BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

YORDY GAMEZ OLIVER	)	
Claimant	)	
V.	)	
	)	CS-00-0315-522
NATIONAL BEEF PACKING CO.	)	AP-00-0452-646
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 7, 2020, Award issued by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 10, 2020.

APPEARANCES

Conn Felix Sanchez appeared for Claimant. Shirla McQueen appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

The issues on appeal are:

1. What is the nature and extent of Claimant's disability, specifically whether Claimant is permanently and totally disabled or entitled to work disability benefits?

2. Was Claimant terminated for cause?

3. Is Claimant entitled to temporary total disability benefits from September 8, 2017, to May 22, 2019?

FINDINGS OF FACT

The ALJ found Claimant met with personal injury arising out of and in the course of his employment and suffered 20 percent permanent partial functional impairment to the body as a whole for a low back injury. Claimant was awarded future medical treatment upon proper application. The ALJ found Claimant was terminated for cause and not entitled to permanent partial benefits based on wage loss and task loss or work disability. The ALJ also found Claimant was not permanently and totally disabled. Finally, the ALJ found Claimant was not temporarily and totally disabled from September 8, 2017, to May 22, 2019, as Claimant was working under restrictions from Dr. Stuckey.

Claimant injured his low back in the course of his employment on August 1, 2013. Claimant understood he had three collapsed vertebrae in his back. His medical treatment included injections, physical therapy, medications and work restrictions. Surgery was recommended, which Claimant initially declined. Claimant eventually had two back surgeries, an L3-L5 laminectomy in March 2017 and an L3-L5 fusion on August 3 2018. Claimant was assigned work restrictions after the March 2017 surgery. According to Claimant, the surgeries did not cure his back pain and he has pain extending into his legs and other parts of his body. Claimant believes his pain level is 8 to 10 on pain scale of 1 to 10 with 10 being the worst pain.

While undergoing treatment Claimant was assigned accommodated work in Respondent's glove room. The work in the glove room is to get gloves that are laundered, sort them and get them ready for the production floor. This can be a sitting, standing, or alternating position job.

According to Claimant, he was fired from his job because he was violating his medical and labor restrictions. Claimant believes he was just doing his job. He provided a statement to Respondent: "I was on my knees to pick up a glove – one glove with a hook. This was the only time I did that today. I know it was bad against my restrictions."[1] Claimant told Respondent this was the first time he kneeled in this job.

Joe Davis, the safety manager, testified he was walking down the hallway when he glanced into the glove room and noticed someone under the table where the gloves are stored. He knew many of the employees in the glove room were under restrictions, so he watched to see why someone would be under the table. He saw Claimant backing out from underneath the table and pulling something. Mr. Davis knew Claimant was outside his restrictions when he saw him kneeling on the ground, because he was asked to find a job Claimant could perform within his restrictions. Mr. Davis testified Claimant had been

[1] Claimant Depo. (Jul. 29, 2020) at 6.

assigned to the glove room after March 2, 2017, when the restrictions were assigned. Mr. Davis did not ask Claimant what was going on, Mr. Davis simply reported the incident.

Working outside of restrictions is considered a safety violation by Respondent. An employee who commits a safety violation can be disciplined, which includes being written up, suspended or terminated. All injured employees who are working with restrictions are aware violating those restrictions can lead to termination of employment. The decision to terminate an employee is left to the human resources department following investigation of the complaint. According to Respondent, all employees with restrictions are required to sign a sheet containing their restrictions so everyone is aware what the restrictions are. The employee with the restrictions, the nurse and the supervisor providing the work sign the sheet.

Claimant was suspended without pay on September 8, 2017, and terminated on September 22, 2017. Claimant was terminated for a safety violation, working outside of his restrictions by being on his knees to pick up gloves off the floor. According to Respondent, the job Claimant was assigned to perform did not have him picking up gloves, let alone kneeling. Claimant's actions were considered an egregious safety violation. Part of Respondent's decision to terminate Claimant, was consideration of Claimant's past employment infractions. Claimant's prior infractions could have resulted in termination of employment, but they were not considered willful or intentional. Claimant received a written warning on January 19, 2017, for sleeping on the job, and another written warning on April 28, 2017, for leaving his work area without a supervisor's authorization.

Claimant has not been able to find work since he was terminated by Respondent. He continues to have pain and has not been able to find work because no one wants to risk hiring someone with his restrictions.

Mr. Paul S. Hardin, a vocational consultant, interviewed Claimant on December 13, 2019, at Claimant's attorney's request. Mr. Hardin noted Claimant's employment has been in three areas: saw operator, packing, and houseman. Claimant performed twenty different tasks in the five years prior to August 1, 2013. He noted Claimant could read, write, speak and understand English in a very limited amount. Mr. Hardin understood Claimant has a 25 percent permanent partial impairment of function to the body as a whole. Using the report of Dr. Murati dated October 31, 2019, and based on Claimant's age, physical capabilities, education, training, prior experience, and geographic area, Mr. Hardin found Claimant to be essentially and realistically unemployable, and incapable of engaging in any type of substantial and gainful employment. He came to this conclusion first due to Dr. Murati's four hours of work per day restriction. Claimant also has, according to Dr. Murati, strict physical restrictions of no bending, crouching, stooping, crawling, rarely climbing and squatting, and a ten pound lifting limit. He also noted if Claimant had not been terminated for violating his restrictions and Respondent was able to accommodate, Claimant would not have a wage loss and would be considered employable.

Ms. Karen Terrill, a vocational rehabiliation consultant, interviewed Claimant via telephone on March 19, 2020, at the request of Respondent. She found Claimant had performed thirteen tasks in the five years preceding August 1, 2013. Ms. Terrill noted Claimant's knowledge of computers is limited. He has not worked since September 2017. Claimant worked for Respondent from November 31, 2010, until September 22, 2017. She noted Claimant had previously worked for Respondent from 2009 to 2010, and as a houseman from 2008 to 2009 at a hotel in Las Vegas. Before he moved to the U.S., Claimant worked in security for a company in Cuba from 2004 to 2007. Claimant had some medical training in Cuba, as an orthopedic technician and radiology technician. Claimant did not work between 2001 and 2004. Ms. Terrill noted Claimant was not working at the time of this interview, which would make his wage loss 100 percent.

Based on the restrictions of Dr. Pratt, Ms. Terrill opined Claimant could return to work as a houseman at a hotel earning what he was at the time of the accident with no wage loss. She did not know how much Claimant was making as a houseman at the hotel, but because he was a supervisor, his wages should have been close to what he was making with Respondent. If Claimant did have a wage loss by limiting his job area to Liberal, Kansas, he would have a 41 percent wage loss.

Based on the restrictions of Dr. Murati, Ms. Terrill opined Claimant would not be able to engage in any work and would have a 100 percent wage loss. However, Ms. Terrill does not believe permanent total disability applies to Claimant under the restrictions of Dr. Pratt. Her reasoning was Claimant's lifting restrictions and pushing and pulling restrictions put him in a light-medium work level, tending more toward light-level work. Since Claimant was allowed to occasionally bend or twist, Ms. Terrill did not feel this was indicative of being permanently totally disabled.

Dr. Pedro A. Murati examined Claimant on January 20, 2015, at the request of Claimant's attorney. Claimant's chief complaints were: difficulty standing due to low back pain; low back pain that goes down the right leg; difficulty bending, twisting, sleeping and lifting due to low back pain; numbness and tingling in the right foot, including the toes; and cramping down the right leg. Dr. Murati diagnosed Claimant with low back pain with signs of radiculopathy and right SI joint dysfunction. He assigned permanent restrictions of: no bending, crouching or stooping; no lifting, carrying, pushing or pulling more than 20 pounds; lifting 20 pounds occasionally and 10 pounds frequently; rarely climb stairs, ladders, squat or crawl; occasionally sit, stand or drive; frequently walk; alternate sitting, standing, and walking.

Dr. Murati opined within a reasonable degree of medical certainty the prevailing factor in the development of Claimant's low back complaints was the work accident of August 1, 2013. Claimant sustained permanent structural change in the anatomy of his low back, which caused pain necessitating treatment.

Dr. Murati found Claimant had a 10 percent body as a whole permanent impairment, based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition* (*The Guides*), using Lumbosacral DRE category III rating criteria for the low back.

Dr. Murati examined Claimant again on April 6, 2016, at the request of Claimant's attorney. Claimant's chief complaints were the same as when Claimant was examined on January 20, 2015, but worse. Dr. Murati continued to diagnose Claimant with low back pain with signs of radiculopathy and right SI joint dysfunction. He noted a June 22, 2015, MRI revealed degenerative disc disease at L3-4 and L4-5 with an annular tear at L4-5 and a posterolateral protrusion bilaterally at L4-5, worse on the left. Dr. Murati assigned permanent restrictions of: no bending, crouching or stooping; no lifting, carrying, pushing or pulling more than 10 pounds; lifting 10 pounds occasionally, 5 pounds frequently and, 2 pounds constantly; rarely climb stairs, ladders, squat or crawl; occasionally sit, stand or drive; alternate sitting, standing, and walking and; allow Claimant to rest for 30 minutes after 90 minutes of work.

Dr. Murati increased Claimant's permanent impairment rating to 19 percent to the body as a whole. The 19 percent rating consisted of 10 percent for signs of L3-L4 radiculopathy, according to Lumbosacral DRE II and 10 percent for signs of L4-L5 radiculopathy, according to Lumbosacral DRE III of *The Guides*. Dr. Murati testified Claimant's impairment doubled from his last visit because Claimant now has a polyradiculopathy. He gave Claimant an additional radiculopathy rating for a right ankle jerk condition. Dr. Murati noted Claimant's condition continues to get worse as he continues to work.

Dr. Murati examined Claimant again on October 31, 2019, at the request of Claimant's attorney. Claimant's chief complaints continued to be the same as on his previous visits. Dr. Murati noted Claimant underwent surgery on August 3, 2018, with Dr. Henry. Dr. Murati noted Claimant had undergone two other procedures in 2017. The procedures did not relieve Claimant's pain. Claimant was found to be at maximum medical improvement on May 22, 2019, by Dr. Henry.

Dr. Murati diagnosed Claimant as follows: status post L3-L5 laminectomy and decompression in March 2017; status post L3,-L5 posterolateral fusion utilizing local morcellized autograft and allograft; L3-L5 redo laminectomy with bilateral medial facetectomy and foraminotomy at L3-L5; L3-L5 posterior instrumentation utilizing pedicle screws and rods; use of intraoperative fluoroscopy for interpretation of images; and right SI joint dysfunction.

Dr. Murati opined Claimant is essentially and realistically unemployable. He assigned permanent restrictions based on a four hour work day of: no bending, crouching or stooping; no lifting, carrying, pushing or pulling over 10 pounds; lifting 10 pounds

occasionally, 5 pounds frequently, and 2 pounds constantly; rarely climb stairs, ladders or squat; occasionally sit, stand or drive; and frequently walk.

Dr. Murati recommended yearly followups for the low back. Dr. Murati considered Claimant to be a chronic pain patient from failed back syndrome. He recommended Celebrex to help with Claimant's pain and swelling. He found Claimant has a 25 percent body as a whole impairment for low back pain status post fusion based on *The Guides*, Lumbosacral DRE Category V. Dr. Murati believes Claimant is not faking his level of pain, but noted many patients like Claimant with chronic pain exaggerate when they feel no one is listening to them or taking them seriously.

Dr. Murati reviewed a list of tasks compiled by Paul Hardin, and determined Claimant has an 80 percent task loss due to losing the ability to perform 16 out of 20 tasks. Dr. Murati reviewed the task list of Karen Terrill and found Claimant can no longer perform 8 out of the 13 tasks for a 61.5 percent task loss.

Claimant was treated for pain management by Dr. Xavier Ng, a rehabilitative physician beginning March 19, 2015, at Respondent's request. Claimant reported his pain at a 10 out of 10 on a pain scale 1 to 10 with 10 being the worst pain. Dr. Ng opined Claimant was in mild to moderate discomfort. Dr. Ng treated Claimant until April 9, 2015.

Claimant returned to Dr. Ng for treatment on September 4, 2019. Claimant reported he had surgery with Dr. Stuckey and Dr. Henry. Claimant reported his pain level was a 10 out of 10 and it radiates down into his lower extremities bilaterally, with the right worse than the left. Dr. Ng continued to treat Claimant for chronic pain syndrome with medications. Claimant continued to insist his pain level was a 10 and the medication did not help his pain. Claimant acknowledged his pain is worse without the medication. Dr. Ng noted Claimant had signs of symptom magnification. Despite the symptom magnification, Dr. Ng still felt Claimant needed pain management for chronic pain syndrome.

Claimant last saw Dr. Ng on October 28, 2019. Claimant reported his pain continuing to be a 10 out of 10. Claimant reported the medication was not helpful. He was agitated and blamed the doctor for his pain and other issues. Since Claimant was not happy with the care he received from the doctor, the doctor released Claimant and allowed him to seek care from another physician.

Dr. Ryan Stuckey, an orthopedic surgeon, performed an L3-L5 laminectomy on Claimant in March 2017. On March 1, 2017, Dr. Stuckey assigned restrictions of: no lifting over 10 pounds; no prolonged standing or walking more than 15 minutes; no excessive bending or twisting; no kneeling, squatting, climbing stairs or ladders; no stooping, no overhead lifting; no pushing or pulling; and no work above shoulder level. A brace must be worn and Claimant should be assigned a sit down job only.

Claimant met with Dr. Stuckey again on August 28, 2017, five months post surgery laminectomy and decompression at L3-L5. Dr. Stuckey noted surgery went well, but Claimant started having increased pain. Imaging revealed spondylolisthesis had progressed. Claimant reported standing and walking made the pain worse. Dr. Stuckey also noted that an updated MRI revealed severe central stenosis due to an extruded disc fragment at L3-4 and has progressed compared to the preoperative status. Dr. Stuckey opined Claimant was a 42 year old male with spondylolisthesis at L3-L4 with disc herniation resulting in central stenosis. He recommended surgical intervention to include an L3-L4 direct lateral interbody fusion with instrumented posterior spinal fusion at L3-L4.

Dr. Terrence Pratt examined Claimant on July 15, 2016, at Respondent's request. Claimant's chief complaint was low back pain and bilateral lower extremity discomfort. Claimant presented with continuous sharp central low back discomfort radiating up to the cervical region. Claimant also had radiating symptoms posteriorly on the right with a sensation of instability, numbness of the leg and tingling of the foot and numbness posteriorly to the knee. He had weakness of both lower extremities, right greater than left. Claimant reported the low back pain was worse than the lower extremity pain. Claimant reported a pain level of 8 out of 10 on the pain scale. Dr. Pratt noted Claimant exhibited self-limited range of motion due to discomfort. This limited Dr. Pratt's ability to measure Claimant's true motor function with generalized giveaway weakness. Dr. Pratt diagnosed low back pain with congenital narrowing of the spinal canal, degenerative changes and L4-L5 disc protrusion and inappropriate responses to examination.

Dr. Pratt found Claimant had 10 percent body as a whole permanent functional impairment using *The Guides* based on DRE Category III rating criteria. This rating did not include anything preexisting. He recommended Claimant not lift in excess of 20 pounds; no pushing or pulling in excess of 40 pounds; and no frequent low back bending or twisting.

Dr. Pratt examined Claimant again on March 17, 2020, at Respondent's request. Claimant's chief complaint was low back pain exceeding lower extremity involvement. Claimant reported continuous stabbing in the central part of the area with radiation generalized to his right heel and left posteriorly to the knee. He reported weakness in the right lower extremity and bilateral lower extremity numbness without change in temperature or color. Claimant's symptoms are exacerbated with movement. Claimant rated his pain at a 10 out of 10 on the pain scale. Dr. Pratt noted after his July 2016 visit with Claimant, Claimant returned to his regular work duties and had an increase in his symptoms. He also noted Claimant continued to have symptoms after a procedure performed by Dr. Stuckey in 2017. Claimant had fusion surgery of the lumbar spine with Dr. Henry. Claimant has had pain management, physical therapy and medication.

Dr. Pratt diagnosed Claimant with L3-L5 decompressive laminectomy; spinal stenosis at L3-L4 with spondylolisthesis at L3-L4 and severe neural foraminal narrowing

at L4-L5; status post L3-L5 redo laminectomy with posterior instrumentation; and inappropriate responses on the examination.

Dr. Pratt did not specifically say in his March 17, 2020, report Claimant was at maximum medical improvement, but he was not aware of any additional treatment options for Claimant related to the accident. He assigned a 20 percent permanent body as a whole functional impairment under *The Guides* based on DRE category IV. This was an increase of impairment from his July 2016 opinion, due to the two surgeries.

Dr. Pratt assigned restrictions of: no frequent bending or twisting; no lifting in excess of 15-20 pounds and; no pushing or pulling in excess of 30-40 pounds. He reviewed Karen Terrill's task list and found Claimant lost the ability to perform 4 out of 13 tasks for a 31 percent task loss.

Dr. Pratt opined, based on the available information, the work event of August 1, 2013, was the prevailing factor resulting in impairment and need for medical treatment. He could not say within a reasonable degree of medical certainty Claimant would need future medical treatment, but if there were a progression of his symptoms, Claimant would need reevaluation by a surgical specialist. Dr. Pratt did not believe Claimant is permanently and totally disabled.

Claimant met with Dr. Baoluan Nguyen on December 13, 2019, for pain management for the low back. Dr. Nguyen did not take Claimant on as a patient, indicating Claimant's refusal to be truthful about the level of his pain and his bad attitude towards pain management, led the doctor to believe the doctor patient relationship could not be established. Dr. Nguyen opined Claimant's pain level could not have been a 10 out of 10 based on vital signs at the time of the examination. Claimant had a blood pressure of 140/90 and a pulse of 89. He also testified Claimant did not act like someone who was in extreme pain. He was not able to determine if pain management would have been beneficial due to Claimant's uncooperative behavior.

The parties stipulated to an average weekly wage of $612.19 at the time of Claimant's accident and Claimant's average weekly wage with fringe benefit was $661.08. There is no date specified as to when fringe benefits were terminated by Respondent. Claimant was terminated from employment on September 22, 2017.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 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."

Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss, as defined in K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i), the employee may receive work disability compensation in excess of the percentage of functional impairment.[2] In such cases, work disability is determined by averaging the post-injury task loss caused by the injury with the post-injury wage loss caused by the injury.

In determining wage loss, the Court is required to impute an appropriate post-injury wage based on the employee's age, physical capabilities, education and training, prior experience, the availability of jobs in the open labor market, and other relevant factors.[3] K.S.A. 44-510e(a)(2)(E)(I) states in part: "Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury."

"For cause" has been defined in the context of eligibility for work disability. The Appeals Board, in the context of eligibility for work disability, defined "for cause" under the standard used in *Morales-Chavarin*.[4]

> [T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.[5]

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[2] See K.S.A. 2013 Supp. 44-510e(a)(2)(C)(i).

[3] See 2013 Supp. K.S.A. 44-510e(a)(2)(E).

[4] *Morales-Chavarin v. National Beef Packing Co.,* No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed August 4, 2006).

[5] *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205; *Kulmiye v. Tyson Fresh Meats, Inc.*, No. 1,068,606, 2017 WL 898261 (WCAB February 23, 2017); see also *Dirshe v. Cargill Meat Solutions Corp.*, No. 1,062,817, 2015 WL 6776994 (WCAB October 20, 2015).

The burden of proving the employee's termination was for cause belongs to the employer.[6]

Claimant argues the Board should modify the Award and find Claimant is permanently and totally disabled, or in the alternative find Claimant has a 90 percent work disability because Claimant was not terminated for cause. Finally, Claimant argues he is entitled to temporary total disability benefits from September 8, 2017, to May 22, 2019.

Respondent argues the Award should be affirmed. Respondent contends Claimant was terminated for cause, specifically working in violation of his work restrictions, which is a violation of Respondent's safety policies. Respondent argues this violation coupled with Claimant's prior disciplinary history establishes Claimant was terminated for cause and is ineligible for a work disability award.

In order to determine Claimant's eligibility for an award based on work disability, it must be determined whether Claimant was terminated for cause by Respondent. Claimant was terminated when he was observed kneeling a single time on the floor in his work area. Claimant was working in the glove room, a work area where his work restrictions could be accommodated. The work in the glove room is to get gloves that are laundered, sort them and get them ready for the production floor. One of Claimant's work restrictions was no kneeling. Claimant was kneeling once to retrieve a glove under the table in his work area. Claimant acknowledged he was not to be kneeling, but he was trying to do his job. Respondent contends Claimant was not required to kneel to do his job and Claimant was not abiding by his work restrictions, a safety violation and grounds for termination.

In addition to the work restrictions violation, Respondent also took into account Claimant's two prior disciplinary actions, which were written warnings, one given on January 19, 2017, for sleeping on the job and the second one given on April 28, 2017, for leaving his work area without supervisor's authorization. The second written warning and the incident occurring on September 8, 2017, both occurred after Claimant was on work restrictions for his worker's compensation injury.

Claimant's actions of kneeling to retrieve a glove in his work area were at most a brief lapse in judgment or an inadvertent reaction, but does not constitute an act of bad faith by Claimant. Respondent disciplined Claimant twice since he was put on work restrictions for his worker's compensation injury, one written warning followed by termination. Such actions by Respondent can be construed as simply getting rid of a troublesome employee to avoid paying Claimant work disability payments. For these reasons, it is concluded Claimant was not terminated for cause.

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[6] *Dirshe v. Cargill Meat Solutions Corp.*, No. 1,062,817, 2015 WL 6776994 (WCAB October 20, 2015).

Claimant contends he is permanently and totally disabled.

K.S.A. 44-510c(a)(2) states:

> 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.

Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from an injury independent of all other causes, shall constitute permanent disability. In all other cases permanent total disability shall be determined in accordance with the facts.[7] An employee is permanently and totally disabled when rendered "essentially and realistically unemployable."[8]

Claimant is not totally and permanently disabled. Based on Dr. Pratt's restrictions, Claimant is capable of work. Claimant was working at the time of his termination. Credible medical evidence was presented showing Claimant magnifies his symptoms, especially his pain level. Claimant also had some medical training in Cuba, security work experience, and housekeeping experience, which could be transferrable job skills to light duty work. For these reasons, Claimant is not permanently and totally disabled.

It is found Claimant has a 20 percent body as whole functional impairment. Dr. Pratt's rating is found to be more credible due to Dr. Murati not accounting for Claimant's symptom magnification in his rating and opinions.

As of September 22, 2017, Claimant has a 100 percent wage loss and thus is eligible for an award based on a work disability. However, imputing a wage loss in determining the amount of a work disability is based on age, physical capabilities, training, work experience and labor market. According to Ms. Terrill, the only vocational expert who took into account Dr. Pratt's restrictions, concluded Claimant is capable of earning $9.00 per hour or $360.00 per week, which is a 41 percent wage loss. Dr. Murati's opinions as to Claimant's restrictions and abilities are not as persuasive. There is credible medical evidence Claimant magnifies his symptoms, which diminishes Dr. Murati's conclusions.

Dr. Pratt found Claimant has a task loss of 31 percent. Based on a 31 percent task loss and 41 percent wage loss Claimant is entitled to a work disability award of 36 percent.

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[7] *Pruter v. Larned State Hospital*, 271 Kan. 865, Syl. ¶ 1, 26 P.3d 666 (2001).

[8] *Wardlow v. ANR Freight Systems*, 19 Kan. App.2d 110, 113, 872 P.2d 299 (1993).

Claimant seeks temporary total benefits from September 8, 2017, to May 22, 2019. Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any substantial and gainful employment, and an authorized treating physician's opinion regarding work status shall be determinative.[9]

The only temporary medical restrictions in the record were from Dr. Stuckey, an authorized treating physician, from March 1, 2017. There is a note in the record Dr. Henry found Claimant at maximum medical improvement on May 22, 2019. There are no other references as to Claimant's physical capabilities covering the period in question, except Claimant having back surgery, which included a three level fusion. Since Dr. Stuckey is the authorized treating doctor and the restrictions Claimant was under were very limiting, it is found and concluded Claimant was temporarily and totally disabled from September 22, 2017, date of Claimant's termination, to May 22, 2019, when Dr. Henry found Claimant at maximum medical improvement. This is a period of 86.86 weeks. There is no evidence in the record when or if fringe benefits were terminated. For that reason, the Board uses the $408.15 compensation rate based on the wage without fringe benefits or $612.19. Claimant is entitled to $35,452 of temporary total benefits.

With regard to future medical, K.S.A. 2013 Supp.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 been diagnosed with chronic pain syndrome. Moreover, further medical intervention was recommended for Claimant's chronic pain syndrome. This diagnosis justifies leaving future medical open upon proper application.

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[9] *See* K.S.A. 2013 Supp. 44-510c(b)(2)(A).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Pamela J. Fuller, dated August 7, 2020, is modified.

Claimant is entitled to 86.86 weeks of temporary total disability at a rate of $408.15, totaling $35,452.00, followed by 125.53 weeks of permanent partial disability at $408.15 per week, totaling $51,235.07, for a total amount of $86,687.07, less amounts previously paid, for a 36 percent work disability. The award of future medical is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)

Conn Felix Sanchez, Attorney for Claimant
Shirla McQueen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge