

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LIONEL CARR)	
Claimant)	
V.)	
NEIGHBORS & ASSOCIATES INC)	AP-00-0480-784
Respondent)	CS-00-0444-088
AND)	
VALLEY FORGE INSURANCE CO)	
Insurance Carrier)	

ORDER

The claimant, now deceased, through William Phalen, requested review of Administrative Law Judge (ALJ) Brian Brown's Award, dated January 12, 2024. James Hess appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on May 9, 2024.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the: (1) court-ordered independent medical report of Lowry Jones, M.D., dated November 11, 2020; (2) regular hearing transcript, held June 23, 2023; (3) deposition transcript of Pedro Murati, M.D., taken August 23, 2023, and exhibits; (4) regular hearing by deposition transcript of Amber Harris Carr, taken October 16, 2023; (5) documents of record filed with the Division; and (6) parties' briefs.

ISSUE

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

FINDINGS OF FACT

The claimant began working for the respondent in 2017. On February 21, 2019, he sustained a compensable injury to his right knee. An MRI revealed an ACL tear. On April 11, 2019, Kevin Mosier, M.D., performed a right anterior cruciate ligament repair. Following physical therapy, the claimant was released at maximum medical improvement on October 14, 2019. He received no further treatment for his work injury.

On November 25, 2019, the claimant saw Pedro Murati, M.D., at his attorney's request. The claimant complained of: (1) difficulty removing his shoes/boots; (2) swelling in his right knee; (3) inability to sit for long periods of time, causing difficulty driving; (4) difficulty with prolonged bending and kneeling; (5) weakness in his right knee; (6) occasional right hamstring pain; (7) stiffness with occasional popping in his right knee; (8) relies on his left knee to go from a sitting to standing position; and (9) right knee is unreliable.

Dr. Murati performed a physical examination which showed a positive drawer and Lachman's, medial instability, tenderness of the medial collateral ligament and moderate crepitus. The doctor diagnosed the claimant with post-status ACL repair, anterior cruciate laxity and medial collateral ligament laxity.

On November 11, 2020, the claimant saw Lowry Jones, M.D., for a court-ordered independent medical examination. The claimant complained of popping in his right knee, particularly after sitting for an extended period. He reported feeling fatigue by the end of the day, but no regular day-to-day pain. He reported no instability and felt his knee was stable. The claimant was not taking any medications at the time of his visit.

Dr. Jones' physical examination showed range of motion as 0-125 degrees, no medial or lateral instability, negative Lachman's, a 2 mm anterior drawer with a good endpoint, a completely negative pivot shift, no tenderness medially or laterally, minimal tenderness along the posterior hamstring, excellent quadriceps and hamstring strength at 5/5 and no evidence of neurologic defects.

Dr. Jones opined the claimant had a good result from his anterior cruciate reconstruction and would require no additional medical treatment related to his work injury. The doctor's report stated the claimant's knee was "very stable".¹ Dr. Jones did not issue an opinion regarding the claimant's impairment of function.

On April 2, 2021, the claimant died from injuries sustained in a motorcycle accident. The claimant's wife was appointed administratrix and acted as the legal representative of the claimant's estate. His estate pursued his workers compensation claim.

On November 4, 2021, Dr. Murati issued a report addressing permanent partial impairment without having seen the claimant since November 25, 2019. Using the *AMA Guides*, 6th Ed., as a starting point, Dr. Murati assigned the claimant 29% right lower extremity impairment as a result of the claimant's work injury. Dr. Murati testified:

- A. If I was using the Guides strictly speaking, the Sixth Edition, it would actually be a 22 percent . . . lower extremity impairment.

¹ Lowry IME Report at 2.

- Q. Okay. Can you explain that to the Judge.
- A. Because the Guides say cruciate ankle ligament injury, and if you see the laxity class 2, table 16-3 it's a 22 percent default number.
- Q. Okay. Thank you. So here, Doctor, to summarize for the benefit of the Judge, if you use the AMA Guidelines, Sixth Edition, as a, if you base your opinion solely on the AMA Guidelines, Sixth Edition, your impairment would be 22 percent impairment to the right lower extremity?
- A. Correct. Yes, sir.
- Q. And if we use the AMA Guidelines, Sixth Edition, as a starting point it would be 29 percent to the right lower extremity; is that correct?
- A. Yes, sir.²

Dr. Murati testified he did not have Dr. Jones' report at the time he issued his rating report. Dr. Murati, on cross-examination, was asked about differences between his physical examination of the claimant as compared to that of Dr. Jones. According to Dr. Murati, he suspected Dr. Jones "missed" the claimant's medial instability and crepitus.³ Dr. Murati testified all of his opinions were provided within a reasonable degree of medical certainty and medical probability. He further testified his opinions were not altered by the findings of Dr. Jones.

Amber Harris Carr, the claimant's wife, testified the claimant continued to experience problems in his right knee after being released by Dr. Mosier. She testified he had range of motion limitations; pain and popping; a grinding sound upon movement; difficulty standing; inability to sit long periods causing difficulty driving; difficulty walking up and down stairs; difficulty getting in and out of the shower; and difficulty putting on shoes. Ms. Carr testified the claimant continued to have these problems until the time of his death.

The ALJ stated:

The Court finds Dr. Murati's assessment of the existence of Claimant's right knee disability before his untimely death is credible. However, on the basis of the whole record, the Court determines Dr. Murati's evidence to be less credible regarding the extent of Claimant's disability. Dr. Murati assessed PPD at 22% of the knee using 6th Edition alone. When he used the 6th Edition as a starting point and then diverted from it by utilizing competent medical evidence - his experience, education, and expertise - he assessed 29% PPD of the knee. (In *Weaver v. Unified*

² Murati Depo. at 20.

³ *Id.* at 24-25.

Government of Wyandotte County, — P.3d ----, 2023 WL 7931280, the Kansas Court of Appeals held competent medical evidence may be considered to determine impairment in both scheduled and non-scheduled injuries. Weaver, 2023 WL 7931280, at *9.)

Dr. Murati based his 29% PPD rating upon individual assessments of cruciate laxity (16%), medial instability (10%), and crepitus (7%). Because Claimant had undergone an ACL reconstruction with numerous resulting complaints, the Court finds Dr. Murati's assigning 16% impairment for cruciate laxity to be credible. The Court also finds credible Dr. Murati's assessment at least some percentage of PPD for right knee crepitus, due to his findings of "occasional popping" on exam and Mrs. Carr's testimony recalling audible popping and grinding from Claimant's knee. The doctor's report indicates he relied on Table 16-3 of the 6th Edition (and, presumably, competent medical evidence) in assessing 7% impairment for crepitus. The Court, however, has reviewed Table 16-3 and finds no mention of the term "crepitus" (or synonyms for that term) contained therein. Nor does the doctor's testimony specifically explain how he arrived at a 7% assessment for this condition. The Court finds 2% PPD is a more appropriate conditional assessment.

In light of COIME physician Dr. Jones' exam findings, the Court does not find credible Dr. Murati's assessment of 10% PPD for medial instability. Dr. Jones performed his (neutral) exam a full year after Dr. Murati's exam, and found no clinical evidence of right knee instability. Jones also noted Claimant did not complain of instability. When Dr. Murati was asked about Dr. Jones' finding of no instability, he testified Dr. Jones must have "missed" the instability on his exam; the Court finds this to be highly unlikely.

Based on the above, the Court therefore finds Claimant sustained an 18% permanent partial disability to his right knee.⁴

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues the respondent presented no evidence, making him entitled to 29% right lower extremity impairment based on Dr. Murati's opinions. The respondent maintains the Award should be affirmed, and reiterates arguments made to the ALJ concerning Dr. Jones' physical examination markedly varying from Dr. Murati's physical findings.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.⁵ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the

⁴ ALJ Award at 7-8.

⁵ K.S.A. 44-501b(b).

various conditions on which the right to compensation depends.⁶ The trier of fact shall consider the whole record.⁷

The Appeals Board possesses authority to review de novo all decisions, findings, orders and awards of compensation issued by administrative law judges.⁸ A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.⁹

Under K.S.A. 44-516, the finder of fact must consider the report detailing a court-ordered independent medical examination.

“Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.”¹⁰

An impairment rating must be based on the *AMA Guides*, Sixth Ed., as a starting point, and must always be proved by competent medical evidence.¹¹ This case presents only one impairment rating. Dr. Jones did not provide an impairment rating for the Board to consider. The rating testified to by Dr. Murati is not contradicted. No other impairment rating is in evidence. Dr. Murati’s testimony is not improbable, unreasonable or untrustworthy. The claimant’s surviving wife provided testimony supporting Dr. Murati’s findings on physical examination. The Board concludes the claimant’s impairment of function to his right leg is 29%, as testified to by Dr. Murati. This decision is based on the particular facts in the record.

Additionally, as part of the argument concerning his impairment, the claimant argued it was unfair the ALJ took judicial notice of the *AMA Guides* and essentially created an impairment rating as the basis of the award of compensation after the record was closed. The ALJ is not a physician and lacks the competence to issue an impairment rating. This is not a case where the ALJ was presented competing ratings and made a credibility determination or split the ratings. Rather, the ALJ acted as his own expert witness and exempted himself from being confronted by counsel in cross-examination.

⁶ See K.S.A. 44-501b(c).

⁷ See *id.*

⁸ See K.S.A. 44-555c(a).

⁹ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

¹⁰ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146 (1976), *superseded by statute on other grounds as stated in Hughes v. Inland Container Corp.*, 247 Kan. 407, 415, 799 P.2d 1011 (1990).

¹¹ *Weaver v. Unified Gov't of Wyandotte Cnty.*, 63 Kan. App. 2d 773, 785, 539 P.3d 617 (2023).

AWARD

WHEREFORE, the Board modifies the Award. The claimant’s estate is entitled to 23.61 weeks of temporary total disability (TTD) compensation at the rate of \$645 per week totaling \$15,231.28, followed by 51.15 weeks of permanent partial disability (PPD) compensation at \$645 per week, in the amount of \$32,991.75, for 29% impairment to the right leg. The total award for both TTD and PPD is \$48,223.03, all due and owing.

IT IS SO ORDERED.

Dated this _____ day of June, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I would affirm the ALJ’s ruling. *Tovar*,¹² a case that was superceded by statute, nevertheless provides general guidance for the finder of fact to consider:

- The existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine.¹³

¹² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), superseded on other grounds by statute as stated in *Beachum v. Accessory City*, No. 111,350, 2015 WL 3514027, at *6 (Kansas Court of Appeals unpublished opinion filed May 22, 2015).

¹³ See *id.* at 784.

- Medical evidence is not essential to establish the existence, nature, and extent of an injured worker's disability.¹⁴
- The finder of fact is free to consider all evidence and decide for itself the percentage of disability.¹⁵
- The finder of fact is not bound by the medical evidence presented in the case and has the responsibility of making its own determination.¹⁶
- The fact-finder must decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability.¹⁷

Tovar was favorably cited by the Court of Appeals as recently as 2021 for the proposition the Board “is free to consider all of the evidence and decide for itself the percentage of disability.”¹⁸ *Tovar* was superceded by statute because the law in effect at the time of *Tovar* did not require a physician to provide an opinion as to the extent of a worker’s task loss, but that was legislatively altered in 1993.¹⁹ At the time of *Tovar*, as is the continuing case now, the definition of functional impairment was at least partly based on competent medical evidence.²⁰ *Tovar*, like this case, only concerned functional impairment. Also, at the time of *Tovar*, there was no requirement to use a certain version of the *AMA Guides* in determining functional impairment, but use of the *AMA Guides*, 6th Ed., is required now.²¹ The relevant general principles noted above from *Tovar* have not changed otherwise: the ALJ still must look at all of the evidence and determine the proper level of a worker’s impairment. A doctor’s impairment rating is only proper if it is based on the *AMA Guides*, 6th Ed., as a starting point, and competent medical evidence. However,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *id.* at 785.

¹⁷ See *id.* at 786.

¹⁸ See *Perez v. Nat'l Beef Packing Co.*, 60 Kan. App. 2d 489, 508, 494 P.3d 268 (2021); see also *Eder v. Hendrick Toyota*, No. 114,824, 2016 WL 7324454, at *12 (Kansas Court of Appeals unpublished opinion filed Dec. 16, 2016).

¹⁹ See *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 803, 975 P.2d 807 (1998).

²⁰ Compare K.S.A.1990 Supp. 44-510e(a), to K.S.A. 1993 Supp. 44-510e(a).

²¹ Compare K.S.A. 1990 Supp. 44-510d and K.S.A. 1990 Supp. 44-510e, to K.S.A. 1993 Supp. 44-510d(a)(23) and K.S.A 1993 Supp. 44-510e(a) (adding the requirement functional impairment must be based on the *AMA Guides*, 3rd Ed., Revised).

the ultimate determination of impairment is a factual matter for the ALJ (and the Board) to decide. The ALJ did exactly what is permitted in *Perez*, a case acknowledging a worker's impairment is based on the *AMA Guides* as a starting point and competent medical evidence, yet the final determination of impairment still subject to the fact-finder weighing the evidence and making a factual ruling. The ALJ need not be a physician to make a judicial decision. *Perez* allows an ALJ or the Board to consider or take judicial notice of the *Guides*, even if the *Guides* are not placed into evidence.

As stated in *Eder*, "Kansas courts have upheld Board decisions disregarding uncontested medical testimony due to factual circumstances that undermined its validity. See *Miller v. Williams Mach. Tool Co.*, No. 97,803, 2008 WL 762518, at *6-7 (Kan. App. 2008)."²² There is no legal requirement for more than one impairment rating in evidence before an ALJ may question the validity of a doctor's opinion regarding impairment.

Here, the ALJ properly considered evidence which undermined Dr. Murati's opinion concerning the claimant's impairment of function. The underlying basis of Dr. Murati's rating is contradicted by the physical examination findings of the court-ordered and neutral examiner, Dr. Jones. Dr. Murati found physical problems not found by Dr. Jones. There is no law or rule preventing the ALJ from discrediting Dr. Murati's rating. The ALJ is free to consider the *AMA Guides*, as is the Board.²³ Also, Dr. Murati's findings of laxity and instability seem quite similar and raise the concern the claimant is being awarded benefits for the same or similar condition twice.

BOARD MEMBER

c: (via OSCAR)
William Phalen
James Hess
Hon. Brian Brown

²² *Eder*, at 2016 WL 7324454, at *12.

²³ See *Perez* at 508.