BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID HAWLEY	)	
Claimant	)	
V.	)	
	)	
UNCLE RICK'S DIESEL AND	)	AP-00-0459-361
AUTO LLC	)	CS-00-0109-647
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION	)	
FUND	)	

ORDER

The Kansas Workers Compensation Fund (Fund), through Timothy Emerson, requested review of Administrative Law Judge (ALJ) Gary Jones' Award dated July 23, 2021. Jonathan Voegeli appeared for the claimant. The pro se respondent was given notice of the date and time of oral argument, but did not appear. The Board heard oral argument on November 18, 2021.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the transcripts of:

1. the discovery deposition of David Hawley, taken October 1, 2018, stipulated into evidence at Hawley's June 1, 2021, deposition;

2. the discovery deposition of Ben Epperson, taken October 1, 2018, stipulated into evidence at Hawley's June 1, 2021, deposition;

3. the Preliminary Hearing with exhibits, held August 15, 2019;

4. the Regular Hearing, held December 15, 2020;

5. the evidentiary deposition of David Hawley with exhibits, taken February 8, 2021;

6. the deposition of Karen Terrill with exhibits, taken February 23, 2021;

7. the deposition of Dr. Pedro Murati with exhibits, taken March 15, 2021;

8. the deposition of Dr. Pat Do with exhibits, taken March 22, 2021;

9. the deposition of Steve Benjamin with exhibits, taken March 24, 2021;

10. the deposition of Dr. Vito Carabetta with exhibits, taken May 4, 2021;

11. the deposition of Dr. Alison Raymond with exhibits, taken May 11, 2021;

12. the Continuation of the Regular Hearing by Deposition, taken June 1, 2021;

13. the discovery deposition of Ben Epperson, taken February 3, 2021, stipulated into evidence at the Continuation of the Regular Hearing by Deposition on June 1, 2021;

14. the evidentiary deposition of Ben Epperson, taken June 30, 2021 and

15. the exhibits offered and accepted into evidence by the parties and the pleadings and correspondence contained in the administrative file.

ISSUES

1. Did the claimant sustain personal injury by accident arising out of and in the course of his employment, including whether the accident was the prevailing factor causing his injury, medical condition and impairment?

2. Was the claimant's employment terminated for cause on two occasions?

3. What is the nature and extent of the claimant's impairment and disability?

4. Is the claimant entitled to future medical benefits?

FINDINGS OF FACT

The claimant, 57 years old, received his GED in 2005. He began working for the respondent in early January 2018, as a master mechanic.

The claimant was convicted of receiving money under false pretenses when he was 17 years of age.

The respondent did not have workers compensation insurance when the claimant's asserted accidental injuries occurred. Because the respondent had a payroll of at least $20,000, the Kansas Workers Compensation Fund was made a party to the proceedings.

The Circumstances of the Claimed Accidental Injuries

The claimant testified he was injured when assisting the respondent's owner, Ben Epperson, with lifting an engine over the tailgate of a pickup truck on July 17, 2018. The tailgate was broken and could not be lowered. The claimant heard a "pop" and felt a burning sensation in his shoulders. The claimant told Mr. Epperson something was not right. They then lifted a transmission and a transfer case. Later that day, the claimant told Mr. Epperson he was not doing well and was done working at 5:00 p.m. The claimant also indicated he was getting sore from heavy work-related lifting in the week prior to July 17, stating, "Well, the week prior we were doing some lifting and I was getting sore."[1] The claimant denied any prior shoulder problems. In subsequent testimony, the claimant indicated he was hurt lifting an engine (but gave the estimated weight of an engine block) and later a cast-iron engine block weighing between 250 and 350 pounds.

While legal notice is not at issue, Mr. Epperson testified he first became aware the claimant was alleging a work injury when he received a certified letter from the claimant's attorney on July 27. Mr. Epperson denied a lifting incident occurred or prior knowledge of the claimant sustaining a work injury, as well as denied the claimant mentioning pain or being hurt. Further, Mr. Epperson indicated heavy lifting is typically done with cherry-pickers. He denied lifting an engine or a transmission with the claimant on July 17.

The Claimant's First Termination of Employment

Mr. Epperson initially testified on October 1, 2018. The morning after the asserted accident, Wednesday, July 18, the claimant phoned Mr. Epperson and said he was going to a doctor. The claimant testified Mr. Epperson's wife followed the claimant to the doctor's office in her car. According to Mr. Epperson, his wife just happened to be traveling in the same area and her driving near the claimant's vehicle was purely coincidental. Mr. Epperson testified the claimant stopped at the respondent's premises on July 18 after the doctor's visit. Mr. Epperson asked the claimant to provide a note from the doctor's office.

The claimant called Mr. Epperson on Thursday, July 19. Mr. Epperson told the claimant not to worry about coming in to work until he recovered and the claimant knew "he could take off as many days as he wanted, just as long as he contacted us, let us know, hey."[2] Mr. Epperson admitted the claimant called in on both July 18 and 19, both in his initial testimony and in writing.[3] On July 20, Mr. Epperson sent the claimant a text asking him to come into the office. At that time, according to the claimant, Mr. Epperson terminated his employment due to needing someone at work all the time.

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[1] Claimant Depo. (Oct. 1, 2018) at 20

[2] Epperson Depo. (Oct. 1, 2018) at 47.

[3] *Id*., Ex. 1.

Mr. Epperson testified he terminated the claimant's employment on July 20 because the claimant was a "no call/no show" that day and for damaging a customer's truck by dropping it off a lift on July 17. Mr. Epperson testified the claimant never had prior attendance issues. Further, Mr. Epperson testified he heard rumors the claimant was working on vehicles at his home while claiming to be off work due to injury. The sources of these rumors were a friend and Mr. Epperson's wife, who drove by the claimant's house and purportedly observed a garage full of vehicles. Mrs. Epperson did not testify.

Mr. Epperson testified the accident never happened and the claimant only brought a workers compensation claim because his employment was ended. Conversely, the claimant testified his employment ended because he had been injured at work. Mr. Epperson also testified the claimant had been slandering his business at street races and telling people not to get vehicles serviced by the respondent.

The claimant retrieved a significant amount of personal tools from the respondent on July 21, 2018. Mr. Epperson testified the claimant had no difficulty moving heavy tools.

Mr. Epperson testified at a Preliminary Hearing on August 15, 2019. He stated the claimant was a "[v]ery, very good"[4] employee and did not have prior attendance issues. He testified he terminated the claimant's employment for "no call/no show" on July 19 and 20 and "[j]ust not coming in."[5] He denied the claimant ever called him on July 19, which was different than his testimony on October 1, 2018. Another asserted factor for termination was Mr. Epperson's belief the claimant was slandering his business to customers and coworkers. However, Mr. Epperson testified at the same hearing the claimant did not slander the respondent's business until after the claimant was rehired in February 2019. Mr. Epperson testified the claimant dropping a truck off a lift was not a factor in the termination, and he did not fire the claimant because of suspicion the claimant was working out of his home garage. However, at the same hearing, Mr. Epperson testified he ended the claimant's employment because the claimant was working on vehicles at his house and not contacting him.[6] For his part, the claimant denied doing mechanic's work at home and later testified the vehicles belonged to him and family members.

Testimony from Mr. Epperson also occurred on June 30, 2021. He testified he did not end the claimant's employment the first time due to damaging a customer's vehicle, but was looking to terminate the claimant's employment due to a small claims case resulting from the vehicle damage. The asserted reason for the claimant's first termination was "no

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[4] P.H. Trans. at 58.

[5] *Id*. at 82.

[6] See *id*. at 81, 84.

call/no show." While the record is not entirely clear as to when, Mr. Epperson testified he was forgetting the claimant like a scorned ex-wife.

Mr. Epperson reiterated heavy lifting is done with a cherry-picker, a forklift and cranes. He did not remember the claimant lifting an engine block and getting hurt or the two of them lifting an engine block over a broken tailgate. However, Mr. Epperson acknowledged he and the claimant would sometimes lift an engine block, it would be reasonable, and they could easily lift an engine block over a non-functioning truck tailgate. Mr. Epperson also acknowledged he could not prove the claimant was doing mechanic's work at his home.

The Claimant's Second Termination of Employment

A preliminary hearing was scheduled for February 5, 2019, but did not occur. Instead, the respondent offered to rehire the claimant, who returned to accommodated work on February 11, 2019. The claimant worked the front counter, used a computer, answered the phones, wrote work orders, ordered parts and took care of customers.

The claimant indicated Mr. Epperson hired a new employee to do the desk work around the beginning of June 2019, and had the claimant work in the garage with an employee named Christian. According to the claimant, Mr. Epperson and Christian wagered the claimant would quit his job after the reassignment. The claimant testified he learned about the bet from Christian, who bragged about winning a fancy steak dinner as a result of the bet.

On June 14, 2019, the claimant's employment was terminated a second time by the respondent. According to the claimant, Mr. Epperson said, "You are like having an old girlfriend hanging around, we don't see eye-to-eye, you need to go."[7] After being rehired and prior to the second termination, the claimant received no disciplinary actions, and denied Mr. Epperson spoke to him about his work or behavior. The claimant was surprised by the termination.

In testimony on August 15, 2019, Mr. Epperson noted he and the claimant discussed the purported slander on a couple of occasions over the phone on unknown dates, prior to the second termination, and the claimant told him there was a misunderstanding. Mr. Epperson also testified he could not afford to have the claimant as a non-mechanic, but denied this factor had anything to do with the claimant's second termination of work.[8]

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[7] *Id*. at 22.

[8] See *id.* at 93, 96-97.

Wholly absent from the testimony from the claimant and Mr. Epperson at the preliminary hearing on August 15, 2019, was information put into the record in 2021 about the claimant interacting with a customer of Auto Now. The customer wanted a vehicle he bought at Auto Now repaired. Auto Now is a car dealership and, by servicing its customer's cars through the respondent, it was the respondent's biggest account. The customer apparently threatened the claimant with violence and the claimant responded in kind.

Mr. Epperson testified on February 3, 2021. He indicated the claimant had been slandering the respondent's business. He believed Auto Now stopped giving the respondent business because the claimant threatened the Auto Now customer with physical violence. Mr. Epperson testified the Auto Now incident caused him to terminate the claimant's employment in June 2019:

> I fired him specifically for Auto - - for the Auto Now incident. That was my biggest account that I lost. Probably the biggest account I've ever had being in business. And I lost it thanks to him threatening their customer and damn near having a fistfight in my office.[9]

Mr. Epperson also testified he most likely would not have terminated the claimant's employment the second time, and would have continued to accommodate the claimant's work restrictions, absent the claimant slandering the respondent's business.[10] However, Mr. Epperson testified he did not terminate the claimant's employment the second time as a result of perceived slander against the respondent and the termination "was specifically for the Auto Now incident . . . ."[11] Mr. Epperson stated the asserted slandering occurred after he fired the claimant the second time, which was different from his prior testimony. Mr. Epperson also testified he would not have rehired the claimant in February 2019 if the claimant had been slandering his business.

On February 8, 2021, the claimant testified he had a testy phone conversation with a customer of Auto Now about two months before he was fired the second time. The claimant testified the Auto Now customer threatened him with bodily harm. In turn, the claimant threatened the Auto Now customer he would defend himself.

The claimant testified he later spoke to the owner of Auto Now, Tony Moldenhauer, about the incident. The claimant testified he told Mr. Moldenhauer Mr. Epperson was stealing from Auto Now. In turn, Mr. Moldenhauer removed at least 10 Auto Now vehicles from the respondent's premises and quit doing business with the respondent.

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[9] Epperson Depo. (Feb. 3, 2021) at 45-46.

[10] *Id*. at 39.

[11] *Id*. at 46 (see also pp. 47-48).

Mr. Epperson testified on June 30, 2021. He testified the reason for the claimant's second termination was the fight with the Auto Now customer.

The claimant testified he has not worked anywhere since June 14, 2019.

Medical and Vocational Expert Evidence

On July 18, 2018, the claimant saw Dr. David Lauer at West Wichita Family Physicians (WWFP). The claimant complained of shoulder pain for two weeks, the left shoulder worse than the right shoulder, and denied any injury or new types of activity. He reported trying ibuprofen and etodolac with no relief. Dr. Lauer administered an injection to the claimant's left rotator cuff and took the claimant off work for four days.

At his attorney's request, the claimant saw Dr. Pedro Murati on September 12, 2018, for an independent medical examination (IME). The claimant reported a sudden onset of burning and stabbing pain in his shoulder while lifting an engine block over the side of a truck bed on July 17, 2018.

Dr. Murati diagnosed the claimant with right rotator cuff tear versus sprain, with probable labral involvement; left shoulder rotator cuff tear versus sprain; and low back pain with signs of radiculopathy, the prevailing factor being the work accident. The doctor recommended additional medical treatment.

Dr. Murati did not find significant the fact claimant reported a two-week history of shoulder pain prior to seeing a doctor on July 18, 2018, rationalizing the claimant had a progression of pain until he could not tolerate it any more and had to see a doctor.

The Court ordered an IME with Dr. David Hufford. The claimant saw Dr. Hufford on December 20, 2018. The claimant reported experiencing sudden and immediate pain in both shoulders while lifting an engine with a coworker over the end gate of a pickup truck.

Dr. Hufford diagnosed the claimant with occupational lifting injury with bilateral shoulder injury. The doctor recommended additional treatment and stated the prevailing factor for his bilateral shoulder injury was the work accident.

On February 28, 2019, the claimant began authorized treatment with Dr. Pat Do. The claimant presented with bilateral shoulder pain after a work-related injury on July 17, 2018, while picking up an engine. Dr. Do opined the work injury was the prevailing factor for the claimant's bilateral shoulder injuries unless he was having complaints of bilateral shoulder pain "within a few months of July 17, 2018."[12] Dr. Do acknowledged the accident was the prevailing factor if the claimant did not seek medical attention for his shoulders

[12] Do Depo. at 33.

between 2014 and 2018. Dr. Do performed right shoulder surgery on March 25, 2019, consisting of a subacromial decompression, rotator cuff repair and extensive debridement of the joint. On August 26, 2019, the claimant underwent left shoulder surgery, consisting of debridement of the joint, a SLAP repair, a subacromial decompression and rotator cuff repair.

Dr. Do released the claimant from treatment on February 4, 2020, with no restrictions. Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*), Dr. Do assigned the claimant a combined 11% whole person impairment representing 4% for the right shoulder and 7% for the left shoulder. The doctor opined the claimant will not require future medical treatment.

At his attorney's request, the claimant returned to Dr. Murati on February 26, 2020. Dr. Murati opined the claimant's work accident of July 17, 2018, was the prevailing factor for his injury, need for medical treatment and resulting impairment. The doctor recommended additional treatment, to include bilateral total shoulder replacements. Dr. Murati imposed permanent restrictions. Using the *Guides*, Dr. Murati assigned the claimant a combined 21% whole person impairment, which represents a 6% impairment to the right upper extremity, 6% impairment to the left upper extremity and 11% impairment to the low back.

On October 23, 2020, the claimant saw Dr. Carabetta for a court-ordered IME. The claimant reported an injury on July 17, 2018, while lifting an engine with the company owner. The doctor testified the MRI scans showed evidence of rotator cuff tearing on both sides and physical examination showed reduced mobility and an odd sensory distribution. Dr. Carabetta diagnosed the claimant with status-post bilateral rotator cuff tear repairs and bilateral upper extremity paresthesias. Dr. Carabetta testified the work incident was the prevailing factor for the claimant's work injury, surgery and later paresthesias. The doctor agreed the claimant suffered acute rotator cuff tears. While Dr. Carabetta had concerns about a July 18, 2018 medical record noting a two-week history of shoulder pain, the doctor also testified his prevailing factor opinion was strengthened by the claimant's testimony he had soreness prior to his July 17, 2018 accident, but felt pops and burning sensations in both shoulders on such date. Despite cross-examination, Dr. Carabetta did not alter his prevailing factor opinion.

Using the *Guides*, Dr. Carabetta assigned the claimant a combined 21% whole person impairment representing 18% impairment for the left upper extremity and 18% impairment for the right upper extremity. Dr. Carabetta opined the claimant will require future medical treatment. The doctor imposed permanent work restrictions of lifting up to 40 pounds occasionally and 25 pounds frequently when in unison, lifting to 25 pounds occasionally and 15 pounds frequently with either upper extremity and limit use of the upper extremities to chest level with no more than 5 pounds for short periods.

At his attorney's request, Karen Terrill, a vocational rehabilitation consultant, interviewed the claimant by phone on April 28, 2020. Ms. Terrill prepared a list of 22 tasks the claimant performed in the five years before the accident. Ms. Terrill testified the claimant is capable of work and earning at best the minimum wage of $7.25 an hour based on his restrictions, age, education, work experience and geographical location.

Out of the 22 tasks on Karen Terrill's list, Dr. Murati opined the claimant is unable to perform 20 for a 91% task loss. Dr. Carabetta opined the claimant is unable to perform 16 for a 73% task loss, and Dr. Do opined the claimant is unable to perform 9 for a 41% task loss.

At the Fund's request, Steve Benjamin, a vocational rehabilitation consultant, interviewed the claimant in person on November 13, 2020. Mr. Benjamin prepared a list of 30 tasks the claimant performed in the five years preceding the accident. Mr. Benjamin opined the claimant was capable of earning approximately $486.27 in the open labor market based on Dr. Carabetta's restrictions, but would be unable to reenter the open labor market based on Dr. Murati's restrictions. Mr. Benjamin believed the claimant's skills would allow him to sell automobiles.

Out of the 30 tasks on Steve Benjamin's list, Dr. Carabetta opined the claimant is unable to perform 6 for a 2% task loss. It was Dr. Do's opinion the claimant is unable to perform 19 for a 63% task loss.

Dr. Carabetta admitted his opinions regarding whether the claimant could perform the tasks on Mr. Benjamin's task list were based on the lifting being less than 40 pounds. Otherwise, the claimant was unable to perform 19 out of the 30 tasks for a 63% task loss.

On December 16, 2020, Ms. Terrill prepared an amended report after reviewing Dr. Carabetta's report. Ms. Terrill testified the claimant would be unable to work as an automobile sales person because the job requires some bending. Ms. Terrill opined the claimant, more likely than not, will have difficulty finding employment.

Dr. Alison Raymond, the claimant's primary care physician, testified on May 11, 2021. She stated the claimant complained of right shoulder pain at his first visit with WWFP in January 2013, and later complained of left shoulder pain. The doctor testified the claimant did not have shoulder complaints or treatment at WWFP between 2013 and the visit on July 18, 2018. Dr. Raymond first became aware the claimant had a work injury when she received her deposition subpoena.

The ALJ's Decision

The ALJ stated:

The Court finds that the Claimant met with personal injury by accident on July 17, 2018, arising out of and in the course of his employment with the Respondent and that accident was the prevailing factor causing the injury, medical condition, need for treatment and the resulting disability or impairment[.]

The Claimant's testimony about how the accident and injury occurred is reasonably consistent. The Claimant reported the accident promptly to the Respondent. Dr. Hufford, Dr. Do, Dr. Carabetta and Dr. Murati all said that the July 17, 2018, accident was the prevailing factor for the Claimant's shoulder condition. Those doctors who were asked also explained how the accident as described by the Claimant was consistent with the Claimant's injuries.

There was some question raised about the notes from Dr. Raymond's office not referring to a work injury. But Dr. Raymond explained that sometimes injuries are not recorded in the medical notes. And the parties either sent Dr. Raymond's medical records to Dr. Hufford, Dr. Do, Dr. Carabetta and Dr. Murati or else had the opportunity to ask the doctor about the records during a deposition. Dr. Hufford, Dr. Do, Dr. Carabetta and Dr. Murati all still opined that the July 17, 2018, accident was the prevailing factor for the Claimant's injuries.

. . .

The Claimant was terminated twice. The first time was on July 20, 2018, three days after the accident. Mr. Epperson testified that the Claimant was terminated for no call/no show, but admitted during his testimony that the Claimant did call in on the days he was absent prior to July 20, 2018. The Court finds that the Respondent did not exercise good faith in terminating the Claimant and the termination was not for cause.

The Respondent rehired the Claimant on February 11, 2019, and then terminated him a second time on June 14, 2019. The Court finds that the Respondent and the Fund have not shown that this termination was for cause.

First, there was no evidence of any warnings given to the Claimant by the Respondent that the Claimant's behavior was in some way unacceptable. There were no write-ups or disciplinary action taken prior to the termination.

Second, Mr. Epperson initially testified that the Claimant was terminated for making disparaging comments to customers about the Respondent's business. Mr. Epperson testified on a later occasion that the Claimant's alleged slanderous comments were likely made after the Claimant was terminated and the Claimant was not terminated for disparaging the Respondent's business. Instead, Mr. Epperson said that the Claimant was terminated for getting into an argument with a customer that resulted in Auto Now not doing business with the Respondent. The Respondent changing reasons for terminating the Claimant indicates that he is searching for a plausible reason why he terminated the Claimant rather than giving the actual reason.

Third, Mr. Epperson claimed that the argument between the Claimant and a customer was the reason that Auto Now pulled its business from the Respondent and the Claimant was terminated. But the Claimant's testimony and the affidavit from Tony Moldenhauer with Auto Now establishes that the argument was not the reason why Auto Now pulled its business. Additionally, according to the Claimant, he was justified in defending himself against a threatening customer. The Claimant was present when the argument occurred, and Mr. Epperson was not.

. . .

The Court finds that the Claimant has a 21% whole body functional impairment based on impairment to the Claimant's bilateral shoulders in accordance with the opinion from Dr. Carabetta. Dr. Carabetta performed an IME at the Court's request and his opinion may be more neutral than the opinion from a doctor specially retained by one of the parties. Although Dr. Carabetta's opinion is higher than Dr. Do's opinion, it is lower than the 32% opined by Dr. Murati in light of the Johnson decision.

The Court does not find Dr. Do saying the Claimant can work without restrictions to be realistic. Likewise, Dr. Murati's restrictions appear to be more than is necessary. The Court finds Dr. Carabetta's restrictions to be the most persuasive.

The Court finds the task loss report prepared by Ms. Terrill and Mr. Benjamin to be equally persuasive. Dr. Carabetta said that the Claimant has a 63% task loss using Mr. Benjamin's task list and a 73% task loss using Ms. Terrill's list. Giving equal weight to these two opinions, the Court concludes that the Claimant has a 68% task loss.

The Court finds Mr. Benjamin's opinion on wage loss more persuasive than that of Ms. Terrill. Ms. Terrill's opinion that the Claimant can only earn $7.25 per hour appears low. It is unclear what jobs the Claimant could do that would pay $7.25 per hour instead of about $10.00 per hour. However, giving some weight to Ms. Terrill's opinion that the Claimant is capable of earning less that the $486.27 per week opined by Mr. Benjamin, the Court concludes that the Claimant is capable of earning $440.00 per week. Based on the . . . Claimant's average weekly wages of $910.45 per week, this results in a wage loss of 52% ($910.45 - $440.00 = $470.45 / $910.45 = 52%).

Averaging the 68% task loss and the 52% wage loss results in the Claimant having a 60% work disability.

The Court finds the Claimant is not permanently and totally disabled. Both vocational experts agreed that he could do some work using Dr. Carabetta's restrictions.

. . .

> Dr. Do said the Claimant will not need future treatment and Dr. Murati said that he will. Dr. Carabetta says that the Claimant's [parasthesias] is a byproduct of his shoulder injuries, but additional investigation is needed to determine that for certain.
>
> Based on the above, the Court concludes that the Claimant is entitled to future medical benefits.

The Fund argues the claimant failed to prove he suffered a compensable work-related injury on July 17, 2018, because he provided a two-week history of shoulder pain during his first interaction with a health care provider. Should the Board find the claim compensable, the Fund argues the claimant was terminated for cause and should be limited to an award based on his functional impairment only, but not a work disability award. In addition, the Fund argues more weight should be given to the opinions of Dr. Do, the treating physician. The claimant maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

Under K.S.A. 44-501b: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the trier of fact considers the whole record; and (3) the burden of proof is on the worker. Under K.S.A. 44-566a(e)(2) and K.S.A. 44-532a(a), the Fund is liable for payment of workers compensation benefits to an employee who is unable to receive such benefits from the employer because the employer does not have workers compensation insurance or is financially unable to pay for benefits. The Fund "steps into the shoes" of the employer.

The Board's review is de novo – consideration of an existing decision and agency record, but with independent findings of fact and conclusions of law.[13]

1. The claimant's injuries by accident arose out of and in the course of his work on July 17, 2018.

K.S.A. 44-508 states, in part:

> (f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

[13] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

The claimant testified he was injured in an accident on July 17, 2018, while performing work duties with Mr. Epperson, who in turn denies any accidental injury occurred at all. When considering the entirety of the evidence, the Board accepts the claimant's version of what occurred and rejects Mr. Epperson's general denial.

The claimant's testimony regarding the circumstances of his accident was consistent. He repeatedly testified he was injured while helping Mr. Epperson lift an engine or engine block into the back of a truck with the tailgate up. The Board acknowledges the July 18, 2018 medical record from WWFP, which states the claimant had shoulder pain for two weeks and had no injury causes pause for concern. However, the claimant testified he was having pain the week leading up to the July 17, 2018 accident, and the medical evidence supports a finding the accident was the prevailing factor for the claimant's injuries. Dr. Carabetta agreed the claimant probably had shoulder pain before the date of accident, but sustained traumatic injuries on July 17, 2018. The Board accepts the opinions of Drs. Carabetta, Hufford, Do and Murati: the accident was the prevailing factor in causing the claimant's injuries, medical conditions and resulting impairment and disability. No doctor testified the prevailing factor was something else, like a preexisting condition.

The Board does not view the claimant's conviction for dishonesty, which occurred about 40 years ago, as sufficient to defeat his testimony regarding his accidental injury.

In testimony on October 1, 2018, Mr. Epperson initially denied the respondent would have employees lift engines by hand and would typically use a cherry-picker. In his last testimony, Mr. Epperson indicated it would be reasonable for him and the claimant to lift an engine block together and such activity was occasionally done. As explored below, the balance of Mr. Epperson's testimony is wildly inconsistent and not credible.

The claimant proved he sustained accidental injuries arising out of and in the course of his employment on July 17, 2018, and the accident was the prevailing factor in his injuries, medical conditions, and resulting impairment and disability.

2. The claimant's employment was not terminated for cause on July 20, 2018, or June 14, 2019.

K.S.A. 44-510e(a)(2)(E)(i) states "[w]age loss caused by . . . termination for cause shall in no way be construed to be caused by the injury."

The Kansas Court of Appeals stated:

> [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 of 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.[14]

The Court of Appeals also stated:

> "Cause" . . . is a shortcoming in performance which is detrimental to the discipline or efficiency of the employer. Incompetency or inefficiency or some other cause within the control of the employee which prohibits him from properly completing his task is also included within the definition. A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory.[15]

Mr. Epperson initially testified he terminated the claimant's employment for not showing up to work or calling in on one day, Friday, July 20, 2018. This is despite Mr. Epperson knowing the claimant had an injury requiring medical attention on July 18 and telling the claimant on July 19 to take off as much time as needed, and the claimant's lack of prior attendance issues. Mr. Epperson also initially testified another reason for terminating the claimant's employment was for dropping a customer's truck off a lift, causing damage to the truck.

The next time Mr. Epperson testified was August 15, 2019. He asserted he fired the claimant for missing work and not calling in on both Thursday and Friday, July 19 and 20, 2018. Again, Mr. Epperson previously testified he spoke to the claimant on July 18, knew he was injured, and telling him on July 19 to take off as much time as needed. Mr. Epperson, unlike his initial testimony, stated firing the claimant had nothing to do with dropping a customer's truck off a lift. Also necessarily inconsistent with his own testimony at the hearing on August 15, 2019, Mr. Epperson testified he did not terminate the claimant's services for working out of a home garage and he did fire the claimant for working out of his home garage, which is obviously contradictory.

During his June 30, 2021 testimony, Mr. Epperson testified he was considering terminating the claimant's employment due to a small claims suit arising out of the claimant having dropped a customer's truck from a lift. This was new information.

Regarding the second termination of employment, the claimant testified Mr. Epperson dismissed the claimant for being like "an old girlfriend," whatever that means. Mr. Epperson testified he was forgetting the claimant like a scorned ex-wife. Mr. Epperson also testified he could not afford to pay the claimant to do non-mechanic work. Despite Mr. Epperson's denial to the contrary, the Board concludes part of the reason the claimant was

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[14] *Dirshe v. Cargill Meat Sols. Corp.*, 53 Kan. App. 2d 118, 122-23, 382 P.3d 484 (2016).

[15] *Id.* at 123 (quoting *Weir v. Anaconda Co.*, 773 F.2d 1073, 1080 (10th Cir. 1985)).

let go the second time was a business decision to not pay the claimant. This conclusion is bolstered by the claimant's testimony Mr. Epperson hired someone else to do the claimant's assigned desk work and Mr. Epperson had a wager with another employee, Christian, the claimant would quit over being reassigned to the garage. The Board concludes Mr. Epperson wanted the claimant to quit.

The claimant testified he had a verbal altercation with an Auto Now customer about two months before his second termination on June 14, 2019. This testimony is uncontroverted and is conclusively presumed to be true.[16] So, the Auto Now incident occurred around the middle of April 2019. In Mr. Epperson's testimony on August 15, 2019, this incident is not mentioned. Yet, Mr. Epperson testified twice in 2021 the reason for the claimant's second termination was the Auto Now incident.

While Mr. Epperson alleged he would have kept the claimant as an employee in an accommodated position absent perceived slander from the claimant, Mr. Epperson testified the second termination was due to the Auto Now incident. It is bizarre the Auto Now incident, which involved the respondent's biggest account, would have formed the basis for the claimant's termination two months later, especially when Mr. Epperson did not mention the incident just two months after the claimant was let go the second time. The Board rejects the respondent's position the claimant's job was terminated the second time over the Auto Now incident.

The claimant acted in good faith to retain his employment. The respondent did not act in good faith to keep the claimant employed, instead terminating his employment twice for varying reasons. Neither of the claimant's terminations of employment were for cause. Mr. Epperson's justifications for the terminations were inconsistent. The Board concludes the respondent wholly lacked cause to end the claimant's employment on either occasion. Both terminations were sudden, without warning, unjustified, irrational and unexpected. The ALJ's determination the claimant was eligible to receive work disability benefits is affirmed.

3. The Board affirms the ALJ's findings and conclusions regarding the claimant's functional impairment and work disability caused by his accidental injuries.

The Board sees no error in the ALJ's decision to adopt the 21% body as a whole functional impairment rating provided by a court-ordered physician, Dr. Carabetta. Such finding is affirmed. Further, the Board adopts and affirms the ALJ's conclusion the claimant sustained a 60% work disability.

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[16] See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146 (1976).

4. The Board affirms the ALJ's conclusion the claimant may seek future medical treatment.

The Board affirms the ALJ's conclusion the claimant is entitled to future medical benefits. Dr. Carabetta indicated the claimant has paresthesias requiring more medical exploration.

AWARD

WHEREFORE, the Board affirms the July 23, 2021, Award.

IT IS SO ORDERED.

Dated this _____ day of December, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Jonathan Voegeli
Timothy Emerson
Hon. Gary Jones
c: (via email)
Ben Epperson, Pro Se Respondent, urpdiesel@outlook.com