

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DUSTIN HOFFMAN)
Claimant)
V.)
) AP-00-0480-184
TITUS TRANSPORT HOLDINGS, LLC) CS-00-0453-111
Respondent)
AND)
)
KS TRUCKERS RISK MANAGEMENT GROUP)
Insurance Carrier)

ORDER

Claimant appealed the December 5, 2023, Award issued by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on April 11, 2024.

APPEARANCES

Scott J. Mann appeared for Claimant. Timothy A. Emerson appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the following and the documents of record filed with the Division.

- 1) Preliminary Hearing Transcript, November 3, 2020, with Claimant’s Exhibits 1, 4 & 5 and Respondent’s Exhibit 2;
- 2) Preliminary Hearing Transcript, December 21, 2021, with Respondent’s Exhibits 5-8;
- 3) Regular Hearing Transcript, October 26, 2022;
- 4) Evidentiary Deposition of Pedro A. Murati, M.D., November 8, 2022, with Exhibits 1-5;
- 5) Evidentiary Deposition of Steve Benjamin, November 14, 2022, with Exhibits 1-2;

- 6) Evidentiary Deposition of David Hufford, M.D., December 6, 2022, with Exhibits 1-8;
- 7) Evidentiary Deposition of John Babb, M.D., March 22, 2023, with Exhibits 1-3;
- 8) Motion Hearing Transcript, April 11, 2023;
- 9) Evidentiary Deposition of Karen Terrill, May 3, 2023, with Exhibits 1-2;
- 10) Evidentiary Deposition of Thomas Frimpong, D.O., May 4, 2023, with Exhibits 1-3);
- 11) Court-Ordered Independent Medical Examination Reports of Terrence Pratt, M.D., dated December 21, 2020, February 7, 2022, April 22, 2022, and February 8, 2023.

ISSUES

1. Does this Board have jurisdiction to determine the constitutionality of K.S.A. 44-510e?
2. Is Claimant's work-related accident the prevailing factor for all Claimant's alleged injuries?
3. What is the nature and extent of Claimant's disability?

FINDINGS OF FACT

Claimant worked for Respondent for less than a year as a semi-truck driver delivering frozen foods to Dillon's warehouses. His job required him to unload pallets of product weighing 60-80 pounds. There was an average of 5-20 pallets on his truck.

On April 11, 2020, Claimant was pulling a loaded pallet using a pallet jack. The pallet jack did not move, so Claimant pulled harder. As Claimant pulled harder his back popped with sharp pain going down his right leg, causing Claimant to vomit. Claimant informed the store they would have to do their own unloading and he called dispatch to report what happened. When Claimant returned to home base, he again reported the accident.

Respondent sent Claimant to the Hutchinson Clinic for an MRI and then Claimant was referred to Dr. John Babb.

Dr. Babb first saw Claimant on June 26, 2020. Claimant's chief complaint was low back pain radiating into his right leg. Claimant reported this pain began immediately after his accident at work. Claimant reported the pain had worsened since the accident and described the pain as constant sharp, stabbing and shooting. Dr. Babb's overall impression and diagnosis was lumbar pain/sprain and degenerative disc disease. He prescribed a back brace, NSAIDs medication and physical therapy. Dr. Babb noted in Claimant's history "He has had back pain in the past but he has always done heavy labor. He has never been treated for back pain in the past and was doing ok at the time of his injury at work."¹ Dr. Babb opined a lot of the pain Claimant was having is an exacerbation of underlying arthritis and a lumbar strain. Dr. Babb assigned restrictions of no lifting, pushing or pulling more than 50 pounds and wear a back brace.

Dr. Babb saw Claimant on August 17, 2020. Claimant reported his symptoms were worse despite therapy. Dr. Babb recommended Claimant continue taking anti-inflammatory medication, attend physical therapy and work under restrictions previously assigned. Dr. Babb opined Claimant's leg pain was not true radiculopathy.

On August 31, 2020, Claimant saw Dr. Babb with complaints of worsening pain. Claimant had stopped going to physical therapy because Claimant did not believe it was helping his pain. Claimant also did not take the prescribed NSAIDs. Dr. Babb opined Claimant was 4 months out from his injury and the lumbar strain has resolved. Dr. Babb believed Claimant's focal pain was from degenerative arthritis and Claimant should have to follow up with his private insurance. Claimant does not believe he can return to work without restrictions. Dr. Babb referred Claimant for a functional capacity evaluation to determine appropriate restrictions. There is no record the functional capacity evaluation was done.

Dr. Pedro Murati evaluated Claimant on September 30, 2020, at his attorney's request. Claimant's chief complaints were bilateral hip pain; low back pain and numbness radiating into the right buttock; difficulty bending over and sleeping secondary to low back pain; occasional right leg weakness; muscle spasm in the right thigh; and inability to "arch" back secondary to pain.

Dr. Murati diagnosed Claimant with low back pain with signs of radiculopathy and right sided sacroiliac joint (SI) dysfunction. Dr Murati opined the April 11, 2020, work-related accident was the prevailing factor for all conditions diagnosed and Claimant's need for medical treatment.

Dr. Murati recommended additional medical treatment for Claimant's lumbar spine such as lumbar spine MRI, bilateral lower extremity EMG/NCS testing and depending on

¹ Babb Depo., Ex. 2 at 26.

the results of the tests, possibly physical therapy, radio frequency ablations, epidurals, and medications and if those treatments failed a surgical evaluation. Dr. Murati also recommended treatment for the SI joint dysfunction, injections, physical therapy, SI belt or gait training and medications.

Dr. Terrence Pratt examined Claimant on December 21, 2020, at the request of the Court. Claimant complained of low back pain and after arching, central stabbing and pain in the hips pointing to the SI joints, numbness in the right posterior gluteal region and intermittently medial arch of the left foot and slight weakness in the right lower extremity.

Dr. Pratt diagnosed lumbosacral syndrome with degenerative disc disease, slight bulging L5-S1, and right SI joint dysfunction. Dr. Pratt opined the prevailing factor for the SI joint involvement was the work-related event. The finding of degenerative disc disease was preexisting and unrelated to the work event. He found it probable Claimant had an aggravation of the underlying degenerative disc disease. There was no significant evidence of stenosis reported or a disc protrusion. Dr. Pratt noted a slight disc bulging, degenerative disc disease and spondylosis.

Dr. Pratt opined Claimant was a candidate for a pain management assessment to consider treatment options for the SI joint dysfunction, including a right SI joint injection and facet blocks. Dr. Pratt assign temporary restrictions of no lifting over 25 pounds; no pushing/pulling in excess of 50 pounds; and no frequent bending or twisting.

Claimant returned to Dr. Babb for treatment of his right SI joint on February 19, 2021. Claimant had complaints of increasing pain in his low back and new pain in his bilateral hips. Dr. Babb was authorized by the Court to treat Claimant. He noted the lumbar strain was resolved, but Claimant continued to have focal pain from degenerative arthritis and right SI joint dysfunction. Dr. Babb recommended Claimant continue with physical therapy and the home exercise program. He sent Claimant for right SI joint injections. Any further treatment of the low back was not work-related. Claimant was continued with work restrictions.

On March 29, 2021, Claimant saw Dr. Babb. Claimant had improvement in his symptoms, but he still had sharp constant pain in his low back as well as numbness and tingling down the right leg. Claimant reported the injection helped the SI joint pain, but not the low back and pain on the iliac crest. Dr. Babb recommended Claimant complete physical therapy for the SI joint and then Claimant more than likely would be released.

Claimant saw Dr. Babb on May 7, 2021, and his main complaint was pain in the low back. The SI joint injection provided transient relief. The only treatment left was an radio frequency ablation (RFA) of the SI joint. Claimant did not complete physical therapy, but according to Dr. Babb the therapy improved the hamstring tightness and recommended

Claimant continue with it. Dr. Babb changed Claimant's restrictions to no lifting, pushing, pulling over 50 pounds and avoid excessive twisting, turning and bending.

On May 17, 2021, Dr. Babb wrote a letter clarifying that the RFA and physical therapy was for the right SI joint pain only and not the lumbar spine.

Claimant underwent (RFA) with Dr. Mueller on July 27, 2021.

On August 20, 2021, Dr. Babb met with Claimant. There were no changes or improvements to Claimant's symptoms and he continued to have low back pain with pain into the right leg. Claimant did not feel the RFA on July 27, 2021, helped and aggravated his low back pain. Claimant was released at maximum medical improvement for the SI joint, without restrictions.

Dr. Babb opined Claimant's failure to improve after the treatment for the SI joint indicates Claimant's pain was likely coming from his low back and not SI joint. Dr. Babb was unaware of the extent of any back complaints Claimant had before his work accident and if Claimant ever had pain into his right leg. The medical records indicate Claimant had prior low back pain from a car accident in 2008.

On September 23, 2021, Claimant had another lumbar spine MRI on his own at the Hutchinson Clinic. Claimant decided to get another lumbar spine MRI because he was concerned something else was wrong due to the pain in his lower back and right leg had worsened. The September 23, 2021, MRI was interpreted as showing:

Bones: The last intervertebral disc space is designated the L5/S1 level for the numbering purpose of this examination. The vertebral body heights are well maintained. Alignment is satisfactory. The signal characteristics are unremarkable.
Cord: The conus tip ends at the T12-L1 level. It is of normal size and signal intensity.
T12-L-1: No disc herniations or bulges are present.
L1-2: No disc herniations or bulges are present.
L2-3: There is mild disc bulging without significant spinal stenosis.
L3-4: There is mild disc bulging without significant spinal stenosis.
L4-5: There is mild generalized disc bulging producing mild bilateral neural foraminal stenosis without significant central spinal stenosis.
L5-S1: There is mild generalized disc bulging without significant spinal stenosis.
Soft tissues: The visualized SI joints and sacrum are well maintained. The paraspinal soft tissues are unremarkable.
Impression:
Mild degenerative disc disease, as described above.²

² Frimpong Depo., Ex. 2 at 2.

Dr. David Hufford evaluated Claimant on September 24, 2021, at the request of Respondent to provide an impairment rating. Claimant received treatment from Dr. Babb in Dr. Hufford's practice. Dr. Babb does not do impairment ratings so Dr. Hufford was providing that service. Claimant was diagnosed with occupational injury to the low back and right SI joint. Dr. Hufford rated Claimant's impairment of 3 percent based on the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition (The Guides)* to the body as a whole for right SI joint strain. He did not rate the lumbar spine because he was not asked. He found no need for future medical treatment for the right SI joint.

Dr. Hufford opined Claimant had residual lumbosacral neuritis as a consequence of the occupational injury regardless of what other physician or administrative body have opined. He believed the residual lumbosacral neuritis was responsible for the majority of Claimant's ongoing symptomatology including potential radiculopathy in the right lower extremity. He recommended a series of 1-3 lumbar epidural corticosteroid injections to improve the residual functioning impairment. Dr. Hufford noted Claimant's ongoing pathology and in order to provide what he believed to be a comprehensive opinion he needed to include the diagnosis of lumbosacral neuritis. Dr. Hufford noted the description of Claimant's injury, the symptomatology, the physical findings, including asymmetry of the reflexes could indicate radiculopathy and were indicators of lumbosacral neuritis.

Since the Court-ordered treatment was completed, Claimant was released at maximum medical improvement. Claimant was returned to work with no limitations and no restrictions.

Dr. Murati examined Claimant September 28, 2021, at his attorney's request. Claimant's chief complaints were the same as they were on September 30, 2020. Claimant had additional complaints of muscle spasms in the low back, soreness after the RFA injection, and difficulty sitting or standing for long due to low back pain.

Dr. Murati continued to diagnose low back pain with signs of radiculopathy and right SI joint dysfunction. He modified his diagnosis to include left SI joint dysfunction.

Dr. Murati opined Claimant's discs bulged so much at the time of the accident it pressed on the nerve root creating a structural anatomical change and producing all the complaints Claimant has had up to this point. This structural change was a bulging disc at L5-S1 compressing the L5 nerve root.

On August 8, 2022, Dr. Murati performed a nerve conduction study on both lower extremities and an EMG on the right lower extremity. Dr. Murati opined Claimant had chronic L5-S1 radiculitis.

Dr. Murati's prevailing factor opinion did not change. He did not provide an opinion

on impairment rating in either of his reports, but when asked at this deposition Dr. Murati provided an impairment rating using *The Guides* of 16 percent to the body as a whole 12 percent for radiculopathy only and 2 percent for each side of the SI joint.

On February 7, 2022, Dr. Pratt examined Claimant and reviewed Claimant's new medical records at the request of the Court. Dr. Pratt noted the September 23, 2021 MRI was not included in the medical records provided to him. Dr. Pratt diagnosed lumbosacral syndrome with degenerative disc disease, disc bulging L5-S1 and no current findings suggesting right SI joint dysfunction.

After reviewing the September 23, 2021, MRI of the lumbar spine, Dr. Pratt provided an addendum dated April 22, 2022, diagnosing Claimant with lumbosacral syndrome with degenerative disc disease and right SI joint dysfunction. He noted Claimant already completed the recommended treatment and found the prevailing factor for the SI joint findings is the work accident. The mild multilevel findings which were noted as degenerative disc disease, he did not relate to the work accident. He did not recommend any restrictions. Dr. Pratt assigned an impairment rating of 5 percent permanent partial impairment to the body as a whole. Dr. Pratt based his rating using *The Guides* as a starting point and used competent medical evidence including *The American Medical Association Guides to the Evaluation of Permanent Impairment 4th Edition*.

On June 14, 2022, Dr. Hufford evaluated Claimant at the request of Claimant's attorney. Claimant reported pain throughout the entire right lower extremity associated with paresthesias. His right hip was numb, but not painful. He reviewed the September 23, 2021 MRI. Dr. Hufford diagnosed Claimant with a lumbar injury with associated lumbosacral neuritis and possible lumbar radiculopathy even though the MRI did not appear to show a true disc herniation. Dr. Hufford opined the prevailing factor for lumbar neuritis, possible lumbar radiulopathy and SI joint strain was the work accident. He noted Claimant had a myofascial component to his injury as well as right SI joint strain. Claimant developed lumbosacral neuritis as consequence of his work injury. This was a physiological rather than an anatomic condition not proved or disproved by imaging. The disc findings did not appear to rise to the level of a true disc herniation based on the radiology report.³

Dr. Hufford rated Claimant's functional impairment as 5 percent to the body as a whole (3 percent for the lumbar spine, including lumbosacral neuritis and 3 percent for the SI joint), using *The Guides*.

Dr. Hufford assigned permanent restrictions of no lifting greater than 10 pounds; work that is primarily sitting and the avoidance of all repetitive bending at the waist and

³ Hufford Depo., Ex. 5.

twisting and turning of the trunk.

Dr. Hufford recommended future medical treatment of: a series of 1-3 lumbar epidural corticosteroid injections, a surgical evaluation for the lumbar spine, and pain and muscle relaxing medications.

On October 1, 2022, Dr. Thomas Frimpong, a neurosurgeon, at the request. Claimant's attorney reviewed Claimant's September 23, 2021, MRI images and the MRI report and possibly a Dr. Hufford report. He did not physically examine Claimant. After reviewing the MRI images Dr. Frimpong opined Claimant's pain generator was the L5-S1 far right lateral disc bulge compressing on the right L5 nerve root. He stated Claimant's symptoms were consistent with L5-S1 discogenic back pain and right L5 radiculopathy. Dr. Frimpong opined the far lateral L5-S1 disc bulge was a structural change in the lumbar spine.

Dr. Frimpong felt injection treatment would be a benefit to Claimant and if that did not work, surgery could be considered. He also noted the disc bulge was not listed on the MRI report.

Q. Is the Impression section accurate when it says "Mild degenerative disc disease"?

A. Yes, for the most part the patient has age-related mild degenerative disease in most of the levels. Typically his back would be no different than somebody else you pick up on the street at 45 years old. They would have something like this. The only issue would be the L5-S1. Typically we don't just develop L5-S1 far lateral disc bulge.⁴

Dr. Frimpong testified as to what he believed his role was and what he was asked to provide by Claimant's attorney. He testified:

So, my goal here--so, I don't know--My goal here wasn't so much to establish causation you know, why there's a herniated disc. Okay? . . .

Q. So I listened to the questions that Mr. Mann asked you, and I actually heard the word causation at least once. What I am hearing from you on cross-examination is that you are not indeed giving any kind of causation opinion with respect to the mechanism of injury and what claimant's current symptoms are, true?

A. I was told to add if there is anything I see on the imagining that explains the claimant's symptoms.

⁴ Frimpong Depo. at 21.

Q. And with respect to those symptoms you're not professing to give us an opinion as to what caused those symptoms, true?

A. I mean, I would have indicated in my report. I just wrote down what the MRI findings is as it relates to claimant's symptoms, because I did not document anything else.⁵

Dr. Hufford authored a third report on November 2, 2022, at the request of Claimant's counsel after reviewing Dr. Frimpong's October 22, letter. He stated in his report:

In my examination of June 14, 2022 I had noted asymmetry of reflexes which are an objective major(*sic*) of radiculopathy in the lower extremity. My interpretation of his MRI was that there was not a true disc herniation compressing the nerve roots. However, a neurosurgeon has reviewed the MRI and indicated compressive pathology on the right at the L5-S1 level. . . The interpretation of the MRI by Dr. Frimpong indicates that there is compressive pathology on the right which is consistent with his symptomatology on the right and evidence of radiculopathy.⁶

Dr. Hufford revised his impairment rating pursuant to *The Guides* to 11 percent to the body as a whole, 9 percent for the lumbar spine and 2 percent for the SI joint. The revised rating reflected there was nerve root compression based on another physician's assessment.⁷

On February 8, 2023, Dr. Pratt authored a final Addendum report to his Court-ordered report as the nature and extent of Claimant's permanent impairment. Dr. Pratt used *The Guides* as a starting point and considered competent medical evidence to arrive at his opinion regarding Claimant's permanent functional impairment. Dr. Pratt considered the 4th Edition of *The Guides* and calculated a rating using p. 3/102 of DRE category II in the 4th Edition to find Claimant's permanent impairment was 5 percent to the body as a whole.

Claimant met with Steve Benjamin for a vocational assessment on July 6, 2022, at the request of his attorney. Claimant reported not working anywhere since his last day with Respondent, the day of the accident, April 11, 2020. Mr. Benjamin prepared a task list of the tasks Claimant had performed in the 5 years preceding the accident and found Claimant had performed 25 work tasks. He opined working in sedentary work demand category Claimant could re-enter the open labor market and earn approximately \$431.60

⁵ Frimpong Depo. at 30; 32.

⁶ Hufford Depo., Ex. 6 at 1-2.

⁷ *Id.* at 2.

a week based on a 40-hour work week, taking into account Claimant's past work history, education, training, transferable job skills, age, and geographic area. He opined Claimant was capable of performing work as a customer service representative, front office clerk and general office clerk. Mr. Benjamin opined Claimant has a 45.5 percent wage loss under the restrictions of Dr. Hufford.

Dr. Hufford reviewed the task list of Steve Benjamin and found Claimant could no longer perform 13 out of 25 tasks for a 52 percent task loss. He opined Claimant was unable to drive a company truck any longer due to his injury and Claimant cannot return to the kind of work he performed for Respondent. Dr. Hufford acknowledged Claimant would have no task loss if it was based on his SI joint injury only because he did not assign any restrictions based solely on the SI joint injury.

Karen Terrill met with Claimant for a vocational assessment on December 28, 2022, at the request of Respondent. Ms. Terrill prepared a task list of 36 tasks Claimant had performed in the 5 years preceding the accident. Ms. Terrill opined Claimant is no longer able to perform his work duties he performed for Respondent. She opined Claimant could work as a customer service representative earning up to \$18 per hour or \$720 per week for a wage loss of 8 percent.

Dr. Babb reviewed Ms. Terrill's task list and found Claimant had no task loss because, in his opinion, Claimant did not have any task loss because there are no restrictions due to the work-related injuries.

Claimant testified he could not return to his former job with Respondent or any of his previous jobs based on Dr. Hufford's restrictions. Claimant never worked in an office and always did manual labor. Claimant graduated from high school and has had some college classes.

Claimant has pain when he walks, and his right leg gives out. He has sharp pain in his back feeling like being stabbed and then hit with electricity. Claimant's right leg locks up and he drops to the ground. He is unable to stand up straight sometimes for as long as two days. There are some days he has difficulty performing basic activities of daily living, like getting out of bed, bathing or getting dressed because of pain in his back and going down his right leg. The pain in his back and right leg gets worse with sitting or standing too long, bending or twisting. Claimant believes he has not received treatment for the pain in his low back, with pain shooting down his right leg. He reported these symptoms to the doctors he has seen and has not been given a solution. Claimant is presently not working because he is unsure which days he will not feel good enough to work and he believes this is unfair to an employer.

Cheryl Kauble, claims administrator for Respondent, testified she remembers Claimant being sent a letter dated August 25, 2021, stating he needed to return to work.

The letter was sent because Claimant had not returned to work after he was released to return to work by Dr. Babb on August 20, 2021. The letter was sent certified mail and received by Claimant on August 26, 2021. The letter told Claimant if he did not return to work or communicate with the employer by August 31, it would be considered job abandonment and he would be terminated. There was no response from Claimant. Claimant's employment was terminated on August 31, 2021, for failure to return to work.

Ms. Kauble testified even though Claimant was released to return to work, his CDL had expired while he was off work, so he would not have been able to go to work right away. In order to get his CDL reinstated Claimant would have to undergo a physical. The employer had authorized Claimant for a Department of Transportation physical. Claimant told Mr. Becker, the operations manager, he did to go to the physical because he did not think he could pass physical and he was going to a spinal doctor for further evaluation.⁸

In her Award dated December 5, 2023, the ALJ found Claimant met the burden of proving the April 11, 2020, accident was the prevailing factor for the right SI joint dysfunction and lumbar spine strain, but not the other conditions involving the lumbar spine, including the degenerative disc disease. The ALJ adopted the opinion of Dr. Pratt and found Claimant to have a 5 percent functional impairment to the body as a whole because of the work accident. The ALJ determined there was an overpayment of temporary total benefits in the amount of \$230.95. The ALJ found Claimant entitled to future medical upon request. Finally, the ALJ found there was no jurisdiction to address the constitutional issue regarding the Sixth Edition of the *Guides* and 44-510e.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the unconstitutionality of K.S.A. 44-510e requiring a functional impairment in excess of 7½ percent to qualify for a work disability and requiring the use of the 6th Edition of the AMA Guides to determine that impairment. Claimant contends he is entitled to a 49.85 percent work disability based on a functional impairment between 11 and 13 percent and future medical treatment for the lumbar spine injury at L5-S1 right lateral disc bulge with right radiculopathy.

Respondent argues the Board does not have jurisdiction over the constitutional issue and argues the award should be affirmed.

K.S.A. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

⁸ P.H. Trans., Ex. 5.

more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

1. The Board does not have jurisdiction to determine if a statute is unconstitutional.

This Board does not have jurisdiction or authority to determine constitutionality of any statutes comprising the Kansas Workers Compensation Act. This Court (Board) is not a court established pursuant to Article III of the Kansas constitution.

2. Claimant's work-related accident is the prevailing factor for the SI joint injury only.

Both parties acknowledge Claimant suffered a work-related accident resulting in an injury. At issue is the extent of the injuries caused by the accident.

K.S.A. 44-508(f) provides in part:

(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:

(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.

K.S.A. 44-508(g) states:

(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.

Claimant has ongoing complaints of pain in his low back into his right leg. Claimant also experiences weakness in his right leg.

Four doctors testified to the cause of Claimant's alleged injuries, including his ongoing complaints about low back pain and pain into his right leg. Dr. Babb, who was the authorized treating physician, initially diagnosed Claimant with a lumbar strain and degenerative disc disease. After Dr. Babb released Claimant at maximum medical improvement Claimant was sent to Dr. Pratt by the Court. Dr. Pratt opined the work accident was the prevailing factor for SI joint dysfunction. However, any other symptoms or complaints Claimant had was an aggravation of preexisting degenerative disc disease.

After Claimant completed his treatment with Dr. Babb for the SI joint dysfunction Claimant was sent by Respondent to Dr. Hufford to provide a rating. Dr. Hufford practices with Dr. Babb, who does not do ratings. Dr. Hufford opined Claimant not only had right SI joint dysfunction but as consequence of Claimant's work accident Claimant developed residual neuritis and potential radiculopathy. After Dr. Hufford rendered this opinion he was retained by Claimant and again opined the prevailing factor for Claimant's SI joint dysfunction and lumbar neuritis was the work accident.

Claimant's attorney requested Dr. Thomas Frimpong, a neurosurgeon to review the September 23, 2021, MRI films and report and possibly a Dr. Hufford report. He did not physically examine Claimant. He opined the L-5-S1 far right lateral disc bulge was compressing on the L5 nerve root. But Dr. Frimpong insisted his goal was not to establish causation.

After reviewing Dr. Frimpong's report, Dr. Hufford changed his rating of Claimant's functional impairment to include the nerve root compression diagnosis. Dr. Hufford related this finding to Claimant's work accident.

The fourth physician Claimant saw was Dr. Murati at his attorney's request. Dr. Murati diagnosed Claimant with low back pain and signs of radiculopathy and right SI joint dysfunction. When he saw Claimant a second time Dr. Murati added the diagnosis of bilateral SI joint dysfunction.

After considering all the physicians' evidence it is found and concluded is Claimant's work accident is the prevailing factor for the SI joint dysfunction only. The most credible opinion was Dr. Pratt, who was Court ordered. He saw Claimant on two occasions and had access to all Claimant's medical records. He had a consistent opinion about what conditions were caused by Claimant's work accident. Dr. Hufford changed his opinion twice, once just based on an MRI review by Dr. Frimpong. Dr. Frimpong provided no causation opinion. His opinion was a diagnosis and not a causation opinion. Dr. Murati was an outlier by adding not only radiculopathy in his diagnosis but bilateral SI joint dysfunction, which were two conditions not found by another physician.

3. Claimant's functional impairment is 5 percent to the body as a whole.

Dr. Pratt’s rating of 5 percent to the body as a whole is the most credible. Dr. Pratt was Court-ordered and the neutrality is a hallmark of credibility. Other hallmarks of credibility are examining Claimant on multiple occasions, having access to a complete set of medical records and consistency. Dr. Frimpong performed a very limited records review, did not see Claimant and did not comment on causation. Dr. Hufford was inconsistent in his diagnoses. Dr. Murati played his role as Claimant’s hired expert and identified unrelated injuries. Dr. Hufford and Dr. Murati’s ratings included impairment for unrelated medical conditions. Dr. Frimpong and Dr. Babb did not issue ratings. Dr. Pratt’s rating comported to the Act and *Johnson*.⁹

Claimant seeks a work disability award. Eligibility for permanent partial general disability compensation or work disability requires the percentage of functional impairment solely due to the work injury must exceed 7.5 percent to the body as a whole.¹⁰ Claimant is not eligible to receive a work disability award because Claimant’s functional impairment is 5 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Ali N. Marchant, dated December 5, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁹ *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021)

¹⁰ K.S.A. 44-510e(2)(C)(I).

DISSENT

The claimant had radicular complaints in his right leg from the date of the accident forward. He had no prior history of right-sided radiculopathy. He only had sharp pain from his low back down his right leg due to the accidental injury.

Dr. Murati initially diagnosed the claimant with low back pain and signs of radiculopathy. Drs. Pratt and Babb diagnosed right SI joint dysfunction.

The claimant told doctors about having prior low back pain around 2008 from a motor vehicle accident, at least according to the initial reports of Drs. Babb, Murati and Pratt.

After a preliminary hearing regarding the claimant's request for medical treatment, the ALJ issued a preliminary Order on February 4, 2021. Under the terms of the Order, the claimant's authorized medical treatment was limited to his right SI joint, consistent with Dr. Pratt's initial opinion on causation. Of course, under K.S.A. 44-534a(a)(2), a preliminary order is not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts. In other words, additional evidence can still be presented to show if the preliminary order was correct.

Based on the preliminary Order, Dr. Babb was instructed by the insurance carrier only treatment for the claimant's right SI joint was approved. The claimant was told to seek treatment for his other low back complaints through private health insurance, which confused the claimant because his symptoms started with the work injury.

Further, based on the preliminary Order, Dr. Hufford was told by the insurance carrier to limit his rating opinion to the right SI joint only. Dr. Hufford initially diagnosed right lumbosacral neuritis and the potential of right lower extremity radiculopathy, as based on an objective sign of radiculopathy, namely asymmetric lower extremity reflexes.

Dr. Murati performed a nerve conduction study/EMG on August 8, 2022. The study was interpreted by Dr. Murati as objective proof evincing right L5-S1 radiculitis, chronic (meaning lasting longer than three months).

Dr. Frimpong, a neurosurgeon, actually reviewed the MRI films. Based on his review of the MRI films, Dr. Frimpong opined the radiologist interpreting the second MRI missed a right-sided disc bulge touching the claimant's L5 nerve root. Dr. Frimpong was unsure of the interpreting radiologist's qualifications (as either a general radiologist or a neuroradiologist). The radiologist did not testify. Dr. Frimpong testified the claimant's disc

problem was not age-related. Dr. Frimpong noted the claimant's clinical history (apparently from other physicians) suggested right-sided radiculopathy and Dr. Hufford's physical examination findings were consistent with the claimant having lumbar radiculopathy. Dr. Frimpong, in writing, diagnosed the claimant with L5-S1 discogenic back pain and right L5 radiculopathy. In fact, the doctor stated "with confidence" the claimant's right L5 radiculopathy was due to the right-sided disc bulge.¹¹

Dr. Hufford looked at Dr. Frimpong's report and found it sufficiently credible to alter his opinion. Dr. Hufford concluded the claimant had right-sided radiculopathy. Based on diagnosing radiculopathy, Dr. Hufford increased the claimant's impairment rating. As for Dr. Hufford changing his opinion, it does not affect his credibility. If anything, the doctor's opinion is more credible when he changes his mind after consideration of additional medical information, such as Dr. Frimpong's opinion. Remember, Dr. Hufford was previously told by the insurance carrier to limit his initial opinion to the right SI joint only. However, Dr. Hufford, speaking freely, voiced his unfiltered and ultimate opinion as to the claimant having low back pain, SI joint pain and radiculopathy due to the accidental injury.

The claimant cannot be awarded work disability absent proving impairment in excess of 7.5% to the body as a whole. Dr. Murati provided a 16% body as a whole rating, while Dr. Hufford provided an 11% whole body rating. Two of three doctors opined the claimant, as a result of his work accident, had more than a 7.5% impairment to the body as a whole. Dr. Pratt's 5% opinion is the outlier.

Dr. Murati was not the only doctor to diagnose radiculopathy. Dr. Hufford did. Dr. Frimpong did. The fact Dr. Murati diagnosed left SI joint dysfunction, in addition to right SI dysfunction, is of little consequence to the question of whether the claimant's work accident caused right-sided radiculopathy. Also, even if Dr. Murati's left-sided SI joint rating is not credible, the claimant still sustained in excess of a 7.5% functional impairment as a result of his accidental work injury. The fact Dr. Pratt was a court-ordered examiner, by itself, is not a marker of increased credibility.¹² Dr. Pratt did not have all of the records. He made no mention of the positive EMG dated August 8, 2022. Dr. Pratt did not personally review any MRI films; rather, he simply accepted the reported MRI results at face value. There is no mention of Dr. Frimpong's report in Dr. Pratt's records. Dr. Murati did not have these two key records.

As for Dr. Pratt being more credible for having seen the claimant twice, it must be pointed out Dr. Murati saw the claimant three times and Dr. Hufford saw the claimant twice as well.

¹¹ Frimpong Depo. at 10-11.

¹² *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 955, 379 P.3d 428 (2016).

Radiculopathy was proven based on the claimant's complaints, the positive EMG, the objective MRI, and the diagnoses of Drs. Hufford, Murati and Frimpong. The undersigned would find the claimant proved in excess of a 7.5% whole body impairment and would remand to the ALJ for consideration of a work disability award.

BOARD MEMBER

c: (Via OSCAR)

Scott J. Mann, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Hon. Ali N. Marchant, Administrative Law Judge