BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HASSAN WARSAME	)	
Claimant	)	
V.	)	
	)	AP-00-0457-958
TYSON FRESH MEATS	)	CS-00-0376-607
Self-Insured Respondent	)	

ORDER

Claimant appealed the May 7, 2021, Award issued by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on August 19, 2021.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. Gregory D. Worth appeared for self-insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Regular Hearing Transcript dated February 2, 2021; Evidentiary Deposition of Pedro A. Murati, M.D. dated February 3, 2021, with exhibits attached; Deposition of Chris D. Fevurly, M.D. dated February 26, 2021, with exhibits attached; Continuation of Regular Hearing by Deposition of Hassan Warsame dated March 12, 2021, with exhibits attached; Deposition of John P. Estivo, D.O. dated March 16, 2021, with exhibits attached; Independent Medical Evaluation Reports of Dr. Vito Carabetta dated June 29, 2018 and February 13, 2020; and the documents of record filed with the Division.

ISSUES

1. What is Claimant's permanent functional impairment due to his work-related injuries?

2. Is Claimant entitled to future medical treatment?

3. Should this case be remanded for Dr. Carabetta to perform an analysis of his rating in accordance with *Johnson v. US Food Service*?[1]

[1] *Johnson v. US Food Service,* 312 Kan. 597, 478 P. 3d 776 (2021).

FINDINGS OF FACT

The ALJ ruled Claimant has a 12 percent permanent partial impairment to the body as a whole as a result of his work-related injury. This finding is based on the opinion of Dr. Carabetta, the Court-appointed physician, using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition*.[2] Claimant was awarded future medical upon proper application and approval.

On April 26, 2016, Claimant's job duties were to use a hook to pull meat off a conveyor belt. The conveyor belt stuck, so Claimant used both arms and a hook to pull on the belt to free it. Claimant felt an onset of pain in both shoulders, right hand, right wrist and back.

Claimant is originally from Somalia. He has no formal education. He does not read, write or speak English.

According to Respondent's records, Claimant first saw the company nurse May 2, 2016. According to those records Claimant reported pain in the right wrist and hand. Claimant had swelling and locking in his hand. He was treated with heat and Ibuprofen. Claimant continued to complain of pain and on May 9, 2016, and requested to see a doctor regarding the pain. Claimant was moved to a less physically demanding job.

Claimant denied any problems with his neck, shoulders or low back before the accident on April 26.

The first three months of Claimant's treatment focused on the right hand and wrist. He did receive an injection in the left shoulder. Claimant had physical therapy and an MRI of his right hand and wrist on June 27, 2016. Claimant was sent to Dr. Garcia for an orthopedic evaluation and then referred to a hand specialist. Claimant had work hardening, injections and an NCS/EMG. By January 2017, Respondent and their medical experts denied Claimant's complaints were work-related because Claimant's complaints appeared to be related to arthritis. It has been approximately two years since Claimant last saw a doctor for his injuries.

Currently, Claimant has problems with bending and twisting from side to side. He has no problems with sitting or riding in a car. Claimant's left shoulder is not as painful as it once was due to the injection. Claimant reports pain while he works and rates it at a 5 out 10 on the pain scale. He has not had any injections in his right shoulder and has constant pain he rates at a 5 out 10 on the pain scale. Claimant has issues raising his right arm and continues to have pain in his neck, which he rates at a 5 out of 10 on the pain scale.

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[2] Hereinafter referred to as *The Guides*.

Claimant started working in a less physically demanding position three and half years ago and continues to work for Respondent in the position with no problems.

Dr. Chris Fevurly examined Claimant on March 15, 2017, at Respondent's request. Claimant complained of pain in his dorsal right wrist, both shoulders and low back after pulling on a conveyor belt. Claimant was upset no evaluation was done for the shoulders and low back pain. Dr. Fevurly noted the majority of Claimant's treatment had been for the right wrist and right hand. He found no mention of either bilateral shoulder pain or low back pain in prior records.

Based on his examination of Claimant and review of records provided Dr. Fevurly found Claimant had good range of motion in both shoulder and the shoulder exam findings were not consistent with impingement or rotator cuff problems. The neck exam was unremarkable. The provocative test for cubital tunnel and carpal tunnel was negative. There was tenderness to palpation in the low back. There was no loss of motion, no neurological compromise and neurological testing of the lower extremities was normal. Dr. Fevurly's impression was chronic regional low back pain.

Dr. Fevurly's impression was Claimant's wrist and right hand pain was likely from degenerative changes in the wrist and hand joints. The MRI of the right wrist showed minor degenerative changes in the triangular fibrocartilage complex (TFCC) which may be consistent with, a degenerative tear, but no evidence of a rupture of the ligaments. He found no symptoms to suggest significant peripheral nerve entrapment. Dr. Fevurly did not believe these conditions were work-related.

Dr. Fevurly opined it was important to note Claimant made no claim of bilateral shoulder pain or low back pain in the statement of injury, and so he could not accord prevailing factor to the shoulder complaints or the low back complaints from the described work event. Dr. Fevurly did not believe Claimant's work activities were the prevailing factor for Claimant's complaints, but did believe the activities aggravated Claimant's underlying degenerative arthritis in the wrist and hands causing chronic muscular-type pain. He opined the problems appeared to be degenerative and age-related, as opposed to work-related. He did not think further medical treatment would be helpful and Claimant needed to decide if he could continue to work with the pain. He also noted Claimant was happy with his modified duty and would be glad to keep doing that work.

Dr. John Estivo, a board certified orthopedic surgeon, first saw Claimant on December 18, 2018, at Respondent's request. Claimant's chief complaint was left shoulder pain. Claimant reported injuring the left shoulder due to repetitive work with Respondent, requiring repetitive use of his upper extremities. He denied further right shoulder and low back pain. Claimant did not complain of any right hand or wrist pain. An MRI of the left shoulder from October 26, 2018, revealed a small partial thickness rotator cuff tear and some tendonitis.

Dr. Estivo examined Claimant and found a left shoulder partial thickness tear with rotator cuff tendonitis. He opined the prevailing factor and need for medical treatment for the left shoulder was the April 26, 2016, incident. He recommended a cortisone injection, which he administered during the visit. He prescribed Mobic for the pain for sixty days and physical therapy 3 times a week for a month. Claimant was assigned temporary restrictions of no lifting more than 10 pounds with the left arm and no over-the-shoulder height work with the left upper extremity. There was no evidence of carpal tunnel syndrome in the right hand or wrist.

Claimant saw Dr. Estivo again on January 15, 2019. Claimant reported less pain in the left shoulder following a cortisone injection and physical therapy. Claimant was happy with the results despite some continued discomfort. Claimant denied pain in the right shoulder, low back, hand or wrist.

Dr. Estivo restated his diagnosis of left shoulder partial thickness tear with rotator cuff tendonitis. He recommended continued physical therapy 3 times a week for an additional 2 weeks. Claimant was also given a 90 day prescription for Ibuprofen. Claimant was allowed to work with the restriction of no lifting over 10 pounds with the left arm and no over-the-shoulder height work with the left upper extremity.

Claimant saw Dr. Estivo again on February 5, 2019. Claimant reported continued improvement in the left shoulder to the point he had no pain. The diagnosis was left shoulder partial thickness tear. Dr. Estivo found Claimant at maximum medical improvement. Claimant did not require any further treatment or restrictions, and was released from care.

On March 21, 2019, Dr. Estivo assigned an impairment rating under *The Guides* of 3 percent to the left upper extremity. According to the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition,* he found Claimant had 0 percent impairment to the left upper extremity because there is no specific impairment rating for a partial thickness rotator cuff tear. Therefore, Claimant had 0 percent impairment because he has no loss of range of motion.

Dr. Pedro Murati examined Claimant on May 29, 2019, at the request of his attorney. Claimant complained of pain in both shoulders, worse on the left; left shoulder weakness; numbness and tingling in left shoulder and right arm; limited range of motion of the left shoulder and right hand; and mid-back to low back pain.

Dr. Murati diagnosed Claimant with: partial tear of the TFCC per the MRI 6-27-16; bilateral carpal tunnel syndrome; left shoulder rotator cuff tear consistent with the MRI of 10-26-18; myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals; and low back strain.

Dr. Murati opined the prevailing factor causing Claimant's conditions was the accident and multiple traumas at work. He found Claimant had no preexisting injuries relating to the current diagnoses. Dr. Murati found Claimant had significant clinical findings giving a diagnosis consistent with the described accident and multiple repetitive traumas at work.

Dr. Murati assigned permanent restrictions based on an eight hour day of frequent sit, stand, walk or drive; occasionally bending, crouch, or stoop, climb stairs or squat; no climbing ladders or crawling; frequent repetitive hand controls with the right and the left; occasional grasping and grabbing with the right and left; no heavy grasping with the right and left, no above the shoulder work with the right and left; no lifting, carrying, pushing or pulling more than 35 pounds, 35 pounds occasionally and 20 pounds frequently; no work more than 24 inches from the body on the left; use wrist splints while working; alternate sitting, standing and walking; no use hooks or knives with the left or right; no use of vibratory tools with the right or left.

Dr. Murati recommended future medical treatment for Claimant. He opined Claimant will need carpal tunnel surgery, surgery to clean up the partial tear of the TFCC, and repair of the torn rotator cuff in the left shoulder. Physical therapy and cortisone injections for the low back were also recommended.

Dr. Murati found Claimant had 19 percent impairment to the body as a whole based on *The Guides*. He found 23 percent impairment to the body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition.* In light of the *Johnson* v. *US Food Service* decision, Dr. Murati determined Claimant's impairment to be 23 percent to the body as a whole. He opined the 23 percent reflected Claimant's true impairment more accurately than 19 percent under *The Guides*, which was a starting point.

Dr. Vito J. Carabetta examined Claimant on June 29, 2018, at the request of the Court. Claimant presented with right wrist pain, numbness in the little finger of the right hand, difficulty bending the right middle finger and pain in both shoulders, with the left shoulder being worse than the right, and pain throughout the upper and mid-back.

Dr. Carabetta examined Claimant and diagnosed regional fibromyositis upper and mid trapezius area; rotator cuff tendinitis, left worse than right; and right TFCC tear.

Dr. Carabetta recommended additional treatment. Dr. Carabetta found the prevailing factor to be the April 26, 2016, work injury. He noted no treatment had been rendered for the left shoulder region and recommended x-rays and an MRI. He recommended corticosteriod injections and physical therapy. He was not optimistic the fibromyositic change in the mid-back would go away, but considered physical therapy a treatment option. He opined Claimant would need surgery for the TFCC tear. The questionable atrophy in the right hand musculature could be from disuse and repeating the

elcetrodiagnostic studies would be best before considering any kind of surgical intervention.

Claimant met with Dr. Carabetta again on February 13, 2020, at the direction of the Court. Claimant continued to complain of pain in the right wrist, little finger, middle finger, right hand, both shoulders and upper and mid-back. Claimant's shoulder symptoms remained unimproved and his right hand was worse from increased usage.

Dr. Carabetta continued to diagnose regional fibromyositis upper and mid trapezius area; rotator cuff tendinitis, left worse than right; and right TFCC tear. He found Claimant to be at maximum medical improvement for several months before this visit.

Under *The Guides*, Dr. Carabetta rated Claimant with a total combined impairment of 12 percent to the body as a whole. Dr. Carabetta apportioned 2 percent whole person to soft tissue problems, 2 percent whole person for the thoracic component; 2 percent whole person for the left shoulder impingement; 1 percent whole person for right shoulder tendinitis, and 5 percent whole person for the TFCC tear.

Under the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*, Dr. Carabetta found a total combined impairment of 15 percent to the body as a whole. He apportioned 5 percent whole person for upper and mid trapezius muscle regions, 5 left upper extremity impairment for the left rotator cuff tendinitis (3 percent whole person), 1 percent impairment for right upper extremity symptoms, and 10 percent impairment for right upper extremity impairment for the TFCC complex tear (6 percent whole person).

There is no record a request was made to the ALJ for Dr. Carabetta to reevaluate his rating under the *Johnson* analysis.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues his impairment should be 23 percent to the body as a whole based on the opinion of Dr. Murati, who based his rating on the *Johnson* analysis. In the alternative, Claimant argues the case should be remanded for Dr. Carabetta to provide a rating based on the *Johnson* analysis.

Respondent argues compensation should be denied as the evidence shows Claimant did not sustain a work-related injury to any part of his body. Should the Board find Claimant entitled to compensation from a work-related injury, Respondent argues impairment should be no more than 3 percent permanent partial impairment to the left shoulder based on the opinion of Dr. Estivo. Should the Board find the right shoulder be included, impairment should be no more than the 12 percent impairment to the body as a whole as provided by Dr. Carabetta and awarded by the ALJ. Respondent argues

Claimant is not entitled to future medical treatment as he failed to sustain his burden of proving he was entitled to it.

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. 44-510e(2)(B) states:

> 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.

Communication of Claimant's injuries, in this case, was hindered by a language barrier. The medical evidence and Claimant testimony about his injuries while credible, was also erratic and limited.

The 12 percent rating to the body as a whole based on *The Guides* issued by Dr. Carabetta is the best indicator of Claimant's permanent impairment. The 12 percent rating to the body as a whole is attributable to the cervical spine, thoracic spine, left shoulder and right upper extremity. Dr. Carabetta saw Claimant twice at the request of the ALJ. His examination and opinions are neutral and less biased because it was done at the request of the ALJ. Dr. Carabetta's rating addresses all of Claimant's complaints.

Claimant's request for a remand for Dr. Carabetta to do an analysis of his rating based on the recent Kansas Supreme Court case of *Johnson v. US Food Service* is denied. The *Johnson* case was decided before this case was submitted to the ALJ. There is no record Claimant requested Dr. Carabetta reevaluate his rating under *Johnson* when this case was before the ALJ. The Board is bound by the record made before the ALJ. The time and place to have Dr. Carabetta reevaluate his rating was when the case was still before the ALJ.

K.S.A. 2016 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.

At Dr. Carabetta's first evaluation of Claimant, he recommended treatment for Claimant. Claimant did not receive all the treatment recommended by Dr. Carabetta, such as physical therapy directed toward his back complaints or TFCC surgery. For these reasons, it is found Claimant is entitled to future medical treatment upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 7, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2021.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)
Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Hon. Pamela J. Fuller, Administrative Law Judge