

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TERRY BAKER)	
Claimant)	
V.)	
)	AP-00-0481-140
)	CS-00-0363-415
BELGER CARTAGE SERVICE, INC.)	
Respondent)	
AND)	AP-00-0481-142
)	CS-00-0376-441
BELGER CARTAGE SERVICE, INC)	
Insurance Carrier)	

ORDER

Respondent appeals the February 2, 2024 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on June 13, 2024. Matthew L. Bretz appeared for Claimant. Randall W. Schroer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

1. Independent Medical Examination (IME) report of Dr. David Hufford, dated September 17, 2015. Dr. Hufford letter, dated January 4, 2016;
2. Transcript of Discovery Deposition of Terry Baker, taken February 12, 2016;
3. Permanent impairment rating of Dr. Pat Do, dated November 7, 2016;
4. Transcript of Regular Hearing with exhibits, held March 13, 2017;
5. Deposition transcript of Dr. Robert Barnett with exhibits, taken March 17, 2017;
6. Deposition transcript of Dr. George Fluter with exhibits, taken March 22, 2017; and,
7. Deposition transcript of Steven Benjamin with exhibits, taken May 26, 2017.

ISSUES**Case No. CS-00-0363-415 and AP-00-0481-140 (shoulder injuries)**

1. Whether the June 4, 2014 accident was the prevailing factor causing Claimant's bilateral shoulder injuries, medical condition and resulting disability or impairment?
2. What is the nature and extent of Claimant's disability, including is he eligible for work disability compensation?
3. Should an offset for Social Security retirement benefits paid to Claimant be applied pursuant to K.S.A. 44-501(f), and if applicable, what is the value of the offset and when does the offset begin?
4. Is Claimant entitled to future medical benefits?

Case No. CS-00-0376-441 and AP-00-0481-142 (left wrist injury)

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant, seventy-four years of age, worked for Respondent for twenty years, initially as an iron worker, but mostly as a working foreman.

On June 4, 2014, Claimant was on a high rise building moving a telecommunications cabinet. A crane lifted the cabinet off the roof, exposing a hole which Claimant did not see. Claimant stepped into the hole with his right foot and fell backwards. Claimant's left arm caught a handrail and his right arm went down through a grating, jamming his right shoulder. He reported his injury and was sent to Via Christi Occupational Medicine (Via Christi). Claimant reported pain to both shoulders, more on the right than the left, and pain in his right leg. He received conservative treatment through Via Christi, but was ultimately referred to Bernard F. Hearon, M. D., an orthopedic surgeon specializing in the care of upper extremities. Dr. Hearon performed right shoulder surgery on October 15, 2014. The surgery included extensive intra-articular and extra-articular debridement, subacromial decompression, rotator cuff repair of a massive three tendon tear and

suprascapular nerve block. Following a course of physical therapy, Claimant was released from treatment for the right shoulder, with permanent restrictions on April 2, 2015.

Following his release by Dr. Hearon for his right shoulder, Claimant returned to his regular job duties, performing his primary tasks as a foreman until he injured his left wrist on May 1, 2015. Claimant's right leg symptoms were no longer present. His left shoulder pain continued, but had not been evaluated or treated.

At his attorney's request, Claimant was evaluated by David W. Hufford, M.D., on September 17, 2015. Dr. Hufford was asked to address Claimant's current status and need for further treatment. Regarding the history of Claimant's injury to his shoulders, Dr. Hufford stated:

He states that on or about August 20, 2013 while walking on ground level he tripped and fell backwards with his arms outstretched. He noted sudden and immediate pain in both shoulders and was evaluated through the worker's compensation system, Initially at Via Christi Occupational Medicine with subsequent referral to Dr. Hearon, an orthopedic upper extremity specialist in Wichita, Kansas. There is a contemporaneous complaint of bilateral shoulder pain documented in the medical records from Via Christi. His right shoulder pain was greater than the left and an MRI was performed revealing a rotator cuff tear. He was taken to surgery by Dr. Hearon where an arthroscopic rotator cuff repair was performed and he has recovered from that surgery in the usual and expected manner with release at MMI and a permanent weight restriction.¹

Dr. Hufford opined the prevailing factor for Claimant's bilateral shoulder injuries was the August 20, 2013, work-related fall and recommended additional treatment. Dr. Hufford opined the prevailing factor for Claimant's medical condition in his left wrist injury was the May 1, 2015, work-related injury and recommended additional treatment. Dr. Hufford saw Claimant as an authorized physician for Claimant's left shoulder and wrist on January 4, 2016. Claimant did not see Dr. Hufford after this date.

While still receiving treatment for his shoulders, Claimant suffered an injury to his left wrist on May 1, 2015. Claimant was moving a machine inside a facility. He went outside to his truck to retrieve some 4 by 6 cribbing (square piece of wood put under a machine to help when moving it). Claimant grabbed the cribbing and when he pushed himself up, it rolled over, causing his left wrist to twist. Claimant reported his injury and was sent to Via

Christi, where x-rays were taken and a nerve conduction test (NCT) was ordered. After receiving the results of the NCT, which were positive for carpal tunnel syndrome, Claimant was referred to Pat Do, M.D., a board-certified orthopedic surgeon, who performed a left carpal tunnel release on May 13, 2016. Following a course of physical therapy, Claimant was released from treatment for his left wrist, with restrictions for the left wrist on September 22, 2016.

Following an MRI of his left shoulder on April 13, 2016, Claimant was referred to Dr. Do for treatment. On June 13, 2016, Dr. Do performed surgery on Claimant's left shoulder, which included extensive debridement of the glenohumeral joint, soft tissue biceps tenodesis, subacromial decompression, rotator cuff repair and distal clavicle excision. Following a course of physical therapy, Claimant was released from treatment for the left shoulder, with permanent restrictions on September 22, 2016.

At Respondent's request, Dr. Do provided functional impairment ratings for Claimant's injuries to his left shoulder and wrist, by letter dated November 7, 2016. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition (*Guides*, 4th ed.), Dr. Do opined Claimant has 4% functional impairment to the left upper extremity for the June 14, 2014 injury to his left shoulder. He did not provide a rating to the right shoulder because he was not authorized to treat it. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition (*Guides*, 6th ed.) as a starting point and based on competent medical evidence, Dr. Do opined Claimant has 5% functional impairment to the left upper extremity for the May 1, 2015, injury to his left wrist. Dr. Do's letter did not address future medical benefits.

Claimant returned to work, performing his usual job tasks until November 7, 2016, when he was called into the office by Respondent, who informed him he was not a foreman, his hourly wage was being reduced and he would not be working full time due to his restrictions. Claimant was advised he would only be called to work jobs within his restrictions, such as flagging a crane. Since November 7, Claimant has worked twice for Respondent. Claimant believes he is still employed with Respondent and is willing to work. He is receiving pension from his union and social security retirement benefits, which began on December 1, 2016 in the amount of \$1,706 per month. Claimant has not sought employment since November 7.

At his attorney's request, Claimant was evaluated by George Fluter, M.D., on November 17, 2016. Dr. Fluter opined the prevailing factor for Claimant's bilateral shoulder injuries, medical condition and resulting impairment or disability was the June 14, 2014, work-related injury. Dr. Fluter opined the prevailing factor for Claimant's left wrist injury,

medical condition and resulting impairment or disability was the May 1, 2015, work-related injury.

Using the *Guides*, 4th ed., Dr. Fluter opined Claimant has 19% functional impairment to the whole body (12% to the right upper extremity and 22% to the left) for the June 14, 2014 injuries to Claimant's shoulders. Using the *Guides*, 6th ed. as a starting point and based on competent medical evidence, Dr. Fluter opined Claimant has 13% functional impairment to the left upper extremity for the May 1, 2015, injury to Claimant's left wrist. Dr. Fluter opined future medical benefits would be likely for both injuries. Based on the task list prepared by Claimant's expert, Dr. Fluter opined Claimant could not perform nine of the eleven tasks identified, resulting in an 82% task loss.

Two vocational experts interviewed Claimant, Dr. Robert Barnett at his attorney's request, and Steve Benjamin at Respondent's request. Dr. Barnett is a rehabilitation counselor/evaluator and a job placement specialist. He identified eleven non-duplicative tasks and opined Claimant could earn minimum wage (\$280/week).

Mr. Benjamin is a certified rehabilitation counselor and job placement specialist in vocational rehabilitation counseling. He identified fourteen non-duplicative tasks. Based on the restrictions of Dr. Hearon and/or Dr. Fluter, Mr. Benjamin opined Claimant could earn approximately \$342.67 per week. Based on the restrictions of Dr. Do, Mr. Benjamin opined Claimant could earn approximately \$507.82 per week.

On August 20, 2013, Claimant injured his shoulders and right hip when he suffered a similar fall injury while loading/landing plates. Claimant stepped into a hole on the counterweight on the crane and fell backward. He received a short course of conservative treatment (physical therapy) and was released. Claimant described this injury as "another little fall."² He returned to work performing his usual job duties, without restrictions and was symptom free until his fall on June 4, 2014.

Dr. Fluter was provided and reviewed the Via Christi medical records generated from Claimant's August 20, 2013 fall. Comparing August, 2013 shoulder x-rays to those taken in June, 2014 revealed there were similar degenerative findings, particularly with the acromioclavicular joints. Dr. Fluter opined the June 4, 2014, accident was not the prevailing factor causing the degenerative conditions in Claimant's shoulders. From review of the records from 2013, Dr. Fluter noted Claimant's symptoms had resolved within 5-6 weeks

² R.H. Trans. At 34.

and Claimant was not seen again at Via Christi until the June 4, 2014 work-related injury. He opined:

I would not have expected him to have resolution of his symptoms in a, I don't know, five or six week time frame if he had had the - - sort of the extensive internal derangement of his shoulders at that time. So while he may have had some degenerative changes that were similar, in terms of other structural pathology, I don't think there was - - it would seem to me unlikely for him to have the same degree of any sort of internal derangement of the shoulders in 2013 and that they would have resolved in a five to six week period whereas, you know, the more extensive - - we do know more extensive internal derangement based on imaging studies after the 2014 injury would indicate more severe involvement. So while he may have degenerative changes, I don't think he had the same internal structural changes of the shoulder, the internal derangement, because I would not have anticipated that resolving in, you know, a few weeks.

...

Q. Based upon that history, is it more likely that not these torn rotator cuffs and other findings found during surgery after his work-related injury were caused by work-related injury as opposed to being pre-existing conditions?

A. Well, yes, my opinion had been that those internal derangement findings were as a result of the June, 2014, injury and were not pre-existing.³

For Claimant's shoulder injuries, the ALJ found the rating of Dr. Fluter to be more credible than Dr. Do because Dr. Fluter was the only physician to address all of Claimant's injuries, resulting in an award of 19% functional impairment to the whole body. The ALJ awarded Claimant 73.5% work disability compensation. He found Claimant had an 82% task loss based upon Dr. Fluter's opinion. He found Claimant has a 65% wage loss based upon an average of the opinions of the competing experts (71% per Dr. Barnett and 58% per Mr. Benjamin). Pursuant to K.S.A. 44-501(f), the ALJ found Claimant's award of work disability was less than the functional impairment and awarded Claimant the 19% functional impairment to the whole body.

For the left wrist injury, the ALJ found the ratings of Dr. Fluter (13%) and Dr. Do (5%) credible and averaged the two, resulting in a 9% functional impairment to the left upper extremity at the 210 week level.

³ Fluter Depo. (March 22, 2017) at 24-26.

The ALJ awarded future medical benefits for both injuries based upon the opinions of Dr. Fluter.

Respondent argues Claimant's June 4, 2014 injury is a scheduled injury to the left shoulder. Benefits should be denied for the right shoulder because there is no evidence to support the need for treatment to the right shoulder as a result of the June 14 injury and the prevailing factor for the right shoulder medical condition and resulting disability is the August 13, 2013 injury. Respondent did not object to the ALJ's award of 9% functional impairment based on a split of the physician's ratings for the May 1, 2015 left wrist injury. Respondent argues future medical benefits should be denied in each claim because seven years have passed since these claims were submitted for award and Claimant has not requested medical treatment.

Claimant maintains the ALJ's finding Claimant has 19% functional impairment to the whole body for the June 4, 2014 injury to his shoulders should be affirmed; the finding Claimant has 73.5% work disability should be modified to 76.5%; the finding Claimant has 9% functional impairment for the injury to his left wrist should be modified to 13%; and, the Award of future medical benefits should be affirmed for both injuries.

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.⁴ The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.⁵ 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.⁶

An accident is an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single

⁴ See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

⁵ See K.S.A. 44-555c(a).

⁶ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

work shift.⁷ The accident must be the prevailing factor causing the injury. An injury is any lesion or change in the physical structure of the body, causing damage or harm.⁸ Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁹ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

1. The June 4, 2014, accident was the prevailing factor causing Claimant's bilateral shoulder injuries, medical condition and resulting disability or impairment.

Respondent argues Claimant's June 4, 2014, injury is a scheduled injury to the left shoulder because there is no evidence to support the need for treatment to the right shoulder as a result of the June 4 injury and the prevailing factor for the right shoulder medical condition and resulting disability is the August 13, 2013, injury. Respondent's arguments are considered and rejected. There is no dispute Claimant fell in August 2013 and received a short course of conservative treatment. It is also not disputed Claimant returned to his regular work duties without symptoms following treatment. Claimant worked without issues until his fall on June 4, 2014.

The medical evidence supports this conclusion. Dr. Fluter was unequivocal in his opinion the June, 2014 fall was the prevailing factor for Claimant's medical condition and resulting impairment or disability. Although there is some confusion with the date of accident, Dr. Hufford shares this opinion. Dr. Hufford's prevailing factor opinion refers to Claimant's fall occurring on August 20, 2013. It is unclear if Claimant gave Dr. Hufford the wrong date or if Dr. Hufford made the error. What is clear is the August, 2013 date was referred to in error.

A review of the history provided by Dr. Hufford reflects Claimant's injury and the medical treatment he received as a result of the injury occurred on June 4, 2014. Dr. Hufford's report describes the August 2013 fall accompanied by immediate pain in both shoulders. The history contained in the report notes initial treatment at Via Christi, referral to Dr. Hearon, followed by an MRI and subsequent surgery to repair the right shoulder. The

⁷ See K.S.A. 44-508(d).

⁸ See K.S.A. 44-508(f)(1).

⁹ See K.S.A. 44-508(g).

treatment provided in 2013 did not include an MRI and subsequent surgery. In addition, Claimant suffered significant injuries to both shoulders. It is hard to believe Claimant could work symptom free from August, 2013 through June, 2014 if he suffered these injuries in 2013.

Claimant met his burden of proving the prevailing factor for his shoulder injuries, medical condition and resulting impairment or disability was the June 4, 2014, work-related fall.

2. Claimant has 19% functional impairment to the whole body and is entitled to work disability compensation for the June 4, 2014, injuries to his shoulders.

The law in effect on the date of the accident controls.¹⁰ Because the date of accident is June 4, 2014, the Guides 4th edition apply.¹¹

Two physicians provided functional impairment ratings. At Claimant's request, Dr. Fluter opined 19% to the whole body, Dr. Do, the treating physician for Claimant's left wrist and shoulder, opined 4% for the left shoulder. The ALJ adopted the opinion of Dr. Fluter and found Claimant has 19% functional impairment to the whole body because Dr. Do's opinion did not address all of Claimant's injuries. The Board agrees and finds Claimant has 19% functional impairment to the whole body as a result of the June 4, 2014, fall at work and affirms the ALJ's award in this regard.

K.S.A. 44-510e(a)(2)(c), states an injured worker may be entitled to compensation in excess of functional impairment, if the functional impairment exceeds 7.5% to the body as a whole and the injured worker sustains a post-injury wage loss in excess of 10%.

Claimant's 19% functional impairment to the whole body meets the functional impairment threshold. The next issue is whether he meets the wage loss threshold for work disability. Claimant is not currently working and believes he is still employed with Respondent. The record is absent of any evidence Claimant was terminated for job abandonment or cause. The Board is tasked with imputing an appropriate post-injury wage based on the factors in K.S.A. 44-510e(a)(2)(E).

¹⁰ See *Jamison v. Spears Holding Corp.*, No. 109,670, 2014 WL 1887645, at *5 (unpublished Kan. App. Opinion filed May 9, 2014).

¹¹ See K.S.A. 44-510e(a)(2)(B).

The ALJ averaged the wage loss opinions of the two vocational experts contained in the record and found Claimant has a 65% wage loss. The Board agrees with this finding. The only task loss opinion in the record was the 82% task loss opinion provided by Dr. Fluter, based upon Dr. Barnett's task loss assessment. The ALJ adopted Dr. Fluter's opinion Claimant has an 82% task loss, averaged it with Claimant's 65% wage loss, resulting in an 73.5% work disability. The Board agrees Claimant is entitled to work disability compensation and the ALJ's finding of a 73.5% work disability. The Board affirms the ALJ's award of 73.5% work disability compensation.

3. Should an offset for Social Security retirement benefits paid to Claimant be applied pursuant to K.S.A. 44-501(f), and if applicable, what is the value of the offset and when does the offset begin?

K.S.A. 44-501(f) states:

(f) "If the employee receives, whether periodically or by lump sum, retirement benefits under the federal social security act or retirement benefits from any other retirement system, program, policy or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment. Where the employee elects to take retirement benefits in a lump sum, the lump sum payment shall be amortized at the rate of 4% per year over the employee's life expectancy to determine the weekly equivalent value of the benefits."

In the Award, Claimant's work disability award was offset by \$426.50 per week. The ALJ calculated the weekly offset by dividing the monthly social security retirement benefit of \$1,706.00 by 4. The Board finds the weekly offset is \$393.63. This amount is calculated by multiplying the monthly benefit of \$1,706 by 12 (months) and dividing this sum by 52.14 ($\$1,706 \times 12 = \$20,472 / 52.14$). Claimant began receiving social security benefits in December 2016, causing his compensation rate to decrease to \$170.94 beginning December 1, 2016.

4. Claimant has 9% functional impairment to the left upper extremity at the 200 week level for the May 1, 2015 injuries to his left wrist.

The law in effect on the date of the accident controls.¹² Because the date of accident is May 1, 2015, the Guides 6th edition apply. The ALJ found the ratings of Dr. Fluter (13%) and Dr. Do (5%) credible and averaged the two, resulting in a 9% functional impairment to the left upper extremity at the 210 week level. The Board agrees with finding a split of the ratings at 9% functional impairment, but modifies the number of weeks available to the left forearm, or 200 weeks, for the May 1, 2015 injury to his left wrist.

5. Claimant is entitled to future medical benefits for both work injuries.

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.¹³ 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."¹⁴

Dr. Do did not offer a future medical opinion. Dr. Fluter opined Claimant will require future medical benefits. His report and testimony are medical evidence. Under K.S.A. 44-510(e), Claimant provided sufficient medical evidence showing it is more probably true than not additional medical treatment will be necessary after he was placed at MMI, thereby overcoming the presumption Respondent's obligation to provide medical treatment upon him reaching MMI terminated. The Award of future medical benefits for the injuries sustained on June 4, 2014 and May 1, 2015 are affirmed.

¹² See *Jamison v. Spears Holding Corp.*, No. 109,670, 2014 WL 1887645, at *5 (unpublished Kan. App. Opinion filed May 9, 2014).

¹³ See K.S.A. 44-510h(a).

¹⁴ See K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Thomas Klein, dated February 2, 2024, is affirmed in part and modified in part.

For the June 4, 2014 work-related injury to Claimant’s shoulders, he is entitled to 78.85 weeks of permanent partial disability at the rate of \$563.58 per week, or \$44,438.28 for his 19% functional impairment to the whole body. Beginning November 8, 2016, Claimant is entitled to 226.18 weeks of permanent partial disability for work disability compensation, to be paid at the rate of \$563.58, for 3.29 wks or \$1,854.18 (from November 8, 2016 through November 30, 2016), followed by 222.89 weeks to be paid at the rate of \$170.94 or \$38,100.82 or \$39,955.00 for a 73.5% permanent partial work disability, making a total award of \$84,393.28, which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

For the May 1, 2015 work-related injury to Claimant’s left wrist, he is entitled to 18 weeks of permanent partial disability at the rate of \$425.99 per week, or \$7,667.82, for a 9% permanent partial functional disability, making a total award of \$7,667.82, which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this day of July, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

TERRY BAKER

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**AP-00-0481-142
CS-00-0376-441**

c: (Via OSCAR)

Matthew L. Bretz, Attorney for Claimant
Randall W Schroer, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge