

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

<b>FELIPE TORRES</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>AGCO CORPORATION</b>	)	
Respondent	)	Docket No. 1,019,224
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the July 14, 2008 Award by Administrative Law Judge Bruce E. Moore (ALJ). The Board heard oral argument on October 22, 2008.

**APPEARANCES**

Joni J. Franklin, of Wichita, Kansas, appeared for the claimant. Larry Shoaf, of Wichita, 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 the parties agreed that the issues involving the underpayment of temporary total disability benefits (TTD) and the payment of the interpreter fees is no longer in dispute.<sup>1</sup> Accordingly, they will not be addressed by the Board in this appeal.

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<sup>1</sup> Respondent's counsel conceded that the TTD and the interpreter fees were due but remained unpaid due to this appeal. At the conclusion of the oral arguments, the Board suggested that respondent take immediate steps to pay those monies and avoid the potential for prejudgment interest under K.S.A. 44-512(b).

### ISSUES

The ALJ concluded that respondent failed to establish that claimant willfully failed to use a safety guard on the horizontal drill press he was using.<sup>2</sup> Thus, the affirmative defense set forth in K.S.A. 44-501(d)(1) was not applicable and claimant was eligible for benefits for his otherwise compensable injury under the Act. Accordingly, he went on to find that the claimant was entitled to a 24.5 percent functional impairment to the body as a whole based upon a 30 percent permanent partial impairment to the right forearm and a 7.5 percent impairment to the body as whole due to the psychological impact of his traumatic injury.<sup>3</sup>

Claimant requests review of the nature and extent of his impairment arguing that the Award should be modified to reflect the permanency to his right forearm and his neck, as evidenced by the testimony of Dr. Murati. When Dr. Murati's rating to the forearm and neck are combined with the 7.5 percent whole body impairment for claimant's psychological injuries, the net result is 48 percent to the body as a whole. Alternatively, claimant argues he is entitled to a 33 percent body as a whole functional impairment based upon an average of the functional impairment ratings offered by Drs. Gluck and Murati with an additional 7.5 percent whole body impairment for his uncontroverted psychological impairment.

Respondent contends the Award should be reversed as it contends the provisions of K.S.A. 44-501(d)(1) preclude compensation in this matter. In the alternative, respondent contends the ALJ's Award should be affirmed.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board finds that the Administrative Law Judge's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The ALJ concluded that respondent had failed to establish the requisite elements of K.S.A. 44-501(d)(1), commonly referred to the "safety guard" defense. K.S.A. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection

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<sup>2</sup> ALJ Award (July 14, 2008) at 9.

<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

**Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

As previously noted, the administrative regulation promulgated to implement the requirements K.S.A. 44-501(d) mandates that when safety rules are generally disregarded by employees and not rigidly enforced by the employer, then violation of the rules will not prejudice an injured employee's right to compensation.

The ALJ noted that -

The appellate courts have considered the language of **K.S.A. 44-501(d)(1)**. In **Carter v. Koch Engineering, 12 Kan.App. 2d 74, 735 P.2d 247 (1987)**, the court determined that,

Violation, alone, of instructions from an employer is not enough to render the employee's action "willful" as a matter of law under K.S.A. 44-501(d).[citation omitted]<sup>4</sup>

He went on to note that the term "willful" means not only an intentional act, but an act in defiance of instructions.<sup>5</sup> Finally, the ALJ acknowledged that an employee's willfulness is a question of fact.<sup>6</sup>

The ALJ then concluded that he had "no difficulty concluding that [c]laimant's conduct (in allegedly failing to use the machine's guard or 'break away' gloves) does not rise to the level of "willful" misconduct that would prevent recovery of workers compensation benefits."<sup>7</sup> The Board agrees. Like the ALJ, the Board is unpersuaded that claimant acted willfully or in an intractable manner. In fact, there is a very real question as to whether claimant was even appropriately trained on this particular machine. He was never counseled about his failure to use break away gloves. The gloves he was wearing

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<sup>4</sup> ALJ Award (July 14, 2008) at 8-9. Emphasis supplied.

<sup>5</sup> *Id.* at 9.

<sup>6</sup> *Id.*, citing Koch engineering, Syl. 6.

<sup>7</sup> *Id.* 9.

at the time of his accident *were provided by respondent*. Claimant was normally assigned to another machine and had only limited exposure and training on the horizontal drill involved in this accident. Under these facts and circumstances, the Board affirms the ALJ's conclusion that K.S.A. 44-501(d)(1) does not apply.

As for the nature and extent of claimant's impairment, the Board is likewise persuaded that the ALJ's findings are appropriate and should be affirmed. The injury to claimant's hand and forearm is most certainly significant, given the number of surgeries and his resulting physical limitations. Dr. Gluck, the treating physician, assigned a 30 percent permanent partial impairment to the right upper extremity. Moreover, Dr. Gluck was aware of claimant's shoulder and neck complaints. He even went so far as to refer claimant to Dr. Issac for additional testing for those complaints. And Dr. Gluck testified that he took those tests (and their negative results) into account in assigning an impairment rating.

In contrast to Dr. Gluck is the testimony of Dr. Murati, who, in addition to a 48 percent permanent partial impairment to the upper extremity, assigned a 5 percent whole person functional impairment for a cervical strain, based on DRE Category II of the *Guides*. The ALJ also noted that Dr. Murati examined claimant a single time and solely for the purposes of providing an impairment rating and without the benefit of any additional treatment or testing.

Only one physician, Dr. Moeller, evaluated claimant's psychological condition and it was Dr. Moeller's opinion that claimant sustained a 7.5 percent permanent partial impairment to the whole body. Respondent does not dispute this finding and has offered no medical testimony to dispute this conclusion.

The ALJ was more persuaded by the opinions of Dr. Gluck and awarded claimant a 30 percent permanent partial impairment to his right upper extremity (forearm) along with the 7.5 percent whole body impairment assigned by Dr. Moeller. When converted and combined as provided for in the *Guides*, this totals a 24.5 percent functional impairment to the whole body. The Board has considered the record as a whole and finds the ALJ's functional impairment Award should be affirmed. Like the ALJ, the Board is more persuaded by the opinions expressed by Dr. Gluck over those of Dr. Murati.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 14, 2008, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

The undersigned Board Members concur in the result found by the majority, but dissent on the method used to calculate the permanent partial disability award. We are of the opinion that, in light of *Casco* claimant's scheduled injury to the upper extremity (30 percent) must be awarded and calculated separately from that of his whole body impairment (7.5 percent). To do as the majority has done is inconsistent with the construction the Kansas Supreme Court has recently espoused with respect to the calculation of injuries to separately scheduled parts of the body.

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BOARD MEMBER

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant  
Larry Shoaf, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge