

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

ROBERTO BARAJAS)	
Claimant)	
)	
VS.)	Docket No. 1,031,117
)	
CARGILL MEAT SOLUTIONS CORP.)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 13, 2007, Award entered by Administrative Law Judge Pamela J. Fuller. The Board placed this appeal on its summary docket for disposition without oral argument.¹ Conn Felix Sanchez, of Kansas City, Kansas, appeared for claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was not entitled to permanent partial disability compensation for his right thigh injury as he did not sustain any permanent loss of function due to that injury. The ALJ found that both rating doctors, Dr. Alok Shah and Dr. Michael Munhall, were equally credible and, therefore, averaged the combined upper extremity ratings of the two doctors, which she found resulted in a 37 percent permanent partial impairment to the right upper extremity at the level of the arm (210 weeks). The ALJ computed claimant's average weekly wage (AWW) to be \$628.56, found that claimant is entitled to unauthorized medical not to exceed \$500, and found that claimant is entitled to future medical treatment upon proper application and approval by the Director.

The Board has considered the record and adopted the stipulations listed in the Award.

¹ For purposes of K.S.A. 2006 Supp. 44-551(i)(1), September 5, 2007, is the date arguments were presented to the Board.

ISSUES

Claimant contends the ALJ improperly calculated his AWW and that his AWW was \$694.47 at the time of his injury. Claimant also asserts that Dr. Shah failed to use the AMA *Guides*² to make a correct impairment rating for claimant's injuries to his hand, wrist and elbow and, therefore, his opinion should not be considered substantial and competent evidence. Claimant contends he is entitled to an impairment rating based on the opinion of Dr. Munhall, who found that claimant had a 5 percent permanent partial impairment to his right lower extremity and a 49 percent permanent partial impairment to the right upper extremity at the level of the arm.

Respondent argues that the Board should find that Dr. Shah's opinion concerning impairment is more persuasive than that of Dr. Munhall, as Dr. Shah was claimant's treating physician. Respondent asserts that Dr. Shah testified that he based his impairment rating on the AMA *Guides* and that using the Combined Values Chart, claimant would have a 21 percent functional rating to his right upper extremity. Respondent further asserts that the ALJ accepted Dr. Shah's functional impairment rating of 0 percent with respect to claimant's right thigh and requests that this finding be affirmed. Respondent further requests that the Board affirm the ALJ's finding with respect to claimant's AWW.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's disability?
- (2) What is claimant's AWW?

FINDINGS OF FACT

Claimant was injured on July 23, 2005, when his right arm and leg were caught between two couplers while he was trying to hook up two rail cars. When the rail cars compressed against him, his arm was broken. The rail cars pressed against his tool belt, which compressed against his right leg. Now his right arm is stiff and he has a metal plate and five screws in it. He experiences a lack of movement in his right hand. He also has problems with his right leg becoming stiff and locking up. He has a big scar on his right thigh and gets a burning sensation in that area. Claimant has returned to work at respondent with restrictions.

Respondent provided a wage statement that reveals that at the time of the accident, claimant was receiving regular pay of \$446 per week. During the 23-week period shown on the wage statement, claimant earned \$4,231.47 in overtime, \$4.07 in shift differential pay, \$356.80 in holiday pay, 96¢ in night overtime, and \$139.50 listed as "charity." Claimant testified he did not have any deductions from his paycheck for any charity.

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

However, he testified that he received a meal allowance of \$4.50 at certain times, and from reviewing claimant's pay stubs, the payments listed on the wage statement as "charity" are probably those meal allowances.

Dr. Alok Shah, a board certified orthopedic surgeon, operated on claimant's hand and forearm on July 23, 2005, for injuries caused by the accident. Claimant had a fracture of the right ulna and the right distal radius. Dr. Shah ordered claimant to physical therapy on August 24, 2005. Claimant underwent a second surgery on October 20, 2005, to remove two k-wires and a bony cartilaginous lump that were causing him problems. Because claimant continued to complain of discomfort, numbness and problems with the hand, Dr. Shah ordered a nerve conduction study on November 30, 2005. That study showed a complete ulnar nerve lesion below the elbow area with axonotmesis. There was also sensory radial nerve loss and mild carpal tunnel syndrome reported. In May 2006, claimant was still complaining of weakness and stiffness in his hand.

Dr. Shah's office note of February 8, 2006, indicates that claimant was given a cortisone injection in his right thigh in the area of his scar. Dr. Shah's February 22, 2006, office note indicates that claimant was again complaining of pain in the area of the scar. He noted that claimant had some keloid formation at the scar site. A second cortisone injection was given to claimant on July 12, 2006. Injecting cortisone in scars has two purposes, (1) reduce the hypertrophic scar (keloid) and (2) offer some pain reduction or reduce the itching sensation.

Dr. Shah last saw claimant on July 26, 2006, at which time claimant complained of limited range of motion in his elbow, wrist and hand. Claimant decided, however, that he did not want to pursue further treatment options of removing the plate and screws or possible release of ulnar nerve in the carpal tunnel area.

Dr. Shah rated claimant as having a 3 percent impairment for stiffness in the elbow, 6 percent impairment for stiffness in the wrist, and 4 percent for the injury to the thumb and contracture in the first web space. He also rated claimant as having a 12 percent impairment to the upper extremity for the ulnar nerve lesion and mild carpal tunnel syndrome. These combine for a 25 percent permanent partial impairment to the right upper extremity, which would convert to a 15 percent impairment of the whole person based on the *AMA Guides*.³ Dr. Shah admitted he did not use the Combined Values Chart and that had he used it, claimant's combined right upper extremity impairment would be 21 percent rather than 25 percent. Dr. Shah opined that claimant had not sustained any permanent impairment for the injury to the right thigh.

Dr. Michael Munhall, a certified independent medical examiner who is board certified in physical medicine and rehabilitation, examined claimant on October 4, 2006, at the request of claimant's attorney. Claimant described constant popping of the right elbow,

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

loss of elbow extension, burning through the ulna forearm surgical plate, and intermittent popping and heat through the right radial wrist. He had numbness of the right wrist and hand, right hand pain, and loss of right hand grip and movement. He also complained of burning and spasm through the right lateral thigh. Dr. Munhall found claimant had a well-healed keloid on his right proximal lateral thigh with adjacent tenderness and tingling. Claimant also had tenderness in his right wrist, tenderness and crepitus in his right elbow, and tenderness in his right forearm. He had decreased grip strength in his right hand and a modest right posterolateral elbow deformity. He believed that claimant may need future surgery for ulnar, median and radial sensory nerve injuries through the right forearm. Claimant may also need to have the hardware removed from his right forearm and plastic surgery for scar revision. Also, claimant may need additional hand therapy and programs for improvement in his right hand digit function.

Utilizing the *AMA Guides*, Dr. Munhall rated claimant as having a 5 percent impairment to his right lower extremity for his scar and thigh pain. He found that claimant had a 10 percent impairment to the right upper extremity for right ulnar nerve injury, 5 percent for right radial sensory nerve injury, and 10 percent for right median nerve injury. He opined that claimant also had a 15 percent impairment to his right upper extremity for loss of right wrist excursion and 4 percent for right wrist crepitus. Using the Combined Values Chart, these combine for a 19 percent right upper extremity impairment. Dr. Munhall also found that claimant had a 4 percent impairment for loss of right elbow excursion and 2 percent for right elbow crepitus. These combined for a 6 percent right upper extremity impairment. He found that claimant also had a 13 percent impairment for right hand excursion, which converts to a 12 percent right upper extremity impairment. Using the Combined Values Chart, Dr. Munhall found that claimant had a 49 percent right upper extremity permanent partial impairment of function.

PRINCIPLES OF LAW

K.A.R. 51-3-8 states in part:

The parties shall be prepared at the first hearing to agree on the claimant's average weekly wage except when the weekly wage is to be made an issue in the case. (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:

.....

QUESTIONS TO BOTH PARTIES

10. What was the average weekly wage?

.....

20. Have the parties agreed upon a functional impairment rating?

(b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law

judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of the record.

(c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

K.S.A. 44-511 states in part:

(a)(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

(b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be determined as follows:

....

(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-

time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

.....
(11) For the loss of a hand, 150 weeks

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

.....
(21) Permanent loss of the use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. As used in this paragraph (21), "shoulder" means the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures.

.....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

ANALYSIS

Claimant's preinjury gross AWW is \$651.78. This excludes the three weeks claimant was on vacation and not working and is computed as follows:

Regular earnings	\$446.00
Overtime	\$183.98 (\$4,231.47 ÷ 23)
Shift differential	\$0.18 (\$4.07 ÷ 23)
Holiday pay	\$15.51 (\$356.80 ÷ 23)
Night overtime	\$0.04 (\$0.96 ÷ 23)
Meal allowance	\$6.07 (\$139.50 ÷ 23)
TOTAL:	<u>\$651.78</u>

The ALJ averaged Dr. Shah's 25 percent with Dr. Munhall's 47 percent to arrive at 37 percent. However, Dr. Shah said his opinion would be 21 percent using the *AMA Guides Combined Values Chart*. Therefore, the Board will average 21 percent with 49 percent and find claimant's permanent partial impairment is 35 percent to the forearm.

During the initial months that claimant was receiving treatment from Dr. Shah for his right arm, he made no complaints about his thigh injury. Dr. Shah's first chart entry about the thigh injury after the initial examination was on February 8, 2006, over six months after the accident. Dr. Shah believed the thigh injury consisted of a small abrasion and contusion. Nevertheless, Dr. Shah provided treatment for this condition, including cortisone injections to reduce the scar and the pain. He assigned a 0 percent impairment to the thigh. Claimant was still having thigh pain when he was examined by Dr. Munhall in October 2006. There was no loss of function, but Dr. Munhall assigned a 5 percent impairment to the thigh because of the scar and pain. Both doctors purported to follow the *AMA Guides*. The ALJ averaged the two physicians' rating opinions with respect to the arm injury but accepted Dr. Shah's opinion that the thigh injury was not rateable under the *Guides*. In addition to the scar, claimant was still having symptoms in his thigh almost two years after his accident.⁴ Dr. Shah obviously believed claimant's symptoms were real as he treated them with cortisone injections. Accordingly, the Board will average the two physicians' opinions on impairment of the leg as well as the arm.

CONCLUSION

The ALJ's finding that claimant has a 37 percent impairment to the right arm is modified to 35 percent. In addition, claimant has a 2.5 percent permanent partial impairment to his right leg. Claimant's gross preinjury AWW is \$651.78.

Although the ALJ approved claimant's contract of employment with his attorney in her Award, the record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and

⁴R.H. Trans. at 14.

the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 13, 2007, is modified as follows: Claimant's AWW is \$651.78, and his weekly compensation rate is \$434.54. Claimant has a 35 percent permanent partial impairment to his right upper extremity at the level of the arm. Claimant also has a 2.5 percent permanent partial impairment to his right lower extremity at the level of the leg.

Right Arm

Claimant is entitled to 73.5 weeks of permanent partial disability compensation, at the rate of \$434.54 per week, in the amount of \$31,938.69 for a 35 percent loss of use of the right arm, making a total award of \$31,938.69.

Right Leg

Claimant is entitled to 5 weeks of permanent partial disability compensation, at the rate of \$434.54 per week, in the amount of \$2,172.70 for a 2.5 percent loss of use of the right leg, making a total award of \$2,172.70.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agree with the majority's factual findings and their determinations that claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent, including injuries to both his right arm and right leg and that claimant is entitled to permanent partial disability compensation for those injuries. However, we disagree with the majority's conclusion that the claimant's percentages of functional impairment for his several scheduled injuries to his upper extremity should be combined for a single permanent partial disability award based upon the total of all of his upper extremity impairments. We read *Casco*⁵ to require each of the upper extremity injuries to be compensated as separate scheduled injuries.

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. *Foos*, 277 Kan. at 695. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute. *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15, 81 P.3d 425 (2003).⁶

The *Honn* court's interpretation of the statute did not follow a key tenet of statutory construction—courts cannot add something to a statute that is not readily found in the language of the statute.⁷

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.⁸

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.⁹

⁵ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

⁶ *Id.* at 521 (citing *Foos v. Terminix*, 277 Kan. 687, 89 P.2d 546 [2004]).

⁷ *Id.* at 525 (citing *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 [1931]).

⁸ *Id.*, Syl. ¶ 7.

⁹ *Id.*, Syl. ¶ 9.

In *Casco*, when discussing *Honn* and its parallel injury rule as it relates to the statutes defining permanent total disability, permanent partial disability, scheduled injuries and general body disabilities, the Supreme Court makes an analogy to baseball.

The Workers Compensation Act calculates compensation for injured workers in a specific and sequential manner, their order defined by statute as precisely as the four bases on a major league baseball diamond. *Honn* essentially allows the claimant, after successfully reaching first base, to be waved home and exempted from traversing to second and third bases, thus improperly converting a single into a home run.¹⁰

The majority, by combining the separate scheduled injuries to the claimant's upper extremity, is reading something into K.S.A. 44-510d that is not there. Because the hand, forearm (wrist) and arm (elbow) are each contained within the schedule of K.S.A. 44-510d(a), claimant's disability to this extremity must be compensated according to the schedule as three separate scheduled injuries.

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Self-Insured Respondent
Pamela J. Fuller, Administrative Law Judge

¹⁰ *Id.* at 527.