

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

JOHNNY W. DEAN)	
Claimant)	
)	
VS.)	
)	
HI LO INDUSTRIES, INC.)	
Respondent)	Docket No. 1,044,771
)	
AND)	
)	
LUMBERMEN'S UNDERWRITING ALLIANCE)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 21, 2014, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 21, 2014. William L. Phalen of Pittsburg, Kansas, appeared for claimant. J. Scott Gordon of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to sustain his burden of proof that he suffered a permanent impairment of function to his low back as a result of an accidental injury occurring on May 15, 2008. The ALJ determined claimant suffered a 7.5 percent impairment of function to the right lower extremity at the level of the foot, with future medical to be considered upon proper application.

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

ISSUES

Claimant argues he sustained a 20 percent functional impairment to the body as a whole based upon his right foot and low back injuries. Further, claimant contends he is entitled to functional impairment benefits until his last day of employment with respondent, February 28, 2009. Claimant argues he is then entitled to a 65.5 percent work disability for the period of February 28, 2009, through June 7, 2010.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues the evidence proves claimant did not sustain permanent injury to his low back when he suffered the accidental injury to his right foot, or as a result of an altered gait.

The issues for the Board's review are:

1. Did claimant meet his burden of proving permanent impairment of function to his low back?
2. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began performing general maintenance for respondent in 2005. On May 15, 2008, claimant and coworkers were moving a vertical panel saw chained to a forklift. The chain securing the equipment "popped,"¹ the machine shifted, and claimant jumped out of the way. Claimant testified he heard a snap in his right foot when he landed. Claimant reported the injury to respondent's safety coordinator Blaine Meisch and was sent by respondent to Dr. Robert Thomen at the Ashley Clinic in Chanute, Kansas. Dr. Thomen took x-rays and determined claimant's right fifth metatarsal was broken and required surgery.

Claimant was referred to Dr. John King, an orthopedic surgeon at the Ashley Clinic. Dr. King prescribed a CAM Walker (boot)² and crutches on May 15, 2008. Claimant's fracture did not heal well, and Dr. King provided a bone growth stimulator. Subsequently, claimant's orthopedic care was taken over by Dr. Martin Dillow of the Ashley Clinic, who discontinued the use of the boot on January 13, 2009, and recommended a stiff-soled shoe.

Claimant testified the boot affected his walking, causing him to limp and creating problems in his low back. Claimant stated he had constant pain in his low back which worsened while wearing the boot. He maintained his low back pain began in June 2008. Claimant testified he did not inform anyone at respondent of his back pain nor did he request treatment for back pain. Claimant stated he informed Dr. Dillow of his low back pain; however, there is no documentation of back pain complaints in any Ashley Clinic record through the last date of service in April 2009.

¹ Claimant's Depo. at 6.

² Controlled Ankle Motion Walker, or orthopedic boot, designed to limit motion of the ankle and foot.

On February 25, 2009, claimant was laid off from his employment with respondent due to a factory-wide layoff. Claimant was unemployed until June 7, 2010, when he began employment as the city superintendent for the City of Thayer, Kansas.

Claimant began building a house in 2007, while he was still employed at respondent. Because of claimant's background in maintenance, he was capable of constructing of the house. Claimant testified he did all work on the house, including:

Digging the footing, foundation, setting the sub floor down, putting the walls up, ceiling, the whole works, wired it, plumbed it, all of it.³

Claimant stated the majority of the house work was completed before the accident on May 15, 2008. He testified his family was living in the house at the time of the accident, although it was not completed.⁴ Claimant indicated he continued to work on his house in a limited fashion following the accident and was still doing interior work at the time of regular hearing. Claimant testified he never injured his back while working on his house.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at his counsel's request on April 15, 2009. Claimant presented with nearly constant pain in his right foot that worsened with activity and a low backache which began while wearing the boot.⁵ Claimant's back pain was "in the center of his back at the waist level without radiation to either leg."⁶ After reviewing claimant's history, medical records, taking x-rays, and performing a physical examination, Dr. Prostic noted a "slow healing of the fracture of the fifth metatarsal and . . . aggravated pre-existing spondylolisthesis at L5-S1."⁷ Physical examination revealed limited range of motion in claimant's lumbar spine, but was otherwise satisfactory. Dr. Prostic opined claimant's altered gait from wearing the boot aggravated his preexisting spondylolisthesis, and therefore, claimant's back and foot conditions were related to the work injury. Claimant did not demonstrate an altered gait at the time of his visit with Dr. Prostic. Dr. Prostic had no additional treatment recommendations for claimant's right foot, but suggested conservative care for claimant's back.

On April 20, 2009, claimant was examined by Dr. Stanley Bowling, an orthopedic surgeon, at respondent's request. Claimant testified he had noted his areas of pain as

³ P.H. Trans. at 31.

⁴ Claimant testified at deposition he moved into the house in June 2008, approximately one month following the accident. (Claimant's Depo. at 10.)

⁵ Dr. Prostic's April 15, 2009, report is the first documented complaint by claimant of low back pain.

⁶ Prostic Depo., Ex. 2 at 1-2.

⁷ Prostic Depo. at 16.

“lower back” and “right foot” on the intake form at Dr. Bowling’s office.⁸ Claimant stated a nurse informed him Dr. Bowling does not treat backs and marked through the reference of lower back pain on the form. Dr. Bowling determined claimant had reached maximum medical improvement as to the right foot on April 20, 2009, with no permanent work restrictions. Dr. Bowling’s notes did not mention claimant’s back pain.

Dr. Pat Do, a board certified orthopedic surgeon, examined claimant at ALJ Thomas Klein’s request on March 25, 2010, for purposes of an independent medical evaluation (IME) and low back pain causation. Dr. Do reviewed claimant’s history and noted it was “a little bit inconsistent” because claimant stated he could work on his house with no back pain, but the use of the boot caused back pain.⁹ Dr. Do performed a physical examination, finding tenderness in the lower lumbar spine and no evidence of an altered gait. Dr. Do diagnosed claimant with myofascial low back pain and recommended x-rays, an MRI, physical therapy, and injections. Dr. Do opined:

So in summary, . . . I think within a reasonable degree of medical probability that his foot fracture and him being in a cam walker for an extended period of time and crutches may have aggravated, accelerated, or made active his lower back complaints, and again the spondylolisthesis and any wear and tear that he may have here is a pre-existing condition.¹⁰

As the superintendent for the City of Thayer, claimant performed many jobs, including shoveling coal mix to repair potholes, assisting with snow removal, pulling manholes for inspection, reading water meters, testing the city’s water supply, and performing general maintenance on the city’s vehicles. Claimant testified he occasionally lifts up to 100 pounds in the course of his employment with the City of Thayer. Claimant stated he performs his various job duties without any restrictions, aside from those he has imposed on himself. Claimant explained he can work at his own pace and decide which tasks to complete while at work.

Claimant returned to Dr. Do on May 24, 2011, at which time he began low back treatment with medication and physical therapy. Claimant declined the recommended injections. Claimant followed up with Dr. Do on July 13, 2011, subsequent to attending two physical therapy sessions. Dr. Do noted claimant indicated the physical therapy was helping, and the medication reduced his symptoms. Dr. Do recommended claimant continue with medication and physical therapy with consideration of a back brace should the pain continue.

⁸ P.H. Trans. at 16.

⁹ Do Depo., Ex. 2 at 1.

¹⁰ *Id.* at 3.

Dr. Do again saw claimant on September 6, 2011. Claimant complained of ongoing back pain and indicated his symptoms were somewhat relieved with medication. Claimant informed Dr. Do he discontinued physical therapy because he felt it was worsening his condition. Claimant attended only two physical therapy sessions in June 2011.

Dr. Do took an updated history of claimant and performed a physical examination, concluding claimant suffered low back pain, degenerative disc disease, and spondylolisthesis. Dr. Do determined claimant was at maximum medical improvement if he declined to undergo injections. Dr. Do released claimant on September 6, 2011, with no restrictions.

Claimant returned to Dr. Prostic on August 14, 2012, for a rating examination. Dr. Prostic noted in his report an MRI of the lumbar spine revealed "grade II spondylolisthesis at L5-S1 and mild central disc protrusion at L4-5."¹¹ Claimant presented with pain in the center of his low back with intermittent radiation to each calf with numbness and tingling. He also reported to Dr. Prostic temporary aggravation of the low back with meter reading. Dr. Prostic opined:

It continues to be my opinion that on or about May 15, 2008, [claimant] sustained injury to his low back during the course of his employment. He had fracture of the base of the fifth metatarsal. He aggravated pre-existing spondylolisthesis. He is now having symptoms of spinal stenosis. He may be improved by epidural steroid injections and/or surgery.¹²

Using the *AMA Guides*,¹³ Dr. Prostic opined claimant sustained a combined 20 percent impairment of function to the body of a whole. This rating combines a 10 percent impairment of function to the right lower extremity at the level of the foot and an additional 18 percent impairment of function to the body as a whole for loss of lumbar range of motion. Dr. Prostic testified he used the Range of Motion model when assessing claimant's impairment, although he acknowledged the preferred method is the DRE model.

Dr. Prostic recommended the following restrictions:

For [claimant's] low back difficulties, he should avoid lifting weights greater than 40 pounds knee-to-shoulder occasionally or half that much frequently. He should minimize activities below knee height. He should avoid frequent bending or twisting

¹¹ Prostic Depo., Ex. 3 at 1.

¹² *Id.* at 2.

¹³ 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.

at the waist, forceful pushing or pulling, or more than minimal use of vibrating equipment.¹⁴

Dr. Paul Stein, a board certified neurological surgeon, performed a neutral court-ordered IME of claimant on February 5, 2013. Claimant complained of residual right foot pain and low back pain accompanied by intermittent cramping in both calves. Dr. Stein reviewed claimant's history and treatment records. He performed a physical examination, finding claimant had a normal gait with mild restriction in flexion and extension of the lower back. Otherwise, claimant manifested no focal tenderness, no guarding, and no lumbar muscular spasm. Dr. Stein diagnosed spondylolysis and spondylolisthesis at L5-S1. He testified walking with an altered gait could aggravate these conditions, "but when the gait becomes normal, I would anticipate that would resolve, although I cannot state that it can't permanently aggravate it."¹⁵

Dr. Stein further explained:

If the altered gait were very severe, if the altered gait were persistent for a very long period of time, if there were any instability. That would really be the biggest key is the question of instability. If the spondylolisthesis was unstable, then the altered gait would have more of a likelihood of aggravating it. If it's stable and doesn't move on flexion/extension, it's pretty well socked into place, you may get some back strain because the back is not mechanically normal, but again, I would expect more likely than not once the altered gait was gone that the discomfort would resolve.¹⁶

Dr. Stein noted claimant's spondylolisthesis was stable on flexion and extension. Because claimant did not demonstrate an altered gait upon physical examination, and records noted claimant's gait was satisfactory since 2009, Dr. Stein opined claimant was in DRE Lumbosacral Category I of the *AMA Guides* with a 0 percent impairment to the low back. He recommended no permanent work restrictions in regard to the low back and "specifically in relation to the current incident."¹⁷ Using the *AMA Guides*, Dr. Stein rated claimant with a 5 percent impairment to the right lower extremity at the level of the foot. He recommended no specific permanent medical work restrictions for the right foot, but noted claimant should wear a supportive shoe with a stiff sole if he climbed ladders.

Dr. Do was not asked to offer an impairment rating until the morning of his November 20, 2013, deposition. Dr. Do stated he had not seen claimant since September 6, 2011, and would base his rating on that examination; however, he later testified he

¹⁴ Prostic Depo., Ex. 6.

¹⁵ Stein Depo. at 31.

¹⁶ *Id.* at 32-33.

¹⁷ *Id.*, Ex. 2 at 7.

would defer to Dr. Stein's ratings and opinions of claimant. Dr. Do also agreed claimant's job duties with the City of Thayer, specifically lifting 80-pound bags of concrete and shoveling coal mix, could aggravate, accelerate, or cause pain in claimant's low back.

Karen Terrill, a rehabilitation consultant, interviewed claimant via telephone at his counsel's request on October 31, 2012. Ms. Terrill obtained claimant's work history spanning the 15 years prior to his May 2008 accident. Ms. Terrill testified she reviewed only Dr. Prostic's medical records, and she did not verify claimant's employers. Dr. Prostic reviewed the task loss report generated by Ms. Terrill. Of the 15 tasks on the list, Dr. Prostic opined claimant could not perform 5 for a 33 percent task loss. Dr. Prostic later testified when forming his opinions he was unaware of claimant's house building activities or that claimant did any task other than read meters for the City of Thayer. Dr. Stein also reviewed Ms. Terrill's list and opined claimant suffered no task loss in relation to the 2008 accident.

PRINCIPLES OF LAW

K.S.A. 2007 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. 2007 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."

ANALYSIS

1. Did claimant meet his burden of proving permanent impairment of function to his low back?

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁸ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁹ An injury is not compensable, however, where the worsening

¹⁸ See *Odell v. Unified School District No. 259*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁹ See *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. 2, 949 P.2d 1149 (1997).

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.²⁰

For the reasons stated by the ALJ, the Board agrees that Dr. Stein provides the most credible medical opinion regarding the existence of a low back impairment related to the injury. The Board adopts the findings of fact and conclusions of law contained in the ALJ's order of January 21, 2014.

Dr. Prostic assessed an 18 percent impairment rating for claimant's low back spondylolisthesis. In his report of August 14, 2012, Dr. Prostic noted claimant aggravated preexisting spondylolisthesis and assessed an impairment rating without breaking down the amount that was preexisting or related to the accident. Dr. Prostic testified the entire low back rating is related to the injury, which caused the altered gait.

Dr. Prostic was unaware claimant had been building his own house, shoveling asphalt and lifting bags of concrete for the two years prior to the 2012 examination. Dr. Prostic agreed these activities could aggravate claimant's low back condition. Dr. Prostic also agreed walking in a CAM boot most often causes a temporary aggravation to the low back. Dr. Prostic testified he did not know how long claimant was in a CAM boot. The Board does not accept Dr. Prostic's opinions in this case relating to impairment and causation.

Dr. Do's opinion claimant suffered a five percent impairment related to the altered gait came over two years after his last examination of claimant. Dr. Do's assessment of impairment is purely speculative and will not be adopted by the Board. It is also noted that Dr. Do deferred to Dr. Stein's opinion regarding impairment.

Dr. Stein diagnosed claimant with spondylolysis and spondylolisthesis at L5-S1. Dr. Stein opined any aggravation of the preexisting spondylolysis and spondylolisthesis by an altered gait would resolve when the gait returned to normal. Dr. Stein testified:

Q. Can walking with an altered gait permanently aggravate the diagnoses that you've just shared?

A. In most cases, I would say probably not. It could aggravate it, but when the gait becomes normal, I would anticipate that would resolve, although I cannot state that it can't permanently aggravate it.²¹

Responding to a question about his opinions being based upon the lack of low back complaints in the records of Dr. Bowling and the Ashley Clinic, Dr. Stein stated:

²⁰ See *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

²¹ Stein Depo. at 31.

. . . it's not a question of whether he had some back discomfort after the injury because of his gait. It's whether it became a permanent aggravation, a permanent injury. But it certainly did affect my ultimate opinion the fact that there were no complaints for many, many, many months after the injury while his gait should have been at its worst.²²

Dr. Stein assessed a 0 percent impairment for claimant's low back complaints, based on DRE Lumbosacral Category I.²³ When asked if he had provided impairment ratings for patients with severe altered gaits, Dr. Stein stated:

I have. It's uncommon that there's enough evidence that I will provide that impairment to somebody whose gait has now been normal for six months or a year or more, but to those who continue to have substantially abnormal gait, then they frequently will continue to have pain, particularly if there's an underlying problem.²⁴

The Board finds Dr. Stein's opinions as a neutral examining physician to be credible and finds his opinions persuasive.

2. What is the nature and extent of claimant's disability?

The ALJ averaged the impairment ratings to arrive at an award of a 7.5 percent impairment of function to the right lower extremity at the level of the foot. The Board has concluded on numerous occasions in prior opinions it can be appropriate to average the ratings provided by the doctors.²⁵

CONCLUSION

Claimant did not meet his burden of proving permanent impairment of function to his low back. Claimant suffers a 7.5 percent impairment of function to the right lower extremity at the level of the foot.

²² Stein Depo. at 48.

²³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

²⁴ Stein Depo. at 61.

²⁵ *Purdy v. Kansas Rehabilitation Hospital*, No. 1,058,490, 2014 WL 517221 (Kan. WCAB Jan. 21, 2014); *See also Morales v. International Paper Company*, No. 1,057,820, 2013 WL 6920082 (Kan. WCAB Dec. 20, 2013); *See also Phillips v. State of Kansas*, No. 1,045,139, 2010 WL 1918581 (Kan. WCAB Apr. 14, 2010).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated January 21, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge