

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALLEN W. WEVE)	
Claimant)	
)	CS-00-0313-584
V.)	AP-00-0452-304
)	
TYSON PREPARED FOODS, INC.)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Allen Weve requested review of the July 17, 2020, Award in Remand Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on November 5, 2020. Mitchell Rice of Hutchinson, Kansas, appeared for Mr. Weve. P. Kelly Donley of Wichita, Kansas, appeared for self-insured respondent.

The Board previously ruled on this matter on January 23, 2020.¹ The Board ordered the ALJ to consider the entire record, including the discovery deposition of Mr. Weve dated September 13, 2018.

After doing so, the ALJ found Mr. Weve sustained 6 percent permanent partial impairment of the body as a whole as a result of his January 1, 2017, accident. The ALJ determined Mr. Weve was not entitled to future medical treatment. The ALJ further added:

Had the 4th edition of the guides applied, or if in the future, claimant's whole body disability reaches the necessary threshold for a work disability, the court would adopt Dr. Pratt's opinion on functional impairment and task loss and awarded a 71.4% work disability, notwithstanding the testimony of Tonya Reed. Ms. Reed identified several positions within Dr. Pratt's restrictions that may have been available, but admitted respondent could not accommodate claimant's sedentary restrictions, that were apparently the basis of his long term disability.

Unfortunately for the claimant, that is not the current state of the law or the case.²

¹ *Weve v. Tyson Prepared Foods, Inc.*, CS-00-0313-584, 2020 WL 719925 (Kan. WCAB Jan. 23, 2020).

² ALJ Award (July 17, 2020) at 4.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues the ALJ's Award should be affirmed, and Mr. Weve is not entitled to a work disability. Respondent maintains Mr. Weve voluntarily terminated his employment or, alternatively, was terminated for cause. However, should the Board find Mr. Weve is entitled to a work disability, respondent contends Mr. Weve's work disability is 28.6 percent. Respondent further argues Mr. Weve is not permanently and totally disabled. Additionally, respondent contends the ALJ improperly issued an advisory opinion regarding Mr. Weve's impairment and improperly rejected Tonya Reed's uncontradicted testimony regarding his termination for cause.

The issues for the Board's review are:

1. What is the nature and extent of Mr. Weve's disability?
2. Is Mr. Weve entitled to future medical treatment?
3. Was Mr. Weve terminated by respondent for cause?
4. Did the ALJ improperly disregard the uncontradicted testimony of Tonya Reed?
5. Is the Sixth Edition *AMA Guides*³ constitutional and, if not, did the ALJ properly utilize the Sixth Edition to calculate Mr. Weve's impairment? Additionally, did the ALJ improperly provide an opinion of Mr. Weve's disability under the Fourth Edition *AMA Guides*?

FINDINGS OF FACT

Mr. Weve fell and injured his right ankle in the course of his employment on January 1, 2017, while working as a refrigerator mechanic. Mr. Weve reported the incident to his supervisor and was treated with ice/elevation. Mr. Weve returned to his normal work duties for two weeks following the incident, but the swelling in his right ankle continued. Mr. Weve was eventually sent to Dr. Fanning, who provided conservative treatment and an air boot. Mr. Weve was provided accommodated work under Dr. Fanning's restrictions of sedentary work. Mr. Weve was then sent to Dr. Bonar and provided a plaster cast, which he broke the following day. Mr. Weve was given another plaster cast, which he also broke the

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

following day, He returned to an air boot. Dr. Bonar was told to release him from treatment following the broken casts.

Mr. Weve began having symptoms in his hips and low back. Mr. Weve treated with Dr. Cayme, receiving injections and prescription medication for pain.

Mr. Weve stopped working at respondent when he fell twice due to his legs giving out, sometime in August 2017. Mr. Weve went to the emergency room after his fall and was directed to seek treatment with his primary care physician, Dr. Tammy Nelson. Mr. Weve indicated Dr. Nelson restricted him to sitting for two-hour periods before lying down to relieve pressure from his low back and hips. Mr. Weve received short-term disability and FMLA for a time, based upon these restrictions. Dr. Nelson did not testify.

Tonya Reed, respondent's Complex HR Manager, agreed Mr. Weve's last day worked was sometime in August 2017. Ms. Reed stated respondent provided Mr. Weve with accommodated employment following his accident. She said, "At the time we were accommodating him and then he quit showing up."⁴ Ms. Reed explained Mr. Weve was terminated from his employment in July 2018 because he exceeded respondent's one-year leave of absence policy. Ms. Reed spoke to Mr. Weve for the last time in July 2018, when Mr. Weve informed her there were no jobs at respondent he was capable of performing. Ms. Reed suggested a number of jobs Mr. Weve could perform within his restrictions, including inspector, material handler, packager, or receptionist.

Dr. Pedro Murati initially evaluated Mr. Weve at his counsel's request on June 27, 2017, for treatment recommendations. Dr. Murati reviewed Mr. Weve's medical records, history, and performed a physical examination. Dr. Murati found Mr. Weve suffered a right high ankle sprain, right talofibular and deltoid complex sprain, low back sprain secondary to antalgic gait, right SI joint dysfunction and trochanteric bursitis secondary to antalgic gait, and possible complex regional pain syndrome (CRPS). Dr. Murati related Mr. Weve's diagnoses to the work-related accident of January 2017, and provided restrictions. Dr. Murati also recommended additional treatment, including medications, physical therapy, and injections.

Dr. Terrence Pratt evaluated Mr. Weve on November 9, 2017, for a court-ordered independent medical evaluation (IME). Mr. Weve complained of pain in his right ankle and low back. Mr. Weve was not using a cane when he presented for his examination by Dr. Pratt. Dr. Pratt reviewed Mr. Weve's history, medical records, and performed a physical examination. Dr. Pratt listed the following impressions:

⁴ Reed Depo. at 8.

- Right ankle syndrome with ligamentous involvement and possible subtle fracture.
- Low back pain with degenerative disk disease.
- Inappropriate responses.⁵

Dr. Pratt opined the prevailing factor causing Mr. Weve's right ankle condition was the work-related accident. Based upon his review of Mr. Weve's medical records and an MRI of the lumbar spine taken on October 6, 2017, Dr. Pratt concluded the prevailing factor for Mr. Weve's low back condition was the degenerative disc changes seen on the MRI, not his work-related accident.

Dr. Pratt noted Mr. Weve's inappropriate responses to the Waddell's assessment limited his evaluation and treatment options. Dr. Pratt discussed the Waddell's assessment:

Q. Doctor, what are Waddell's?

A. Waddell's is specific for the low back. It's an assessment created by Dr. Waddell that has five portions to the evaluation, and if three or more are positive, he is considered as having inappropriate responses on the examination, or symptom magnification.

Q. And how many positive responses or inappropriate responses did Mr. Weve have?

A. Four.⁶

Mr. Weve returned to Dr. Murati on February 19, 2018, at which time Dr. Murati found Mr. Weve's condition worsened. Dr. Murati performed a physical examination and reviewed Mr. Weve's updated information, finding Mr. Weve's diagnoses relatively unchanged since June 2017. Dr. Murati noted Mr. Weve suffered low back pain with signs of radiculopathy, and removed any indication of possible CRPS from his report.

Dr. Murati opined Mr. Weve's antalgic gait had worsened his low back and provided stricter restrictions, including: occasional sitting and driving, rare standing and walking, no bending, ladder climbing, squatting, crawling, repetitive right foot controls or lifting, and no pushing or pulling greater than 20 pounds. Dr. Murati limited Mr. Weve to working 4 hours per day. Dr. Murati reported Mr. Weve "is essentially and realistically unemployable" and suggested he apply for Social Security disability.⁷ Dr. Murati recommended additional

⁵ Pratt Depo., Ex. 2 at 5.

⁶ Pratt Depo. at 11.

⁷ Murati Depo., Ex. 3 at 4.

medical treatment and again related Mr. Weve's conditions to the work accident of January 2017.

Using the *AMA Guides*, Dr. Murati determined Mr. Weve sustained a combined 19 percent whole person impairment. Dr. Murati explained his rating consists of an 8 percent whole person impairment related to Mr. Weve's right lower extremity, a 2 percent whole person impairment for SI joint dysfunction, and a 12 percent whole person impairment related to Mr. Weve's lumbar radiculopathy. Dr. Murati recommended future medical treatment related to Mr. Weve's right ankle, including annual followup examinations, possible physical therapy, anti-inflammatory and pain medications, and the possibility of surgical intervention.

Dr. Pratt provided an addendum to his IME dated July 10, 2018, without physically re-examining Mr. Weve. Using the *AMA Guides*, Dr. Pratt opined Mr. Weve sustained a combined 6 percent whole person impairment, consisting of a 4 percent whole person impairment related to Mr. Weve's right lower extremity and a 2 percent whole person impairment related to Mr. Weve's lumbosacral soft tissue involvement.

Dr. Pratt provided permanent restrictions, including occasional maximum lifting up to 50 pounds, frequent lifting to 25 pounds, avoid running, crawling, and no frequent lumbosacral bending or twisting. Dr. Pratt further explained sitting does not count as lumbosacral bending or twisting. Dr. Pratt did not anticipate future medical treatment for the lumbar spine. Dr. Pratt was unaware of the need for additional care for Mr. Weve's right lower extremity.

Steve L. Benjamin performed a vocational evaluation, including a labor market survey, at respondent's request. Mr. Benjamin opined Mr. Weve was capable of substantial and gainful employment within Dr. Pratt's restrictions. Applying Dr. Pratt's restrictions, Mr. Weve could earn approximately \$579 per week, a 42.9 percent wage loss. Dr. Pratt reviewed the task loss information compiled by Mr. Benjamin and opined claimant could no longer perform 12 out of 28 listed tasks, or 42.8 percent.

Robert W. Barnett performed a vocational evaluation at Mr. Weve's request. Based upon Dr. Murati's restrictions, Mr. Barnett agrees Mr. Weve is realistically unemployable. Dr. Barnett opined Mr. Weve is unemployable and has a 100 percent wage loss. Based upon Dr. Pratt's restrictions, Dr. Barnett believes there may be sedentary employment available, although he did not perform a labor market analysis to determine if Mr. Weve could obtain employment within Dr. Pratt's restrictions.

Mr. Weve could not return to his former position with respondent due to his inability to bend or kneel. Mr. Weve further alleges he must use a cane due to an inability to keep his balance. Mr. Weve received long-term disability benefits from respondent ending September 2018. Mr. Weve has not worked since leaving his job with respondent.

PRINCIPLES OF LAW

K.S.A. 2016 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2016 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. 2016 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2016 Supp. 44-510e(a) states:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

(1) Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average weekly wage that the employee was earning prior to the date of injury and the amount the employee is actually earning after such injury in any type of employment. In no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c, and amendments thereto.

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not

covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

- (i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;
- (ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or
- (iii) the loss of or loss of use of both eyes.

(B) 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 therein, until January 1, 2015, but for injuries occurring on and 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.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

- (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7 ½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
- (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

K.S.A. 2016 Supp. 44-510c states, in relevant part:

(a)(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

K.S.A. 2016 Supp. 44-510h(e) states, in part:

It is presumed that the employer's obligation to provide [medical benefits] 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. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2016 Supp. 44-525(a) states, in part:

. . . No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury.

ANALYSIS

1. What is the nature and extent of Mr. Weve's disability?

In *Johnson*,⁸ the Kansas Court of Appeals found use of the *AMA Guides*, Sixth Edition, was unconstitutional. The Kansas Supreme Court reversed the Court of Appeals,⁹ so the decision has no force or effect. A motion to reconsider has been filed in the Supreme Court and the mandate will not issue until disposition of the Supreme Court's ruling on the motion. Further, the Board may not decide the constitutionality of Kansas laws.¹⁰ Medical opinions using the *AMA Guides*, Fourth Edition, will not be considered at this time.

Dr. Pratt's examination included reviewing a lumbar spine MRI conducted on October 6, 2017. Based upon his review of the MRI, Dr. Pratt concluded Mr. Weve's radiculopathy was due to a preexisting degenerative lumbar spine, not the work-related accident or altered gait caused by the accident. Dr. Pratt opined Mr. Weve's altered gait caused only a soft tissue injury to the lumbar spine. Dr. Pratt's opinions relating to the MRI findings are uncontradicted. Dr. Pratt also conducted the Waddell's examination and concluded Mr. Weve was magnifying his symptoms.

⁸ *Johnson v. U.S. Food Serv.*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018), *rev'd*, No. 117,725, 2021 WL 70145 (Jan. 8, 2021).

⁹ *Johnson v. U.S. Food Serv.*, No. 117,725, 2021 WL 70145 (Jan. 8, 2021).

¹⁰ See *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

Factoring in the MRI findings and the evidence Mr. Weve was magnifying his symptoms, Dr. Pratt assessed a 2 percent whole body impairment to the lumbar spine and a 4 percent whole body impairment to the right lower extremity. In his report, Dr. Pratt explained the calculations and grade modifiers used to arrive at his impairment opinions relating to the lower extremity and low back. The Board finds the degree of specificity Dr. Pratt used to explain his opinions helpful.

Dr. Murati was silent on the extent of degenerative changes in the lumbar spine. There is no indication in his deposition testimony or reports Dr. Murati reviewed the October 6, 2017, lumbar spine MRI film or report. Dr. Murati's report containing his permanent impairment opinions are not as thorough as Dr. Pratt's regarding the specific details of how he arrived at his numbers. Dr. Murati's opinions relating to the extent of permanent impairment related to Mr. Weve's accident are given less weight than Dr. Pratt's.

The Board, as the ALJ, adopts the functional impairment opinion of Dr. Pratt, the court-ordered examining physician. Dr. Pratt's opinions are neutral and unaffected by either party. The Board typically affords some deference to the opinions of court-ordered physician, although the Board is not bound by a court-ordered medical opinion.¹¹

The Board finds Mr. Weve suffers a 6 percent whole body impairment related to his work-related accident referable to the low back and right lower extremity. Because Mr. Weve's impairment does not exceed 7½ percent, he is not eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment pursuant to the provisions of K.S.A. 44-510e(a)(2)(C).

The Board also finds Mr. Weve is not permanently and totally disabled. The Board finds Dr. Pratt's assessment of permanent restrictions more persuasive than Dr. Murati's. Dr. Barnett made no attempt to determine if Mr. Weve has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, based upon the opinions of Dr. Pratt. The Board gives more weight to Mr. Benjamin's opinion Mr. Weve is capable of substantial and gainful employment within Dr. Pratt's restrictions.

2. Is Mr. Weve entitled to future medical treatment?

Dr. Pratt opined he did not anticipate Mr. Weve requiring future medical treatment for his lumbar spine. Dr. Pratt was unaware of the need for future medical treatment related to the lower extremity. Dr. Murati did not recommend specific treatment for the lumbar spine. For the right ankle, Dr. Murati recommended future medical treatment,

¹¹ See *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 955, 379 P.3d 428 (2016).

including annual followup examinations, possible physical therapy, anti-inflammatory and pain medications, and the possibility of surgical intervention.

The Board finds Mr. Weve met his burden of presenting medical evidence, the testimony of Dr. Murati, proving it is more probable than not future medical treatment will be required as a result of his work-related injury. Accordingly, Mr. Weve is awarded future medical treatment.

All other issues are moot.

CONCLUSION

Claimant suffers 6 percent whole body functional impairment as the result of his work-related accident. Claimant is entitled to future medical treatment. The issue of constitutionality of the Act is reserved for the Supreme Court's final determination of the issue.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein dated July 17, 2020, is affirmed in part, and reversed in part. The award of permanent partial disability compensation based upon 6 percent impairment to the body as a whole under the *AMA Guides*, Sixth Edition, referable to the low back and right lower leg is affirmed. Mr. Weve is awarded future medical treatment, to be provided by agreement or upon application, as provided by K.S.A. 44-510k.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

copies via OSCAR to:

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Hon. Thomas Klein, Administrative Law Judge