

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JORGE ZAPATA-ENRIQUEZ)	
Claimant)	
V.)	
)	AP-00-0482-987
NATIONAL BEEF PACKING CO., LLC.)	CS-00-0443-659
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

NUNC PRO TUNC ORDER

Respondent appealed the April 29, 2024 Award by Administrative Law Judge (ALJ) Larry Gurney. The Board heard oral argument on September 12, 2024. Jeff K. Cooper appeared for Claimant. Shirla McQueen 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. Preliminary hearing transcript, held October 4, 2019;
2. Independent Medical Evaluation Reports of Dr. Stan Bowling, M.D., dated November 25, 2019 and January 29, 2020;
3. Independent Medical Evaluation Report of Dr. Vito J. Carabetta, M.D., dated May 24, 2022;
4. Regular hearing transcript, held July 28, 2022, with exhibits;
5. Deposition transcript of Pedro Murati, M.D., taken August 16, 2022, with exhibits;
6. Deposition transcript of Vito Carabetta, M.D., taken August 25, 2022;
7. Deposition transcript of David Hufford, M.D., taken August 31, 2022, with exhibits;
8. Deposition transcript of Richard Thomas, taken September 6, 2022, with exhibits;
9. Deposition transcript of Ashley Bayer, taken October 13, 2022, with exhibits;
10. Deposition transcript of Karen Terrill, taken October 25, 2022, with exhibits; and
11. Deposition transcript of Jorge Zapata, taken November 21, 2022.

ISSUES

1. What is the nature and extent of Claimant's disability, including is he eligible for work disability compensation?
2. Is Claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant is 47 years of age, with a 6th grade education and limited ability to read and write English. Claimant was employed with Respondent from February 6, 2016 through August 26, 2021, primarily as an electric motorized pallet jack operator and forklift driver.

On October 16, 2018, Claimant injured his right foot while he was operating a floor jack moving a pallet holding 2,000 pounds of ice. His right foot/ankle was pinned between the pallet jack and an iron structure attached to the wall.

Claimant reported his injury and was seen at the nurses' office at the plant. He was taken to the ER at Southwest Medical Center. X-rays revealed a crush injury with fractures to Claimant's second, third and fourth proximal phalanges with minimal displacement. Claimant was referred to Suhail Ansari, M.D., an orthopedic surgeon in Liberal for treatment on October 17, 2018. Dr. Ansari provided conservative treatment including the use of a Cam boot and placed temporary work restrictions on Claimant's activities.

Claimant returned to work with Respondent, primarily as a forklift driver, limited to driving 30 minutes and then resting for 20 minutes. From late September of 2020 through August 26, 2021, when he lost his job with Respondent, Claimant was returned to a light duty position in the glove room.

Approximately one month or two after the accident, Claimant started to have pain in his right knee. At some point, Dr. Ansari discontinued the use of the Cam boot and tried physical therapy. As time passed, Claimant started to have pain in his right hip and lower back. On September 16, 2019, Dr. Ansari noted it was 10 months post injury and Claimant was still having significant pain. He recommended Claimant be evaluated by an ankle/foot orthopedic surgeon.

Claimant was evaluated by Stanley A. Bowling, M.D., for a Court-ordered Independent Medical Evaluation (IME) on November 25, 2019. Dr. Bowling opined the October 16, 2018 work-related injury was the prevailing factor for his ongoing foot and ankle pain, but not the knee pain. He opined Claimant's right knee pain was due to his walking in the boot followed by his favoring the foot, which aggravated his right knee. Dr. Bowling continued Dr. Ansari's temporary restrictions and recommended an

electromyographic nerve test (EMG) of Claimant's right lower extremity, which was provided on January 20, 2020. Dr. Bowling reviewed the results of the EMG and issued an amendment report on January 29, 2020. The EMG results revealed right sural nerve neuropathy and right peroneal neuropathy. Dr. Bowling did not believe surgical intervention would be beneficial. He recommended evaluation and treatment by either a neurologist or a physiatrist for a course of treatment utilizing medications to address Claimant's on going symptoms for as long as his symptoms continued. Dr. Bowling recommended the same work restrictions.

In October 2020, Claimant began treatment with Baoluan Nguyen, M.D., a pain management specialist. Claimant continues to receive pain management treatment through Dr. Nguyen.

In early August 2021, Claimant learned his mother had a stroke and had COVID. Claimant talked with Silvia Garibay with Human Resources regarding time off to travel to Mexico to see his mother. Claimant was given a leave of absence provided he send paperwork confirming his mother's medical condition, which he provided by email on August 7 or 8. Ms. Garibay notified Claimant by email on August 11, 2021, his leave of absence was extended and he needed to return to work on August 18, 2021.

Claimant's mother passed away on August 10, 2021. Claimant called Respondent on August 23, 2021, and spoke to "Nora". He explained his situation with his mother and was advised there would be no problems if he returned to the plant with a copy of the death certificate. On August 26, 2021, Claimant arrived at the plant and was stopped at the initial security post. While there, Claimant spoke with Respondent's employee, Jesenya Solis, by telephone. Claimant was informed he did not have a job because he voluntarily quit by not returning timely from his leave of absence. Claimant acknowledged he was aware of Respondent's absenteeism policies, including 3 consecutive no call/no shows and overstaying a leave of absence was considered to be a voluntary quit. Claimant disputes he voluntarily quit his employment.

Claimant worked with a recruiter, Kelly Garcia, to find a job. Ms. Garcia found Claimant a part-time job at Tyson Fresh Meats as a "temp taker" (during the COVID pandemic). Claimant was hired on January 31, 2022, and worked for Tyson through March 7, 2022. Claimant stood in the security area, where he passed out masks and checked people's temperature. Claimant was paid \$22.50 per hour, working approximately 26 hours per week. The part-time position ended when Governor Kelly lifted many of the COVID related workplace rules. Although Claimant's last day of work was March 7, 2022, his employment was officially terminated on March 31, 2022.

When Claimant lost his temp taker job at Tyson, he was offered the opportunity for continued employment. Claimant talked with Norma in Human resources on the kill side with Tyson who informed him there were no jobs available within his restrictions. He also

talked with Maria on the production side who advised there were no jobs available within his restrictions. According to Claimant, he did not complete any paperwork when he left employment with Tyson and was not offered employment.

Ashley Bayer is the Complex HR Manager at Tyson's Finney County facility. Ms. Bayer did not have any personal interaction with Claimant. Her knowledge of Claimant's employment with Tyson was limited to the contents of his personnel file. Claimant was hired on January 31, 2022 for a part-time temp taker job. He was paid \$22.50 per hour which included incentive pay, meal allowance and shift differential. Claimant could work up to 30 hours per week. Pay statements contained in Claimant's personnel file revealed he worked 28 hours per week for three weeks, 32 and 17 hours the other two weeks. Claimant's pay statement for his first work week was not included in his file. Claimant's total earning from his employment with Tyson was \$3,897.19. Claimant's personnel file contained his work restrictions imposed by Dr. Nguyen and noted his reason for leaving was "Voluntary resignation-Returned to School."¹

According to Ms. Bayer, all temp takers were given the opportunity to seek employment in the plant. At this time, there were more than 300 jobs available. Ms. Bayer believed Tyson could have found a job within Claimant's restrictions. Ms. Bayer acknowledged there were no documents in Claimant's personnel file indicating a job offer was extended to Claimant.

Claimant found a job on September 26, 2022, with Helpers, Inc. Helpers provides in-home care for individuals needing such services. Claimant was employed to assist his mother-in-law, who has cancer. He works 20-25 hours per week and is paid \$13.13 per hour. He asked for additional hours of work, but none are available. Claimant is willing to work with other clients in the area, but there was no other available work.

At his attorney's request, Claimant was evaluated by Pedro A. Murati, M.D., on two occasions. Dr. Murati is board-certified in physical medicine, rehabilitation, electrodiagnosis, independent evaluations and pain medicine. Dr. Murati evaluated Claimant on August 5, 2019 for treatment recommendations. He opined Claimant's October 16, 2018 work accident was the prevailing factor for the medical conditions to his right foot, knee, hip and back. Dr. Murati recommended additional treatment.

Dr. Murati evaluated Claimant again on March 23, 2021, to provide his opinions regarding functional impairment, permanent restrictions and task loss. Dr. Murati's prevailing factor opinion remained the same. He opined Claimant has 14% functional impairment to the whole body based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th edition (*Guides*, 6th ed.), and competent medical evidence. Dr. Murati

¹ Bayer Depo at Ex.31.

placed permanent restrictions on Claimant's activities and opined future medical treatment was necessary. Based on a task list prepared by Richard Thomas, Dr. Murati opined Claimant lost the ability to perform 5 of 9 tasks, for a 55.5% task loss.

Claimant was evaluated at Respondent's request by David W. Hufford, M.D., on June 17, 2021. Since June 1, 2022, Dr. Hufford's practice is limited to performing independent medical examinations. Approximately one-half of the examinations he performs are at the request of the ALJ's in Kansas workers compensation cases. Dr. Hufford opined the prevailing factor for the medical conditions and resulting impairment in Claimant's right foot and hip was the October 16, 2018 crush injury. Using the *Guides*, 6th ed., as a starting point and based on competent medical evidence, Dr. Hufford opined Claimant has 5% functional impairment to the whole body. He imposed permanent restrictions on Claimant's activities and opined Claimant should continue with pain management treatment with Dr. Nguyen. Based on Richard Thomas's task list, Dr. Hufford opined Claimant has lost the ability to perform 8 or 9 of the 9 non-duplicative tasks for an 89 or 100% task loss. It was unclear if operating the pallet jack required constant walking. If operating the pallet jack required constant walking, then Dr. Hufford stated Claimant could not perform this task resulting in the loss of the ability to perform all 9 tasks.

Dr. Hufford testified he did not deviate from the *Guides*, 6th ed., in arriving at his functional impairment rating. He believes the *Guides*, 6th ed., understates some impairment values arising from lower extremity injuries, which has resulted in him becoming more liberal with his lower extremity ratings. Dr. Hufford further testified *Johnson* had been out for approximately six months when he evaluated Claimant and he believes he now has more latitude in assigning functional impairment than he did at the time he evaluated Claimant.

Claimant was referred to Vito J. Carabetta, M.D., for a Court-ordered IME on May 24, 2022. Dr. Carabetta diagnosed Claimant with a right foot crush injury, a right sural nerve injury and mechanical low back pain due to his antalgic gait. Utilizing the *Guides*, 6th ed., as a starting point and based on competent medical evidence, Dr. Carabetta opined Claimant has 13% functional impairment to the whole body. He imposed permanent restrictions on Claimant's activities and opined Claimant should continue with pain management treatment. Dr. Carabetta reviewed the task lists of Mr. Thomas and Ms. Terrill. Based on Mr. Thomas list, he opined Claimant has lost the ability to perform 9 of the 9 non-duplicative tasks or 100% task loss. Based on Ms. Terrill's list, he opined Claimant has lost the ability to perform 10 of the 11 non-duplicative tasks or 91% task loss.

Two vocational consultants interviewed Claimant, Richard L. Thomas, M.S., at his attorney's request and Karen Crist Terrill, M.S., on behalf of Respondent. Mr. Thomas is a vocational consultant with over 40 years of experience in vocational rehabilitation. He identified 9 non-duplicative tasks and opined Claimant could earn approximately \$240-

\$270 per week. Mr. Thomas opined Claimant's restrictions from various doctors limit him to light and sedentary work, he could not perform any of the jobs he had performed in the five year period prior to his injury and he could not operate a forklift.

Ms. Terrill is a vocational rehabilitation consultant with over 35 years of experience. She identified eleven non-duplicative tasks and opined Claimant could earn approximately \$400 per week. Ms. Terrill shared Mr. Thomas opinions Claimant was unable to perform any of the jobs he had held in the five year period prior to his work injury and was limited to sedentary or light unskilled work.

The ALJ found Claimant had 13% functional impairment to the whole body and was entitled to a work disability of 66% based on an 81.5% task loss and a 50.5% wage loss. The ALJ found Claimant had 13% functional impairment to the whole body based on the opinions of Court-ordered evaluator Dr. Carabetta. In so doing, he found the ratings of Dr. Carabetta and Dr. Murati (14%) were essentially the same, even though the specifics of the ratings were different and they did not have the same diagnoses. The ALJ rejected Dr. Hufford's 5% rating noting he did not deviate from the *Guides*, 6th ed., his testimony he now has more latitude to deviate from the *Guides*, 6th ed., and the rating was too low for a condition resulting in a relatively young man being limited to sedentary to light work.

In finding an 81.5% task loss, the ALJ averaged the three physicians task loss opinions (Carabetta 100%, Murati 55.5% and Hufford 89%) based on the task list prepared by Mr. Thomas, as it was the only list reviewed by all three physicians. The ALJ found Claimant's post-injury wage was \$525.20, which was based on Claimant's actual hourly rate at Helpers, Inc., multiplied by 40 hour per week. The ALJ awarded future medical benefits, noting Claimant was receiving pain management care from Dr. Nguyen and Respondent conceded Claimant was entitled to future medical care.

Respondent appealed arguing Claimant's Award should be limited to a 5% functional impairment based on Dr. Hufford's opinion, thereby denying work disability compensation to Claimant for failing to meet the functional impairment threshold. Should the Board determine Claimant has met the functional impairment threshold, he should be denied work disability compensation because he voluntarily removed himself from the open labor market by not pursuing employment with Tyson following the end of his temp taker job. Lastly, should the Board determine Claimant is eligible for work disability compensation, it should not begin paying out until his employment with Respondent ended. The ALJ calculated work disability compensation and ordered the \$130,000 to be due and owing as of the date of the Award. Claimant maintains the Award should be affirmed.

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.² The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.³ 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.⁴

1. Claimant has 13% functional impairment to the whole body and is entitled to a 66% work disability award for the October 16, 2018, accidental injuries.

Three physicians provided functional impairment ratings to the whole body. At Claimant’s request, Dr. Murati opined 14%, Dr. Hufford 5%, and the Court-ordered evaluator, Dr. Carabetta 13%. The ALJ adopted the opinion of Dr. Carabetta and found Claimant has 13% functional impairment to the whole body. The ALJ’s findings in this regard are well-reasoned and supported by the evidence. The Board agrees and finds Claimant has 13% functional impairment to the whole body as a result of the August 16, 2018, work-related injuries 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 13% functional impairment to the whole body meets the functional impairment threshold.

The next issue is whether Claimant meets the wage loss threshold for work disability. Claimant is currently working for Helpers earning \$13.13 per hour, working 26 hours per week. Respondent’s argument Claimant voluntarily removed himself from the open labor market was considered and rejected by the ALJ. His findings in this regard are well-reasoned and supported by the evidence. The Board agrees and finds Claimant did not voluntarily remove himself from the open labor market. Therefore, the Board is tasked with imputing an appropriate post-injury wage based on the factors in K.S.A. 44-510e(a)(2)(E).

² See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

³ See K.S.A. 44-555c(a).

⁴ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

The ALJ found Claimant's post-injury wage was \$525.20, which was based on Claimant's actual hourly rate at Helpers, Inc., multiplied by 40 hour per week resulting in a 50.5% wage loss. The ALJ's finding is well-reasoned and supported by the evidence. The Board agrees with this finding. The ALJ found Claimant had an 81.5% task loss, averaged it with Claimant's 50.5% wage loss, resulting in an 66% work disability. The Board agrees Claimant is entitled to work disability compensation and the ALJ's finding of a 66% work disability. The Board affirms the ALJ's award of 66% work disability compensation.

The ALJ found \$130,000 all due and owing for work disability compensation. Claimant's work disability did not start until his employment with Respondent ended on August 26, 2021. Claimant is entitled to permanent partial disability compensation for his 13% functional impairment beginning on his date of accident, October 16, 2018, followed by permanent partial disability compensation for his 66% work disability beginning August 26, 2021. Claimant's 66% work disability qualifies him for the statutory maximum compensation for permanent partial disability of \$130,000. As of the date of this Order, the \$130,000 awarded for permanent partial disability for functional impairment and work disability, is all due and owing.

2. Claimant is entitled to future medical benefits.

Claimant continues to receive on-going pain management treatment through Dr. Nguyen. Respondent acknowledged in their brief to the Board and at oral argument that Claimant is entitled to future medical benefits. The Award of future medical benefits is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Larry Gurney, dated April 29, 2024, is affirmed. Claimant is entitled to permanent partial disability in the amount of \$130,000, which is all due and owing and ordered paid in one lump sum, less any amounts previously paid. Claimant is also entitled to an award of future medical benefits upon proper application or by agreement of the parties.

IT IS SO ORDERED.

Dated this day of September, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant
Shirla McQueen, Attorney for Respondent and its Insurance Carrier
Hon. Larry Gurney, Administrative Law Judge