder.

Dr. David Hufford examined Claimant at the request of the Court on January 28, 2022. Claimant had an MRI revealing a tear of the distal biceps. From a few days after surgery until his appointment with Dr. Hufford, Claimant complained of left shoulder pain. Claimant's left shoulder pain and the left elbow pain did not limit him.

Dr. Hufford examined Claimant and diagnosed occupational hyperextension injury of the left elbow with distal biceps rupture and associated left shoulder pain. He found the work accident was the prevailing factor for the biceps rupture, the hyper-extension mechanism of the injury creating traction on the left arm up to and including the shoulder.

Dr. Hufford assigned 6 percent impairment at the left shoulder according to *The Guides*. For the distal biceps rupture, he assigned a 5 percent impairment to the left upper extremity impairment. He combined the two impairments for 7 percent left upper extremity impairment. He did not recommend any future medical treatment.

Dr. George Fluter examined Claimant on August 11, 2021, at the request of his attorney. Claimant presented with pain in the left shoulder and elbow. He described the uncomfortable pain as a dull ache. Claimant reported exercise made the pain worse and medication made it better. His pain was constant and worse in the morning. The pain level was as low as a 2 and as high as 10 on the pain scale. Claimant avoided activities causing him pain, such as overhead activities.

Upon examination, Dr. Fluter diagnosed status post work-related injury, 10/15/20; left distal biceps tendon rupture; status post left distal biceps tendon repair, 11/09/20; left upper arm/biceps deformity; and left shoulder pain/impingement/tendonitis/bursitis. Dr. Fluter noted Claimant was released from orthopedic care in February 2021.

Dr. Fluter found within a reasonable degree of medical probability there was a casual/contributory relationship between Claimant's current condition and the reported work-related injury. He opined the mechanism of injury more likely than not had an effect on the left shoulder and the work accident was the prevailing factor for the injury, need for medical treatment and the resulting impairment.

Dr. Fluter assigned the following impairment rating according to *The Guides*; 2 percent impairment to the left upper extremity for left elbow range of motion deficits, 13 percent left upper extremity for left shoulder range of motion deficits, and an additional 3 percent impairment because Claimant had not regained his previous function. He combined these impairment ratings for 18 percent impairment to the left upper extremity.

Under the *American Medical Association Guides to the Evaluation of Permanent Impairment 4<sup>th</sup> Edition*, Dr. Fluter assigned: 1 percent impairment to the left upper extremity for elbow range of motion deficits; 10 percent impairment left upper extremity for left shoulder range of motion deficits; and an additional 3 percent impairment because Claimant had not regained his previous function. He combined these impairment ratings for an 14 percent impairment to the left upper extremity.

Dr. Fluter opined due to Claimant's ongoing pain and dysfunction from the work injury, the impairment rating should be calculated under *The Guides*, 18 percent to the left upper extremity, because this rating best represents Claimant's degree of impairment.

Dr. Fluter recommended permanent restrictions of limiting repetitive flexion, extension, pronation and supination of the left elbow to an occasional basis; and limiting activities at or above shoulder level using the left arm to an occasional basis.

Dr. Fluter opined given the nature of Claimant's musculoskeletal conditions and impairments, future medical care is likely and Claimant should continue with the use of medication treatment. He opined Claimant would benefit from a sleeve for the left elbow during periods of activity, and a support harness for the shoulder during periods of activity.

The ALJ found based on the opinion of Dr. Hufford, the court-ordered IME physician, Claimant was entitled to permanent partial disability compensation based on 7 percent impairment to the left upper extremity. The request for future medical treatment was denied.

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

Claimant argues the ALJ erred in not properly considering the 18 percent impairment rating of Dr. Fluter without any explanation other than it was significantly higher than the other ratings. Claimant requests the Board award compensation for an 18 percent impairment. Claimant also requests the Board reverse the denial of future medical treatment.

Respondent argues the ALJ's Award should be modified to reflect 5 percent impairment to the left upper extremity at the elbow based on the opinion of Dr. Prohaska, the treating physician, as he was best situated to provide an opinion of Claimant's condition. Respondent contends the denial of future medical should affirmed. In the alternative, Respondent argues the Award should be affirmed.

K.S.A. 2018 Supp. 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. 44-510d(b)(23) states:

Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth

edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on or after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

The primary issue is the nature and extent of impairment to Claimant's left upper extremity. Two doctors, one of whom is the doctor retained by the Court, found Claimant had permanent impairment of 5 percent to the left upper extremity and 7 percent to the left upper extremity. The 7 percent impairment is the rating of Dr. Hufford. Dr. Fluter found Claimant has 18 percent impairment to the left upper extremity. The Board finds the opinion of Dr. Hufford the most credible. He was retained by the Court and his rating of 7 percent is more neutral since he is not an expert retained by either party. Dr. Fluter's impairment rating is an outlier compared to the other two physicians and the rating is not representative of Claimant's permanent impairment. Claimant's permanent impairment is 7 percent to the left upper extremity.

With regard to future medical K.S.A. 44-510h(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.

While the Board did not find Dr. Fluter's rating credible his recommendation Claimant have future medical treatment is. Dr. Fluter's opinion is medical evidence it is more probably true than not additional medical treatment will be necessary after Claimant reached maximum medical improvement. This opinion satisfies the burden of proof particular to K.S.A. 44-510h(e). Claimant's left upper extremity was subject to surgical treatment and access to medical treatment is more probably than not needed according to Dr. Fluter. Claimant is awarded access to future medical treatment upon proper request according to K.S.A. 44-510k.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of ALJ Gary K. Jones dated July 14, 2022, is modified as to future medical treatment. Claimant is entitled to future medical treatment upon request in accordance with K.S.A. 44-510k.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2023.

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

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BOARD MEMBER

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

c: (Via OSCAR)

Mitchell W. Rice, Attorney for Claimant  
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier  
Hon. Gary K. Jones, Administrative Law Judge