BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES YOUNG	)	
Claimant	)	
V.	)	
	)	
SOUTHWEST PUBLISHING & MAILING	)	AP-00-0478-977
Respondent	)	CS-00-0459-288
AND	)	
	)	
ZENITH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier (respondent), through Bruce Levine, requested review of Special Administrative Law Judge (SALJ) Mark Kolich's Award, dated September 25, 2023. Roger Fincher appeared for the claimant. The Board heard oral argument on February 8, 2024.

RECORD AND STIPULATIONS

The Board considered the same record as the SALJ, consisting of the: (1) regular hearing transcript, held May 12, 2023; (2) regular hearing by evidentiary deposition of the claimant, taken May 31, 2023; (3) evidentiary deposition of Daniel Zimmerman, M.D., taken June 5, 2023; (4) evidentiary deposition of Robert Bruce, M.D., taken July 20, 2023; (5) all exhibits attached to items 2-4; (6) documents of record filed with the Division; and (7) parties' briefs.

ISSUES

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

2. Is the claimant entitled to future medical treatment?

3. What is the claimant's average weekly wage?

4. Is the claimant entitled to an underpayment of temporary total disability (TTD) benefits?

FINDINGS OF FACT

The claimant, 40 years old, has worked for the respondent for over four years as an inserter. He operates a flow machine, which is a high-speed machine processing publications for mail. On May 18, 2021, the claimant tripped and fell, landing on his left knee. The respondent accepted compensability of the claim.

Robert Bruce, M.D., an orthopedic surgeon who is fellowship trained in sports medicine, began treating the claimant on August 9, 2021. Dr. Bruce reviewed MRI images, took a history and performed a physical examination. The doctor diagnosed the claimant with a complex tear of the medial meniscus and performed a partial medial meniscectomy on August 25, 2021. The claimant was released to sedentary work in September 2021, but continued to experience problems. A second MRI in November 2021 showed a recurrent medial meniscus tear. Dr. Bruce performed a second surgery on January 24, 2022. The doctor's post-operative diagnosis was recurrent medial meniscus tear with chondromalacia of the patella. On May 24, 2022, the claimant was released to full duty. Dr. Bruce opined the claimant will not require future medical treatment.

Using Table 16-3, on page 509, of the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*, 6th ed.), Dr. Bruce assigned the claimant 5% impairment to the left lower extremity. The doctor did not use any grade modifier tables. In explaining how he arrived at his impairment, Dr. Bruce testified:

> Q. As I understood the question, you were asked if you used anything other than the 6th Edition of the AMA Guides to come up with the rating, and I took that to mean other texts or treatises; is that how you understood the question?
>
> A. Yes.
>
> Q. And your answer was you did not?
>
> A. That's correct.
>
> Q. Did you utilize your 39-year experience as an orthopedic surgeon in arriving at the rating?
>
> A Yes.
>
> Q. And your experience treating hundreds of individuals with the same injury that Mr. Young presented with?
>
> A. Correct.
>
> Q. And your best medical judgment?

A. Yes.[1]

Dr. Bruce testified his opinions were provided within a reasonable degree of medical certainty.

At his attorney's request, the claimant saw Daniel Zimmerman, M.D., a certified independent medical examiner, on September 12, 2022. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Zimmerman diagnosed the claimant with a left knee complex tear involving the body and posterior horn of the medial meniscus.

Using Table 16-3, Page 509, of the *Guides*, 6th ed., Dr. Zimmerman assigned the claimant 3% to the left lower extremity and 20% under the AMA *Guides to the Evaluation of Permanent Impairment,* 4th Edition. In explaining how he arrived at the claimant's impairment, Dr. Zimmerman testified:

> Q. Can you tell us what your rating was according to the Sixth Edition and then utilize the standards set forth in the Johnson case to determine if there was any other ratings appropriate using competent medical evidence and reasonable medical probability?
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> A. The Johnson decision was 3 percent of the -- correction. The Sixth Edition AMA Guides rating was 3 percent of the left lower extremity at the knee level from Table 16-3, Page 509 from Class I, for a meniscal injury using the Grade Modifier Tables, Tables 16-6, 16-7, and 16-8, and the Net Adjustment Formula.
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> Considering the Johnson decision, based on range of motion limitations at the knee level as measured and discussed in my report the impairment rating using the Fourth Edition in this case AMA Guides was 20 percent of the affected lower extremity at the knee level.[2]

Dr. Zimmerman further testified:

> Q. From your opinion, based upon your understanding of the term impairment, do you think the Sixth Edition is sufficient in determining his permanent impairment?
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> A. No.

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[1] Bruce Depo. at 33.

[2] Zimmerman Depo. at 6-7.

Q. Do you think the method you utilized consistent with the Johnson decision is more appropriate?

A. Yes.[3]

Dr. Zimmerman opined the claimant will require future medical treatment, including non-steroidal anti-inflammatory medications, physician follow-ups, injections and possible referral to an orthopedist for viscosupplementation. Dr. Zimmerman testified all of his opinions were given based upon reasonable medical probability.

The claimant testified he worked around 11 hours a day at the time of his accident, earning $12.50 an hour as a base rate, with a normal work week being three to four days.[4] He also received a piece rate for anything made over the base rate. He testified there were days he could make $200 or $300 under the piece rate. He was off work for about a month in January 2021 for a non-work related condition.

The claimant testified his wage statement was accurate. It contained the following pay periods, among others, which are not explained based on his hourly rate: the pay period ending April 24, 2021, shows 50.23 hours worked and $232.87 as the amount earned; the pay period ending December 19. 2020 shows the claimant worked 1.06 hours, yet made $188.25; the pay period ending January 16, 2021, shows the claimant working one-half hour, and earning $26.87; and the pay period ending March 13, 2021, shows the claimant working 13.45 hours, and earning $268.13.

The claimant continues to work for the respondent in a light duty position. He indicated the respondent moved him to light duty to reduce the risk of him being reinjured. While his symptoms have improved since the second surgery, the claimant still has days when he leaves work early because of the pain. He testified he continues to have fluid build-up, swelling and pain on the inside of his knee, he cannot squat, he has strength and range of motion deficits, he needs to lay down, and he is unable to fully extend and flex his knee. He takes Tylenol as needed.

The SALJ stated:

> The wage information provided by respondent is insufficient to allow an accurate calculation of claimant's wage regardless of how the term "calendar week" is interpreted. Earnings are reported for two-week periods without specifying how much was earned for each of the two weeks. As an example, it is reported claimant worked only 13.45 hours during the two week pay period ending March 13, 2021, but it is unknown whether those few hours were worked during a single week or

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[3] *Id*. at 9.

[4] R.H. by Depo. Trans. at 14.

spread out over both weeks. Accordingly, it would be speculative to conclude claimant "actually worked" two calendar weeks, whether full or partial in character.

Additionally, the amount of pay during some of the pay periods appears inaccurate. The pay period ending April 24, 2021 shows 50.23 hours worked and $232.87 as the amount earned. Since the wage record indicates an hourly rate of $12.50 the pay for this period should be at least $627.88.

Since both parties have submitted the claim for decision it is probably not appropriate to reopen the record for the purpose of obtaining useful wage information. Instead, an attempt will be made to compute a wage based upon the available data.

No work was performed during period number 8 and the number of hours worked during periods 9 (.05) and 11 (1.06) cannot possibly be considered calendar weeks actually worked. This reduces the divisor by 6 weeks. Also, all pay periods consisting of less than 30 hours will be viewed as a single calendar week. This includes pay periods number 4, 5, 10 and 12 thereby reducing the divisor by another 4 weeks. Therefore, 16 will be divisor for the purpose of calculating the wage. Dividing the total wages earned of $4,733.81 by 16 produces an average weekly wage of $295.86.

Knowing the number of days worked during each of the pre-injury calendar weeks is essential for a precise wage calculation. This allows a determination to be made of whether full or partial calendar weeks were actually worked. Most likely this information would result in a finding of an average weekly wage much greater than $295.86.

Information should also be provided regarding wages earned up to the date of accident. Respondent's wage record stops on May 8, 2021, ten days shy of the accident date.

. . .

Dr. Bruce's December 19, 2022 report contains his rating of 5%, but there is no mention of the 6th Edition. He did, however, testify he based his rating upon the 6th Edition, specifically table 16-3 on page 509. Given his adherence to the 6th Edition, Dr. Bruce's rating will be viewed as a "starting point."

Dr. Zimmerman also used table 16-3 and arrived at a 6th Edition rating of 3%. However, he felt 20% was more representative of claimant's true impairment. He explained on page 5 of his report, "The 20% impairment rating of the left lower extremity at the knee level is more equitable in that it permits more detailed consideration of the impact of the range of motion limitations, pain and discomfort on Mr. Young's ability to perform activities of daily living and work related tasks."

> Giving weight to the ratings of both medical experts it is found claimant has a 12.5% permanent impairment of his left leg as a result of his work injury.
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> . . .
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> Dr. Bruce predicted claimant will not need medical care in the future for his injury. However, slightly more than a year after being released by Dr. Bruce, claimant testified he continues to experience significant problems with his injured knee and no basis exists to doubt his veracity. Therefore, it is determined the need for additional care is likely. Dr. Zimmerman's suggestions for future care are reasonable and supportive of an award for the same.

PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the claimant sustained 4% impairment of the left lower extremity based on a split of the ratings assigned under the *Guides*, 6th ed., and has an average weekly wage of $213.95. The respondent contends the claimant is not entitled to future medical treatment based on the treating physician's opinion. The claimant maintains the Award should be affirmed on the issues of permanent impairment and future medical benefits, but be remanded on the issue of average weekly wage. However, at oral argument, the claimant maintained Dr. Zimmerman's 20% rating is more consistent with the facts and the law, as opposed to the rating from Dr. Bruce.

1. The claimant, as a result of his accidental injury, sustained 12.5% impairment of function to his left leg.

The respondent was the only party to appeal the SALJ's determination of the claimant's impairment of function. The respondent argued the SALJ was incorrect in opining an impairment rating for a scheduled injury must be based on the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Ed., and also based on competent medical evidence. During the pendency of the appeal, the Kansas Court of Appeals ruled an impairment rating for a scheduled injury must be based on the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Ed., and also based on competent medical evidence.[5] Therefore, the respondent's legal argument is not successful.

There was no appeal questioning the SALJ's factual finding of a 12.5% impairment of function. The claimant did not appeal the issue of impairment, but rather voiced agreement with the SALJ's finding. Therefore, the Board affirms this part of the SALJ's ruling. The claimant, as a result of his accidental injury, sustained a 12.5% impairment of function to his left leg.

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[5] See *Weaver v. Unified Gov't of Wyandotte County*, 63 Kan. App. 2d, 773, 786, 539 P.3d 617 (2023).

2. The claimant is entitled to future medical treatment.

K.S.A. 44-510h(e) states:

> It is presumed that the employer's obligation to provide [medical treatment] 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. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

The Board considered the opinions of both testifying physicians. The Board does not find Dr. Bruce's opinion the claimant requires no future medical treatment particularly credible. The claimant continues to have rather serious complaints. The Board concludes the opinion of Dr. Zimmerman more credible. The claimant overcame the presumption in K.S.A. 44-510h(e). The Board affirms the SALJ's award of future medical treatment.

The Board disagrees with the concurring opinion on how to construe K.S.A. 44-510h(e), a statute which effectively imposes a rebuttable presumption against future medical treatment after an injured worker reaches maximum medical improvement. K.S.A. 44-501b(c) places the burden of proof on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. Further, the statutes states, "In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." Mandatory consideration of the "whole record" necessarily requires consideration of Dr. Bruce's opinion, not just medical evidence favorable to the claimant. Moreover, K.S.A. 44-508(h), which defines burden of proof, is based on a more probably true than not true standard on the basis of the whole record. All evidence must be considered.

Further, K.S.A. 44-523(a) states the parties are to be afforded a reasonable opportunity to be heard and present evidence. It would seem incongruous to read K.S.A. 44-510h(e) as only requiring the claimant to present evidence, without regard to the respondent's evidence. Indeed, in determining if a claimant met the burden of proving, more likely than not, additional medical evidence will be necessary in the future, contemplates considering the evidence in favor of the claimant (Dr. Zimmerman's evidence) and the evidence detracting from the claimant (Dr. Bruce's evidence).

3. What is the claimant's average weekly wage?

The SALJ had clear reservations regarding the calculation of the claimant's average weekly wage. The SALJ questioned remanding the matter for resolution of this issue, but opted to decide the average weekly wage.

With regard to average weekly wage calculations, K.S.A. 44-511 states:

> (a)(1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis earned while employed by the employer, including bonuses and gratuities. Money shall not include any additional compensation, as defined in paragraph 2.
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> . . .
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> (3) The term "wage" shall be construed to mean the total of the money and any additional compensation that the employee receives for services rendered for the employer in whose employment the employee sustains an injury arising out of and in the course of such employment.
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> (b)(1) Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.

The Court of Appeals provided guidance in interpreting this statute in *Morris*.[6] The SALJ's decision did not reference *Morris*. The appellate decision states:

> Under K.S.A. 2020 Supp. 44-511(b)(1)'s plain language, a worker's preinjury average weekly wage calculation must be based on the sum of the wages that the worker earned during the calendar weeks employed "up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee *actually worked*, or by 26 as the case may be." (Emphasis added.) By using the term "actually worked," the Legislature indicated that any week the worker worked for the employer should be included in the worker's preinjury average weekly wage calculation.[7]

In *Morris*, the Court of Appeals remanded to the Board the issue of a worker's average weekly wage because a wage statement was not clear if the worker worked 11 or 12 pay periods listed in the wage statement. The wage statement in this case is far more deficient. The Board agrees with the SALJ regarding the discrepancies in the wage statement. The pay period ending April 24, 2021, shows 50.23 hours worked and $232.87 as the amount earned. This is hard to rationalize if the claimant's hourly rate was $12.50, because he otherwise would have earned at least $627.88. It is hard to believe the

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[6] *Morris v. Shilling Constr. Co. Inc.*, No. 123,297, 2021 WL 5751704 (Kansas Court of Appeals unpublished opinion filed Dec. 3, 2021).

[7] *Id.* at *16.

claimant worked 1.06 hours the pay period ending December 19. 2020, yet made $188.25. The pay period ending January 16, 2021, shows the claimant working one-half hour, yet earning $26.87. The pay period ending March 13, 2021, shows the claimant working 13.45 hours, yet earning $268.13.

The Board understands some pay discrepancies might be based on hourly pay versus piece work. The wage statement does not indicate which form of pay was used.

The SALJ was correct in stating it was impossible to determine if the claimant worked any hours in one week of a two-week pay period. It is possible all hours were worked in only one of the two weeks. Under the law, the wage statement should not stop May 8, 2021, but account for earnings up to the date of accident, May 18, 2021.

As an aside, the Board does not agree with the SALJ's determining two-week pay periods consisting of less than 30 hours should be viewed as a single calendar week. There is no legislative support for this conclusion. Additionally, even if a worker actually works on a part-time basis, *Morris* and K.S.A. 44-511 make no distinction between the average weekly wage calculation for a full-time employee versus a part-time employee.[8]

The Board's review authority is limited to the record presented to the Administrative Law Judge (ALJ). On review of final awards, the Board has the authority to remand any matter to the ALJ for further proceedings. The Board must do so here, rather than engage in speculation regarding calculation of the claimant's average weekly wage. Accordingly, the SALJ's average weekly wage determination, and the temporary total disability and permanent partial disability award, are vacated, and this matter is remanded to the ALJ with instructions to receive additional evidence on claimant's attendance and earnings, and to recalculate the average weekly wage and the corresponding award of temporary total disability and permanent partial disability benefits.

4. Any underpayment of temporary total disability (TTD) benefits cannot be determined without first calculating the claimant's average weekly wage, and the award of TTD is vacated.

The Board is not able to determine this issue without a thorough determination of the claimant's average weekly wage, as noted above. As noted above, the award of TTD is vacated. This issue should be determined by the ALJ on remand.

AWARD

WHEREFORE, it is the finding of the Board the Award is remanded as to the determination of the claimant's average weekly wage and any TTD underpayment and

[8] See *id.*

calculation of permanent partial disability benefits. These matters are remanded to the ALJ to receive additional evidence and to make new findings of fact and conclusions in accordance with the instructions above. The award of permanent partial disability based on 12.5% functional impairment of the left leg is affirmed, but it is subject to recalculation based on determination of the claimant's average weekly wage. The claimant is awarded future medical treatment. In all other respects, the Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2024.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with the majority on the issues of nature and extent, average weekly wage, temporary total disability, and remanding this matter to the ALJ for further proceedings. The undersigned agrees future medical treatment should be awarded to Claimant, but for a different reason than the majority.

The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.[9] The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.[10] It is presumed the employer's obligation to provide medical treatment

[9] *See* K.S.A. 44-501b(b).

[10] *See* K.S.A. 44-510h(a).

terminates upon the employee's 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."[11] "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.[12]

In this case, the majority found Dr. Zimmerman's opinion Claimant will require future medical treatment more credible than Dr. Bruce's opinion Claimant will not require future medical treatment, after it considered Claimant's residual complaints. After making this determination, the majority concluded Claimant overcame the presumption of K.S.A. 44-510h(e) and awarded future medical treatment.

The majority's analysis does not follow the plain language of K.S.A. 44-510h(e). When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.[13] According to the statute, an employee need only present medical evidence stating it is more probably true additional medical treatment will be necessary. The statute does not state the employee must prove entitlement to future medical treatment by a greater weight of the credible evidence in the whole record, including consideration of non-medical evidence.

In support of its conclusion, the majority engages in judicial blacksmithing by grafting the burden of proof from K.S.A. 44-508(h) to K.S.A. 44-510h(e), in violation of the Supreme Court's charge from *Bergstrom*. The majority holds K.S.A. 44-510h(e) requires an employee to prove entitlement to future medical by a greater weight of the evidence in the whole record, including consideration of "all evidence,"[14] but this language is not found in K.S.A. 44-510h(e).

Not only does the majority read non-existent language into K.S.A. 44-510h(e), but it now creates ambiguity in a clearly-worded statute. Under the majority's reading, K.S.A. 44-510h(e) now provides an employee must present medical evidence stating it is more probably true additional medical treatment will be necessary, and the employee must prove entitlement to future medical based on consideration of all evidence, including non-medical evidence, contained in the whole record. Additionally, the plain language of K.S.A. 44-510h(e) requires the employee to present medical evidence, while the majority endorses consideration of all evidence. Essentially, the majority creates two contradictory burdens

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[11] K.S.A. 44-510h(e).

[12] *See id*.

[13] *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[14] *See supra*, at 7.

an employee must satisfy to receive future medical. The resulting ambiguity requires application of the rules of statutory construction. While provisions of a statute should be read *in pari materia*, when two provisions create an irreconcilable conflict the more specific statute controls.[15] As a result, the specific standard from the statute specifically addressing future medical, K.S.A. 44-510h(e), applies in determining whether Claimant proved entitlement to future medical, rather than the general standard from K.S.A. 44-508(h).

Finally, the majority cites the instruction from K.S.A. 44-523(a) requiring the Division to provide the parties an opportunity to be heard and to present evidence. The majority appears to overlook another statute, K.S.A. 44-501b(c), which states the employee has the burden to prove the conditions on which the right to compensation depends.[16] A plain reading of K.S.A. 44-510h(e) does not require a court to disregard evidence submitted by the employer in determining entitlement to future medical, and simply provides the condition the employee must prove to receive an award of future medical.

Turning to the medical evidence concerning future medical in the present matter, Dr. Bruce did not believe, within a reasonable degree of medical probability, Claimant would require future medical. Dr. Zimmerman opined, within a reasonable degree of medical probability, Claimant will require future medication and physician intervention. Dr. Zimmerman's future medical recommendation is not limited to over-the-counter medication or home exercises. Dr. Zimmerman's report constitutes medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement, which satisfies the burden of proof of K.S.A. 44-510h(e). Further analysis is unnecessary under the version of K.S.A. 44-510h(e) in effect on May 18, 2021. For this reason, the undersigned would award future medical treatment.

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BOARD MEMBER

c: (via OSCAR)
Roger Fincher
Bruce Levine
Hon. Brian Brown

[15] *See Redd v. Kansas Truck Center*, 291 Kan. 176, 195-96, 239 P.3d 66 (2010).

[16] *See* K.S.A. 44-501b(c).