BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES LOUGHRIDGE	)	
Claimant	)	
V.	)	
	)	AP-00-0470-852
JACAM MANUFACTURING 2013, LLC	)	CS-00-0445-333
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the September 21, 2022, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on January 26, 2023.

APPEARANCES

Mitchell W. Rice appeared for Claimant. Kristina Mulvany 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 transcript of the Regular Hearing Transcript, taken June 16, 2022, with exhibits attached; Evidentiary Deposition of Pedro Murati, M.D., taken July 11, 2022, with exhibits attached; Evidentiary Deposition of Steve Benjamin, taken July 20, 2022, with exhibits attached; Evidentiary Deposition of Douglas Burton, M.D., taken August 9, 2022, with exhibits attached; Evidentiary Deposition of Tom Karrow, taken August 17, 2022, with exhibits attached; and the documents of record filed with the Division. The Board also reviewed the brief filed by Respondent.

ISSUES

1. Do Claimant's actual post-injury earnings constitute the post-injury wage Claimant is capable of earning?

2. What is the nature and extent of Claimant's permanent impairment?

3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as a clay plant operator. Claimant operated heavy machinery, both moveable with heavy fork trucks, and stationary machinery. He lifted or bagged 50-pound bags of clay as a finished product, and put it on pallets for shipment.

On May 22, 2019, Claimant loaded drums of chemical onto a scale, while adjusting the drums on the scale, Claimant felt a pull in his back and within 15 minutes had burning pain radiating down his right leg.

Respondent provided Claimant medical treatment including, an MRI which revealed herniated discs in the low back at L4-5 and L5-S1. On February 11, 2021, Dr. Douglas Burton performed back surgery, anterior/posterior fusion at L4-S1 with grafts and screws.

Dr. Burton ordered a functional capacity evaluation (FCE). The FCE showed Claimant demonstrated an ability to function in the light physical demand level for an 8-hour day. Light duty is described by the U.S. Department of Labor as: exerting up to 20 pounds of force occasionally, and/or 10 pounds up to 25 pounds of force frequently, and/or a negligible amount of force constantly (constantly; activity or condition exists from 2/3 or more of the time) to move objects. Dr. Burton issued restrictions after reviewing the FCE, of no lifting over 20 pounds maximum, no lifting over 10 pounds frequently, and no lifting constantly. No limits on sitting or standing. Claimant was released from care with these restrictions.

These restrictions did not allow Claimant to return to his old job. Claimant returned to work with Respondent in accommodated work in November 2019. Claimant's current position is as a OTR data entry clerk. This job is mostly sedentary and Claimant is physically able to perform the job duties.

Claimant's average weekly wage before the accident was $942.22. Claimant's average weekly wage post-injury is $728.00. Respondent did not return Claimant to a job paying 90 percent of his pre-injury wage. Claimant is earning more per hour in his current job than he earned in his pre-injury job. However, Respondent does not allow Claimant to work over 40 hours a week, so Claimant does not earn overtime he earned pre-injury. Claimant is compensated for two hours of overtime, but does not work those hours.

Claimant has not looked for other work because of his restrictions and because most of the jobs in his area are laborers and are for less money than he is making now and less than his pre-injury wage. Claimant was advised not look for other work, "to my

knowledge that would hinder where we are today."[1] Driving distances are uncomfortable for him. Claimant is able to perform activities of daily living and yard work. He no longer does his hobby of repairing motors and helping his father at NHRA.

Claimant is college educated with a Master's degree in business administration with an emphasis in health care administration. Claimant has worked in various sales and management positions since 2011.

Dr. Burton, a board certified orthopedic spine surgeon, saw Claimant on February 4, 2020, for evaluation of low back and right leg pain. This was considered a second opinion evaluation as Dr. Burton does not perform independent medical evaluations. Claimant reported low back pain radiating into the right leg down into his toes along with numbness down the right leg to the toes. Claimant reported his back pain was worse than his leg pain. Upon examination, Dr. Burton diagnosed a two-level disc herniation at L4-5 and L5-1 with isthmic spondylolisthesis at L5-S1. Dr. Burton found Claimant's diagnosis was related to the work injury. He recommended Claimant could continue with conservative treatment or have surgery. Claimant opted to have surgery. Claimant had surgery which was performed on February 11, 2021.

On September 14, 2021, Claimant was working in a sedentary position and doing well. Claimant did not believe he could go back to his pre-injury job and further improvement was not likely.

Claimant was found to be at maximum medical improvement on December 10, 2021, with permanent restrictions.

On March 9, 2022, Dr. Burton assigned to Claimant a 19 percent functional impairment to the body as a whole under the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* (*The Guides*), and based on competent medical evidence with *The Guides* as a starting point. Dr. Burton opined Claimant will not require future medical treatment.

Dr. Burton reviewed a task list, with 31 tasks, completed by Tom Karrow. Dr. Burton found Claimant was unable to perform 7 tasks requiring the ability to lift 50 pounds. Dr. Burton found Claimant had a 22.5 percent task loss.

Dr. Pedro Murati examined Claimant on January 31, 2022, at the request of his attorney. Claimant complained of difficulty defecating, sitting or standing for long periods of time, bending over, tying his shoes and putting on socks and cooking. Claimant also had difficulty doing anything on his knees causing nerve pain. Claimant has constant back

[1] Transcript Regular Hearing, p. 29.

pain radiating into his right lower extremity and right hip stiffness. Occasional lifting causes increased pain. Claimant was unable to lift items off the floor and to attend to his 7-year old son. Due to his injury, Claimant gave up up drag racing with his father. Claimant was unable to maintain the inside and outside of his home and his vehicles without back pain.

Dr. Murati examined Claimant and diagnosed: status post anterior lumbar interbody fusion at L4-5 and L5-S1, insertion of intervertebral fusion device L4-5 and L5-S1, use of cancellous allograft with Dr. Burton on 2-1-2021, lumbar radiculopathy; bilateral SI joint dysfunction; and right trochanteric bursitis. Dr. Murati confirmed the right trochanteric bursitis was not diagnosed or treated by Dr. Burton or Dr. Ebelke. It was his diagnosis alone based on Claimant's complaints and the physical findings from the examination. Dr. Murati opined the prevailing factor for these diagnoses was the work accident.

Dr. Murati assigned permanent restrictions based on an 8-hour work day of: occasionally sit, stand, walk and drive; alternate sitting, standing and walking as needed; rarely climb stairs, climb ladders and squat; no crawling; no bending, crouching or stooping; no lifting, carrying, pushing or pulling more than 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly.

Dr. Murati assigned a combined 28 percent whole person functional impairment based on *The Guides* and competent medical evidence (19 percent whole body impairment for the multilevel fusion, 2 percent whole body for SI joint dysfunction, 3 percent whole body for the bursitis).

Dr. Murati reviewed the task list prepared by Steve Benjamin and found Claimant lost the ability to perform 24 out of 38 tasks for 63.2 percent task loss.

Dr. Murati opined Claimant will require future medical treatment as a result of the work injury and recommended yearly followup visits for the back, medication such as Celebrex for inflammation, physical therapy and possibly injections.

Steve Benjamin interviewed Claimant for a vocational assessment on March 8, 2022, at the request of his attorney. Mr. Benjamin reviewed Dr. Murati's records but not Dr. Burton's. Since November 2019, Claimant continued to work for Respondent after the work injury in a light duty position. Mr. Benjamin performed the Wonderlic test on Claimant and determined Claimant was highly capable of working in managerial and upper level clerical positions, including a wide variety of light to sedentary positions. Mr. Benjamin did not provide an opinion regrading Claimant's wage earning capacity.

Mr. Benjamin was questioned about 3 potential jobs Claimant could perform within his restrictions. One job was for Sonara, as a customer service representative, paying $20 to $40 per hour and was a remote job and sedentary. Another job was as freight broker agent for T & S Logistics, which was a remote, sedentary position and paid in the range

of $28,244 to $151,443, depending on whether one worked full-time, part-time or on contract. The third job Mr. Benjamin believed Claimant could perform within his restrictions was store manger for Nex-Tech Wireless in Hutchinson, Kansas, earning $60,000 per year. This job required wireless skills, which Mr. Benjamin was uncertain Claimant had. These three jobs paid at least 90 percent or more of Claimant's pre-injury wage. Mr. Benjamin under cross-examination acknowledged Claimant is capable of competing in the open labor markets for jobs paying more than 90 percent of Claimant's pre-injury average weekly wage.

Mr. Benjamin identified 38 non-duplicated tasks Claimant performed in the 5 years prior to his work injury.

Mr. Benjamin testified Claimant's wage loss if Claimant's current wage represents Claimant's current wage earning capacity is 16.9 percent.

Claimant met remotely with Tom Karrow on June 9, 2022, for a vocational assessment at Respondent's request. Claimant lives in and currently works in Lyons, Kansas. Hutchinson, Kansas, is 32 miles from Lyons, Kansas and Salina Kansas is 60 miles away from Lyons, Kansas. Mr. Karrow found Claimant is capable is working in the light and sedentary categories of physical demand full-time in the Hutchinson and Salina labor markets. Mr. Karrow found Claimant did not have a wage loss, as there are positions open Claimant could perform paying an average weekly wage of $1,163, which is more than he was earning at the time of the injury. The 8 jobs cited by Mr. Karrow are either in Salina, or Hutchinson, Kansas. Mr. Karrow acknowledged under cross-examination under Internal Revenue Service (IRS) guideline, 62.5 cents per mile is the cost for an individual to drive per mile. Based on the IRS guideline it would cost Claimant approximately $19,000 per year to drive to Salina for full-time employment. In his current job with Respondent, Claimant experiences 23 percent wage loss, earning $728 per week.

The ALJ found Claimant sustained a 19 percent functional impairment to the body as a whole for his work injury based on Dr. Burton's opinion. Work disability was denied as Respondent proved Claimant retained the earning capacity to earn wages equal to or in excess of his pre-injury earnings. The ALJ denied the request for future medical as Claimant failed to rebut the presumption it is more probable than not he will require future medical treatment for his injury.

PRINCIPLES OF LAW AND ANALYSIS

Respondent asserts the Board should affirm the Award and find Claimant failed to prove he sustained more than a 10 percent wage loss on account of the injury. Thus work disability benefits should be denied and Claimant is entitled to no more than a 19 percent permanent partial impairment based on Dr. Burton's opinion and denied future medical treatment.

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.

There appears to be no dispute on the ALJ's finding Claimant has a 19 percent body as a whole permanent functional impairment. It is found and concluded Claimant has a 19 percent body as a whole permanent functional impairment.

If Claimant has a functional impairment of more than 7.5 percent he may be considered for permanent partial general disability impairment in excess of his functional impairment.[2] Eligibility for work disability requires the employee sustain a post-injury wage loss, as defined in K.S.A. 44-510e(a)(2)(E), of at least 10 percent which is directly attributable to the work injury and not to other causes or factors.[3] Work disability is determined by averaging the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.[4]

The primary dispute is whether Claimant has a wage loss of greater than 10 percent of his pre-injury wage.

K.S.A 44-510e(a)(2)(E) defines wage loss as:

> "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

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[2] See K.S.A. 44-510e(a)(2)(C)(i).

[3] *See* K.S.A. 44-510e(2)(C)(ii).

[4] See K.S.A. 44-510e(a)(2)(C)(I).

Rebuttable presumption is defined in a criminal case *State v. Hospon*[5] simply and clearly as: "A rebuttable presumption is one that requires the jury to find the presumed element unless the defendant persuades the jury otherwise."

Applying this analysis to Claimant's wage loss, first it is presumed Claimant's actual post-injury wage constitutes the post-injury wage the employee is capable of earning. Claimant's actual post-injury is $728.00 per week, a 23 percent wage loss. Claimant lives and works in Lyons, Kansas. Lyons is 32 miles from Hutchinson, Kansas and 60 miles from Salina, Kansas. Respondent's vocational expert cited 8 managerial/supervisory jobs which are considered sedentary to light duty. Two of the jobs were located in Salina, Kansas and the other 6 were in Hutchinson, Kansas.

Claimant has a masters degree in business and does have some retail manger experience, which would qualify him more than likely for the jobs cited by Respondent's expert. Claimant also has a two level fusion in his back, with significant work restrictions, Claimant has difficulty sitting or standing for extended periods of time and driving distances are difficult for him. K.S.A. 44-510e(a)(2)(E) directs consideration of all factors in determining wage loss. These factors include physical capabilities and availability of jobs in the labor market. Implicit in consideration of these factors is reasonableness.

This Board is not persuaded jobs requiring Claimant to commute 60 miles to 120 miles per day to work overcomes the presumption Claimant's actual wage represents Claimant's post-injury wage capability. For Claimant's current physical condition jobs in Hutchinson and Salina are not a reasonable job markets even if these jobs pay more than he is currently earning and he has the qualifications. For instance it would cost Claimant approximately $19,000 per year to drive to Salina for full-time employment and half that amount to drive to Hutchinson.

It is found and concluded Claimant has a wage loss of 23 percent. Respondent did not rebut the presumption Claimant's post-injury wage represents his post-injury earning capacity.

Claimant's task loss is 42.85 percent which is the average of Dr. Murati's task loss opinion of 63.2 percent and Dr. Burton's task loss opinion of 22.5 percent.

Claimant has a permanent partial general percent disability of 33 percent based on wage loss and task loss.

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[5] *State v. Hopson*, No. 84,970, 2001 WL 37132031 at*4 (Kansas Court of Appeals unpublished opinion filed October 5, 2001).

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.

Claimant has a two level fused back. Dr. Murati recommended Claimant have future medical treatment, including follow-ups by a doctor, physical therapy, medication and injections. It is probably more true than not Claimant will need future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Bruce E. Moore dated September 21, 2022, is modified.

The Claimant is entitled to 31.43 weeks temporary total disability at the rate of $628.18 per week or $19,743.70 followed by 131.53 weeks at the rate of $628.18 per week or $82,624.52 for a 33 percent permanent partial general work disability, making a total award of $102,368.22.

As of February 23, 2023, there would be due and owing to the Claimant 31.43 weeks of temporary total compensation at the rate of $628.18 per week in the sum of $19,743.70 plus 131.53 weeks of permanent partial compensation at $628.18 per week in the sum of $82,624.52, for a total due and owing of $102,368.22 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February, 2023.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agrees with the majority's conclusion Claimant's functional impairment is 19% of the body as a whole, attributable to the low back.

The undersigned concurs with the award of future medical. The presumption the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement 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."[6] Dr. Murati thought it was more probably true than not additional medical treatment would be necessary after Claimant reached maximum medical improvement. This opinion satisfies the specific burden of proof within K.S.A. 44-510h(e) for awarding future medical. Claimant still must prove entitlement to a particular award of future medical care in post-award proceedings held under K.S.A. 44-510k.

The undersigned disagrees with the majority's conclusions Claimant's actual earnings represent his wage-earning capacity, and Claimant is entitled to an award of work disability compensation. A worker's capacity to earn post-injury wages shall be "based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the

[6] K.S.A. 44-510h(e).

open labor market."[7] An administrative law judge is required to impute an appropriate post-injury average weekly wage based on those factors. Where the employee is engaged in post-injury employment for wages, a rebuttable presumption exists the actual earnings constitutes the employee's post-injury wage-earning capacity, but the presumption may be overcome by competent evidence.[8]

In this case, Claimant testified he drives five minutes to his work for Respondent. Claimant also testified he did not want to drive for extended periods of time because it hurts his back. Claimant, however, also testified he was not actively seeking other employment because, "I've been advised not to. To my knowledge that would hinder where we're at today."[9] Claimant has extensive computer skills, college degrees and a graduate degree.

Mr. Benjamin, Claimant's vocational expert, did not provide an opinion on Claimant's wage-earning capacity. Mr. Benjamin only reviewed Dr. Murati's records, noted Claimant was highly educated, competent in the use of computers, capable of performing management and upper-level clerical work, and possessed above-average training potential. Mr. Benjamin also noted Claimant was not looking for other work, and more opportunities to engage in remote work from Lyons, Kansas, existed due to COVID. On cross-examination, Mr. Benjamin conceded Claimant was capable of performing the job at Sonora, which paid on average $30 per hour, and the job at T & S Logistics, which paid on average $89,843.50 per year, depending on the amount of time worked. Both positions were remote positions, which would require no travel. Mr. Benjamin's report also states 110 job openings paying on average $25.41 per hour existed in Rice County, according to the Kansas Department of Labor. It is unknown which of the 110 job openings could be performed by Claimant.

Mr. Karrow, Respondent's vocational expert, met remotely with Claimant, reviewed the medical records of Dr. Burton and Dr. Murati, and reviewed information concerning the labor markets in Saline, Reno and Rice Counties. Unlike Mr. Benjamin, Mr. Karrow provided an opinion regarding Claimant's wage-earning capacity, and thought Claimant could earn up to $60,500 per year. Mr. Karrow identified several retail management positions located in Hutchinson and Salina he believed Claimant could perform. Mr. Karrow also testified many employers were allowing employees to work remotely. Cross-examination of Mr. Karrow focused on the cost and time of Claimant's transportation, not his physical ability to drive, and the perceived prestige of the positions in the eyes of others.

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[7] K.S.A. 44-510c(a)(2)(E).

[8] *See id*.

[9] R.H. Transcript, p.29.

The competent evidence in the record as a whole rebuts the presumption Claimant's actual earnings represent his wage-earning capacity. Claimant is thirty-three years old. Claimant is capable of light-level work, based on the restrictions imposed by Dr. Burton, the treating physician who considered an FCE. Claimant is highly educated, possesses extensive computer skills, and according to both Mr. Benjamin and Mr. Karrow is highly trainable and capable of working in management. Claimant has work experience involving computers, customer service and management. Mr. Karrow, who had the benefit of all the medical records concerning Claimant's physical capabilities, thought Claimant was capable of earning $60,500 per year, albeit in jobs located in Salina and Hutchinson, which would result in no loss of earning capacity. Mr. Benjamin, who did not provide an opinion on Claimant's wage-earning capacity, acknowledged Claimant could perform work paying $60,000 to $89,843.50 in positions allowing for remote work, which would eliminate a transportation obstacle.

Having considered the competent evidence in the whole record, the undersigned finds Claimant capable of earning at least $60,000 per year, or $1,153.85 per week. Respondent successfully rebutted the presumption Claimant's actual earnings constitute his wage-earning capacity. Because Claimant's wage-earning capacity exceeds the average weekly wage he was earning on the date of accident, he is not entitled to permanent partial general disability compensation based on work disability considerations. Instead, Claimant is entitled to an award of permanent partial disability based on 19% functional impairment to the body as a whole, attributable to the lumbar spine.

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BOARD MEMBER

c: (Via OSCAR)

Mitchell W. Rice, Attorney for Claimant
Kristina Mulvany, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge