

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DONALD CREGGER)	
Claimant)	
V.)	
)	AP-00-0472-788
CLW FARMS, INC.)	CS-00-0452-356
Respondent)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the December 12, 2022 Award issued by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 27, 2023.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Kevin M. Fowler appeared for the Fund.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Evidentiary Deposition of Donald Cregger, taken October 12, 2020;
2. Evidentiary Deposition of Corey Weber, taken October 12, 2020, with Exhibits;
3. Preliminary Hearing held November 10, 2020, with Exhibits;
4. Court-ordered independent medical evaluation (IME) report of Lowry Jones M.D., February 28, 2022;
5. Regular Hearing held June 10, 2022;
6. Continuation of Regular Hearing by Deposition, taken on July 1, 2022;
7. Deposition of Pedro Murati, M.D., taken July 5, 2022, with Exhibits;
8. Deposition of Richard L. Thomas, taken August 15, 2022, with Exhibits;
9. Deposition of Pat Do, M.D., taken August 18, 2022, with Exhibits;
10. Deposition of Corey Weber, taken September 14, 2022, with Exhibits;
11. Deposition of Lisa Weber, taken September 14, 2022, with Exhibits;
12. Deposition of Steve Benjamin, taken October 3, 2022, with Exhibits.

ISSUE

Is Respondent entitled to a credit of \$53,977.22 for preexisting impairment, pursuant to K.S.A. 44-501(e)?

FINDINGS OF FACT

The parties presented the following issues for decision to the ALJ:

1. Does the court have jurisdiction over this claim?
2. What is Claimant's average weekly wage?
3. Whether the accident was the prevailing factor in causing Claimant's impairment and medical condition?
4. What is the nature and extent of Claimant's disability?
5. Is Claimant entitled to future medical benefits?
6. Is the Workers Compensation Fund responsible for this claim?

Claimant appealed the ALJ's Award to the Board. The sole issue presented on appeal is whether the Fund is entitled to a credit of \$53,977.22 for preexisting credit, pursuant to K.S.A. 44-501(e). The highly summarized facts follow.

Claimant worked for Respondent approximately six months beginning in September, 2019. He was an over the road truck driver hauling grain and byproducts. On March 11, 2020, Claimant was delivering a load of distillers grain to a feed mill in Sterling, Kansas. Claimant climbed up on the side of the trailer to dislodge the packed material. Claimant's hand slipped as he was climbing and he fell approximately five feet, landing on a concrete surface. Claimant was taken by ambulance to Rice Community Healthcare Hospital, where he stayed several days. Claimant was informed he suffered a broken tibial plateau (left). He was given oxycodone, placed in a knee immobilizer and advised to follow-up with an orthopedic surgeon.

Claimant began conservative treatment for his left knee with Jeff Shepard, M.D., at Advanced Orthopedics in Wichita. Dr. Shepard performed a left total knee replacement on July 14, 2020. He released Claimant at maximum medical improvement (MMI) on August 27, 2020.

Claimant was examined by Pat Do, M.D., an orthopedic surgeon, on November 24, 2020, for continued left knee complaints and low-back pain. Dr. Do recommended Claimant return to Dr. Shepard for his left knee pain and provided conservative care for his low back pain. Dr. Do released Claimant at MMI on May 27, 2021, and opined the prevailing factor for the left knee and back was the work accident. Using the *AMA Guides*

to the *Evaluation of Permanent Impairment, 6th edition (Guides, 6th ed.)*, Dr. Do opined Claimant has 10% functional impairment to the whole body, consisting of 21% functional impairment to the left lower extremity (converted to the whole body is 8%) and 2% for the lumbar spine. Dr. Do assigned permanent work restrictions.

A court-ordered IME was performed by Lowry Jones, Jr., M.D., a board-certified orthopedic surgeon, on February 28, 2022. Dr. Jones opined Claimant sustained injuries to his left knee and back as a result of his work injury on March 11, 2020. He opined Claimant was at MMI and given his age, he may require a revision total knee arthroplasty in the future. Using the *Guides, 6th ed.*, Dr. Jones gave Claimant 19% functional impairment to the whole body consisting, of 37% functional impairment to the left lower extremity (converted to the whole body is 15%) and 4% for the lumbar spine. Dr. Jones assigned permanent work restrictions.

At his attorney's request, Claimant was evaluated twice by Pedro A. Murati, M.D., once for treatment recommendations on September 15, 2020, and once for a rating on August 30, 2021. Dr. Murati opined the March 11, 2020, work accident was the prevailing factor causing Claimant's injuries to his left knee and back. Using the *AMA Guides to the Evaluation of Permanent Impairment, 4th edition (Guides, 4th ed.)*, Dr. Murati gave Claimant 35% functional impairment to the whole body, consisting of 67% functional impairment to the left lower extremity (converted to the whole body is 27%), 11% for the lumbar spine, but 2% was preexisting, and 2% for sacroiliac joint dysfunction in each hip. Dr. Murati stated a strict interpretation of the *Guides, 6th ed.*, would reduce Claimant's rating by 4%, because sacroiliac joint dysfunction is not recognized in the 6th edition. Dr. Murati assigned permanent work restrictions and opined future medical treatment would be likely. He shared Dr. Jones' opinion Claimant would likely need a revision of his total knee arthroplasty due to his age.

Two vocational consultants interviewed Claimant, Richard L. Thomas, at his attorney's request and Steven Benjamin, on behalf of the Fund. Each was for the purposes of identifying the jobs and job tasks performed in the five years preceding the work accident, as well as assessing Claimant's income earning capability.

Mr. Thomas testified Dr. Murati's restrictions restricted Claimant to a narrow level of light and sedentary employment. Claimant would not be able to perform the necessary tasks required to be a truck driver. Mr. Thomas opined Claimant is not employable in the open labor market based on his age, medical restrictions, lack of marketable transferable skills, and limited education.

Mr. Benjamin testified Claimant was capable of returning to a light duty job of "no touch" truck driving, where the driver does not load or unload the truck. Mr. Benjamin testified a "no touch" truck driving job is light duty, not sedentary.

Claimant contacted Respondent to advise he had been released to return to work. Respondent informed Claimant the truck had been sold and no job was available for him. Claimant has not returned to work for any employer, and has been receiving Social Security Disability benefits since June 2022, retroactive to March 2020.

Claimant's initially testified on October 12, 2020:

Q. Okay, thank you. We have those two work injuries, are there any other work comp claims that you have made?

A. Bilateral tibia fractures.

Q. Tell me about that. What happened?

A. I was standing up in a grain wagon, down in it, and I was on top loading potatoes we had. We had me on the gross, but I was over on the trailer tandems and we had to move 1,500 bulk potatoes from the back hopper to the front hopper.

Q. Who were you working for at the time?

A. Pawnee Express.

Q. Do you remember when that accident occurred?

A. 18th of November of '96.

Q. With a fracture of that nature, I am sure you got medical treatment. Where did you go to medical treatment, if you recall?

A. Started out at the hospital in Gooding, Idaho. Then they moved me to Twin Falls, Idaho. And then they transferred me up to Wichita to Wesley Medical Center.

Q. And is that the same leg that you injured this time around?

A. Well, both of them got injured. The one that got the worse was the right one.

Q. Did you receive a settlement out of that work comp claim?

A. Yes.¹

Claimant later testified on July 1, 2022:

¹ Cregger Depo. (10/12/2020) at 8.

Q. Now, it is my understanding that you also experienced an injury to your left tibia in 1996; is that right?

A. I got both the left tibia and the right tibia.

Q. Okay.

A. The left one, I've got six screws left in it. It was a -- it was a tibia fracture on the lower end, and on -- let's see, that -- both the left one and the right one was tib-fib fractures. The right side separated the tibia from the fibula and busted it up.

Q. So you injured both legs in 1996.

A. Yes, sir.

Q. And you still have six screws in your left tibia?

A. No, in the right one.

Q. Oh, in the right.

A. Five or six.

Q. Did you require physical therapy in 1996?

A. Extensively. I was -- yeah, that one kept me down for a little while but I got over it and got back to work and not too much of a problem. I did have an impairment rating with that one, too.

Q. What was your impairment rating?

A. 28 percent in the lower extremity. So they went for a 28 percent total body disability.

Q. Did you obtain a 28 percent whole body impairment rating as part of your settlement?

A. That is correct.

Q. And who were you working for in 1996 when you sustained that injury?

A. Pawnee Express out of Larned, Kansas.

Q. And were you also working as a truck driver at that time?

A. That is correct. I was doing the same thing I was doing for Corey Weber. Exact same thing.²

None of the physicians provided opinions regarding a preexisting condition from the 1996 injury. The only evidence of a preexisting condition was provided through Claimant's testimony.

The ALJ found:

1. Respondent's payroll was sufficient to bring this claim within the jurisdiction of the Act.
2. Claimant's average weekly wage is \$696.75.
3. The March 11, 2020 work accident is the prevailing factor causing Claimant's injuries, need for medical treatment and resulting impairment.
4. Claimant suffered a 19% functional impairment to the whole body and has established he is permanently and totally disabled.
5. Claimant is entitled to future medical treatment.
6. The Fund is responsible for Claimant's award.
7. The Fund was entitled to a credit for Claimant's preexisting condition pursuant to K.S.A. 44-501(e).

Claimant appeals, arguing credit for Claimant's preexisting condition pursuant to K.S.A. 44-501(e) is not supported by the evidence. Specifically, Claimant argues the March 11, 2020 is a new and distinct injury from the 1996 injury, involving different body parts and there is no evidence establishing any functional impairment was preexisting. The Fund maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501(e) states:

(e) An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(1) Where workers compensation benefits have previously been awarded through settlement or judicial or administrative determination in Kansas, the percentage basis of the prior settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Where workers compensation benefits have not previously been awarded through settlement or

² Continuation of Hearing (7/01/2022) at 49.

judicial or administrative determination in Kansas, the amount of preexisting functional impairment shall be established by competent evidence.

(2) In all cases, the applicable reduction shall be calculated as follows:

(A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting. The “current dollar value” shall be calculated by multiplying the percentage of preexisting impairment by the compensation rate in effect on the date of the accident or injury against which the reduction will be applied.

(B) In all other cases, the employer against whom benefits are currently being sought shall be entitled to a credit for the percentage of preexisting impairment.

An award of compensation must be reduced by the amount of functional impairment determined to be preexisting. The Respondent has the burden of proving the amount of preexisting impairment to be deducted.³ “Burden of proof” generally means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence the party’s position on an issue is more probably true than not on the basis of the whole record.⁴

The ALJ stated “In calculating Cregger’s Award for permanent total disability, the previous Award of a 28% whole body functional impairment must be considered.” The Board agrees with this premise, but the Fund is still responsible with providing evidence it is more probably true than not they are entitled to the credit and the specifics regarding how much of a credit should be applied to the award.

K.S.A. 44-501(e)(1) states the percentage basis of a prior Kansas settlement or award shall conclusively establish the amount of functional impairment determined to be preexisting. Worksheets for settlements with attached medical records are available and obtained from the Kansas Division of Workers Compensation. No worksheet for settlement for the 1996 work accident was entered into the record. None of the medical evidence opined Claimant’s 1996 injuries were connected to his March 11, 2020 work injuries.

The only evidence of a preexisting condition in this case comes from Claimant’s testimony, and he said he had 28% whole body functional impairment from injuries

³ *Ward v. Allen County Hospital* 50 Kan. App. 2d 280, 324 P 3d 1122 (2014).

⁴ See K.S.A. 44-508(h).

sustained to his lower legs in 1996. Claimant testified the right leg was injured worse than the left. No specific information was provided as to what body parts were rated, how they were rated individually and converted to a 28% whole body rating. It appears Claimant's current injuries are to different body parts than what he received compensation for in the 1996 claim, but the current record is insufficient to this information. This lack of information renders it impossible to apply the preexisting credit to this case. Claimant's recollection of an injury, occurring more than twenty-five years ago, without any supporting evidence, does not meet the standard of competent evidence. Accordingly, the Board finds the Fund failed to meet their burden of proof establishing their right to a preexisting credit.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Bruce E. Moore dated December 14, 2022, granting the Fund a credit for a preexisting credit pursuant to K.S.A. 44-501(e) is reversed and vacated. The Fund is not entitled to a credit. All other aspects of the Award are affirmed.

IT IS SO ORDERED.

Dated this day of May 2023.

BOARD MEMBER

BOARD MEMBER

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DONALD CREGGER

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c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant
Kevin M. Fowler, Attorney for the Fund
Hon. Bruce E. Moore, Administrative Law Judge