

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID VELAZQUEZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,557
<b>NATIONAL BEEF PACKING COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY and</b>	)	
<b>FIDELITY &amp; GUARANTY INSURANCE</b>	)	
Insurance Carriers	)	

**ORDER**

Claimant appeals the January 26, 2006 Award of Administrative Law Judge Pamela J. Fuller. Claimant was denied a permanent disability after the Administrative Law Judge (ALJ) determined that claimant suffered no permanent impairment for the injury to his back, and further determined that claimant failed to give timely notice of an injury to his arms and hands. The Appeals Board (Board) heard oral argument on May 9, 2006.

**APPEARANCES**

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company appeared by their attorney, Terry J. Malone of Dodge City, Kansas. Respondent and its insurance carrier Fidelity & Guaranty Insurance appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, in the stipulations contained in the Award, the ALJ listed the medical records of Dr. Garcia as being admitted without further foundation. However,

the records of Dr. Garcia were admitted into the record at the deposition of Dr. Garcia on January 10, 2006. The ALJ appointed C. Reiff Brown, M.D., to perform an independent medical examination (IME) of claimant, with the doctor seeing claimant on June 24, 2003, and again on July 7, 2004, with reports generated after each examination. The parties stipulated at oral argument to the Board that the records of Dr. Brown are part of the record and can be considered for the purposes of this appeal.

### ISSUES

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

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant was hired by respondent on April 8, 2002, as an extra. This required that he perform several different types of jobs. On July 6, 2002, claimant was bending over removing a heart. As he straightened up, claimant felt a pop in his back, with pain and discomfort in his back. Claimant also alleged pain and discomfort down his left arm, with a little tingling in his right hand. Claimant reported the injuries to his supervisor, Kevin Ward, and went to the nurse at the plant clinic. The first aid report of July 8, 2002, indicated complaints to claimant's back only.

The record is in conflict regarding claimant's alleged upper extremity problems. Claimant, at various times in the record, testified that he did not tell anyone but the doctors about his wrist problems.<sup>1</sup> Claimant also testified that he had no trouble with his right hand prior to his termination in September 2002,<sup>2</sup> except that he had a strange tingling sensation in his right hand the day after the accident.<sup>3</sup> Claimant testified that he told the plant nurses

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<sup>1</sup> Claimant Depo. at 6 and 10.

<sup>2</sup> Claimant Depo. at 27.

<sup>3</sup> R.H. Trans. at 11.

that he had pain all over his left arm. But when he was asked to fill out a pain diagram, he only marked an area between his shoulder blades.<sup>4</sup>

Susan Stephens, respondent's workers compensation coordinator, testified that claimant only complained of back pain when he first notified respondent of the accident. There was nothing in respondent's records regarding carpal tunnel complaints in July, August or September 2002.<sup>5</sup>

Claimant was referred to physician's assistant Danny Briggs. Mr. Briggs first examined claimant on July 9, 2002. At that time, claimant had complaints of upper back pain. Claimant did not complain of problems with his hands or wrists. Mr. Briggs treated claimant four additional times: on July 12, July 19, August 2 and August 23, 2002. On each occasion, with the exception of the August 23 visit, claimant complained of back pain, with the condition gradually improving. By the final examination on August 23, claimant was pain free in his back. Mr. Briggs diagnosed muscle strain that had resolved. Claimant was returned to work with no restrictions. At no time during any of the visits did claimant complain of problems with his hands or wrists.

Claimant was referred to orthopedic surgeon Guillermo Garcia, M.D., for an examination on August 13, 2002. At that time, claimant alleged discomfort to the thoracic spine and left shoulder blade. Dr. Garcia diagnosed scapulothoracic bursitis. Claimant was examined again on August 27 by Dr. Garcia's associate, Armand Hatzidakis, M.D. At that time, claimant complained of mild tenderness at the mid thoracic spine and parascapular muscles on the left.

Dr. Garcia last examined claimant on January 28, 2003. Claimant continued to experience pain and discomfort between the shoulder blades, with slight discomfort in the left shoulder. Dr. Garcia diagnosed thoracic sprain, which was healing nicely. At no time during any of the three visits did claimant allege discomfort in his hands or wrists. Dr. Hatzidakis placed no specific restrictions on claimant, and Dr. Garcia returned claimant to his job.<sup>6</sup>

Claimant was referred by his attorney to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. Dr. Murati first examined claimant on February 18, 2003. At that visit, claimant alleged pain in his neck, with pain radiating down the left shoulder and arm, and with numbness in the left hand. He also alleged mid-back pain.

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<sup>4</sup> Stephens Depo. at 7.

<sup>5</sup> Stephens Depo. at 12-13.

<sup>6</sup> Garcia Depo., Ex. A.

Claimant had gone to Dr. Carrillo in Mexico earlier. Dr. Carrillo had claimant undergo a nerve conduction study on October 22, 2002. That study was positive for bilateral carpal tunnel syndrome. The tests, performed on October 22, 2002, were reported to Dr. Murati. Dr. Murati diagnosed claimant with bilateral carpal tunnel syndrome and myofascial pain syndrome affecting the cervical and thoracic spine and the left shoulder. He testified that all of claimant's current diagnoses were within a reasonable medical probability, a direct result of the work-related injuries suffered by claimant while working with respondent.

Dr. Murati examined claimant again on January 6, 2004. At that time, claimant alleged neck pain, left shoulder pain, and left arm and hand pain. Dr. Murati again diagnosed bilateral carpal tunnel syndrome and myofascial pain syndrome. Dr. Murati assessed claimant a 20 percent whole body impairment as a result of the diagnosed conditions. This rating was pursuant to the fourth edition of the *AMA Guides*.<sup>7</sup> Dr. Murati determined that the July 6, 2002 accident was the traumatic event that gave rise to claimant's injuries.

On cross-examination, Dr. Murati acknowledged that according to the medical records, claimant never complained of hand problems prior to Dr. Murati's examination of February 18, 2003.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>8</sup>

It is the function of the trier of fact to 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 that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>9</sup>

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

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<sup>7</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>8</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

<sup>9</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>10</sup>

Claimant has alleged an accident on July 6, 2002, and a series of accidents continuing through his September 7, 2002 last day worked with respondent. Respondent acknowledges the accident on July 6 resulted in a temporary injury to claimant's back, but denies any permanent injuries resulted. The clinical records of physician's assistant Danny Briggs, the medical records of Dr. Garcia and the reports of Dr. Brown support a finding that any back injuries suffered by claimant on July 6, 2002, were temporary. Additionally, the medical evidence contained in this record fails to support claimant's allegation that he suffered bilateral carpal tunnel syndrome as a result of the alleged work-related accidents with respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident. This record contains several conflicting entries regarding to whom claimant reported the upper extremity injuries and when. The ALJ determined that claimant did not tell respondent of the upper extremity complaints in a timely fashion. The Board disagrees with the ALJ's analysis. K.S.A. 44-520 requires notice of accident, which claimant provided to his supervisor, Kevin Ward. The statute does not require notice of each and every injury associated with that accident. The Board finds claimant did provide notice of "accident" as required.

The Board, therefore, affirms the ALJ's denial of a permanent partial disability award for claimant's back complaints and affirms the denial of benefits for the alleged injuries to claimant's upper extremities, although on other grounds.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 26, 2006, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>10</sup> K.S.A. 44-510e(a).

Dated this \_\_\_\_ day of June, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Stanley R. Ausemus, Attorney for Claimant  
Terry J. Malone, Attorney for Respondent and its Insurance Carrier (Liberty Mutual)  
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier (Fidelity)  
Pamela J. Fuller, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director