BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH P. JACOBS, JR. Claimant	)	
VS.	)	
CHAMNESS TECHNOLOGY Respondent	)	Docket Nos. 1,003,734 & 1,005,459
AND	)	
UNITED STATES FIDELITY & GUARANTY CO. Insurance Carrier	)	

ORDER

Respondent requested review of the December 22, 2004 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 22, 2005.

APPEARANCES

Henry A. Goertz, of Elkhart, Indiana, appeared for the claimant. Michael P. Bandre, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, both parties agreed that while respondent's notice of appeal did not reference Docket 1,005,459, it was respondent's intention to appeal both docketed claims as they were tried together. Further, for purposes of both docketed claims, the parties stipulated to a September 14, 2001 accident date.

ISSUES

The ALJ found that as a result of his accidental injury on September 14, 2001, claimant suffered a 54 percent work disability from August 26, 2003 to August 30, 2004,

and that after he returned to work earning a comparable wage, he was thereafter entitled to an Award for a 28 percent permanent partial disability. The ALJ found claimant failed to meet his burden of proof and therefore did not grant temporary total disability benefits for the period September 14, 2001 to November 19, 2001.

The respondent does not contest the ALJ's findings with respect to the task or wage loss components of the ultimate 54 percent work disability finding, nor for the bulk of the 28 percent permanent impairment finding. Rather, respondent's sole issue on appeal rests with the ALJ's decision to deny respondent's request for a credit for claimant's preexisting impairment to his knee under K.S.A. 44-501(c).

Claimant argues that the ALJ's Award should be affirmed with respect to the 28 percent permanent impairment rating as he believes there is insufficient evidence upon which to base any claim for a credit under K.S.A 44-501(c). However, he further argues that the ALJ erred in failing to grant his request for the additional temporary total disability compensation for the period of September 14, 2001 to November 19, 2001. Claimant argues that it is uncontroverted that he was unable to work during this period and that the evidence contained within respondent's pay records make it clear he was not paid the statutory benefits to which he was entitled.

Respondent does not contest that claimant was temporarily and totally disabled during this period immediately following his accident. However, to the extent any further temporary total disability benefits are ordered paid, respondent contends it is entitled to credit for those monies it paid in excess of the temporary total disability rate under K.S.A. 44-510f(b) as it maintains claimant received sick, vacation and/or bonus pay for the period at issue.

The issues to be resolved in this appeal are as follows:

1. Whether respondent is entitled to a credit for an alleged preexisting condition to claimant's left knee under K.S.A. 44-510(c);
2. Whether claimant is entitled to temporary total disability benefits from September 14, 2001 to November 19, 2001; and if so
3. Whether respondent is entitled to a credit for unearned wages for the requested period of additional temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained an accidental injury on September 14, 2001, when he fell from the back of a truck while sweeping out waste material. Claimant fell four to five feet down

and landed on a concrete slab. On his way down, claimant caught his back on the tailgate pin, landing on his left knee, leg and his right hip. Claimant was off work for a period of time and according to him, he took sick and vacation time so that he would continue to receive a paycheck. His pay stubs confirm this fact although, some of them reflect "bonus" pay. Claimant was uncertain as to what "bonus" pay was and there was no other testimony within the record to clarify the source of these funds, or the reason claimant was paid during the period September 14, 2001 to November 18, 2001.

After this period off work and conservative treatment, claimant returned to work. He continued to perform his job until July 23, 2002.[1] At that point, claimant indicated that he could no longer do the work because it was "painful". He testified that he had difficulty walking from his car to the truck, which took him down some stairs and up a ramp. As a result of claimant having to climb and walk since his injury to perform his work duties, he developed problems with his left leg and back.

Claimant was off of work for a period of time while he received treatment and ultimately underwent knee replacement surgery for his left knee complaints. After surgery, claimant returned to work but was earning less money than before his injury. He eventually began earning a comparable wage on August 30, 2004, and at that point, was no longer entitled to a work disability.[2]

The center of the parties' dispute stems from claimant's previous history of a knee replacement that took place in 1980. Claimant's left knee was replaced and following his recovery, claimant testified that he did remarkably well. He was engaged in rather heavy work activities and in fact, became a valued employee for respondent.

Two physicians examined claimant for purposes of this litigation and both spoke specifically to the issue of claimant's preexisting knee impairment. Claimant saw Dr. C. Reiff Brown for a court-ordered independent medical examination on April 6, 2004. It was Dr. Brown's opinion that claimant had a preexisting degenerative disc disease, a previous lumbar radicular syndrome which was treated with surgery, a spinal fusion at L5-S1, and spinal stenosis in the low lumbar area. He also opined that claimant suffered an injury to his left total knee arthroplasty on September 14, 2001, which caused rapid deterioration of the joint.[3] He indicated that claimant was at maximum medical benefit and assigned a 5 percent impairment based upon an aggravation of claimant's preexisting back problems.

Dr. Brown further opined that as a result of claimant's continuation of work after the accident, he suffered additional injury to his knee which resulted in a 50 percent

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[1] R.H. Trans. at 17.

[2] See K.S.A. 44-510e(a).

[3] Brown Depo., Ex. 1 at 3.

impairment of function of the left lower extremity. However, in light of claimant's earlier knee replacement, claimant had, at a minimum, a 37 percent impairment to the left knee before his September 14, 2001 accidental injury. Thus, only 13 percent was attributable to the accident at issue in this claim.[4]

Claimant was also examined by Dr. Philip R. Mills at his attorney's request. In his first report dated May 29, 2002, Dr. Mills diagnosed claimant with a mid-back laceration resulting from the September 14, 2001 fall, low back pain with spinal stenosis, right L4 radiculopathy, left S1 radiculopathy, and bilateral shoulder impingement syndrome with degenerative changes. He found claimant to have a 20 percent permanent partial impairment to the whole body solely for his back complaints, as Dr. Mills could not attribute the shoulder complaints to claimant's work activities. He indicated that 50 percent of this back impairment would be attributable to the preexisting problems of degenerative changes and spinal stenosis, and 50 percent would be from the fall. Thus, he assigned claimant a net 10 percent permanent partial impairment to the whole body for his back complaints as a result of his work-related injury.[5]

In his subsequent August 26, 2003 report issued after claimant had his knee replacement surgery, Dr. Mills addressed claimant's ongoing knee complaints and resulting permanency. He diagnosed claimant with post total knee revision and found that claimant had reached maximum medical improvement. Claimant was assigned a 50 percent permanent partial impairment to the left lower extremity which when converted, yields a 20 percent whole person impairment rating. When the 20 percent for the knee is combined with the 10 percent for the back, the result is a 28 percent whole body impairment.

During his deposition, Dr. Mills was asked whether claimant had any preexisting conditions, to which he responded that he was unaware of any prior rating for the left knee.[6] Dr. Mills confirmed that he was aware that claimant had undergone a total knee replacement before September 14, 2001, and that under the *Guides*, a single total knee replacement indicated that the "best result" rendered a 37 percent permanent partial impairment to the lower extremity. He went on to concede that "I'm not aware that he had any preexisting rating. But certainly any preexisting rating would need to be subtracted out. . ."[7] Then he was asked -

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[4] All ratings are made pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

[5] Mills Depo., Ex. 2 at 7.

[6] *Id.* at 27.

[7] *Id.* at 28-29.

Q. So within a reasonable degree of medical certainty, there is an argument that can be made that a 37 percent preexisting condition was present in Mr. Jacobs; is that correct?

A. Yes, there's a reasonable argument that could be made for that.[8]

The ALJ found claimant had a 28 percent permanent partial impairment to the body as a whole, expressly adopting the opinions of Dr. Mills over that offered by Dr. Brown, and apparently failed to take into consideration the issue of preexisting impairment. The Board has considered this issue and finds that the ALJ's Award should be modified.

The Board concludes respondent is entitled to a credit of 37 percent for the left knee. Both physicians conceded that a good result, which claimant undoubtedly had, from his 1980 knee replacement surgery would render a 37 percent permanent partial impairment to the lower extremity. And the Board is persuaded by the opinions offered by the independent medical examiner, Dr. Brown. Thus, the Board finds that the ALJ's Award should be modified to reflect a 5 percent whole body impairment for his ongoing back complaints and an additional 13 percent to the left lower extremity for the aggravation of his left knee problems and the subsequent knee replacement surgery. When converted and combined, this yields 10 percent permanent partial impairment to the body as a whole. The ALJ's permanency finding will be so modified beginning August 30, 2004.

The Board also finds that claimant is entitled to temporary total disability benefits for the period September 14, 2001 to November 18, 2001. Respondent does not dispute claimant's entitlement to these benefits but merely asserts that claimant was otherwise paid, via vacation leave, sick leave or "bonus" payments. However, there is insufficient evidence within the record to conclude that respondent is entitled to any credit for such payments under K.S.A. 44-510f(b). Moreover, the Board has held that because this case was litigated, rather than settled by virtue of a lump sum settlement, as required by K.S.A. 44-510f(b), respondent is not, by the language set forth in the statute, entitled to any credit for such "unearned wages".[9] In addition, this record fails to establish that wages representing sick or vacation leave are "unearned".

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 22, 2004, is modified as follows:

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[8] *Id.* at 29.

[9] *Loy v. State of Kansas*, No. 264,079, 2004 WL 485720, (Kan. WCAB Feb. 27, 2004).

The claimant is entitled to 64.81 weeks of temporary total disability compensation at the rate of $365.91 per week or $23,714.63 followed by 36.52 weeks of permanent partial disability compensation at the rate of $365.91 per week or $13,363.03 for a 54 percent work disability, making a total award of $37,077.66. Claimant's permanent partial general disability decreased to 10 percent on August 30, 2004. No additional permanent partial disability compensation is payable due to the accelerated payout formula.

IT IS SO ORDERED.

Dated this _____ day of June, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Henry A. Goertz, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director