

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

MATTHEW R. CONCHOLA)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,041,628
)	
AND)	
)	
STATE SELF INSURANCE FUND)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the February 11, 2011, Award entered by Special Administrative Law Judge Jerry Shelor. The Board heard oral argument on May 11, 2011. James E. Martin, of Overland Park, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) found that claimant had a 16 percent functional impairment to the body as a whole. Further, the SALJ found that claimant was presently unemployed and, thus, entitled to a work disability. The SALJ held that claimant had an 84 percent work disability based on a 67 percent task loss and a 100 percent wage loss.¹

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties suggested that claimant's award should be calculated as though there was no gap in employment between the date when

¹ Claimant testified that he was unemployed from August 11, 2009, through February 14, 2010, during which time he would have had a 100 percent wage loss. From February 15, 2010, through August 23, 2010, claimant worked at Jarden Home Brands, earning \$11.50 per hour and working 40 hours per week, which computes to a wage loss of 27 percent. From approximately February 16, 2010, to present, claimant has worked for Holland Trucking earning \$11.75 per hour and working 20 hours per week. This computes to a wage loss of 63 percent.

claimant was terminated by Jarden Home Brands and when he began working for Holland Trucking. This was subsequently confirmed by letter.²

ISSUES

Respondent argues that claimant's recovery is limited to a scheduled injury. Respondent contends that claimant's current back condition is the result of factors other than his injury of August 8, 2008.

Claimant contends he proved that he sustained an accidental injury to his right knee and low back in the accident of August 8, 2008. And since his wage loss is greater than 10 percent of his preinjury average weekly wage, he is entitled to a work disability. Claimant asks the Board to affirm the ALJ's Award.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent as a corrections officer at Lansing Correctional Facility. On August 8, 2008, he was responding to an alarm when he slipped on a wet floor. He caught himself and did not fall, but he injured his right knee. He reported the injury to his supervisor, finished his shift, and then went to Shawnee Mission Urgent Care, where he was put in a knee immobilizer. Respondent referred claimant to Dr. Jesse Cheng, who ordered an MRI of claimant's right knee. The MRI revealed a tear of the patellar tendon. Claimant was then sent to a surgeon, Dr. Stephen Munns, who performed arthroscopic surgery on August 28, 2008, to repair the patellar tendon.

Claimant signed an Application for Hearing on August 20, 2008, where he claimed his "[i]nitial injury was to the right knee but due to over use the claimant then developed left knee difficulties. Currently he has right ankle swelling and he has pain in his hips and low back; general body disability claimed."³ Claimant testified that by August 20, he was starting to have problems with his left knee, his ankle, his hips and his low back "just from the way I was having to walk."⁴ Claimant said he told every doctor he saw about his left knee, ankle, hips and low back, but he was only treated for the right knee.

Claimant was released to return to work for respondent on or about November 23, 2008. He was initially placed in a sedentary job working at a desk screening visitors and

² Correspondence from claimant's attorney filed with Division on May 13, 2011.

³ Form K-WC E-1, Application for Hearing, filed August 21, 2008.

⁴ R.H. Trans. at 10.

employees. After a couple of weeks, however, he was returned to work in the cell house, where he was required to be on his feet all day, do rounds every 30 minutes, and respond to alarms. He was still having problems with his back, both knees, right ankle and hips when he returned to work, and his condition became progressively worse from being on his feet. Claimant's last day working for respondent was August 10, 2009. He stopped working for respondent because he could not run and so did not feel safe, he was in pain all the time, and he was on his feet all day.

After quitting his job with respondent, claimant looked for work. On February 15, 2010, he went to work for Jarden Home Brands (Jarden), a job he got through a staffing agency. He drove a forklift and was an order picker. He earned \$11.50 per hour and worked 40 hours per week. His last day at Jarden was August 23, 2010. Claimant then got a job working at Holland Truck Company (Holland), where he also drove a forklift.⁵ He makes \$11.75 per hour and works 20 hours per week. He did not have fringe benefits at Jarden, nor does he have them at Holland.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on June 1, 2009, at the request of claimant's attorney. Claimant told Dr. Prostic that on August 8, 2008, he was running when he lost his footing on a slick floor and believed he twisted his knee. Claimant denied any previous problems with his right knee. He said he had fractured his left ankle in high school and also had conservative care for an athletic injury to his left knee while he was in college. Claimant also reported to Dr. Prostic that he had rolled his right ankle while at physical therapy subsequent to the work accident.

Claimant complained to Dr. Prostic that he had stiffness and soreness of the right knee when he awakened. The problem worsened with standing or walking. He had difficulty going up or down stairs, squatting or kneeling. He was hesitant to run or jump. He had swelling, frequent clicking, popping and giving way, and had sensitivity to inclement weather. Claimant also reported to Dr. Prostic that he had episodic low back pain worsened by limping on his right leg. Claimant was 6 feet 3 inches tall and weighed 350 pounds at the time of Dr. Prostic's examination.

Dr. Prostic noted that claimant's spine was satisfactorily aligned. Claimant had no tenderness. Range of motion of the low back was normal except for lateral bend.⁶ Claimant could walk a short distance on his heels and toes. He squatted minimally. Straight leg raise maneuver was negative bilaterally when seated and supine. Claimant had no neurologic deficit in either leg. There was a 3/4 inch decrease in claimant's right thigh as compared to the left. There was an external squint of both patellae when the

⁵ Claimant did not testify as to what date he started working for Holland, but he was still working there at the time of the Regular Hearing.

⁶ Dr. Prostic admitted that he did not know what claimant's range of motion was before the accident.

claimant was seated with his knees over the examining table.⁷ He had tenderness about the patellar tendon of the right knee and tenderness at the area of the scar on his right knee. Claimant had anterior crepitus of the right knee during active flexion and extension. Meniscal tests were negative. No instability was obvious.

Dr. Prostic opined that claimant sustained a rupture of the patellar tendon in his fall on August 8, 2008. He thought that more than likely claimant aggravated preexisting degenerative changes in his back in the accident. Claimant told Dr. Prostic that his back condition worsened because of the limping on his right leg, and Dr. Prostic believed this was likely. But Dr. Prostic also said the same twisting mechanism that injured claimant's knee could have injured his back. In regard to claimant's left knee, Dr. Prostic opined that claimant's altered gait was causing difficulties with the left leg. He stated: "This is not a normal size person. This is a supersized guy who had a previously operated left knee, so it's easy for me to imagine that his left knee could be aggravated earlier than most people."⁸ Dr. Prostic said believed claimant's hip difficulties are referred from his low back.

Dr. Prostic rated both claimant's lower extremities and his low back. Using the *AMA Guides*,⁹ Dr. Prostic rated claimant as having a 20 percent permanent partial impairment of his right lower extremity, a 10 percent impairment of his left lower extremity, and a 5 percent impairment to the body as a whole, which he combined for a 16 percent impairment to claimant's body as a whole on a functional basis. In rating claimant's low back, Dr. Prostic found that claimant was in DRE Lumbosacral Category II, based on a combination of his complaints and his mild decrease in range of motion.

Dr. Prostic did not impose any restrictions on claimant at the time he saw him. He testified he tries not to impose work restrictions on people who are back at work because it tends to cause some of them to lose their jobs. At some point later, Dr. Prostic was told claimant no longer worked for respondent, and claimant's attorney told him he should impose whatever work restrictions he felt were appropriate. Dr. Prostic, however, has not provided any written work restrictions to claimant, and he does not believe he ever wrote up any restrictions. Nevertheless, he reviewed a task list prepared by Michael Dreiling, and of the 15 tasks on the list, he opined that claimant would be unable to perform 10, for a 67 percent task loss.

⁷ Dr. Prostic said the external squint in claimant's right patella was not caused by claimant's accident in August 2008 but was a preexisting condition. He believed the external squint condition was developmental and weight related.

⁸ Prostic Depo. at 27.

⁹ 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.

Dr. Terrence Pratt performed an independent medical evaluation of claimant on December 4, 2009, at the request of the ALJ. Claimant described his accident to Dr. Pratt as: He was running to an alarm and turned a corner; the floor was wet and he slipped, caught himself, and heard a loud pop. It was Dr. Pratt's understanding that claimant did not fall to the ground. Claimant complained to Dr. Pratt that he experienced a continuous dull, deep pain with throbbing and, less frequently, stabbing, in his right knee. He said his right knee gave way and locked. He had weakness going up and down stairs involving the right knee and occasionally had numbness in the anterior aspect of the right knee. Symptoms were worse with standing and walking. Claimant's low back symptoms were intermittent across the low back. On the right, pain shot to the buttocks. Symptoms were exacerbated when limping secondary to knee involvement.

Dr. Pratt noted that claimant had a mild gait disturbance. Claimant had palpable tenderness at his low back, as well as some limitations in active movement with mild limitations in flexion. Claimant related his low back involvement to an altered gait, which Dr. Pratt found to be reasonable as he did not see any evidence of involvement of the low back in the accident. In examining claimant's right knee, Dr. Pratt found palpable tenderness was limited to the anterior lateral aspect of the knee. Claimant had loss of range of motion in the right knee. There were no significant findings on assessment of claimant's right ankle or left knee.

As a result of the evaluation, Dr. Pratt found claimant was in DRE lumbosacral Category II for a 5 percent impairment to the body as a whole. He attributed this impairment to an altered gait. For patellar tendon repair, he rated claimant with a 7 percent impairment to the right lower extremity, and he rated claimant as having a 5 percent impairment for patellofemoral crepitus and symptoms, making his total impairment to the right lower extremity 12 percent, which converts to a 5 percent whole person. Combining the lumbosacral and right knee impairments calculates to a 10 percent whole person functional impairment.

Dr. Pratt testified that claimant meets the requirements of DRE lumbosacral Category II because he had a specific injury by history and he had loss of range of motion. Dr. Pratt said DRE lumbosacral Category II requires that clinical history and examination findings be compatible with a specific injury or illness. He admitted there was no specific illness in this case. Dr. Pratt made no specific diagnosis. He said that it was unknown if claimant had a vertebral body compression, posterior element fracture, any transverse or spinous process fracture; spondylolysis, spondylolisthesis, vertebral body fracture, or stenosis facet arthrosis or disk arthrosis because there were no radiographic studies. Dr. Pratt found no objective findings of any spine injury in claimant. He relied on claimant's self-reporting of symptoms and some limited range of motion.¹⁰

¹⁰ Dr. Pratt agreed with respondent's attorney that he did not examine claimant before the accident and did not know if claimant's range of motion is the same, better or less than it was before the accident.

Dr. Pratt was shown claimant's Application for Hearing, which was signed 12 days after claimant's accident. The Application indicated that claimant was reporting back pain at that time. Because claimant had not worked after the accident to the date the Application for Hearing was filed, Dr. Pratt would not attribute his back pain to an altered gait. He acknowledged, however, that the original accident was competent to cause a back injury.

Dr. Chris Fevurly, who is board certified in internal medicine and preventative medicine, examined claimant on May 4, 2010, at the request of respondent. Claimant told Dr. Fevurly that on August 8, 2008, he was coming around a corner when he slipped on a wet spot on the floor. He was able to catch himself without falling, but he hyper flexed his right knee and heard a pop in his right knee.

Claimant told Dr. Fevurly he had persistent throbbing in the right knee with standing or walking more than 10 to 15 minutes. He averaged 12 Advil tablets a day in order to control his right knee pain. He cannot run, kneel, squat or crawl. His right knee gave away on several occasions. Claimant said he had low back pain, which his primary care doctor told him was a result of his weight gain.¹¹ The low back bothered him two to three days per week and was a dull, deep aching pain that occasionally radiated upward into the neck but did not radiate into the lower extremities. Claimant did not complain about his right ankle or his left knee.

Claimant had a slight limping gait at the time of the examination, which Dr. Fevurly said could cause back problems, particularly in a large person. Claimant also had obvious varus deformity of the lower legs bilaterally, which Dr. Fevurly said was a result of his obesity. He could briefly do a toe walk and heel walk but could only perform a 1/4 squat. He had generalized tenderness throughout the lumbar spine but had relatively well preserved range of motion. He could bend forward and touch his toes with full extension and lateral motion but had pain at the extreme ranges of motion. He had good range of motion in the right knee with no unusual crepitation. He had tenderness over the anterior right knee and over the patellar tendon. He had some atrophy of the right thigh. Based on his examination, Dr. Fevurly opined that as a result of the accident claimant had a right knee patellar tendon rupture. Dr. Fevurly found nothing unusual about claimant's right ankle.

Based on the *AMA Guides*, Dr. Fevurly rated claimant with a 7 percent impairment to the right lower extremity for the patellar tendon rupture and a 3 percent impairment for atrophy of the right thigh, which combine for a 10 percent right lower extremity impairment. He rated claimant as being in DRE Category I for a 0 percent permanent partial impairment as regards to chronic residual low back pain without evidence of vertebral segmental

¹¹ Claimant indicated he gained weight after the accident and his weight was up to 400 pounds but that he had lost 50 pounds. He weighed 350 pounds at the time he was examined by Dr. Fevurly.

instability or radiculopathy. Dr. Fevurly opined that although claimant reported sporadic low back pain, it did not meet the criteria for an injury or objective abnormality of the lumbar spine. He also believed claimant's obesity is a significant contributing factor to his low back pain. Dr. Fevurly did not think it feasible that claimant would develop a low back condition from an altered gait within 12 days from the accident, particularly when he was not working during that time.

Dr. Fevurly recommended that claimant be placed in a position that does not require prolonged or nonstop standing or walking more than 30 minutes without being able to get off his feet for 10 to 15 minutes at a time. He should not squat, kneel, crawl or repetitive use stairs as a result of his right knee condition. Dr. Fevurly said claimant's biggest problem is his weight. With the combination of claimant's weight and his surgically repaired patellar tendon, he is likely to rupture the tendon again with the activities of squatting, kneeling, crawling or repetitively using stairs.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "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. 2010 Supp. 44-508(g) defines burden of proof as follows: "'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."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹² The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹³ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁴

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

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

¹² *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹³ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁴ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

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:

.....
(16) For the loss of a leg, 200 weeks.

.....
(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.

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

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means 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 Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Logsdon*,¹⁵ the Kansas Court of Appeals held:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

In *Casco*,¹⁶ the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

ANALYSIS

The fact that claimant sustained injury to his right knee in the work-related accident of August 20, 2008, is not in dispute. What is in dispute is whether claimant also injured his left knee, right ankle and low back, either as a direct result of that accident or as a natural consequence due to his altered gait. The Board finds that claimant has not established any permanent impairment in his right ankle, but he has proven a 10 percent impairment of his left lower extremity, a 20 percent impairment to his right lower extremity, and a 5 percent impairment to his low back, all as a direct and natural consequence of his August 8, 2008, accident. These impairments combine to a 16 percent impairment to the body as a whole. Accordingly, the Board affirms the functional impairment finding of the SALJ.

The Board likewise affirms the SALJ's conclusion that after his termination from employment with respondent on August 10, 2009, claimant is entitled to a permanent partial disability award based on work disability, and that claimant's task loss is 67 percent. However, the SALJ's determination that claimant is unemployed and suffers a 100 percent wage loss is incorrect. Claimant testified that he found other employment, and from February 15, 2010, through August 23, 2010, earned \$460 per week. When compared to his gross average weekly wage with respondent of \$631.30, this results in a 27 percent wage loss, which when averaged with his 67 percent task loss as required by K.S.A. 44-510e, results in a work disability of 47 percent. Thereafter, claimant earned \$235 per week for a 63 percent wage loss and a 65 percent work disability.

¹⁵ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

¹⁶ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

CONCLUSION

The percentage of permanent partial disability should be modified to account for claimant's actual post-accident earnings, but the Award entered by the SALJ is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated February 11, 2011, is modified to correct claimant's percentages of wage loss but is otherwise affirmed.

Claimant is entitled to 15 weeks of temporary total disability compensation at the rate of \$354.04 per week or \$5,310.60 followed by 52.43 weeks of permanent partial disability compensation at the rate of \$354.04 per week or \$18,562.32 for a 16 percent functional disability followed by 26.86 weeks of permanent partial disability compensation at the rate of \$420.89 per week or \$11,305.11 for a 84 percent work disability followed by 27.14 weeks of permanent partial disability compensation at the rate of \$420.89 per week or \$11,422.95 for a 47 percent work disability followed by permanent partial disability compensation at the rate of \$420.89 per week not to exceed \$100,000.00 for a 65 percent work disability.

As of May 25, 2011, there would be due and owing to the claimant 15 weeks of temporary total disability compensation at the rate of \$354.04 per week in the sum of \$5,310.60 plus 52.43 weeks of permanent partial disability compensation at the rate of \$354.04 per week in the sum of \$18,562.32 plus 78.28 weeks of permanent partial disability compensation at the rate of \$420.89 per week in the sum of \$32,947.27 for a total due and owing of \$56,820.19, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$43,179.81 shall be paid at the rate of \$420.89 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Marcia Yates Roberts, Administrative Law Judge