

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROMONE ST. CLAIR, III)	
Claimant)	
v.)	
)	AP-00-0461-398
PROVIDENCE MEDICAL CENTER d/b/a)	CS-00-0097-560
Respondent)	
and)	
)	
SAFETY NATIONAL CASUALTY CORP.)	
Insurance Carrier)	

ORDER

Respondent requested review of the September 21, 2021, Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample. William G. Manson appeared for Claimant. Brian J. Fowler appeared for Respondent and its Insurance Carrier. Due to a conflict, Board Member William G. Belden, recused himself from this appeal. Mark Kolich was appointed as a Board Member Pro Tem. The Board heard oral argument on January 13, 2022.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ. The Board reviewed the parties' briefs and documents of record filed with the Division.

ISSUES

1. What is the nature and extent of Claimant's disability? Specifically, is Claimant entitled to compensation for work disability or permanent total disability?
2. Is Claimant entitled to additional temporary total disability (TTD) benefits?
3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant was employed by Respondent in January 2016, as a lead floor technician. As a floor tech, Claimant stripped, waxed and buffed floors. Claimant was often required to lift furniture weighing in excess of 50 pounds. On October 4, 2017, Claimant and another worker were moving wall lockers when the cart they were using moved, causing the lockers to fall. In trying to stop the cart and the lockers from falling, Claimant lost his balance and fell to his right.

Claimant reported his injury to his supervisor. Respondent referred Claimant to US HealthWorks for evaluation for his back and left leg pain. US Healthworks recommended pain management, physical therapy, took Claimant off work and scheduled a follow-up appointment. X-rays were performed on October 12, 2017, but no additional treatment was authorized or provided by Respondent. Claimant was released by US HealthWorks without restrictions on October 17, 2017.

A few days after his injury and first appointment at US HealthWorks, Claimant sought treatment from the V.A. Medical Center (VA) because he was dissatisfied with his treatment. The VA performed an MRI on October 16, 2017, revealing disc bulges at L4-5 and L5-S1. Pain medication and physical therapy was prescribed. Claimant was unable to take pain medication because he did not have food to take with the medication as prescribed. Claimant attended three therapy sessions, but discontinued them due to increased muscle spasms while performing the exercises. Epidural injections were provided, but failed to provide relief. The VA provided Claimant with a back brace, walker, canes and a TENS unit.

As a result of a preliminary hearing on January 3, 2018, Claimant was referred to Harold Hess, M.D., a board certified neurosurgeon, for a Court-ordered evaluation. Dr. Hess evaluated Claimant on March 16, 2018. Dr. Hess opined the October 16 MRI revealed a broad L4-5 disc bulge and a larger right L5-S1 disc bulge with a probable right L5-S1 annular tear. In his opinion, the work-related injury of October 4, 2017, was the prevailing factor causing the current medical condition and need for medical treatment. Dr. Hess recommended conservative treatment in the form of physical therapy and lumbar epidurals. If Claimant's pain failed to improve, then additional diagnostic testing should be performed (myelogram, discogram and CT scan at L3-L4, L4-L5, and L5-S1) to determine if Claimant could be a surgical candidate for a lumbar fusion or spinal cord stimulator trial. Dr. Hess restricted Claimant to sedentary work. The conservative treatment recommended by Dr. Hess was provided, but did not provide Claimant any relief.

Respondent referred Claimant to Alexander Bailey, M.D., a board certified orthopedic surgeon, on November 19, 2018 for treatment. Although Dr. Bailey was designated as the authorized treating physician, he saw Claimant on only one occasion. Based on the physical examination performed, Dr. Bailey opined Claimant's subjective responses suggested the subjective findings far exceeded the objective abnormalities

noted in the studies performed; Claimant's low back pain was radiculitis rather than true radiculopathy; and there was no leg atrophy. His review of the x-rays revealed no instability or fractures, and showed normal segmentation. He found no evidence of "significant" disc herniation or neurologic impingement. Dr. Bailey opined Claimant was not a surgical candidate, placed temporary restrictions on his activities (limit lifting to 20 pounds or less) and ordered an MRI.

Upon review of the MRI, Dr. Bailey issued a report on January 21, 2019. He opined Claimant was at MMI and had 0% impairment of function using the 4th or the 6th Edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (Guides)*. Dr. Bailey performed a records review on July 12, 2021. Included in the review was a more recent MRI. Review of the updated medical records did not reveal any significant changes in Claimant's condition. Dr. Bailey's opinions were not changed. He opined further medical treatment would cause more harm than benefit.

Mark Bernhardt, M.D., an orthopedic surgeon, performed a Court-ordered independent medical evaluation on December 20, 2019. Dr. Bernhardt diagnosed chronic low-back pain, lumbosacral radiculitis (left leg), and degenerative lumbosacral disc disease. Dr. Bernhardt opined additional treatment would not benefit Claimant. He noted Claimant was not a surgical candidate because fusions are not helpful in relieving mechanical back pain or radiculitis. Dr. Bernhardt opined Claimant was at MMI and assigned permanent work restrictions at the sedentary work level, stating "He is capable of desk work. He needs to be accommodated with the ability for frequent changes of position, avoidance of any lifting, bending, twisting activities, and walking significant distances."¹ Dr. Bernhardt opined Claimant sustained a 3% whole person impairment under the *Guides* 6th Edition and a 7.5% whole person impairment under the *Guides* 4th Edition. Unfortunately, Dr. Bernhardt passed away on April 30, 2020.

At Claimant counsel's request, Steven G. Charapata, M.D., evaluated Claimant on May 26, 2020, and May 11, 2021. Dr. Charapata diagnosed Claimant with lumbar radiculopathy due to left disc bulging at L5-S1 and mild compression of the S1 nerve; a bulging disc at L4-L5; chronic intractable low back pain; chronic muscle spasm of the lumbar and thoracic paraspinous muscles; decreased strength, sensation, and range of motion of the left leg; decreased range of motion of the lumbar spine; and a grade 5 annular tear at L5-S1, a grade 1 annular tear at L4-L5, both of which were verified by discogram on October 9, 2018. Dr. Charapata opined Claimant's work injury on October 4, 2017, was the prevailing factor for his medical condition, need for treatment, and resulting impairment. Dr. Charapata imposed permanent restrictions at the sedentary work level, with the ability to change positions frequently to relieve pain, Dr. Charapata opined Claimant would not have been able to work in the open labor market between October 5, 2017 and January 21, 2019.

¹ Bernhardt Court Ordered Examination Report at 5 (filed Jan. 17, 2020)

Dr. Charapata opined Claimant has a 19% permanent partial impairment to the body as a whole using the *Guides* 6th Edition. He opined this rating did not accurately account for Claimant's loss of function, quality of life, continuous back spasm, and difficulty walking. Dr. Charapata adjusted Claimant's impairment rating to a 27.5% whole person impairment. Dr. Charapata reviewed Mr. Cordray's task loss report, and opined Claimant could not perform ten of thirteen tasks, resulting in a 77% task loss. After reviewing Mr. Cordray's task loss report, Claimant's history of manual labor, and sedentary restrictions, Dr. Charapata opined Claimant was not capable of working in the open labor market in any capacity and was permanently and totally disabled.

Terry L. Cordray evaluated Claimant at his attorney's request. He prepared a report setting forth Claimant's five year work history. Mr. Cordray identified thirteen tasks Claimant performed in the past five years. He opined Claimant has a 100% wage loss based upon Dr. Charapata's restrictions and is essentially and realistically unemployable. Mr. Cordray based his opinion on Claimant's age (57), his use of a cane to ambulate, stale education background, recent work history at the medium to heavy demand level, no meaningful computer skills, and no transferable skills.

Since his injury, Claimant's ability to sleep has been limited. He is unable to sleep in his bed and sleeps in a recliner. Claimant describes himself as homebound. He relies on others to drive him. Claimant has not been able to travel outside of town. He is unable to participate in leisure activities and hobbies since the accident. Claimant testified he is not physically able to do his job for Respondent. Claimant has not worked since the accident, nor has he looked for work. Claimant continues to experience pain in his back and left leg. He has uses a cane to assist in ambulating and a TENS unit for pain. Walking causes increased pain.

The ALJ found Claimant's October 4, 2017, accident was the prevailing factor for his injury, medical condition, and resulting disability or impairment; Claimant is permanently and totally disabled; Claimant is entitled to future medical benefits; and, Claimant was entitled to TTD from the date of accident until January 21, 2019, (date of MMI), less any amounts previously paid and giving credit for the eight days paid after Claimant reached MMI.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant is permanently totally disabled.

Respondent argues the ALJ erred in finding Claimant is permanently totally disabled and should be limited to a functional impairment of 3% based upon the opinion of Dr. Bernhardt. In support of their argument, respondent argues the ALJ should have relied solely on the opinions of Dr. Bernhardt as he was chosen by the Court to perform an

evaluation. While it is true the Board has deferred to Court-ordered or treating physician's opinions in the past, it is not required. To blindly follow a Court-ordered or treating physician's opinions would breach the obligation as the trier of fact to "determine which testimony is more accurate and credible."²

Dr. Bernhardt did not provide an opinion regarding whether Claimant was permanently and totally disabled. His impairment of function rating was provided before the Supreme Court's decision in *Johnson v. U.S. Food Service*.³ In *Johnson*, the Court clarified how an impairment rating for an injured worker is to be calculated. Use of the *Guides*, 6th Edition is simply the starting point. Medical experts must then consider other available relevant, competent medical evidence to arrive at an accurate, comprehensive impairment rating. Dr. Bernhardt's rating was based strictly on the *Guides*, 6th Edition. Unfortunately, Dr. Bernhardt died before he was afforded the opportunity to consider other relevant, competent medical evidence to arrive at an impairment rating.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.⁴ Concluding an employee is permanently and totally disabled because the employee is essentially and realistically unemployable is consistent with legislative intent.⁵ In *Wardlow*, the Court of Appeals affirmed a finding of permanent total disability by the trial court based on a totality of the evidence, including consideration of the nature of the injuries, the testifying physicians' opinions on the employees ability to work, the activities the employee can perform, the employee's age, education, vocational history and current symptoms. *Wardlow* continues to be cited by the Court of Appeals.⁶

The greater weight of the evidence supports the ALJ's conclusion Claimant is permanently and totally disabled. Dr. Bernhardt was the court-ordered evaluator, but did not provide an opinion regarding whether Claimant was permanently and totally disabled. Dr. Charapata believed Claimant was unemployable. Dr. Bailey did not believe Claimant suffered any impairment or required any permanent restrictions. His opinions stand alone. Dr. Bernhardt and Dr. Charapata both opined Claimant was limited to sedentary work. Dr.

² See *Burns v. Stafford County Flour Mills Co.*, No. 1,072,562, 2017 WL 4106376 (Kan. WCAB, Aug. 25, 2017).

³ See *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

⁴ See *K.S.A. 44-510c(a)(2)*.

⁵ See *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113, 872 P.2d 299 (1993).

⁶ See *Stark v. Atwood Good Samaritan Center*, No. 113,075, 2016 WL 4076203, at *7 (Kansas Court of Appeals unpublished opinion July 29, 2016).

Charapata's medical opinion on Claimant's ability to work, supported by the permanent restrictions imposed by Dr. Bernhardt, is the most credible.

Mr. Cordray provided the only vocational evidence. He testified, Claimant was realistically unemployable based on Dr. Charapata's restrictions. Moreover, Claimant's age (57), his use of a cane to ambulate, stale education background, recent work history at the medium to heavy physical demand level, no meaningful computer skills and no transferable skills, all are limiting factors in Claimant returning to substantial and gainful employment.

Claimant's low back and left leg remain symptomatic. Based upon a totality of the evidence, and consideration of the expert testimony of Dr. Charapata and the vocational opinions of Mr. Cordray, Claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, the award of permanent and total disability compensation is affirmed.

2. Claimant entitled to additional temporary total disability (TTD) benefits.

K.S.A. 44-510c(b)(2)(A), states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.

In the Award the ALJ stated:

In this instance, Claimant was released to return to work with no restrictions just weeks after his accident, with very little treatment. He was later given restrictions by Dr. Hess and then Dr. Bailey (both treating physicians designated by Respondent) from the first visit with each of those physicians. Dr. Bailey would later provide a subsequent report but that report was silent on the issue of restrictions. It wasn't until January 21, 2019 before Dr. Bailey removed those restrictions. That evidence, coupled with the opinion expressed by Dr. Charapata as to Claimant's ability to work from the date of his accident until January 21, 2019, persuades the Court that Claimant is entitled to the TTD benefits for that period, less any sums previously paid by Respondent, and with appropriate credit given for the 8 days (\$455.86) that were paid in January of 2019,

after he was found to be at MMI. The findings from U.S. HealthWorks failed to take into account Claimant's condition and the extent of his complaints. This period of TTD is 67-5/7 weeks, 8 weeks of that is paid at \$354.56 per week (\$2,836.48) and the balance at \$355 per week (\$21,193.50).⁷

Respondent argues the treatment received by Claimant through Healthworks, where he was found to be at MMI and released without restriction on October 17, 2017, is determinative regarding the issue of additional TTD. This argument is considered and rejected. Claimant received very little, if any treatment through Healthworks and no authorized treatment until Dr. Hess' evaluation on March 16, 2018. Upon evaluation, Dr. Hess placed sedentary restrictions on Claimant. Some form of restrictions remained in place until all restrictions were removed by Dr. Bailey on January 21, 2019, when he found Claimant to be at MMI and released him without restrictions. The ALJ's Award of additional TTD is well-reasoned and should be affirmed.

3. Claimant is entitled to future medical treatment.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or relieve the effects of the injury.⁸ It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment means treatment provided or prescribed by a licensed healthcare provider and not home exercises or over the counter medications."⁹

The ALJ awarded future medical benefits based upon the opinions of Dr. Charapata, who opined Claimant would benefit from pain management treatment modalities including a spine stimulator. Dr. Charapata's opinions are the most credible of the testifying physicians because he had a more accurate understanding of the extent of Claimant's injuries.

Claimant provided sufficient medical evidence showing it is more probably true additional medical treatment will be necessary after maximum medical improvement satisfying the prerequisite for awarding future medical treatment under K.S.A. 44-510h(e). The Award of future medical treatment is affirmed.

⁷ ALJ Award (Sep. 21, 2021) at 10.

⁸ See K.S.A. 44-510h(a).

⁹ See K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Julie A.N. Sample, dated September 21, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

William G. Manson, Attorney for Claimant

Brian J. Fowler, Attorney for Respondent and its Insurance Carrier

Hon. Julie A.N. Sample, Administrative Law Judge