BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARLEN D. BARHAM Claimant	)))	
VS.	))	Docket Nos. **1,026,934 & 1,047,681**
CNH AMERICA, LLC. Self-Insured Respondent	)))	

ORDER

Claimant requests review of the July 6, 2012 Awards entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on January 23, 2013.

APPEARANCES

Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record, including settlement hearing transcripts, with exhibits, in Docket No. 1,026,934 dated May 1, 2007, and September 28, 2007, and adopts the stipulations listed in the Awards and in the settlement hearing transcripts.

ISSUES

In Docket No. 1,026,934, the parties settled right and left shoulders injuries that resulted from an accident on November 20, 2003. The settlement was on a "running award" basis in which claimant's future rights were left open. Claimant thereafter filed an application for review and modification. Following the presentation of evidence, the ALJ found claimant's right shoulder impairment had increased by 8% and awarded claimant additional permanent partial disability benefits (PPD) based on that finding.

Claimant filed another application for hearing on October 6, 2009, Docket No. 1,047,681, in which claimant alleged injuries to the left shoulder and cervical spine on August 24, 2009. After the presentation of evidence by both parties, the ALJ found claimant sustained a left shoulder injury with a permanent functional impairment of 3% to the left shoulder. Claimant was awarded PPD based on that impairment of function. The

ALJ also found claimant sustained no injury and no permanent impairment to the neck. Accordingly, the ALJ awarded no PPD based on general bodily impairment or work disability.

Claimant contends the ALJ erred in determining the nature and extent of claimant's disability in both claims.

In the review and modification proceeding in Docket No. 1,026,934, claimant argues he sustained impairment of function to the right shoulder of 25%.

In Docket No. 1,047,681, claimant maintains he sustained permanent functional impairment to the left shoulder of 13% and an injury to the neck with a functional impairment of 5% to the whole body. Claimant argues he is entitled to a 95% work disability benefits based on a 100% wage loss and a 90% task loss.

Respondent argues claimant did not sustain his burden of proof that he suffered an injury to his cervical spine. Respondent argues claimant is only entitled to permanent partial disability for a scheduled injury to his left shoulder in Docket No. 1,047,681. Respondent agrees with the ALJ's finding of an 8% additional impairment to claimant's right shoulder in Docket No. 1,026,934.

The sole issue the Board must consider is the nature and extent of claimant's disability in both docket numbers.

FINDINGS OF FACT

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

In Docket No. 1,026,934, claimant alleged personal injury by a series of repetitive accidents on November 20, 2003, and each and every working day thereafter. Claimant claimed injuries to both shoulders, both upper extremities and all related body parts from performing his normal job activities, including running a heavy grinder and manipulating heavy parts of a jig.[1] Following this series of repetitive traumas, claimant underwent surgical treatment consisting of: (1) a right shoulder acromioplasty with repair of an attenuated rotator cuff beneath Codman's triangle, performed by Dr. J. Mark Melhorn, an orthopedic surgeon, on August 16, 2004, and (2) a left shoulder arthroscopic subacromial

[1] Form K-WC-E-1, Application for Hearing (filed Jan. 10, 2006).

decompression and arthroscopic rotator cuff repair performed by Dr. Daniel J. Prohaska, also an orthopedic surgeon, on January 11, 2006.

On January 24, 2005, Dr. J. Mark Melhorn provided a rating of 13% impairment to the right shoulder due to pain and loss of strength and sensation. Dr. Melhorn apparently did not address the left shoulder.

Dr. Pedro Murati, who holds certifications in physical medicine and rehabilitation, electrodiagnostic medicine, and in independent medical evaluations, examined claimant on January 29, 2007, at the request of his attorney. Dr. Murati rated claimant's right shoulder at 8% due to severe acromioclavicular crepitus. For the right subacromial decompression, Dr. Murati found an additional 10% impairment to right shoulder. Using the AMA *Guides*[2] Combined Values Chart, Dr. Murati opined that claimant sustained a 17% right shoulder impairment.

Dr. Murati rated claimant's left shoulder at 10% due to claimant's left subacromial decompression.

A settlement hearing was conducted in Docket No.1,026,934, on May 1, 2007. This settlement hearing was limited by agreement of the parties only to the right shoulder injury. The right shoulder was settled on the basis of an open award, under which claimant's rights to future medical treatment and review and modification remained open upon application to the Director. In addition to the previously paid temporary total disability benefits (TTD) totaling $2,200 and medical compensation paid totaling $13,071.63, claimant was awarded PPD in the amount of $14,520 which represented a 15% permanent functional impairment to the right shoulder.

Dr. Prohaska provided his opinion regarding claimant's left shoulder impairment by letter dated May 23, 2007. Based on the AMA *Guides*, Dr. Prohaska found claimant sustained a 4% left shoulder impairment due to the left arthroscopic rotator cuff repair and subacromial decompression.

A second settlement hearing in Docket No.1,026,934, was conducted regarding the left shoulder injury on September 28, 2007. In addition to the TTD and medical compensation previously paid in the amounts of $6,286 and $11,380.89 respectively, claimant was awarded PPD in the amount of $6,631.73, based on a 7% permanent impairment to the left shoulder.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

On October 2, 2009, claimant filed a new application for hearing, Docket No. 1,047,681. Claimant alleged a series of repetitive accidents on August 24, 2009, and each and every working day thereafter, caused by claimant's performance of repetitive work activities, many at or above shoulder level. Injuries were alleged to the neck, upper extremity, and all related body parts.[3]

On October 28, 2009, claimant underwent another right shoulder surgery consisting of an arthroscopic subacromial decompression and a repair of a "massive"[4] two-tendon rotator cuff tear performed by Dr. Bernard Hearon. On July 7, 2010, claimant underwent another left shoulder surgery consisting of a diagnostic arthroscopy and biceps tendon tenodesis performed by Dr. Prohaska.

On July 20, 2011, claimant filed, pursuant to K.S.A. 44-528, a review and modification application in Docket No.1,026,934, alleging the reason for the application was: "Increase to permanent total disability; pursuing Work disability."[5]

The ALJ consolidated for hearing purposes the regular hearing in Docket No. 1,047,681 and the review and modification proceeding in Docket No. 1,026,934.[6]

At the hearing in both claims on August 22, 2011, claimant testified he began working as a welder for respondent on August 12, 1996.

Claimant described his August 24, 2009 accident:

> Well, I came in. They told me to go over to this job, which I knew was against my restriction. It was all overhead work. I even told the lead man, I said, I don't know how long I will last on this job. He pointed towards the front of the building. He said, if you have any problems, go up front, which I guess he was talking about the nurse. So after two days doing that job, at first I couldn't lift my right arm up, so I was using my left one to hold it up. After -- well, I think I reported it after about the third day, I went to the nurse. About two weeks later, my left shoulder was hurting, my neck was hurting. It still took them probably a month to get me in to the doctor.[7]

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[3] Form K-WC-E-1, Application for Hearing (filed Oct. 2, 2009).

[4] Stein Depo., Ex. 3 at 4.

[5] Form K-WC-E-5, Application for Review and Modification (filed Jul. 20, 2011).

[6] R.H. Trans. at 3.

[7] *Id.* at 12-13.

Respondent provided medical treatment for claimant's shoulders, but denied authorized treatment for the neck and back. Claimant sought treatment for his neck on his own with Dr. William Wilson, a chiropractor.

Dr. Wilson first examined claimant on September 25, 2009, due to claimant's complaints of pain in his neck and across the top of his shoulders into the levator scapula and trapezius muscles. Dr. Wilson performed vertebral adjustments at the first and fourth cervical and the second and sixth thoracic levels. The doctor recommended moist heat on the right deltoid bursa and ice on the cervical region.

On September 28, 2009, claimant returned to Dr. Wilson with complaints of cervical pain and pulling in his levator scapula and trapezius muscles. Dr. Wilson performed additional spinal adjustments and "interferential therapy" across the upper and mid thoracic region.

Claimant's last visit to Dr. Wilson was on October 2, 2009. Claimant continued to complain of cervical and shoulder pain. Dr. Wilson performed spinal adjustments and also some acupuncture.

Claimant testified that he has only worked 3 1/2 days since January 2011. Claimant testified he was still receiving health insurance coverage through respondent.

Claimant described his current condition:

> I still have some numbness in this right hand and my left shoulder keeps popping all the time and has weakness and pain right exactly where he did the last surgery, which it was a failed surgery as far as I am concerned, but he wouldn't listen to me.[8]

Claimant continued to experience popping and pain in his neck when he turned his head to the left.

> Q. Your neck, your back and your shoulders, how are they now as compared to how they were immediately before the August 2009 injury? Better, worse, the same?
>
> A. I would say maybe a little worse. My right one hasn't been right since 2003. The left one is worse now than it was.[9]

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[8] R.H. Trans. at 16.

[9] *Id.* at 17.

On cross examination, claimant testified that he was not working and was not seeking work.

On December 17, 2010, the ALJ ordered an independent medical examination by Dr. Paul Stein, a board certified neurosurgeon, to provide his opinions regarding diagnosis, causation, and treatment recommendations for claimant's neck and bilateral shoulders. The doctor reviewed claimant's medical records[10] and took a history from him. Upon physical examination, Dr. Stein found claimant had a mild decrease in flexion and extension and also moderate decrease in rotation of his neck.

Dr. Stein opined:

> The patient reports neck pain which he states today started around the time of his second shoulder surgeries. There is no indication in any of the treatment records, physician records and physical therapy, regarding complaints of neck pain. The IME of Dr. Murati on 1/29/07 notes complaints of neck pain but, as noted, the patient now reports the onset of the pain considerably later. The IME of Dr. Fluter also reports complaints of neck pain. However, the IME done by Dr. Estivo shows no specific complaints regarding the neck and his examination revealed a full range of cervical movement. Today's examination shows only nonspecific findings with some limitation of movement, no focal tenderness, no guarding, and no spasm. There is no specific incident or accident related to the neck. Based upon all of this information, I cannot determine within a reasonable degree of medical probability that Mr. Barham sustained a neck injury as a result of his work activity at Case New Holland.[11]

At the request of claimant's attorney, Dr. Pedro Murati again examined claimant on March 30, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Murati's diagnostic impressions included myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical paraspinal muscles. Dr. Murati opined claimant's current diagnoses to the shoulders and neck are a direct result of his work-related injuries sustained on November 20, 2003, and August 24, 2009.

Based on the AMA *Guides*, Dr. Murati rated claimant's crepitus of the right shoulder at 8%; for claimant's status post right shoulder subacromial decompression at 10%; and,

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[10] Dr. Stein was apparently not provided the chiropractic records of Dr. Wilson before Dr. Stein prepared his narrative report to the ALJ. However, Dr. Stein did review those records at his deposition and testified the records made no difference in his opinions. Stein Depo. at 34-35.

[11] Stein Depo., Ex. 3 at 7.

for the right distal clavicle excision at 10%. These right shoulder impairments combine to 25% to the right shoulder.

Dr. Murati rated claimant's left shoulder at 13%, consisting of 3% for loss of range of motion and 10% for status post left shoulder subacromial decompression.

Dr. Murati also provided a rating for claimant's myofascial pain syndrome affecting the cervical paraspinals. Dr. Murati found claimant fell within the AMA *Guides*' Cervicothoracic DRE Category II for a 5% whole person impairment.

Dr. Murati placed permanent restrictions on claimant's physical activities. Dr. Murati reviewed the list of claimant's work tasks prepared by Dr. Robert Barnett and concluded claimant could no longer perform 9 of the 10 tasks for a 90% task loss.

Dr. Robert Barnett is a licensed clinical psychologist as well as a vocational counselor and consultant. Dr. Barnett interviewed claimant by telephone on May 23, 2011, at the request of claimant's counsel. Dr. Barnett identified 10 work tasks performed by claimant in the 15-year period before August 24, 2009.

The ALJ found claimant sustained an additional 8% permanent partial disability to his right shoulder and awarded additional PPD in Docket No. 1,026,934 based on that finding. The ALJ also found claimant sustained a 3% permanent partial disability to his left shoulder in Docket No. 1,047,681. Judge Klein found claimant did not prove any injury or permanent impairment to the cervical spine.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) provides:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

K.S.A. 2009 Supp. 44-508(g) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

ANALYSIS AND CONCLUSIONS OF LAW

The issues raised for the Board's consideration with regard to the nature and extent of claimant's disability in both pending claims require no extended discussion.

Claimant is not entitled to a work disability or whole person functional impairment. The court-appointed neutral physician, Dr. Stein, found insufficient evidence to establish that claimant sustained an injury to the cervical spine. Under the circumstances of this claim, the Board finds the ALJ did nor err in finding the opinions of the neutral physician should be adopted and that claimant did not sustain his burden to prove injury or permanent impairment to the cervical spine.

The ALJ's findings regarding permanent impairment to the left and right shoulders are supported by a preponderance of the credible evidence. The only current evidence presented in the record before the Board is that of Dr. Murati. As such, the rating opinions of Dr. Murati should be regarded as conclusive unless found to be unreasonable. Dr. Murati's current ratings are 25% to the right shoulder and 13% impairment to the left shoulder.

Reducing Dr. Murati's current ratings by the amount of preexisting functional impairment (right: 25% minus 17%; left: 13% minus 10%)[12] results in increased impairment of 8% to the right shoulder and 3% to the left shoulder. The ALJ's Awards based on such evidence are adopted by the Board as though fully set forth herein.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Awards of ALJ Thomas Klein dated July 6, 2012, are affirmed.

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[12] K.S.A. 44-501(c).

[13] K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 28th day of February, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant,
matt@bretzpilaw.com
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier,
ekuhn@foulston.com
Thomas Klein, ALJ