

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

KEVIN KINDLESPARGER)
Claimant)
VS.)
FABSOURCE, INC.)
Respondent)
AND)
CONTINENTAL WESTERN INS. CO.)
Insurance Carrier)

Docket No. 1,051,019

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 29, 2011, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 2, 2011. The Director has appointed Gary Terrill to act as a Board Member pro tem in place of former Board Member Julie A.N. Sample. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. James M. McVay, of Great Bend, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to permanent partial disability compensation for two scheduled injuries. The ALJ found that claimant had a 59.5 percent permanent partial impairment to the left upper extremity at the level of the hand, which was the average of the rating opinions of Dr. David Hufford and Dr. George Fluter. The ALJ also found that claimant had an 11 percent permanent partial impairment to the left upper extremity at the level of the forearm, which she based on an average of Dr. Hufford's lack of a rating opinion for the forearm, which the ALJ treated as a rating of 0 percent, and Dr. Fluter's rating opinion of 22 percent.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument before the Board, the parties agreed to the ALJ's determination that claimant suffered a 59.5 percent permanent impairment to his left hand.

ISSUES

Respondent requests review of the ALJ's finding that claimant is entitled to a separate award for injuries to his left forearm and wrist. Respondent also argues that Dr. Fluter's functional impairment opinions are not based on the *AMA Guides*.¹ Respondent asks the Board to accept the impairment opinion of Dr. Fluter of 2 percent to the left upper extremity at the level of the wrist but reject the additional 20 percent rating to the forearm for loss of strength because it is duplicative of the ratings to the wrist and hand and not based on the *AMA Guides*.

Claimant contends that as a result of his accident, he suffered injuries to his hand, wrist and forearm. Claimant argues that based on a strict construction of K.S.A. 44-510d, he must be assigned separate awards for each affected level of the injured upper extremity. Claimant agrees the impairment ratings for his left hand of Drs. Fluter and Hufford be averaged and he be awarded a 59.5 percent permanent partial impairment to the left upper extremity at the level of the hand. However, claimant asserts Dr. Hufford did not properly evaluate or provide a separate impairment rating for the injuries to his left forearm and wrist, and he therefore asks the Board to modify the ALJ's award to find that he has a 22 percent impairment to the left upper extremity at the level of the forearm based on Dr. Fluter's opinions.

The issue for the Board's review is: What is the nature and extent of claimant's disability? Specifically, is claimant entitled to separate scheduled injury awards for left wrist and left forearm injuries, in addition to the impairment to his hand and, if so, what is the percentage of permanent impairment to those scheduled members?

FINDINGS OF FACT

Claimant was employed by respondent as a welder and said he also worked as a millwright. On April 24, 2009, claimant was working inside an elevator leg. Somehow a piece of metal came loose and dropped 25 to 30 feet, hitting claimant on his left hand. As a result, claimant's left hand suffered severe injuries, including amputation of his thumb and three fingers. Claimant's thumb and one finger were reattached, but both his index finger and middle finger are missing from his left hand. The surgeries included incisions to the wrist to resect and reattach veins and tendons and harvesting bone material from the wrist to graft onto claimant's left thumb. Claimant was hospitalized for a week after the accident. About eight and a half weeks after the accident, claimant returned to work with a restriction of no use of his left hand. Claimant continues to work, although he no longer works for respondent.

¹American 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.

Claimant is still having pain every day in his left hand, mainly in his thumb area, as well as his left wrist. His left thumb is now shorter than the right thumb. He has had diminution in his ability to grip and grab with his left hand. His fine motor dexterity in his left hand has been affected. Pinching activities are difficult. Since the injury, he has had to shift from being left-handed to using his right hand. Claimant has noticed a loss of strength in his left arm in comparison to his right arm. The atrophy and loss of strength in his left arm has affected his ability to lift.

Dr. David Hufford, a board certified independent medical examiner, evaluated claimant on April 15, 2010, at the request of respondent. As part of the examination, he reviewed claimant's medical records and performed a physical examination.

Dr. Hufford used a finger goniometer to measure range of motion deficits in claimant's remaining fingers and thumb. He checked for sensory deficit in the left hand but did not find any. He said claimant complained of an increased sensation in the thumb or very small area of isolated numbness in the ring finger which was not circumferential and did not extend to the tip. Dr. Hufford said this did not appear to involve the digital nerves, at least in the ring finger. He said if claimant experienced a sense of numbness in that area, it was superficial sensory nerves, the nerves in the skin, for which there is no precise or described impairment in the *AMA Guides*, so there is no way to provide an impairment rating based on the *Guides* for that condition.

Dr. Hufford did not measure the scarring on claimant's left wrist that resulted from the surgical procedure. He did not perform any examination of the scar to determine sensory loss or any difficulty stemming from the scar. He did not view claimant's thumbs side by side and did not measure the length of his thumbs to see if one was longer than the other.

Dr. Hufford found no local tenderness or restriction in claimant's left wrist. Dr. Hufford said he thinks he took range of motion testing or measurements as related to the left wrist, but he did not make a note of it in his report. Dr. Hufford had no recollection of whether he used a goniometer. If he did not use a goniometer, he would have asked claimant to dorsiflex his wrist, palmar flex the wrist, move the wrist radially and move the wrist to the ulnar angle. If he did not use a goniometer, he would have been satisfied that claimant's ranges of motion appeared to be full enough that they did not indicate something for which impairment could be awarded.

Dr. Hufford testified that from his training and understanding of the *AMA Guides*, the impairment for amputation is awarded because it also includes the assumption that some component of grip strength will be lost due to that amputation. He said an award for loss of a finger includes not only the physical loss but also entails some loss of grip strength. Therefore, measuring grip strength and awarding further impairment is not an appropriate interpretation of the *AMA Guides*.

Dr. Hufford did not take any measurements of claimant's forearms, either left or right. He said he would not expect that a person who is left hand dominant to experience atrophy in the left upper extremity upon suffering loss of digits in the left hand. He indicated although it was possible that claimant's right arm might have experienced some increase in muscle mass as he used his right hand more, he would not necessarily expect to be able to tell whether there had been growth or development of muscle mass because of shifting tasks from one hand to the other.

Dr. Hufford opined, after examining claimant's forearm, wrist and all aspects of his hand, was that there was no deficit in range of motion. Using the *AMA Guides*, Dr. Hufford rated claimant as having a 49 percent permanent partial impairment to his left upper extremity at the level of the hand, which breaks down as follows:

20 percent to the hand for amputation of the index finger.

20 percent to the hand for amputation of the middle finger.

12 percent for ankylosis of the interphalangeal joint of the thumb.

3 percent for impairment at the metacarpophalangeal joint of the thumb.

(The impairments to the thumb convert to 5 percent to the hand.)

36 percent for complete ankylosis of the distal interphalangeal joint of the ring finger.

(This is a 4 percent hand impairment.)

Dr. George Flutter is board certified in physical medicine and rehabilitation. He examined claimant on July 27, 2010, at the request of claimant's attorney. He saw claimant a second time for a supplemental examination on November 16, 2010. He reviewed the medical records of claimant's treatment for the April 24, 2009, injury. He took a history from claimant and performed a physical examination. He performed range of motion testing and then rated claimant as follows:

Left thumb

33 percent for range of motion deficits and ankylosis.

25 percent for partial sensory loss.

(These combine for a permanent partial impairment to the left thumb of 50 percent.)

Left index finger

100 percent for amputation at the metacarpophalangeal joint level

Left middle finger

100 percent for amputation at the metacarpophalangeal joint level

Left ring finger

54 percent for range of motion deficits and ankylosis

25 percent for partial sensory loss

These combine for a permanent partial impairment to the left ring finger of 66 percent for range of motion and sensory deficits.

Left little finger

26 percent for range of motion deficits.

Dr. Fluter combined the above impairment ratings to the individual digits and converted them to an impairment of the left hand. Based on the *AMA Guides*, he rated claimant as having a 70 percent permanent partial impairment to the left upper extremity at the level of the hand. Dr. Fluter also found that claimant had a 2 percent permanent partial impairment to the left upper extremity at the level of the forearm for range of motion deficits in claimant's wrist.

Dr. Fluter examined claimant on November 16, 2010, specifically to look at the size of claimant's arms, right versus left, and to do some grip strength measurement testing. In testing claimant's grip strength, Dr. Fluter used a hand grip dynamometer. He stated the *AMA Guides* require the use of that type of measurement to come up with appropriate impairment assessments with regard to strength measurements. He stated a strength loss index can be calculated based upon the results of the hand grip dynamometer results.

Dr. Fluter said he took actual measurements of both claimant's right and left forearms and wrists. Claimant's right forearm measured 4 centimeters larger on the right versus the left. Claimant's wrist measured .8 centimeters larger on the right versus the left. Dr. Fluter would not expect those measurements to change significantly, so they are essentially permanent.

Dr. Fluter testified that with regard to the forearm up to the elbow, the applicable impairment would be related to the strength measurements because the muscles that control finger movement are in the forearm. In claimant's case, Dr. Fluter said there was an impairment to the forearm level based on grip strength measurements. The percentage of strength loss index was 46 percent based upon the measurements of the grip strength using the hand dynamometer. According to the *AMA Guides*, a strength loss index of 46 percent is equivalent to a 20 percent upper extremity impairment. Claimant's 2 percent wrist impairment and 20 percent forearm impairment combine for a 22 percent permanent partial impairment to the left upper extremity at the level of the forearm. Dr. Fluter did not assign any permanent impairment based just on claimant's atrophy. He said there is no table or chart in the *AMA Guides* pertaining to the upper extremities that are just based on atrophy measurements.

Dr. Fluter said when using a hand dynamometer to measure strength, the patient will hold the device with one post being supported by the thumb and the other post being supported by the four fingers. He stated, "obviously it would—they would likely have less

strength because they don't have as many fingers to generate the force, sure."² If the patient was missing his thumb, he would not be able to hold the device.

Dr. Fluter said the hand grip dynamometer does not completely isolate the forearm for its strength measurements. The hand is also involved. There are muscles in the hand that are involved in movement of the fingers. But the majority of the grip strength comes from muscles that are controlled in the forearm. Dr. Fluter said he was not aware of any way he would be able to test for a grip strength or strength loss of the forearm if the person being tested did not have a thumb. At the time of his evaluation, he found claimant had a 50 percent impairment of the left thumb. In addition, claimant was missing both his left index finger and left middle finger. Dr. Fluter said that missing some digits will have an affect on grip strength, but a person would still be able to do the test with that type of configuration of the hand.

Dr. Fluter used a goniometer to measure claimant's range of motion. Dr. Fluter's findings of range of motion deficits in claimant's wrist is based on a 50 degree range of motion on extension. This means that claimant's degree of range of motion extension was at least 50 but under 55. Dr. Fluter said he always rounds to a degree of range of motion that has actually been achieved; he does not round up.

When testing abnormal motion measurements in the digits, Dr. Fluter used a small goniometer. He obviously could not measure the index or middle fingers because of their amputation. He used the same rounding technique in measuring the digits range of motion as he did the wrist. He found claimant had a 33 percent range of motion impairment to the thumb.

Dr. Fluter believed there were sufficient digits and enough of claimant's hand left that he could get valid measurements using the hand dynamometer and comport with what he had to do in accordance with the *AMA Guides*. Dr. Fluter did not believe that claimant would have a significant improvement in terms of his grip strength any time in the future. He did not expect significant improvement in claimant's forearm atrophy.

Claimant was left-hand dominant. Dr. Fluter said in most people, their dominant side is stronger than the non-dominant side. Dr. Fluter said there would be an expectation that there would be some improvement in terms of strength and girth of the nondominant side if it has to be used as the dominant side. Dr. Fluter had no measurements available to him of either claimant's grip strength or muscle circumference in either of claimant's upper extremities prior to this accident. Dr. Fluter said that any changes in claimant's right arm as a result of usage, either strength or girth, would have no impact on his impairment rating.

² Fluter Depo. at 31.

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."

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:

- (1) For loss of a thumb, 60 weeks.
- (2) For the loss of a first finger, commonly called the index finger, 37 weeks.
- (3) For the loss of a second finger, 30 weeks.
- (4) For the loss of a third finger, 20 weeks.
- (5) For the loss of a fourth finger, commonly called the little finger, 15 weeks.
- (6) Loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of 1/2 of such thumb or finger, and the compensation shall be 1/2 of the amount specified above. The loss of the first phalange and any part of the second phalange of any finger, which includes the loss of any part of the bone of such second phalange, shall be considered to be equal to the loss of 2/3 of such finger and the compensation shall be 2/3 of the amount specified above. The loss of the first phalange and any part of the second phalange of a thumb which includes the loss of any part of the bone of such second phalange, shall be considered to be equal to the loss of the entire thumb. The loss of the first and second phalanges and any part of the third proximal phalange of any finger, shall be considered as the loss of the entire finger. Amputation through the joint shall be considered a loss to the next higher schedule.

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- (11) For the loss of a hand, 150 weeks.
 - (12) For the loss of a forearm, 200 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.

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(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.A.R. 51-7-8(c) states in part:

(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in the loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

In *Mitchell*, the Kansas Supreme Court stated: "K.S.A. 44-510d requires compensation for each scheduled injury when multiple injuries occur within a single extremity."³

ANALYSIS

The Kansas Supreme Court held in *Mitchell* and *Redd* that when multiple scheduled injuries occur even to a single extremity, compensation shall be awarded for each scheduled injury. Accordingly, if claimant suffered injuries to both his hand and his forearm, those injuries should be compensated separately. Pursuant to K.A.R. 51-7-8,

³ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, Syl. ¶ 1, 239 P.3d 51 (2010); see also *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

however, claimant's multiple injuries to his fingers and thumb shall be considered an injury to his hand and any injury to the wrist shall be considered a loss to the forearm.

In addition to the injuries and symptoms claimant has in his left hand, he also has pain in his left wrist and a loss of strength and atrophy in his left arm. The atrophy and loss of strength in his left arm has affected his ability to lift. Dr. Fluter rated claimant's left upper extremity at 2 percent for loss of range of motion in the wrist and 20 percent for loss of strength. He combined these ratings as 22 percent at the forearm level. Dr. Fluter described how he arrived at these ratings using a goniometer and a hand dynamometer and following the *AMA Guides*. He did not provide a separate rating for claimant's atrophy because he said there is no table or chart in the *AMA Guides* for this. Although Dr. Hufford expressed a contrary opinion that the ratings to the hand are inclusive of any loss of strength, the Board is persuaded that Dr. Fluter's rating of 22 percent to the forearm in addition to the impairment to the hand is credible. Furthermore, it is consistent with the *AMA Guides* and with claimant's diagnosis, symptoms and complaints. The Board, therefore, concludes that claimant suffered a 22 percent loss of use to his left upper extremity at the forearm level in addition to his 59.5 percent impairment to his hand.

CONCLUSION

As a result of the work-related accident, claimant has a permanent loss of use of 59.5 percent to his left hand and an additional 22 percent loss of use at the level of the left forearm.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 29, 2011, is modified as follows:

Claimant is entitled to 8.63 weeks of temporary total disability compensation⁴ at the rate of \$529 per week in the amount of \$4,565.27 followed by 84.12 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of \$44,499.48 for a 59.5 percent loss of use of the left hand, making a total award of \$49,064.75.

Claimant is entitled to 44 weeks of permanent partial disability compensation, at the rate of \$529 per week, in the amount of \$23,276 for a 22 percent loss of use of the left forearm, making a total award of \$23,276.00.

⁴ In the Award, the ALJ awarded the temporary total disability compensation to the calculation concerning claimant's left hand and awarded no temporary total disability compensation in the calculation concerning claimant's left forearm. Since this issue was not mentioned in the briefs or at oral argument, the Board has also awarded the temporary total disability compensation to the calculation concerning claimant's left hand.

The ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and his current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit this written contract to the Director for approval.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge