

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

**WILLIAM E. MCMANIS, JR.**  
Claimant

VS.

**SUPERIOR INDUSTRIES**  
Self-Insured Respondent

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Docket No. 1,044,183

**ORDER**

Respondent appealed the August 7, 2012, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on December 14, 2012.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Troy A. Unruh of Pittsburg, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated that the exhibits to the preliminary hearing transcript are part of the record. Both parties agreed that if claimant's hernia did not result in a whole body impairment that claimant was not entitled to any additional benefits other than what the ALJ ordered for that injury. The parties also agreed that if claimant's back injury was the result of his September 19, 2008, accident, then neither party would contest ALJ Avery's findings on functional impairment.

**ISSUES**

ALJ Avery found claimant sustained a low back injury in a work-related accident on September 19, 2008, and sustained: (1) a 7% whole body functional impairment for the back injury; (2) a wage loss of 100% from September 19, 2008, through June 14, 2011; a 21% wage loss from June 15, 2011, through January 11, 2012; and earned comparable

wages thereafter; (3) a 79% task loss; and (4) permanent partial disability of 89.5% from September 19, 2008, through June 14, 2011; 50% from June 15, 2011, through January 11, 2012; and no work disability thereafter. ALJ Avery ordered 13.43 weeks of temporary total disability benefits at the rate of \$526.46 per week in the amount of \$7,070.22, which appears to be for claimant's scheduled hernia injury.

Respondent admitted claimant sustained a hernia by accident on September 19, 2008, arising out of and in the course of his employment, but contends claimant did not sustain his burden of proving a low back injury. Instead, respondent alleges claimant's low back injury was the result of a 2007 accident. It also maintains there is no substantial evidence to support an award of work disability. Respondent contends claimant's hernia is a scheduled injury and that he be limited to the benefits provided for in K.S.A. 44-510d(a)(22).

Claimant maintains ALJ Avery properly held that claimant sustained a new back injury on September 19, 2008, and that the permanent impairment to claimant's back originated from that injury, not from claimant's 2007 accident. Claimant also requests that the Board modify the ALJ's Award and find the hernia injury resulted in a whole body functional impairment.

The issues before the Board on this appeal are:

1. Should the May 17, 2012, medical report of Dr. Kathleen M. Sisler be part of the record?
2. What is the nature and extent of claimant's disability? Specifically:
  - a. Is claimant's hernia injury a scheduled or whole body injury?
  - b. Did claimant sustain a back injury as the result of his work-related accident on September 19, 2008?
  - c. What is claimant's work disability?

#### FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant sustained a prior back injury on November 5, 2007. He settled that claim, Docket No. 1,038,561, on December 2, 2008. Claimant was represented by Angela Trimble and respondent by Troy A. Unruh. The SALJ was David L. McLane. Despite the fact that SALJ McLane and Ms. Trimble were associated with the same law firm, claimant

and respondent did not object to SALJ McLane presiding over the settlement hearing. SALJ McLane assured the parties he had no interest in the outcome of the claim and would review and decide the claim in an impartial manner. No functional impairment rating was ever issued for claimant's back injury. Claimant settled for a lump sum with all issues resolved. At the settlement hearing, claimant testified of injuring his right lower back in 2007 while lifting wheels on a conveyor. Attached to the settlement transcript were a January 3, 2008, Mt. Carmel Regional Medical Center record signed by physical therapist Heather Watson and Dr. Brent L. Cosens and a January 22, 2008, MRI report by Dr. John B. Pope. Dr. Pope's impressions were:

- 1) L5-S1 right paracentral disc protrusion. This obliterates the lateral recess and results in at least moderate right neural foraminal stenosis.
- 2) Generalized L4-L5 disc bulging with mild bilateral neural foraminal stenosis[.]<sup>1</sup>

At the December 2, 2008, settlement hearing, claimant testified that his treatment following the 2007 back injury consisted primarily of physical therapy. He did not receive any injections, nor was he prescribed any medications. Claimant testified he was told to take over-the-counter Ibuprofen. No doctor told claimant that he needed surgery. Claimant indicated that he had returned to the same job he had before the 2007 accident, but was discharged the day before the settlement hearing due to a layoff. Respondent's attorney stated that claimant had a pending claim involving a hernia and claimant indicated he had hernia surgery in October 2008. Neither claimant nor the attorneys mentioned a new back injury claim.

At the settlement hearing the following exchange took place between the SALJ and claimant:

THE COURT: Have you returned to work?

MR. MCMANIS: Yes, sir.

THE COURT: Did you return to work at Superior for a time?

MR. MCMANIS: Yes.

THE COURT: Are you still there now?

MR. MCMANIS: Yesterday was my last day.<sup>2</sup>

THE COURT: Under the layoff; right?

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<sup>1</sup> P.H. Trans., Resp. Ex. 1.

<sup>2</sup> On August 7, 2012, the parties filed a stipulation that claimant last worked for respondent on September 19, 2008, and was unemployed from September 19, 2008, until June 15, 2011.

MR. MCMANIS: Yes.

THE COURT: When you went back to work did you go back to the same job?

MR. MCMANIS: Yes, sir.

THE COURT: Did you get along reasonably well?

MR. MCMANIS: Yes.

THE COURT: Do you have plans for finding employment somewhere?

MR. MCMANIS: I'm looking.

THE COURT: It's hard to find a job, I know, but here's what I want to know. You are not claiming you are disabled from working because of your back; are you?

MR. MCMANIS: Oh, no. No, sir.<sup>3</sup>

In the current claim, on February 6, 2009, claimant filed an application for hearing alleging that on or about September 19, 2008, he injured his back, abdomen, skin and other affected body parts while loading 18-inch wheels. Claimant testified at the preliminary hearing that each day he would pick up 900 wheels, each weighing 50 pounds, from a roller that was waist high. He would then swing around and put the wheels in bins behind him. The top bin was approximately five feet high and as claimant was swinging a wheel to place it in the top bin he felt gurgling in his stomach and a pop in his back.

At the February 9, 2010, preliminary hearing, claimant requested medical treatment for a back injury. Claimant testified that he immediately told his supervisor, Les Flood, of having a hernia and back issues. Claimant was taken the same day by respondent's employees to the hospital. Claimant testified that he felt more pain after the 2008 injury than when he sustained his 2007 back injury. Also, the back pain from the 2008 injury was higher up than the pain in 2007. Claimant testified that after the 2007 accident, his right leg pain had resolved completely. After claimant's September 2008 injury, the pain in his right leg was constant and more painful.

According to claimant, when he arrived at the hospital he told hospital employees of a back injury. The hospital records were not placed into evidence. Claimant testified that when he completed an accident report he did not mention the back injury, because the hernia was his primary concern. Also, he was told by his superiors, Les Flood and Keith Coonrod, to just put down the hernia, as that was his worst injury. Ultimately, claimant underwent two surgeries for the hernia.

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<sup>3</sup> P.H. Trans., Resp. Ex. 1.

Following his first hernia surgery on October 3, 2008, claimant eventually returned to his same job duties. He worked for two weeks until December 2, 2008. Claimant testified he was supposed to work until respondent closed its plant, but respondent moved up claimant's layoff date because of his abdomen and back issues. During the two weeks claimant worked after the hernia surgery, his abdomen hurt. Consequently, claimant worked in a bent-over position. Claimant testified lifting the wheels in that awkward position caused a worsening of his back.

At the February 9, 2010, preliminary hearing, claimant acknowledged not mentioning any additional back problems at the settlement hearing for the 2007 back injury, which he attributed to being on pain medication for the hernia. Claimant testified he knew he sustained a back injury while picking up the wheel on September 19, 2008. However, following the accident, he was given pain medication for the hernia, which claimant alleges masked the back pain. Later, claimant's back began hurting when he quit taking the pain medication.

During the preliminary hearing, claimant introduced a November 4, 2009, medical report from Dr. Alan M. Buchele. Dr. Buchele saw claimant for his hernia and indicated that Dr. Philip Cedeno performed an umbilical herniorrhaphy on October 3, 2008, and a diagnostic laparoscopy on January 27, 2009. Dr. Buchele's report indicated claimant made complaints of back pain. Dr. Cedeno's treatment records were not placed into evidence.

Claimant, at the regular hearing, testified that his low back symptoms from the 2007 injury had resolved by the time he saw a physical therapist on January 3, 2008, and was released to full duty. Out of an abundance of caution, claimant saw Dr. Yarosh in Joplin, Missouri, on two occasions. On February 15, 2008, when claimant saw Dr. Yarosh, claimant's back pain had resolved and he was given no restrictions. Claimant returned to his job duties at respondent on February 18, 2008. Those job duties required significant lifting and bending. Dr. Yarosh's medical records were not placed into the record. Claimant continued to perform his job duties until the September 19, 2008, accident.

During the regular hearing, claimant testified that the 2007 low back injury was to his right lower back and the 2008 injury was across the lower back. Claimant thought that as a result of the 2008 accident, he sustained a new back injury rather than an aggravation of the 2007 low back injury. He also testified that at the 2008 settlement hearing, there was a discussion that the purpose of the settlement hearing was to settle only his 2007 back injury claim. Claimant testified he did not return to work for respondent after his September 19, 2008, accident.<sup>4</sup> At the regular hearing, claimant testified that since the 2008 accident, he received no treatment for his low back, was prescribed no medications and worked without restrictions.

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<sup>4</sup> R.H. Trans. at 19-20.

At the request of his attorney, on April 13, 2009, claimant was evaluated by Dr. Pedro A. Murati. Claimant reported feeling gurgling in his stomach on September 19, 2008, when he was lifting 18-inch wheels. When claimant lifted his shirt, he saw a “thumb” sticking out of his belly button. Dr. Murati’s report indicated that he reviewed medical records of claimant from Dr. Cedeno and Mt. Carmel Hospital. Dr. Murati’s report does not mention a 2007 accident and back injury or the 2008 settlement.

Dr. Murati’s report indicated claimant attributed his back injury to the repetitive nature of his job duties, which entailed bending over constantly loading tires and lifting the tires onto different shelves. Claimant indicated the low back pain began after claimant’s first hernia surgery, but increased after his second hernia surgery when he was hunched over from abdominal pain. According to Dr. Murati’s report, claimant was then sent to Mt. Carmel Hospital where he was given work restrictions and scheduled for surgery. Dr. Murati’s impression was low back pain with signs and symptoms of radiculopathy, status post umbilical herniorrhaphy and recurrent umbilical hernia. For claimant’s back condition, Dr. Murati recommended a lumbar spine MRI, bilateral lower extremity NCS/EMG to include the lumbar paraspinals, physical therapy, anti-inflammatory and pain medication as needed and a series of lumbar epidural steroid injections. If conservative treatment failed, Dr. Murati recommended a surgical consultation.

In a February 10, 2010, Order, ALJ Kenneth J. Hursh denied the request for medical treatment for claimant’s back. He stated:

The claimant proceeded to a settlement hearing on his previous back injury claim on December 2, 2008. In the course of the hearing it was made clear that the settlement in that case only applied to the previous back injury claim and not to the subsequent claim for the hernia. Nowhere in the settlement record was the present injury referred to as anything other than a hernia. The claimant testified that his back pain from the September 19 incident had gone away because he was on pain medications for the hernia, so that is why the September 19 back injury wasn’t mentioned at that time. The first mention of a second back injury in any medical records was when the claimant saw Dr. Murati on April 13, 2009 some seven months after the accident.<sup>5</sup>

On March 30, 2010, Dr. Murati, at the request of claimant’s counsel, examined claimant a second time. Dr. Murati indicated he had previously evaluated claimant on April 13, 2009, for a work-related injury and to see that report for a detailed history. Dr. Murati’s March 30, 2010, report does not mention a 2007 accident and back injury or the 2008 settlement. Claimant reported that he had not received treatment for his back injury. Dr. Murati’s impressions were the same, except the umbilical hernia was described as resolved, and his recommendations for claimant’s low back were the same as when he saw claimant on April 13, 2009. He restricted claimant to occasional sitting, climbing stairs

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<sup>5</sup> ALJ Order (Feb. 10, 2010) at 1.

and ladders, squatting, crawling and driving; frequent standing and walking; rarely bending, crouching and stooping; lifting, carrying, pulling and pushing no more than 20 pounds, 20 pounds occasionally and 10 pounds frequently; and alternate sitting, standing and walking.

On September 10, 2010, without seeing claimant again, Dr. Murati opined that claimant was in Lumbosacral DRE Category III because of symptoms of radiculopathy and had a 10% whole body functional impairment for the low back injury. Dr. Murati also opined that using the pain chapter of the *Guides*,<sup>6</sup> claimant had a 2% whole body functional impairment for the umbilical herniorrhaphy. Dr. Murati testified that claimant had foreign materials in the belly that can produce pain on the abdominal wall. Dr. Murati then combined the impairments for a 12% whole body functional impairment. Dr. Murati's restrictions were unchanged from when he saw claimant on March 30, 2010.

On February 9, 2011, ALJ Avery ordered claimant be referred to Dr. Pat D. Do for an independent medical examination,

for evaluation and disability rating regarding an alleged work-related injury sustained by claimant allegedly with this respondent, and recommendations regarding what future medical treatment is appropriate, if any. Restrictions are to be imposed and opinions concerning apportionment of any pre-existing impairment of the affected body parts, together with opinions concerning loss of task-performing ability, if any, are to be given as appropriate.<sup>7</sup>

Dr. Do, a board-certified orthopedic surgeon, conducted the IME on March 16, 2011. He reviewed claimant's medical records from Dr. Cedeno, Mt. Carmel Regional Medical Center, Dr. Murati, Dr. Buchele and Dr. Edward J. Prostic. Dr. Do's IME report indicated claimant injured his back and sustained a hernia when lifting an 18-inch wheel. Claimant did not give Dr. Do a history of a back injury prior to the 2008 accident. Dr. Do's report indicated claimant was able to do everything he could do before the 2008 accident, just not as long in duration. Dr. Do noted claimant was tender on the paraspinal areas of the spine, had no nerve root tension signs in the lower extremities when he was in the sitting or supine positions and had normal sensation and strength in the lower extremities. He did not perform any diagnostic tests on claimant, nor did he review the films or reports from prior diagnostic tests.

Dr. Do diagnosed claimant with myofascial lumbar spine pain and status post umbilical hernia repair. As to claimant's functional impairment for his back injury, Dr. Do stated, "[f]or his myofascial back pain, usually Lumbosacral Category II with the 5% for DRE Category II, but that is not a big a portion of the symptoms, I would give him a 4% for

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<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>7</sup> ALJ Order (Feb. 9, 2011) at 1.

that as well.”<sup>8</sup> Dr. Do’s report did not indicate whether claimant had back issues that preexisted the 2008 accident. The doctor also opined claimant had a 4% whole body functional impairment for the hernia and placed claimant in Class 1 in Table 7 on page 247 of the *Guides*. Other than being asked his opinion on claimant’s functional impairment, Dr. Do gave no significant testimony concerning the hernia.

At his deposition, Dr. Do testified that he reviewed a report from Dr. Kathleen M. Sisler, who works at Central States Orthopedics in Tulsa, Oklahoma. Dr. Sisler examined claimant on May 17, 2012, at the request of respondent. At Dr. Do’s deposition, respondent initially objected to Dr. Sisler’s report. Respondent’s attorney stated:

MR. UNRUH: Bill, I am going to object. Feel free to ask the doctor information about Dr. Sisler’s report, but Dr. Sisler’s report is not in front of the Court and is not in evidence at this time, so my objection would be lack of foundation and hearsay. Up until that time, I think the questions are highly inappropriate, but if you are trying to bootleg a document without foundation is hearsay and improper. And also the findings as well.

MR. PHALEN: Let me get my question in, I understand you have the objection now.<sup>9</sup>

Later in the deposition, the following took place:

MR. PHALEN: I offer all of my exhibits.

MR. UNRUH: I don’t have any objection. . . .<sup>10</sup>

Dr. Do testified that based upon the history given to him by claimant and the medical records provided him, the back injury he diagnosed claimant with resulted from the September 19, 2008, accident. He also testified the 2008 accident aggravated claimant’s previous back injury. On redirect examination by respondent’s counsel, Dr. Do testified that he could not tell with absolute certainty if claimant’s back injury resulted from the September 19, 2008, accident or was preexisting.<sup>11</sup> Dr. Do gave claimant no work restrictions. However, Dr. Do indicated that if he had given claimant restrictions, those restrictions would be lifting no more than 75 pounds and bending no more than 66% of a workday. Dr. Do testified claimant did not want restrictions because he did not want to be limited on what he could do. Dr. Do was not asked to give an opinion on claimant’s task loss.

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<sup>8</sup> Do Depo., Ex. 2 at 2.

<sup>9</sup> *Id.*, at 16.

<sup>10</sup> *Id.*, at 25.

<sup>11</sup> *Id.*, at 25-26.

At the September 23, 2011, regular hearing, claimant testified that he was enrolled in an HVAC program at Fort Scott Community College and would graduate in December. Claimant also worked 40 hours a week at Sugar Creek Packing since June 15, 2011, where he made \$9.45 per hour. Claimant also worked significant overtime at Sugar Creek. Claimant testified he met with vocational expert Karen Crist Terrill and had provided a list of job tasks performed in the 15 years prior to the September 19, 2008, accident.

Dr. Murati was deposed on February 29, 2012, nearly two years after he last saw claimant. He opined claimant's low back injury was caused or permanently aggravated by the September 19, 2008, accident. Just prior to his deposition, Dr. Murati reviewed the medical records of Drs. Cosens and Yarosh, and physical therapy notes from Mt. Carmel Regional Medical Center. Dr. Murati, after reviewing the foregoing medical records, opined claimant sustained a temporary injury to his low back in 2007 that resolved with conservative treatment.

Dr. Murati testified that all of the restrictions he assigned claimant were from claimant's 2008 low back injury. Dr. Murati opined that based upon Ms. Terrill's job task list, claimant had a 79% task loss.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The first issue that must be addressed is whether Dr. Sisler's report is admissible. Respondent asserts it contemporaneously objected to the report, while claimant contends respondent later withdrew that objection. Neither party raised this as an issue in their submission letters to the ALJ. Nor did the ALJ address the admissibility of Dr. Sisler's report in the Award. In fact, only claimant's brief to the Board mentions Dr. Sisler's report. Rather than remand this matter to the ALJ for a ruling on the admissibility of Dr. Sisler's report, the Board will resolve this issue.

The Board has ruled that the longstanding "contemporaneous objection rule" applies to a workers compensation claim.<sup>12</sup> In *Waters*,<sup>13</sup> the Board stated, "Although the rules of evidence are not strictly applied in workers compensation cases, the Board finds that the longstanding 'contemporaneous objection rule' applies to a workers compensation case.

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<sup>12</sup> *Smith v. Beachner Construction Company, Inc.*, No. 1,041,873, 2011 WL 2185258 (Kan. WCAB May 25, 2011).

<sup>13</sup> *Waters v. Waters True Value Hardware*, No. 1,041,172, 2010 WL 4009114 (Kan. WCAB Sept. 17, 2010).

Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making clear the grounds of the objection.”<sup>14</sup>

The Board finds respondent contemporaneously objected to Dr. Sisler’s report. Respondent specifically objected to the report being “bootlegged” into evidence and claimant’s counsel acknowledged the objection. It was not necessary for respondent to object each and every time claimant attempted to place Dr. Sisler’s report into evidence.

K.S.A. 44-519 provides:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

In *Boeing Military Airplane Co. v. Enloe*,<sup>15</sup> the Kansas Court of Appeals stated:

K.S.A. 44-519 governs the admissibility and competence of expert medical opinions expressed in the form of a certificate or report of examination on the issues of determination and collection of compensation in a workers' compensation proceeding. To be considered as competent evidence in the proceeding, the opinions expressed in the certificate or report must be supported by admissible testimony of the physician or surgeon who issued the certificate or report. K.S.A. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee.

K.S.A. 44-519 provides that in order for a medical report to be considered as competent evidence in the proceeding, the opinions expressed in the report must be supported by admissible testimony of the health care provider who issued the report. Dr. Sisler did not testify and, therefore, her report is inadmissible.

The second issue is whether claimant’s hernia injury is a scheduled or whole body injury. ALJ Avery correctly determined claimant’s hernia was a scheduled injury. Neither of the parties mentioned this as an issue in their briefs to the Board. The parties’ briefs and submission letters primarily dwell upon whether claimant sustained a back injury as

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<sup>14</sup> *Id.*, citing see *Anderson v. Scheffler*, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991) and *State v. Carter*, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

<sup>15</sup> *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130, 764 P.2d 462, rev. denied 244 Kan. 736 (1988).

the result of his 2008 accident. This issue is important, because if the Board finds claimant's hernia resulted in a whole body functional impairment, claimant could be entitled to an award for work disability. The Kansas Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>16</sup> "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."<sup>17</sup>

The medical records of Dr. Cedeno, the physician who treated claimant for his hernia, are not in evidence. Dr. Do opined claimant had a 4% functional impairment of the body as a whole for the hernia and Dr. Murati gave claimant a 2% whole body functional impairment. Dr. Murati based his impairment rating for claimant's hernia on the chapter of the *Guides* that deals with pain. Neither Dr. Murati nor Dr. Do indicated claimant's hernia caused an injury or impairment to another body part. Kansas appellate courts have ruled in *Lozano*<sup>18</sup> and *Goudy*<sup>19</sup> that in order for a hernia to be deemed a whole body impairment rather than a scheduled injury under K.S.A. 44-510d(a)(22), there must be a separate and distinct injury from the traumatic hernia. In *Lozano* and *Goudy*, the injured workers also suffered nerve damage. Here, there was insufficient evidence to prove that claimant sustained a separate and distinct injury from his traumatic hernia. Accordingly, the Board finds claimant did not prove by a preponderance of the evidence that he sustained a whole body impairment as the result of his work-related hernia.

The third issue is whether claimant sustained a back injury as a result of the September 19, 2008, accident. There is some confusion in the record on how claimant's back injury occurred. Claimant testified he injured his low back as a result of lifting an 18-inch wheel on September 19, 2008, but that his back condition worsened after working for two weeks in a bent-over position. He testified he has never received treatment for his alleged 2008 low back injury. Claimant's application for hearing alleges a single traumatic injury. Claimant gave a history of a single traumatic accident to Dr. Do. Dr. Murati's history of the low back injury indicated a repetitive series of traumas and his April 13, 2009, report indicated claimant received treatment at Mt. Carmel. After reviewing the record, the Board concludes that if claimant sustained a low back injury in this claim, that it resulted from a single traumatic accident on September 19, 2008.

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<sup>16</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>17</sup> K.S.A. 2008 Supp. 44-508(g).

<sup>18</sup> *Lozano v. Excel Corp.*, 32 Kan. App. 2d 191, 81 P.3d 447 (2003).

<sup>19</sup> *Goudy v. Exide Technologies*, No. 106,385, 2012 WL 3822798 (Kansas Court of Appeals unpublished opinion filed Aug. 31, 2012).

The Board finds that claimant did not sustain a low back injury as the result of the September 19, 2008, accident. As pointed out by ALJ Hursh in his February 10, 2010, preliminary hearing Order, claimant made no mention of a September 2008 back injury at the December 2, 2008, settlement hearing. In fact, the first medical record or report that mentions a back injury resulting from the 2008 accident was Dr. Murati's April 13, 2009, report.

Dr. Pope's January 22, 2008, MRI report indicated an L5-S1 right paracentral disc protrusion and L4-5 generalized disc bulging. After the 2008 accident, no diagnostic tests such as an MRI or x-rays were conducted to determine if claimant had a new back injury. Following the 2008 accident, claimant has never received treatment for his low back injury.

The Board acknowledges that Drs. Do and Murati opined claimant's 2008 accident caused his back injury or aggravated his preexisting back injury. The opinions of Drs. Murati and Do concerning the cause of claimant's back injury are uncontroverted. Uncontradicted medical testimony unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.<sup>20</sup>

The Board finds the causation opinions of Drs. Murati and Do are untrustworthy. When both doctors examined claimant and later issued their reports, they were unaware that claimant had sustained a 2007 back injury. The record indicates that Dr. Murati reviewed medical records from claimant's 2007 back injury shortly before being deposed. Dr. Do testified he was unaware of claimant's 2007 accident when he examined claimant. Neither doctor reviewed claimant's testimony from the December 2, 2008, settlement hearing transcript, nor from the preliminary or regular hearings in this claim. Drs. Murati and Do did not review nor order any diagnostic tests of claimant's low back.

Dr. Murati's reports did not contain the correct mechanism of claimant's alleged 2008 back injury. He also indicated claimant was going to undergo surgery at Mt. Carmel Hospital, which was incorrect. Dr. Murati was deposed nearly two years after he last examined claimant. At his deposition, Dr. Murati agreed with claimant's counsel that the September 19, 2008, accident caused or permanently aggravated claimant's low back injury. When Dr. Murati last saw claimant in March 2010, Dr. Murati gave claimant temporary restrictions and indicated more diagnostic tests were needed. Without seeing claimant again, Dr. Murati changed the temporary restrictions to permanent restrictions in September 2010.

The final issue of the nature and extent of claimant's work disability is moot.

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<sup>20</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

**CONCLUSION**

1. Respondent's objection to the May 17, 2012, medical report of Dr. Kathleen M. Sisler is sustained.
2. Claimant's hernia injury is a scheduled injury.
3. Claimant failed to prove that he sustained a back injury by accident on September 19, 2008, arising out of and in the course of his employment with respondent.
4. The issue of the nature and extent of claimant's work disability is moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>21</sup> 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**, the Board affirms that part of the August 7, 2012, Award entered by ALJ Avery that finds claimant is entitled to no additional compensation beyond temporary total disability and medical expenses for his hernia. The Board reverses that part of ALJ Avery's August 7, 2012, Award that finds claimant sustained a back injury by accident on September 19, 2008, arising out of and in the course of his employment with respondent. Accordingly, pursuant to K.S.A. 44-510d(a)(22) claimant is entitled to 13.43 weeks of temporary total disability benefits at the rate of \$526.45 per week in the amount of \$7,070.22 for claimant's scheduled hernia injury, all of which is due and owing, less any amounts previously paid. All reasonable and authorized medical expenses for treatment of claimant's hernia are ordered to be paid by respondent. Claimant is entitled to unauthorized medical care, if any, for his hernia up to the applicable statutory limit. Claimant is entitled to future medical care for his hernia upon application and review.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>21</sup> K.S.A. 2011 Supp. 44-555c(k).

Dated this \_\_\_\_ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

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Brad E. Avery, Administrative Law Judge