

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JORGE SILERIO-NUNEZ)	
Claimant)	CS-00-0055-123
)	AP-00-0452-845
V.)	
)	CS-00-0160-660
DOLD FOODS, LLC)	AP-00-0452-846
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Jorge Silerio-Nunez requested review of the August 17, 2020, Review and Modification Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on January 7, 2020. Kenton D. Wirth and Brad Avery of Wichita/Topeka, Kansas, appeared for Mr. Silerio-Nunez. Vincent Burnett of Wichita, Kansas, appeared for self-insured respondent.

In Case No. CS-00-0055-123, Mr. Silerio-Nunez alleged injury to his left shoulder on April 5, 2008. The parties entered into an Agreed Award February 23, 2010, based upon a 15.5 percent permanent partial impairment to the left upper extremity. Mr. Silerio-Nunez filed an Application for Review and Modification on August 28, 2012, seeking additional disability benefits, based upon increased impairment to his left shoulder and right shoulder impairment as the natural consequence of his left shoulder injury.

The ALJ found Mr. Silerio-Nunez sustained an increased impairment of 5.5 percent to the left shoulder based on the AMA *Guides*¹ for his April 5, 2008, accident. No impairment was awarded for the right shoulder. The ALJ denied Mr. Silerio-Nunez' request for work disability or permanent total disability (PTD).

In Case No. CS-00-0160-660, Mr. Silerio-Nunez alleged injury by repetitive trauma to both shoulders from 2008 through August 29, 2011. The ALJ found Mr. Silerio-Nunez sustained a 7.5 percent impairment to the right shoulder as the result of repetitive trauma, but found no involvement of the left shoulder. The ALJ determined Mr. Silerio-Nunez failed to meet his burden of proving entitlement to an award for work disability. The ALJ found

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Mr. Silerio-Nunez failed to meet his burden of showing he was permanently and totally disabled.

The ALJ noted Mr. Silerio-Nunez was already entitled to future medical treatment related to his left upper extremity, as provided in the underlying Agreed Award, but he was not entitled to future medical treatment in relation to his right upper extremity. In the Award section, the ALJ awarded future medical treatment.

The Board considered the record and adopted the stipulations listed in the Award. The Board also reviewed the parties' briefs.

ISSUES

Mr. Silerio-Nunez argues he is permanently and totally disabled as a result of his bilateral upper extremity injuries arising from either docketed claim. Mr. Silerio-Nunez contends he is entitled to future medical treatment and unauthorized medical.

Respondent maintains the ALJ properly found Mr. Silerio-Nunez sustained two distinct, scheduled injuries to his shoulders. Respondent argues Mr. Silerio-Nunez did not sustain any additional impairment to his left shoulder, and sustained an impairment of 4 percent to the right upper extremity. Further, respondent argues Mr. Silerio-Nunez failed to meet his burden of proving entitlement to a work disability, future medical benefits, or PTD.

The issues for the Board's review in both docketed claims are:

Case No. CS-00-0055-123; Appeal No. AP-00-0452-845

1. What is the nature and extent of Mr. Silerio-Nunez' impairment, including whether Mr. Silerio-Nunez is entitled to permanent partial disability benefits or PTD, and whether Mr. Silerio-Nunez' right shoulder injury was the natural and direct consequence of the left shoulder injury?

2. Is Mr. Silerio-Nunez entitled to future medical benefits?

Case No. CS-00-0160-660; Appeal No. AP-00-0452-846

1. Did Mr. Silerio-Nunez sustain a bilateral shoulder or right shoulder injury by repetitive trauma?

2. What is the nature and extent of Mr. Silerio-Nunez' impairment, including whether Mr. Silerio-Nunez is entitled to permanent partial disability benefits or PTD?

3. Is Mr. Silerio-Nunez entitled to future medical benefits?

FINDINGS OF FACT

Mr. Silerio-Nunez worked for respondent as a meat trimmer. In this position, Mr. Silerio-Nunez repetitiously hung pork bellies, weighing anywhere from 9 to 22 pounds, onto hooks above his head. On April 5, 2008, Mr. Silerio-Nunez sustained a left shoulder injury and underwent surgery with Dr. Osland.² Mr. Silerio-Nunez was off work for approximately three weeks following surgery. By April 2009, Mr. Silerio-Nunez returned to his full, regular duties at respondent. On February 23, 2010, Mr. Silerio-Nunez settled the claim by an Agreed Award based upon a 15.5 percent permanent partial impairment to the left upper extremity at the shoulder. The right to future medical treatment and review and modification remained open.

Mr. Silerio-Nunez continued working for respondent until his resignation on August 29, 2011. Mr. Silerio-Nunez testified between April 2009 and August 29, 2011, he used his right arm more to protect his left side and began experiencing symptoms in the right shoulder. Mr. Silerio-Nunez alleged a right shoulder injury as a result of his work-related activities through his last date worked.³ Mr. Silerio-Nunez was referred by respondent to Dr. Paul Stein for initial assessment on August 6, 2009.

Dr. Stein again examined Mr. Silerio-Nunez on November 6, 2012, by request of the Court. Mr. Silerio-Nunez complained of continued pain in his left shoulder since 2008, with pain in his low back and right shoulder. Dr. Stein recommended Mr. Silerio-Nunez undergo a right shoulder MRI-Arthrogram. Following this procedure, Dr. Stein produced a follow-up report recommending Mr. Silerio-Nunez receive an orthopedic referral for a right shoulder SLAP tear. Mr. Silerio-Nunez was subsequently referred to Dr. Brennan Lucas, who performed a right shoulder arthroscopic SLAP repair and a subacromial bursectomy on May 7, 2013.

Mr. Silerio-Nunez reported renewed left shoulder complaints and was again sent to Dr. Stein for evaluation by the Court. On July 1, 2014, after a review of Mr. Silerio-Nunez' medical records, history, and a physical examination, Dr. Stein concluded:

² CS-00-0055-123.

³ CS-00-0160-660.

Mr. Silerio-Nunez was seen today for opinions regarding any additional medical treatment or whether maximum medical improvement has been reached for the injury of 6/15/11. The only permanent injury which I can relate to this date within a reasonable degree of medical probability is the right shoulder. He has reached maximum medical improvement for that area of injury. I have no recommendations for any additional investigation or treatment.⁴

Dr. Stein testified Mr. Silerio-Nunez had not been working for 2.5 years by the time of the July 2014 examination; therefore, his left shoulder impairment should not have been significantly different unless caused by degenerative change. Using the *AMA Guides*, Dr. Stein opined Mr. Silerio-Nunez sustained a 6 percent permanent impairment of the right upper extremity at the level of the shoulder. Regarding future medical treatment, Dr. Stein opined:

The surgery in September of 2008 was for a labral tear and rotator cuff repair. It is possible that the labrum could be torn more or that the rotator cuff repair could be torn open at some point in the future. If that occurred, then further investigation and treatment would be appropriate.⁵

Dr. David Hufford examined Mr. Silerio-Nunez on May 4, 2017, for purposes of a Court-ordered independent medical evaluation. Dr. Hufford was asked to examine Mr. Silerio-Nunez' left shoulder complaints. Following a review of Mr. Silerio-Nunez' medical records, history, and conducting a physical examination, Dr. Hufford determined Mr. Silerio-Nunez sustained a repetitive-use left shoulder injury with persistent and ongoing symptomatology, most consistent with ongoing rotator cuff tendinosis. Dr. Hufford wrote:

The issue of causation and the prevailing factor regarding his current complaints of shoulder pain involve what appears to be a chronic condition that began in 2008 and was treated under the worker's compensation system with an open medical claim. . . . There has been no new injury to the left shoulder since 2008 and his second claim in 2011 appears to be a linear result from the initial overuse condition which never completely resolved and I am in agreement with Dr. Stein's opinion as referenced in the joint letter in this regard. The prevailing factor is therefore the repetitive work activities that he engaged in during several years of employment with [respondent] up to and including the 2008 claim and without evidence for further injury in the subsequent interval.⁶

⁴ Stein Depo., Ex. 10 at 4.

⁵ Stein Depo. at 35.

⁶ R.H. Trans., Resp. Ex. B1 at 2.

Dr. Hufford found Mr. Silerio-Nunez reached maximum medical improvement (MMI) and did not require further restrictions. Dr. Hufford opined future medical treatment for the left shoulder could include physical therapy, a repeat MRI of the left shoulder and surgical intervention, if necessary.

Board-certified orthopedic surgeon Dr. Justin Strickland first examined Mr. Silerio-Nunez on November 1, 2017, for left shoulder complaints. Dr. Strickland recommended temporary restrictions and ordered an MR arthrogram, which did not suggest a new rotator cuff tear or labral abnormality. Regardless, Dr. Strickland felt surgery would be beneficial, and he performed a left shoulder subacromial decompression on February 5, 2018. He also removed sutures and materials still in place from Mr. Silerio-Nunez' 2008 surgery.

Mr. Silerio-Nunez continued to complain of left shoulder pain post-surgery, so Dr. Strickland provided a cortisone injection to Mr. Silerio-Nunez' left shoulder. This injection provided temporary relief only. Dr. Strickland ordered a functional capacity evaluation (FCE), but the results were invalid. Dr. Strickland determined Mr. Silerio-Nunez reached MMI by June 20, 2018. He did not recommend permanent restrictions or further treatment. Using the *AMA Guides*, Dr. Strickland opined Mr. Silerio-Nunez sustained an additional 2 percent impairment to the left upper extremity based on the additional surgery related to the 2008 claim. Dr. Strickland did not address Mr. Silerio-Nunez' right shoulder.

Dr. Chris Fevurly, board-certified in internal medicine, examined Mr. Silerio-Nunez on March 20, 2018, at respondent's request. Mr. Silerio-Nunez complained of left shoulder pain, worse with movement, and occasional mild left neck pain. Dr. Fevurly reviewed Mr. Silerio-Nunez' medical history, records, and performed a physical examination. Dr. Fevurly determined Mr. Silerio-Nunez sustained a right SLAP lesion and right shoulder impingement as a result of his 2011 work-related repetitive trauma. Dr. Fevurly noted Mr. Silerio-Nunez had a good result from his 2013 surgery, with minimal to no right shoulder pain and only slight reduction of range of motion. Dr. Fevurly determined Mr. Silerio-Nunez reached MMI from the right shoulder injury by October 1, 2013. Based on the *AMA Guides*, Dr. Fevurly opined Mr. Silerio-Nunez sustained a 2 percent right upper extremity impairment at the level of the shoulder. No future medical treatment was recommended.

Dr. Fevurly did not believe Mr. Silerio-Nunez sustained any impairment to the left shoulder beyond the 15.5 percent adopted in the initial Agreed Award. He attributed Mr. Silerio-Nunez' ongoing left shoulder pain to the 2008 injury. Further, Dr. Fevurly noted Mr. Silerio-Nunez had no cervical impairment and no evidence of a cervical injury.

Dr. George Fluter, board-certified in physical medicine and rehabilitation, examined Mr. Silerio-Nunez at his counsel's request on November 29, 2018. Dr. Fluter previously examined Mr. Silerio-Nunez' left shoulder on October 14, 2009, and again in 2015 to evaluate effects of repetitive trauma through August 29, 2011. Dr. Fluter reviewed Mr. Silerio-Nunez' updated medical history, records, and performed a physical examination,

finding Mr. Silerio-Nunez' functional impairment had increased since 2010. Dr. Fluter opined Mr. Silerio-Nunez sustained an increase of 9 percent to the left shoulder due to the natural aging process and 2018 surgery.

When asked about the relationship of the right shoulder condition to the 2008 left shoulder injury, Dr. Fluter testified:

Q. We have the right shoulder surgery on May 7, 2013. Is that right shoulder surgery related to the April, 2008 injury or was that related to this period of April, 2009 through August of 2011?

A. Well, based on the information, to me it looks like it would more likely be related to the repetitive types of activities as opposed to directly the result of the April, 2008 injury.⁷

As a result of the 2011 injury, Dr. Fluter found Mr. Silerio-Nunez sustained a distinct 9 percent left upper extremity impairment, or 5 percent impairment to the whole person. Dr. Fluter opined Mr. Silerio-Nunez also sustained a 12 percent whole person impairment for the right upper extremity, for a combined whole person impairment of 16 percent related to the 2011 injury. When asked about future medical treatment, Dr. Fluter stated:

Well, mainly – while he told me at the time that he was not taking medications on a regular basis, they tended not to help, there were certain – he was taking over-the-counter medication. So there could be the potential for certain prescription medications to provide some benefit. And those could include analgesic agents or what we call adjuvant agents which are medications which are not specifically pain medications but they have been used to help treat pain symptoms and certain pain conditions. Topical preparations, there are ones that are available over the counter, there are ones that are available by prescription.

I thought he might benefit from using like a shoulder support harness that can help control some of the shoulder movement, not to be an immobilizer, not to prevent him from moving the shoulder but to provide a little support of the shoulder with certain activities. And I thought that he might be able to benefit from tennis elbow straps and also some hand and wrist splints might be helpful.⁸

Karen Terrill and Steve Benjamin interviewed Mr. Silerio-Nunez and provided vocational assessments of his employability. Both reviewed Mr. Silerio-Nunez' education and employment history. Mr. Silerio-Nunez completed the sixth grade and cannot communicate in English. Ms. Terrill wrote Mr. Silerio-Nunez had no transferable job skills

⁷ Fluter Depo. at 20.

⁸ *Id.* at 32-33.

and limited computer knowledge. He is classified as an older worker. Because of these limitations and considering the restrictions imposed by Dr. Flutter, Ms. Terrill opined Mr. Silerio-Nunez no longer retains any ability to engage in work in the open labor market, he is permanently and totally disabled, and he is unable to engage in any type of substantial gainful employment.

Ms. Terrill produced a task list of 5 tasks Mr. Silerio-Nunez performed in the 5 years prior to his work accident. Dr. Flutter reviewed this task list and opined Mr. Silerio-Nunez could no longer perform 3 tasks, for a task loss of 60 percent.

Mr. Benjamin utilized the reports of Drs. Strickland and Fevurly to produce his opinions. Mr. Benjamin produced a task list of 8 tasks Mr. Silerio-Nunez performed in the 15-year period prior to his 2008 injury. Drs. Fevurly and Strickland reviewed Mr. Benjamin's task list and opined Mr. Silerio-Nunez suffered no task loss. Mr. Benjamin noted Mr. Silerio-Nunez suffered no wage loss as a result of his injuries, and has not sustained any work disability related to either the 2008 or 2011 injury. Mr. Benjamin opined Mr. Silerio-Nunez is capable of working in the open labor market.

Mr. Silerio-Nunez has not worked anywhere since leaving respondent on August 29, 2011. He testified he has difficulty completing daily activities, though he assists his family in performing household chores. Mr. Silerio-Nunez is receiving Social Security Disability. Mr. Silerio-Nunez stated he also applied for unemployment benefits but was denied.

PRINCIPLES OF LAW

K.S.A. 2011 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. 2011 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. 2011 Supp. 44-510h(a) states:

It shall be the duty of the employer 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, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2011 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. 2011 Supp. 44-528(a) provides:

Except lump-sum settlements approved by the director or administrative law judge, any award or modification thereof may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, pursuant to the provisions set forth in K.S.A. 44-510b, 44-510c, 44-510d or 44-510e, and amendments thereto, as may be applicable.

ANALYSIS

Case No. CS-00-0055-123; Appeal No. AP-00-0452-845

1. What is the nature and extent of Mr. Silerio-Nunez' additional impairment?

Mr. Silerio-Nunez argues he had an increased impairment in his left shoulder after he returned to work following left shoulder surgery related to his 2008 injury. He also

argues he experiences a right shoulder impairment related to overuse of the right shoulder due to favoring his left shoulder injury, resulting in a whole body impairment.

The evidence does not support finding the right shoulder injury was caused by overuse due to the left shoulder injury. Dr. Flutter, Mr. Silerio-Nunez' own expert, opined the right shoulder condition was more likely related to Mr. Silerio-Nunez' repetitive work, as opposed to being the direct result of the April 2008 injury.

Two physicians testified Mr. Silerio-Nunez experienced an increase of impairment to the left shoulder related to the 2008 injury by accident. Dr. Strickland opined Mr. Silerio-Nunez sustained a 2 percent increase in his impairment to the left upper extremity based on the additional surgery. In a July 28, 2015, report and at his deposition, Dr. Flutter opined Mr. Silerio-Nunez sustained an increase of 9 percent to the left shoulder.

Dr. Fevurly testified Mr. Silerio-Nunez sustained no additional impairment to the left shoulder beyond the 15.5 percent adopted in the Agreed Award. Dr. Stein also found no additional impairment to the left upper extremity.

Drs. Strickland and Flutter are found credible on the issue of extent of increased impairment to the left shoulder. The Board finds Mr. Silerio-Nunez experiences an additional 5.5 percent impairment to the left shoulder related to his April 5, 2008, accident.

2. Is Mr. Silerio-Nunez entitled to future medical benefits?

Future medical treatment remains open pursuant to the Agreed Award of February 23, 2010.

Case No. CS-00-0160-660; Appeal No. AP-00-0452-846

1. Did Mr. Silerio-Nunez sustain a bilateral shoulder or right shoulder injury by repetitive trauma?

Mr. Silerio-Nunez alleges injury by repetitive trauma involving both upper extremities. Mr. Silerio-Nunez alleges the right upper extremity was injured, and the left upper extremity was worsened as the result of repetitive trauma occurring after the settlement of the claim on February 23, 2010, through his last day of employment with respondent.

Employees are entitled to compensation for secondary injuries that are the natural and probable result of the primary injury.⁹ “[A]ll injuries, including secondary injuries, must

⁹ See *Casco v. Armour Swift-Eckridge*, 283 Kan. 508, 515-16, 154 P.3d 494 (2007).

be caused primarily by the original work accident.”¹⁰ Under the law in effect from May 15, 2011, secondary injuries are compensable if caused primarily by the original work accident and are the natural and probable consequence of the original injury.¹¹

Dr. Hufford opined there had been no new injury to the left shoulder since 2008. Dr. Hufford found ongoing symptoms in the left shoulder to be the linear result from the initial overuse condition which never completely resolved.

In his September 6, 2014, report, Dr. Stein testified he did not find evidence of an increased impairment of the left shoulder compared to his examination on December 18, 2009. Dr. Stein stated any symptomology to the left shoulder from work activity after the 2009 examination would be an aggravation of the 2008 injury. Dr. Strickland testified the treatment he provided to Mr. Silerio-Nunez, including surgery in 2018, related back to the 2008 injury. Only Dr. Flutter found Mr. Silerio-Nunez suffered a left upper extremity injury related to the 2011 repetitive trauma. Dr. Fevurly opined Mr. Silerio-Nunez experienced no additional or new impairment after the 2010 Agreed Award in Case No. CS-00-0055-123.

Based upon the weight of the evidence, the Board finds Mr. Silerio-Nunez suffered only a right shoulder injury as the result of repetitive trauma through August 29, 2011. As discussed above in Appeal No. AP-00-0452-845, the increase in left shoulder impairment is found to be the direct result of the injury by accident arising out of Mr. Silerio-Nunez' employment on April 5, 2008.

2. What is the nature and extent of Mr. Silerio-Nunez' impairment, including whether Mr. Silerio-Nunez is entitled to permanent partial disability benefits or PTD?

The ALJ found Mr. Silerio-Nunez experienced a 7.5 percent impairment, to the right shoulder only, as the result of his August 29, 2011, injury by repetitive trauma. The ALJ averaged the impairment ratings provided by Drs. Flutter and Stein. Dr. Strickland did not provide a rating for the right upper extremity. Dr. Fevurly assessed a 2 percent impairment to the right upper extremity. The Board agrees with the ALJ that averaging the impairment ratings provided by Drs. Flutter and Stein is a more reasonable reflection of Mr. Silerio-Nunez' impairment. The ALJ's determination Mr. Silerio-Nunez sustained permanent impairment of 7.5 percent of the right shoulder is affirmed.

¹⁰ *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 951, 379 P.3d 428 (2016).

¹¹ *See id.*

3. Is Mr. Silerio-Nunez entitled to future medical benefits?

Dr. Stein, in his examination report of July 1, 2014, wrote he had no recommendations for additional medical treatment. Dr. Fevurly also opined Mr. Silerio-Nunez did not require future medical treatment for his right shoulder. Dr. Fluter made the same recommendations for future medical treatment for the right shoulder as he did for the left shoulder.

Mr. Silerio-Nunez has a surgically repaired shoulder and ongoing medical symptoms. Dr. Fluter provided medical evidence establishing it is more probably true than not additional medical treatment will be needed. The Board finds Dr. Fluter's evidence supports an award of future medical treatment under K.S.A. 44-510h(e).

CONCLUSION**Case No. CS-00-0055-123; Appeal No. AP-00-0452-845**

Mr. Silerio-Nunez experiences an additional 5.5 percent impairment to the left shoulder related to his April 5, 2008, accident. Mr. Silerio-Nunez met the burden of proving the need for future medical treatment.

Case No. CS-00-0160-660; Appeal No. AP-00-0452-846

Mr. Silerio-Nunez suffered only a right shoulder injury as the result of repetitive trauma through August 29, 2011. Mr. Silerio-Nunez met the burden of proving the need for future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein, dated August 17, 2020, in Case No. CS-00-0055-123 is affirmed. It is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein, dated August 17, 2020, in Case No. CS-00-0160-660, is affirmed with regard to nature and extent of disability and reversed with regard to future medical treatment.

IT IS SO ORDERED.

Dated this _____ day of March, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kenton Wirth, Attorney for Mr. Silerio-Nunez
 Brad Avery, Attorney for Mr. Silerio-Nunez
 Vincent Burnett, Attorney for Self-Insured Respondent
 Hon. Thomas Klein, Administrative Law Judge