

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANIEL BROWN)	
Claimant)	
V.)	
)	CS-00-0268-393
NAZDAR COMPANY)	AP-00-0455-816
Respondent)	
AND)	
)	
FIRST LIBERTY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge (ALJ) Troy A. Larson’s Award dated January 6, 2021. The Board heard oral argument on April 22, 2021.

APPEARANCES

Dennis Horner appeared for Claimant. John Pazell appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

1. What is the nature and extent of Claimant’s disability, including whether Claimant is entitled to work disability compensation?
2. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant, currently 39 years old, worked as a batch worker. Claimant sustained injury to his cervical spine and left shoulder on January 25, 2016, when he tried to move a 55-pound drum from a pallet. He was initially provided authorized medical treatment

through Corporate Health KU Med West. A shoulder MRI revealed a torn labrum. A cervical MRI demonstrated evidence of foraminal narrowing at the C3-C4 level.

Claimant began treatment with Dr. Adrian Jackson on August 24, 2016. Claimant presented with complaints of neck and left arm pain, including the shoulder region. Dr. Jackson performed an anterior discectomy and fusion on February 8, 2018. Claimant was released at maximum medical improvement (MMI) on August 8, 2018, with no restrictions and no recommendations for further medical treatment.

Using the *AMA Guides to the Evaluation of Impairment*, 6th ed. (*Guides*, 6th ed.), Dr. Jackson assigned Claimant a 5% permanent partial impairment to the whole person for the cervical spine. He assigned a 15% permanent partial impairment to the whole person under the *AMA Guides to the Evaluation of Impairment*, 4th ed. (*Guides*, 4th ed.).

Claimant met with Dr. Lowry Jones, M.D., for a Court-ordered IME on November 6, 2017. Dr. Jones examined Claimant and diagnosed cervical spinal stenosis with cervical radiculopathy at C5 on the left; left shoulder labral tear with a pair of labral cysts; and a partial rotator cuff tear. Dr. Jones was authorized to treat the left shoulder. On May 11, 2018, Dr. Jones performed an arthroscopy to repair the labral tear and debrided the area above the shoulder, rotator cuff and bursa. Claimant's pain continued following the surgery. A second MRI revealed acromioclavicular joint arthrosis. A second surgery on November 9, 2018, removed two burrs from the collarbone. Physical therapy and a functional capacity evaluation (FCE) followed.

Dr. Jones found Claimant at MMI for the left shoulder on November 19, 2019. Using the *Guides*, 6th ed., Dr. Jones assigned Claimant a 5% permanent impairment for the left shoulder and a 15% permanent impairment under the *Guides*, 4th ed. Dr. Jones assigned permanent restrictions of no lifting more than 55 pounds, no more than 55 pounds at chest level, no more than 40 pounds at shoulder level and no more than 35 pounds overhead.

When asked to combine Dr. Jackson's impairment rating to the neck with his shoulder ratings, Dr. Jones opined Claimant's impairment would be 8% to the whole person using the *Guides*, 6th ed. and 24% impairment to the whole person using the *Guides*, 4th ed.

At his attorney's request, Claimant saw Dr. Anne Rosenthal on two occasions. The first evaluation occurred in April 2017 and focused on diagnosing Claimant's injuries and providing treatment recommendations. The second evaluation occurred on May 29, 2019. Using the *Guides*, 6th ed., Dr. Rosenthal assigned Claimant an 18% permanent impairment to the whole person and a 34% permanent impairment under the *Guides*, 4th ed. She opined Claimant would require future medical treatment for the cervical spine.

Claimant met with Dr. Vito J. Carabetta, on April 7, 2020, for a Court-ordered IME. Claimant presented with left-sided neck pain, which he described as burning and aching in the left cervical paraspinal muscles extending laterally towards the left shoulder. Claimant reported the pain was constant and varies in intensity. He reported when his pain is at its worst, he sometimes experiences tingling and numbness along the ulnar border of the left hand. Claimant also reported pain in the anterior lateral left shoulder. Claimant described this pain as intermittent and improved from its original status.

After examining Claimant and reviewing his medical records, Dr. Carabetta diagnosed Claimant with status-post C3-C4 anterior cervical discectomy and fusion; status-post left acromioclavicular joint resection arthroplasty; and status-post left labral tear debridement. Using the *Guides*, 6th ed., Dr. Carabetta assigned Claimant a 23% permanent impairment to the whole person and a 33% permanent impairment under the *Guides*, 4th ed. Dr. Carabetta adopted the permanent restrictions from the FCE, which were: no lifting more than 55 pounds; lifting from floor to knuckle height to shoulder level was not to exceed 40 pounds; overhead lifting was not to be more than 35 pounds; and carrying with two hands was not to exceed 40 pounds.

Regarding future medical treatment, Dr. Carabetta recommended Claimant continue with home exercises. Unless Claimant suffered a new injury, no further treatment was anticipated for the left shoulder. He opined there was no further medical treatment expected for the cervical spine.

Two vocational experts interviewed Claimant, Michael Dreiling, at his attorney's request, and Michelle Sprecker, at Respondent's request. Mr. Dreiling prepared a list of 18 work tasks Claimant performed for the five years preceding his accident, while Ms. Sprecker's list identified 22 tasks. Mr. Dreiling opined Claimant could earn \$450, while Ms. Sprecker opined Claimant could earn \$840, including fringe benefits.

Dr. Jackson reviewed the task list prepared by Ms. Sprecker and opined Claimant has no task loss. Dr. Jones reviewed the task list of Ms. Sprecker and found Claimant lost the ability to perform 10 out of 22 tasks for a 45% task loss. Dr. Jones reviewed the task list of Mr. Dreiling and found Claimant lost the ability to perform 11 out of 18 tasks for a 61% task loss. Dr. Rosenthal reviewed the task list of Mr. Dreiling and found Claimant lost the ability to perform 11 out of 18 tasks for a 61% task loss.

Respondent was unable to accommodate Claimant's restrictions. His employment and fringe benefits were terminated on February 22, 2017. Claimant is currently employed with Olathe Subaru earning \$13 per hour for base pay and \$19.50 per hour for overtime. Claimant normally works five hours of overtime per week. Claimant receives fringe benefits of \$352.33 per month. Claimant held three jobs prior to Olathe Subaru, but was terminated from all three for reasons related to this claim (twice for work outside his restrictions and refusal of time off for surgery). The parties stipulated to an average weekly wage for

Respondent, including fringe benefits of \$840.17. Claimant's fringe benefits with Respondent were \$244.68 and were terminated on February 22, 2017.

The ALJ awarded Claimant a 23% permanent partial functional impairment to the whole person based on the Court-ordered evaluation of Dr. Carabetta's *Guides*, 6th ed. rating. The ALJ denied Claimant's request for work disability benefits because there was no wage loss. The ALJ also denied Claimant's request for future medical treatment.

Claimant appeals, arguing the ALJ erred in failing to award a work disability and future medical treatment. Claimant requests the Board find he is entitled to a 39% work disability based upon proper calculation of Claimant's current earnings and to future medical as recommended by Dr. Jones and Dr. Rosenthal.

Respondent argues the Award should be affirmed.

ANALYSIS AND CONCLUSIONS

1. Claimant sustained a 23% functional impairment to the body as a whole on account of his work injury. Claimant is entitled to work disability compensation.

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 a pre-existing functional impairment, and the employee sustains at least a 10% wage loss as defined by K.S.A. 44-510e(a)(2)(E), the employee may receive work disability compensation in excess of the percentage of functional impairment.¹ Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.²

Respondent was unable to accommodate Claimant's restrictions. The ALJ found:

In weighing this expert evidence on permanency, the Court finds the opinion of the neutral IME physician, Dr. Carabetta, to be the most persuasive. Dr. Carabetta was not retained by either party in this claim, but rather was appointed by this Court. As such, Dr. Carabetta's opinions are viewed by this Court to be the least biased. Therefore, the Court finds Claimant has sustained permanent partial impairment of 23% to the body as a whole related to the cervical spine and left shoulder based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment.³

¹ See K.S.A. 44-510e(a)(2)(E)(i).

² See K.S.A. 44-510e(a)(2)(E)(i).

³ ALJ Award at 6.

The Board agrees with the ALJ's analysis and finds Claimant has a 23% functional impairment to the whole person.

The ALJ denied Claimant's request for work disability compensation because Claimant failed to prove a wage loss in excess of 10%. The ALJ found Claimant's post-injury average weekly wage to be \$969.83. The Board disagrees with the ALJ's calculation of post-injury average weekly wage and his finding on wage loss.

Claimant is currently employed with Olathe Subaru earning \$13 per hour for base pay and \$19.50 per hour for overtime. Claimant normally works five hours of overtime per week. Claimant receives fringe benefits of \$352.33 per month. The Board calculates Claimant's post-injury average weekly wage as follows:

\$520.00 Base (\$13/hr x 40 hours)
97.50 OT (\$19.50/hr x 5 hours)
81.09 FB (\$352.33 mo FB x 12 mo = \$4,227.96 yearly / 52.14 weeks)
\$698.59 Post-injury average weekly wage

Comparing Claimant's average weekly wage of \$840.17 to his post-injury average weekly wage of \$698.59 results in a wage loss of 17%.

Claimant's permanent functional impairment is 23% to the body as a whole, and he sustained a 17% wage loss. Claimant is eligible to receive permanent partial disability compensation based on work disability.

With regard to the task loss component, Dr. Jackson opined Claimant had no task loss. Dr. Jones opined Claimant had a 61% task loss using Mr. Dreiling's list and a 45% task loss using Ms. Sprecker's list. Dr. Rosenthal opined Claimant has a 61% task loss using Mr. Dreiling's list. Dr. Jackson's opinions regarding permanent restrictions and task loss are not credible in light of the medical treatment received by Claimant and Respondent's inability to accommodate his restrictions. The Board finds the opinions of the two experts to be credible and therefore affords them equal weight. Claimant has a 53% task loss. Claimant is entitled to receive work disability benefits based on a 17% wage loss and a 53% task loss, which is a 35% work disability.

2. Claimant is entitled to an award of future medical treatment.

K.S.A. 44-510h presumes an employer's obligation to provide medical benefits terminates when the employee reaches MMI. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after such time as the employee reaches MMI.

The ALJ found:

As with the permanency question, the Court finds the opinion of the neutral IME physician, Dr. Carabetta, to be the most persuasive on the issue of future medical treatment. As noted above, Dr. Carabetta was not retained by either party in this claim, but rather was appointed by this Court, and therefore the Court views Dr. Carabetta's opinions to be the least biased. Because Dr. Carabetta has opined that he does not expect Claimant will need future medical treatment, Claimant's request for future medical benefits is denied.⁴

The Board disagrees with the analysis of the ALJ. Claimant suffered a significant injury resulting in three separate and distinct surgical procedures including a cervical fusion and two shoulder surgeries. To suggest no future medical treatment under these circumstances, simply isn't credible. Dr. Rosenthal and Dr. Jones opined future medical treatment will be necessary. The Board concludes Claimant met his burden of proving entitlement to an award of future medical treatment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in part and reversed in part. Claimant's functional impairment due to his work-related injury is 23% to the body as a whole. Claimant is entitled to an award of permanent partial general disability benefits based on work disability considerations. Claimant has met his burden of proving entitlement to an award of future medical treatment under K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Troy A. Larson dated January 6, 2021, is modified. The denial of future medical treatment is reversed. The finding of a 23% functional impairment to the body as a whole is affirmed. The denial of work disability compensation is reversed. Claimant is awarded permanent partial general disability compensation based on a 35% work disability.

Claimant is entitled to 19.29 weeks of temporary total disability compensation, paid at \$397.01 per week, totaling \$7,658.32, as well 49 weeks of temporary total disability compensation at \$560.14 per week, totaling \$27,446.86; 126.6 weeks of permanent partial

⁴ ALJ Award at 7.

work disability compensation, paid at \$560.14 per week, totaling \$70,913.72; for a total award of \$106,018.90, which is all due and owing, less any amounts previously paid.

Furthermore, Claimant’s counsel’s fee agreement complies with K.S.A. 44-536 and is approved. Claimant’s counsel is awarded an attorney fee of 25% of the temporary and permanent disability benefits awarded and reimbursement for actual litigation expenses incurred, to be paid from the compensation awarded herein.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned dissents. The Board incorrectly recalculated the Award.

The ALJ’s Award states the parties stipulated the respondent paid 77.14 weeks of TTD in the total amount of \$30,631.11. The majority of these weeks, or 56 weeks, were paid at the rate of \$397.01. The ALJ also indicated in his Award that the respondent should have to pay an extra \$163.06 per week for 21.14 weeks, or \$3,406.26, during which the claimant’s compensation rate increased due to discontinuation of fringe benefits by the respondent between the time of his separation of employment, February 22, 2017, until July 19, 2017. The compensation rate for such time frame should have been \$560.14. The total TTD awarded by the ALJ was \$34,037.37.

The respondent's brief to the Board states it paid the claimant \$3,406.26 to account for the underpayment in TTD. The claimant's brief indicated the amount should have been \$3,447.05. However, the issue of a TTD underpayment was not listed as an issue by the claimant in his brief and not raised at oral argument by either party. Also, at the Regular Hearing, the claimant's attorney indicated some agreement with the ALJ that the claimant was seeking the higher TTD rate for the period February 22, 2017, to July 16, 2017 (145 days, or 20.71 weeks when including the beginning and ending dates).

The undersigned agrees the initial TTD rate should have been \$397.01 and the \$163.06 figure should have been \$163.07 to get the claimant's TTD rate to \$560.14 for TTD weeks not accounting for his loss of fringe benefits. The 21.14 weeks listed in the ALJ's Award does not match up with the 20.71 weeks noted in the prior paragraph. However, these are very minor mathematical errors.

After the ALJ's Award was decided, neither party raised any issue to the Board regarding whether the ALJ correctly calculated the TTD rate or the weeks of TTD paid by the respondent. In other words, the respondent was not saying it paid too much TTD and the claimant was not asserting the respondent did not pay enough TTD. No party indicated the prior stipulation regarding the amount of TTD paid or the number of weeks paid was incorrect or needed to be withdrawn.

However, the Board disregarded the parties' stipulation regarding the amount of TTD paid and the number of weeks of TTD paid. The Board did so without any explanation.

The Board, on its own and without any input from the parties, indicated the respondent was responsible for paying to the claimant a total of 68.29 weeks of TTD. Of these weeks, the respondent was ordered to pay the lower rate of \$397.01 for only 19.29 weeks and the higher rate of \$560.14 for 49 weeks. The total TTD awarded by the Board was for \$35,105.18. Remember, the ALJ awarded the majority of the claimant's TTD at the lower rate and a minority of the TTD at the higher rate, but the Board did the opposite. The Board has not explained any of these calculations. The Board's determination results in the respondent paying fewer weeks of TTD, yet a higher amount ordered by the ALJ, \$1,067.81 more than ordered by the ALJ.

When calculating an award of permanent partial disability(PPD) benefits for a whole body injury, we start with 415 weeks and discount the TTD weeks paid, excluding the first 15 weeks, before multiplying the remaining weeks by the percentage of disability and the compensation rate.⁵ Therefore, under the ALJ's Award, had it been based on a 35% work disability, would look as follows:

⁵ See K.S.A. 44-510e(a)(2)(F).

415 weeks - (77.14 weeks of TTD less the first 15 weeks, or 62.14) = 352.86 weeks x 35% work disability = 123.5 weeks x \$560.14 = \$69,177.29 for PPD benefits.

The Board's calculations result in a higher amount of PPD benefits. The Board's calculations do not give the respondent the benefit of having paid 77.14 weeks of TTD. The Board's calculations, which are not spelled out, should look like this:

415 weeks - (68.29 weeks of TTD less the first 15 weeks, or 53.29 weeks) = 361.71 weeks x 35% work disability = 126.5 weeks x \$560.14 weeks = \$70,913.72 for PPD benefits.

As I have indicated, this equation is wrong. The respondent paid 77.14 weeks of TTD and the math should account for such stipulated figure.

Overall, the Board is making the respondent pay a total of \$2,804.24 more in combined TTD and PPD than the Award should be. While the respondent may still get credit for any benefits paid to date, such language does not correct the many mathematical discrepancies and fail to provide the respondent with any benefit for having paid 77.14 weeks of TTD. Again, the Board, when ostensibly accounting for a TTD underpayment for weeks which should have paid at a higher rate due to discontinuation for fringe benefits, still results in the respondent paying over \$2,800 more than it is responsible to pay.

The parties made no argument concerning the amount of TTD paid or the number of weeks paid. The Board is not supposed to unilaterally "[reach] out to grab" an issue "without a request . . . or notice to the parties."⁶ The Board is improperly addressing issues that were not raised.

For these reasons, I dissent.

BOARD MEMBER

c: (Via OSCAR)

Dennis Horner, Attorney for Claimant
John Pazell, Attorney for Respondent and its Insurance Carrier

⁶ See *Goss v. Century Manufacturing, Inc.*, No. 108,367, 2013 WL 3867840 (unpublished Kansas Court of Appeals decision filed July 26, 2013).

DANIEL BROWN

10

CS-00-0268-393
AP-00-0455-816

Troy A. Larson, Administrative Law Judge