

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**SCOTT ABEL** )  
Claimant )  
V. ) AP-00-0460-784  
 ) CS-00-0040-369  
**GOODYEAR TIRE & RUBBER CO.** )  
Self-Insured Respondent )

**ORDER**

The claimant, through Roger Fincher, requested review of Special Administrative Law Judge (SALJ) Duncan Whittier's Award dated August 24, 2021. Lance Smith appeared for the respondent and its insurance carrier (respondent).

Due to a conflict, Board Member Rebecca Sanders recused herself and Mark Kolich was appointed as a Board Member Pro Tem. The Board heard oral argument on December 9, 2021.

**RECORD AND STIPULATIONS**

The Board considered the same record as the SALJ, consisting of the: 1. transcript of regular hearing, held on May 7, 2020; 2. transcript of preliminary hearing, held on May 14, 2019; 3. transcript of preliminary hearing, held on August 7, 2018; 4. transcript of the deposition of Joseph Mumford, M.D., taken October 19, 2020, with exhibits; 5. transcript of the deposition of Stephan Pro, M.D., taken July 22, 2020, with exhibits; 6. transcript of the deposition of John Carlisle, M.D., taken July 20, 2020, with exhibits; 7. transcript of the deposition of Daniel Zimmerman, M.D., taken July 21, 2020, with exhibits; 8. transcript of the deposition of Daniel Gurba, M.D., taken July 14, 2020, with exhibits; 9. transcript of the deposition of Scott Abel, taken June 17, 2020; and 10. the pleadings and correspondence contained in the administrative file.

**ISSUES**

1. Did the claimant's injury arise out of and in the course of his employment, including whether the accident was the prevailing factor causing his injury, need for medical treatment and resulting impairment?
2. Is the claimant entitled to 99 weeks of TTD?
3. What is the nature and extent of the claimant's disability?

4. Is the claimant entitled to payment of past medical bills?
5. Is the claimant entitled to future medical treatment?

#### FINDINGS OF FACT

The claimant, 54 years old, began working for the respondent in 1994. He worked as a squeeze truck operator in the warehouse. On March 30, 2018, the claimant felt a pop and severe pain in his right hip. He described the event as follows:

I had unplugged the battery that was connected to the truck - - the charger I meant, not the battery - - but and then plugged the battery in. And I was talking over my shoulder. And I just reached up and grabbed the cage and kicked my leg out to the side. And when I did that, it just, I had to pull myself the rest of the way in my truck with my arms.<sup>1</sup>

The claimant told the respondent he felt and heard his right hip pop when he stepped onto the squeeze truck. He denied any prior hip problems or injuries. The claimant continued to work for approximately 30 days after his accident. The respondent denied workers compensation benefits. The claimant received accident and sickness benefits until April 2019.

At his attorney's request, the claimant saw Daniel Zimmerman, M.D., who has been a board-certified independent medical examiner. Dr. Zimmerman examined the claimant on four occasions. The doctor diagnosed the claimant's right hip injury as a labral tear and/or possible avascular necrosis. He opined the work accident of March 30, 2018, was the prevailing factor in causing the claimant's injury and need for medical treatment. Dr. Zimmerman imposed work restrictions and recommended medications and injections, as well as an MRI arthrogram to determine whether the claimant had a labral tear or avascular necrosis. The doctor testified he recommended the MRI arthrogram because a labral tear does not often show up in a plain film x-ray or even a regular MRI. Dr. Zimmerman further recommended the claimant be seen by an orthopedist who specialized in treating hips.

Dr. Zimmerman concluded the prevailing factor for the claimant's right hip osteoarthritis was the labral tear. Dr. Zimmerman testified:

Q. And what anatomically happened to him, in your opinion, on the date of this accident getting into the Squeeze truck?

A. The labral tissues were disrupted.

Q. Okay. And you believe he tore those on that date?

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<sup>1</sup> P.H. Trans. (May 14, 2019) at 18.

A. I believe that the disruption is the same thing as saying that they were torn.<sup>2</sup>

Dr. Zimmerman testified a labral tear can cause the need for a total hip replacement. He further noted he considered femoral head roughening an arthritic change and testified:

Q. Okay. So, you - - in your opinion, is it probable that you would see that sort of roughening on the femoral head less than two months after climbing on a Squeeze truck?

A. In terms of what happened to him in the activity that he did, it's possible.

Q. But is it probable?

A. Who knows. I mean, if you - - you've got the possibility or the probability. I can't say with 100 percent probability that it's absolutely related, but it certainly was a finding I made. I didn't have x-rays of an earlier date regarding his hip to make a comparison.<sup>3</sup>

Dr. Zimmerman felt it would be impossible to determine if the femoral head roughening was present before the claimant's accident without earlier hip x-rays. He acknowledged it is possible the claimant had asymptomatic degeneration in his right hip prior to the accident. Dr. Zimmerman stated the physician performing the surgery would have the best indication of what was going on with the hip.

Dr. Zimmerman stated the claimant became temporarily totally disabled commencing March 30, 2018. On December 31, 2019, Dr. Zimmerman released the claimant to return to full duty effective January 1, 2020. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition (*Guides*), Dr. Zimmerman assigned the claimant a 59% impairment to the right lower extremity at the hip level. The doctor opined the claimant will require future medical treatment.

At the respondent's request, the claimant saw Stephan Pro, M.D., a board-certified orthopedic surgeon, on August 22, 2018. The doctor reviewed the claimant's MRI and agreed it showed degenerative changes in the hip, specifically cartilage damage. Dr. Pro diagnosed the claimant with right hip degenerative joint disease, right hip femoral acetabular impingement, and a right hip sprain. The only diagnosis he attributed to the claimant's accident was the hip sprain, which he concluded resolved. The doctor concluded the prevailing factor for the hip strain was the work accident, but the accident was not the prevailing factor for the degenerative joint disease or the impingement.

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<sup>2</sup> Zimmerman Depo. at 7-8.

<sup>3</sup> *Id.* at 21-22.

Dr. Pro opined the claimant's degeneration preexisted his accident and testified:

A. In my opinion his degenerative joint disease is related to bullet point No. 2 in that he does have anatomy consistent with this condition called impingement. That condition is a mismatch, if you will, between the ball and socket. That's referenced on his X-rays by the alpha angle measuring 95 degrees. That implies that there is a large prominence on the side of the ball and over time that prominence gets flexed into that socket, it can cause wear of the cartilage, it can cause wear of the labrum. That typically is a multiple year process and a phenomenon that occurs based on the development of his-- his hip itself, the bony anatomy of the hip itself. I feel that bullet point No. 2 likely led to bullet point No. 1.

Q. Now, what causes that kind of impingement? Is that caused by an accident or is it hereditary, what - - any idea?

A. That is the subject of ongoing debate. The consensus in the orthopedics world is that it is a developmental if not genetic condition. It does not occur due to trauma. If it does occur due to trauma it would have to be done - - the trauma would have to be sustained when the growth plates were still open, so for males before age 16. It does not occur due to trauma after the bones have finalized their growth.

Q. Now, you mentioned that you were not able to tell whether or not there was a labral tear in this case, right?

A. Yes. To clarify, we did not see a labral tear on the MRI, but as the radiologist pointed out, sometimes an MRI without dye can miss a labral tear.

Q. Okay. Now, how were you able to determine that the work injury here was not the prevailing factor without that information?

A. My opinion is that if he did have a labral tear it would have been due to his impingement rather than a work related condition. That was a bony anatomy that predisposed him to any possible labral tear.<sup>4</sup>

Dr. Pro believed the claimant's mechanism of injury exacerbated his pre-existing condition and opined the preexisting condition was the root cause of the claimant's pain.

Using the *Guides*, Dr. Pro assigned the claimant a 2% impairment to the right lower extremity. The doctor felt the claimant required no future medical treatment for his hip sprain.

At the respondent's request, the claimant saw Dr. John Carlisle, a board-certified orthopedic surgeon, on January 7, 2019. The doctor reviewed the claimant's MRI scan

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<sup>4</sup> Pro Depo. at 23-25.

and took x-rays, which showed CAM impingement, where the ball and socket of the hip are not perfectly round and there can be a bony prominence, which usually starts during childhood. He diagnosed the claimant with preexisting hip osteoarthritis and stated the osteoarthritis would not have developed between the time of the accident and the MRI of July 27, 2018.

Dr. Carlisle opined the claimant's CAM impingement was likely genetic and the claimant's "clinical complaints stem from preexisting degenerative joint disease of his hip. The workplace injury was felt to be a triggering factor in his pain. It . . . was not felt to be the prevailing source of his degenerative joint disease."<sup>5</sup> When asked how he determined the preexisting degenerative joint disease was the prevailing factor, Dr. Carlisle testified:

A. Because the MRI scan that was obtained shortly after the injury revealed existing osteoarthritic change, and osteoarthritis is not a problem that develops over a period of four months or three and a half months. I'm not sure what the math on that would be from the time of the - - the described onset of symptoms to the MRI on 7/27/18. I would estimate that's probably somewhere between three and four months. Three and a half, four months.

Q. So given that length of time it's - - it's more likely than not - - in fact, it's probable that he had the degeneration in the hip preceding the workplace injury?

A. Correct.

Q. And that was the cause of his current condition when you saw him?

A. Correct.<sup>6</sup>

Dr. Carlisle assigned no impairment and opined the claimant did not require permanent restrictions nor future medical treatment as a result of his work accident.

On his own, the claimant began treating with Joseph Mumford, M.D., a board-certified orthopedic surgeon, in January 2019. The doctor diagnosed the claimant with moderate osteoarthritis of his right hip and preexisting femoral acetabular impingement, which may have dated back to the claimant's adolescence. He recommended hip replacement surgery, which was performed on May 28, 2019. Dr. Mumford testified:

Q. . . . Can you give your opinion as to the prevailing factor of the cause for his medical treatment for which you gave him, and his ultimate surgery and disability? And I think I wrote a letter to you where I asked you - - I explained to you what the law said about prevailing factor, and some other things. Can

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<sup>5</sup> Carlisle Depo. at 14.

<sup>6</sup> *Id.* at 24.

you tell us what your opinion is in that regard as far as the primary factor or the leading factor for causing his need for a hip replacement?

- A. Yeah. 'Um, Scott has what we term femoral acetabular impingement. It refers to a lesion, in this case in his ball, that impinges on the socket. We think that this can date back to adolescent years as the hip was developing. And radiographically he does have a small lesion that predisposed this hip to wearing out. And I suspect that something occurred at work that aggravated that. It did not create the impingement lesion, but something happened that set off the symptoms.
- Q. Okay.
- A. Could have been a multitude of things. He may have tore a labrum. He may have sheared off some cartilage, but something happened at that time with this hip to create his symptoms.
- Q. Do you think that it would be your opinion that more likely than not something anatomically happened in that hip joint on March 30th, 2018, to cause the symptoms for which you operated?
- A. Well, I think anatomically the lesion that was predating symptom onset was - goes back to adolescent years in growth, and I think that he acutely flared this up. It's just hypothetical. He could have tore a labrum or sheared off some cartilage, so there could have been a structural reason. I know he had an MRI after that which did not show those lesions, but it was - - there's no contrast used and a noncontrast MRI would miss those lesions.
- Q. Okay. And if you had to bet one way or another, do you believe it's more likely than not that he had some sort of lesion occur rather than not?
- A. Well, it would be a guess. I mean, clearly something happened to put him in enough pain that he sought medical treatment, and I suspect it sure could have been structural.
- Q. So something likely anatomical happened, you just don't know exactly what - what happened?
- A. I think it's hypothetical, but there are some things that could have happened, sure.
- Q. Do you believe if he wouldn't have had this work-related situation that he would have likely gone down the same path at the same time, like gotten a hip replacement in May - - May 28th, 2019?
- A. Yeah. I think the natural history of untreated femoral acetabular impingement is progression in arthritis. It's fairly slow.

Q. Do you believe the timing of him having this accident in March of - - March 30th, 2018, is what led to him needing that hip replacement in 2019, or if he wouldn't have had this accident at all that he still would have required a hip replacement that soon?

A. I don't know if I can answer that.

Q. Okay. That would be speculation?

A. Yeah.

...

Q. . . . Doctor, there was a little bit of a - - I guess claimant's attorney asked a bit about structural changes that would have occurred during the injury at work. Now, you used the word "hypothetical," but can you be certain, even to a reasonable degree of medical certainty, that there was a structural change caused to the hip by the work injury?

A. Again, I think that's speculative. There's no imaging to confirm that. He did have an MRI, but it was read, as I recall, normal with respect to the labrum. Maybe some early arthritis. And - - however, it was a noncontrast MRI, which is not as sensitive in picking up those sort of subtle lesions.<sup>7</sup>

Dr. Mumford testified he does not routinely note labral tears when performing hip replacement surgery. He did not perform surgery for a labral tear or lesion. He did not recall seeing any tearing, but saw chondromalacia, which predated the work injury.

On September 5, 2019, the claimant saw Daniel Gurba, M.D., a board-certified orthopedic surgeon, for a court-ordered independent medical examination. The doctor stated the claimant's work injury caused an aggravation of pain in his right hip, which had preexisting arthritis. Dr. Gurba testified chondromalacia is a chronic condition, not a one-time injury. The doctor testified:

The prevailing factor, as I said, is the patient's persistent right hip pain, and ultimately need for total hip arthroplasty was the preexisting arthritis. For all the reasons I tried to explain, because of the findings at surgery, that would have been completely different if he truly had had this chondral sheering injury that was sort of suggested in a discussion with the patient but not supported by what was described at surgery.

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<sup>7</sup> Mumford Depo. at 6-9, 12.

A. Well, I think I explained that earlier. It's many people with developing arthritis have it far worse than him objectively. When I say objectively, by x-ray findings, MRI findings, or if one actually sees the joint itself either arthroscopically or at hip replacement, many people have those changes going for years and virtually have no symptoms, I -- I see that in my practice all the time, and then at some point it becomes symptomatic.

So can it be symptomatic with even a very simple injury or literally they woke up with it that morning, and the answer to that is absolutely. I see that in my practice a lot. So it doesn't mean the objective findings of arthritis weren't there. And in this case would this injury have been his triggering event for subjective symptoms, I don't doubt that at all, and I think that's what I stated.

Q. What anatomically happened to him in this accident to cause his symptoms to occur immediately after he stepped into that stirrup?

A. It would have to be just more inflammation in the hip. So if you started with a perfectly normal cartilage surface in both the acetabular and the femoral side, in my opinion and I believe Doctor Carlisle's, that if you start with an absolutely normal joint with that same exact mechanism of injury would I expect the same thing to happen, and I would not.

If you start with an abnormal joint with that same mechanism of injury is that more likely for that to initiate symptoms, I think the answer to that is yes.

Q. Did he suffer some sort of sprain or strain to a ligament or a muscle to aggravate that --

A. No. I think it was just the cartilage surface. And first of all, I saw the word hip strain used by someone that examined him and that's an incorrect term.

A. strain -- strain means a muscle injury, and there is no muscle around the hip in that area. A sprain would be a ligamentous injury. In this case there's really no ligament, there's capsular tissue, so an injury to that.

Now, could that have also been part of the problem? Maybe. There's no real way to diagnose that other than I think certainly strain is an incorrect term given the anatomy around the hip joint, but that same force applied to an abnormal cartilage surface. So when you say, you know, grade 1, grade 2, chondromalacia, as I said, instead of that perfectly smooth white cartilage surface, very slick, it's kind of rough. And if you just shed little bitty bits of that cartilage it sets up an inflammatory response of the hip.<sup>8</sup>

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<sup>8</sup> Gurba Depo. at 21, 23-25 (the record is unclear why two answers are listed for one question).



The claimant returned to work for the respondent on May 26, 2020. He continues to work for respondent in a different position. He continues to have hip pain and takes ibuprofen daily.

On pages 8-9 of the Award, the SALJ stated:

There is no dispute but that Claimant suffered an accident at work on March 30, 2018, while performing his regular job duties and that his right hip immediately became symptomatic. The primary dispute is whether that accident was the prevailing factor causing his right hip injury and resulting need for medical treatment, including the right hip replacement surgery. Multiple physicians have provided expert medical opinions on this issue. Dr. Zimmerman was the first of the testifying physicians to have examined Claimant. He diagnosed the right hip injury as a labral tear and/or avascular necrosis. Either way he opined that the accident was the prevailing factor for the injury. However, he also recommended an MRI arthrogram be performed in order to confirm the diagnosis. That was never done. Dr. Zimmerman, who is not an orthopedic surgeon, also recommended that Claimant be seen by an orthopedic surgeon who specialized in treating hips. That was done four times over, with Claimant being examined by Drs. Pro, Mumford, Carlisle, and Gurba. All four of these physicians are well qualified orthopedic surgeons with specialties including treatment of hips. None of these four physicians agreed with Dr. Zimmerman's possible diagnosis of avascular necrosis. Moreover, none of the four testifying orthopedic surgeons agreed with Dr. Zimmerman's diagnosis of an acute traumatic labral tear. All four agreed that Claimant instead suffered from preexisting conditions, including degenerative osteoarthritis. And although the work accident caused the preexisting condition to become symptomatic, it was not the prevailing factor for the need for subsequent medical treatment and the hip replacement surgery. One physician, Dr. Pro, thought that Claimant had also suffered a strain or sprain type of injury for which the work accident was the prevailing factor but that it had resolved or reached MMI within a matter of a few weeks. Nevertheless, Dr. Pro provided a permanent impairment rating for that sprain or strain. None of the other physicians agreed with Dr. Pro in this regard. However, Dr. Pro was clear that he did not consider the work accident to be the prevailing factor for Claimant's degenerative joint disease, osteoarthritis, chondromalacia, cartilage damage, or impingement conditions. All of the other orthopedists agreed that it was these conditions for which Claimant required his subsequent medical treatment, including the hip replacement surgery.

Based upon the record as a whole, the greater weight of the credible medical evidence supports the conclusion that the prevailing factor for Claimant's injury and need for medical treatment was his preexisting osteoarthritis and impingement conditions. Claimant did not meet his burden of proving that his work accident on March 30, 2018, was the prevailing factor causing his injury and need for medical treatment. Accordingly, workers compensation benefits must be denied.

The claimant argues his injury arose out of and in the course of his employment and the work accident was the prevailing factor. The claimant asserts any preexisting

osteoarthritis was asymptomatic, and the movement of getting in the truck did not simply render the preexisting osteoarthritis symptomatic, but caused a structural change. The respondent maintains the Award should be affirmed.

### PRINCIPLES OF LAW AND ANALYSIS

Claimant carries the burden of proving his right to an award of compensation based on the whole record using a “preponderance of the credible evidence” and a “more probably true than not true” standard.<sup>9</sup> The respondent and insurance carrier must prove any affirmative defenses.<sup>10</sup>

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

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

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<sup>9</sup> K.S.A. 44-501b(c) and K.S.A. 44-508(h).

<sup>10</sup> See *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015) (employer's duty to prove personal or neutral risk); see also *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001) (employer's duty to prove preexisting impairment); *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004) (employer's duty to prove intoxication defense).

(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.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

**The claimant's accident was not the prevailing factor in causing his hip condition, the need for the hip replacement, and resulting impairment or disability. As such, he did not prove his accident arose out of his employment. The claimant's accident rendered his preexisting hip arthritis symptomatic, which is not compensable under K.S.A. 44-508(f)(2). At most, the claimant sustained a hip strain, which resolved without permanent impairment.**

For the claimant's injury by accident to be compensable, he must have sustained something more than "solely" an aggravation, acceleration or exacerbation of a preexisting condition or the rendering symptomatic of an asymptomatic preexisting condition. The work accident must be the prevailing factor causing his injury, medical condition, impairment or disability. Whether prevailing factor is proven is based on all of the evidence and is not solely dependent on medical opinions.<sup>11</sup> Proof of the prevailing factor requirement depends on the specific evidence in each case.<sup>12</sup> The mere presence of a preexisting or degenerative condition does not always preclude compensability.<sup>13</sup>

The SALJ's decision is affirmed. The SALJ correctly noted four orthopedic physicians specializing in treating hips found the claimant had an aggravation or triggering of hip pain, but attributed the claimant's hip injury, medical condition and need for medical treatment to his preexisting degenerative hip condition. Only Dr. Zimmerman opined the work accident was the prevailing factor for the claimant's injury, medical condition and any resulting disability or impairment. The four orthopedic physicians found the prevailing

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<sup>11</sup> See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, at \*5 (Kan. WCAB July 12, 2018).

<sup>12</sup> See *Estrada v. City of Hutchinson*, No. CS-00-0176-146, CS-00-0233-099, CS-00-0317-559, 2019 WL 1118461, at \*6 (Kan. WCAB Feb. 28, 2019).

<sup>13</sup> See *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571, *rev. denied* 301 Kan. 1046 (2015); *Pierson v. City of Topeka*, No. 113,247, 2016 WL 687726 (Kansas Court of Appeals unpublished opinion filed Feb. 19, 2016).

factor to be the claimant’s preexisting and degenerative hip condition. The overwhelming preponderance of the evidence establishes the claimant did not prove his work accident was the prevailing factor in his injury, medical condition and any disability or impairment.

The Board concludes: (1) the claimant’s underlying and preexisting degenerative hip injury or condition was solely rendered symptomatic by the event on March 30, 2018, which is not compensable under K.S.A. 44-508(f)(2); and (2) the prevailing factor in the claimant’s injury, medical condition and impairment or disability is his preexisting hip arthritis. The remaining issues are moot.

K.S.A. 44-508(f)(2) does not permit compensation for the rendering symptomatic of a previously asymptomatic condition, such as the claimant’s preexisting and degenerative hip condition. Additionally, the claimant did not prove the prevailing factor requirement. As such, his injury by accident did not arise out of his employment.

**AWARD**

**WHEREFORE**, the Board affirms the Award dated August 24, 2021.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2022.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (via OSCAR)  
Roger Fincher  
Lance Smith  
SALJ Duncan Whittier