

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

<b>STEVIE D. MASON</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,057,873
	)	
<b>U.S.D. 259</b>	)	
Self-Insured Respondent	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the March 6, 2014, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on June 18, 2014. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for self-insured respondent.

The ALJ found claimant sustained a 5 percent impairment to the right shoulder as a result of his February 22, 2011, accident. The ALJ determined, based on the medical evidence, claimant's neck and left upper extremity problems are not related to the February 22, 2011, accident. Further, the ALJ found claimant is not permanently and totally disabled, and there is no reduction in claimant's benefits under K.S.A. 2010 Supp. 44-501(h).

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

**ISSUES**

Claimant argues the uncontradicted medical evidence proves he sustained a combination of scheduled injuries, establishing the presumption he is permanently and totally disabled. Claimant argues he has a 100 percent wage loss with substantial task loss and is entitled to the maximum award. Further, claimant contends respondent failed to meet its factual burden of entitlement to an offset related to retirement benefits.

Respondent argues the ALJ's Award should be modified to show claimant sustained a three percent permanent partial functional impairment to the right upper extremity at the shoulder level. Respondent maintains that should the Board conclude claimant is entitled

to work disability benefits, then claimant has sustained a 50 percent work disability. Further, respondent argues the statutory provisions of K.S.A. 2010 Supp. 44-501(h) apply to claimant's award. Alternatively, respondent maintains the ALJ's Award should be affirmed.

The issues for the Board's review are:

1. What is the nature and extent of claimant's disability?
2. Does a retirement offset apply in this claim? If so, did respondent timely assert a retirement offset?
3. What is claimant's average weekly wage?
4. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

Claimant was employed by respondent at Wichita High School West as a special education teacher. Claimant lived in Junction City, Kansas, and commuted to Wichita, Kansas, every day. As a special educator, claimant wrote and implemented the Individualized Education Plan for his students, met with parents, attended faculty meetings, and taught in the classroom. Claimant testified part of his duties was to intervene in any type of physical or inappropriate behavior of students.

On February 22, 2011, claimant was standing in the hallway outside of his classroom monitoring students during the passing period when a young male student began an altercation with another student. Claimant testified he first gave the student a verbal command to stop, and when the student did not comply, claimant physically restrained the student. While restraining the student, claimant slammed into the hallway wall. Claimant testified his right arm went numb and did not provide support. He further stated he was injured as a result of the altercation, from "[t]he right shoulder from the tip of the collarbone to the base of [his] neck."<sup>1</sup> Claimant reported the pain in his right shoulder became constant, moving into the neck and left shoulder. Claimant testified to developing low back pain.

Respondent authorized medical treatment following the accident. Claimant was initially seen by Dr. David Hufford at Mid-America Orthopedic. An MRI taken April 7, 2011, revealed some labral fraying and subacromial bursitis. Dr. Hufford then referred claimant to Dr. Justin Strickland, a board certified orthopedic surgeon of the same office, for surgery

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<sup>1</sup> R.H. Trans. at 10.

on April 25, 2011. Medical records indicated claimant only complained of the right shoulder when presenting to Mid-America Orthopedic.

Dr. Strickland recommended claimant undergo a diagnostic arthroscopy to better diagnose his right shoulder. Before the procedure, claimant experienced an episode of kidney failure, and the arthroscopy was cancelled. Claimant did not return to Dr. Strickland until January 27, 2012.

Claimant testified he suffers from various medical problems. Claimant stated he has uncontrolled diabetes and renal failure issues. Claimant's medical records indicated he is also diagnosed with Bell's Palsy, peripheral neuropathy, morbid obesity, hypertension, sleep apnea, depression, chronic bilateral knee pain, and vestibular schwannoma.

In August 2005, claimant underwent a right shoulder rotator cuff repair, subacromial decompression, and biceps tenodesis. Claimant wore an abduction sling following surgery and before attending therapy. Claimant was off work for several weeks following his surgery. Claimant then filed a workers compensation claim in November 2005 following an altercation at work where his right shoulder twisted and aggravated. Claimant was eventually released from treatment for his right shoulder on December 20, 2005. Claimant testified he was not given permanent restrictions at that time.

Following the February 22, 2011, incident, claimant continued to work at respondent. He testified he modified his duties subsequent to the accident in that he utilized a rolling cart to work with students. He also avoided overhead reaching with his right arm. Claimant worked at respondent until he resigned in August 2011. Claimant testified he had not completed the renewal of his teaching certification, causing him to tender his resignation. Claimant explained he did not complete his accreditation hours because he was waiting to learn from Dr. Strickland whether he was a candidate for surgery. Claimant had at least from May 2010 to May 2011 to complete his teaching certification hours.

Claimant returned to Dr. Strickland on January 27, 2012, with complaints of pain in both shoulders, neck pain, and right arm pain. Claimant indicated to Dr. Strickland he "was not having any neck or neurologic symptoms when [Dr. Strickland] last saw him. He is not sure why it has taken so long to come back to see [Dr. Strickland]."<sup>2</sup> Claimant also informed Dr. Strickland he had been diagnosed in December 2011 with adhesive capsulitis of the left shoulder by Dr. Allan Holiday. Dr. Strickland performed a physical examination and diagnosed claimant with right rotator cuff tendinitis, right shoulder impingement, left shoulder pain, left adhesive capsulitis, and inconsistent neurologic findings. Dr. Strickland recommended claimant undergo physical therapy for the right shoulder. He did not

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<sup>2</sup> Strickland Depo., Ex. 1 at 4.

recommended surgery for claimant's right shoulder, and he did not anticipate any permanent restrictions from claimant's original right shoulder injury.

Dr. Strickland opined claimant's neck and possible neurologic symptoms are not due to the original right shoulder injury. Dr. Strickland recommended claimant undergo an MRI of the cervical spine to rule out any cervical etiology for his symptoms. Regarding claimant's left shoulder, Dr. Strickland agreed with Dr. Holiday's adhesive capsulitis diagnosis. Dr. Strickland wrote, "The diagnosis is consistent with his hx of Diabetes, which is the #1 major risk factor for adhesive capsulitis. I do not think his left shoulder symptoms are due to his original right shoulder injury."<sup>3</sup>

Claimant followed up with Dr. Strickland until April 6, 2012. Dr. Strickland released claimant with no permanent work restrictions. Using the *AMA Guides*,<sup>4</sup> Dr. Strickland opined claimant sustained a 3 percent impairment to the right upper extremity due to the February 22, 2011, injury. Dr. Strickland did not anticipate any necessary future medical care for claimant's right shoulder injury.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at his counsel's request for a medical evaluation on July 15, 2013. Claimant complained of continued pain in the neck and right shoulder with difficulty sleeping, difficulty reaching above shoulder height with the right hand, and relatively constant numbness going down the left arm to the ulnar three fingers. Dr. Prostic reviewed claimant's medical records, medical history, performed a physical examination, and took x-rays of claimant's cervical spine and right shoulder. Dr. Prostic wrote:

On or about February 22, 2011, [claimant] sustained injuries during the course of his employment. He has aggravated degenerative disc disease in his cervical spine and has sustained an unspecified injury to the right shoulder, possibly the labral injury noted on MRI. He also has evidence of ulnar nerve entrapment at the left elbow. Additional treatment may be unrewarding because of his major depressive disorder. Permanent partial impairment is rated at 10% of the body as a whole for the cervical spine, 15% of the right upper extremity, and 10% of the left upper extremity, for combined impairment of 23% of the body as a whole on a functional basis. Presently, the patient is able to return to only light duty employment.<sup>5</sup>

Dr. Prostic stated he utilized the *AMA Guides* in arriving at his rating opinion, which included claimant's preexisting right upper extremity impairment. Dr. Prostic testified

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<sup>3</sup> *Id.* at 4-5.

<sup>4</sup> 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.

<sup>5</sup> Prostic Depo., Ex. 2 at 3.

claimant's overall functional impairment would be close to 19 percent if one subtracted the preexisting impairment.

On December 3, 2013, claimant presented to Dr. Chris Fevurly, a board certified physician specializing in occupational medicine, at respondent's request for purposes of a medical evaluation. Claimant presented with constant right shoulder pain worsened by movement, left clavicle and left upper back pain, chronic recurrent low back pain after prolonged sitting or driving with occasional radiation into the left hip, persistent burning and pain in the bilateral feet, and neck pain two to three times per day. Dr. Fevurly reviewed claimant's medical records and medical history. Claimant indicated to Dr. Fevurly he traveled by car (up to 22 hours) extensively through the country over the 2012-2013 holiday period. Claimant also drove to Los Angeles, California, by car in March 2013. Dr. Fevurly noted claimant has a "history of noncompliance on medical management of his multiple disorders."<sup>6</sup>

Dr. Fevurly performed a physical examination of claimant. Dr. Fevurly wrote:

The work event on 2/22/11 resulted in blunt trauma to the right shoulder consistent with a contusion and aggravated preexisting impingement and rotator cuff tendinopathy which had previously undergone surgery in 2005. There was no evidence for significant clinical change from the preexisting condition of the right shoulder. Recovery was complicated by development of adhesive capsulitis in both shoulders resulting from his morbid obesity, his age and his multiple years of uncontrolled diabetes. He has returned to his pre-work-related injury status as it regards the bilateral shoulders. The prevailing factor for the right shoulder condition is the preexisting nature of his impingement and the effects on his shoulders from his age, his elevated BMI and his years of uncontrolled diabetes.<sup>7</sup>

Dr. Fevurly testified claimant's left shoulder condition, low back complaints, and neck complaints are not causally related to the February 22, 2011, work injury. Further, he stated he did not believe claimant's February 2011 work-related injury "caused any type of anatomical change in the structure of the right shoulder."<sup>8</sup> Dr. Fevurly noted claimant achieved maximum medical improvement from work-related aggravation of the right shoulder condition on April 26, 2012. He wrote, "There are no permanent restrictions or limitations resulting from the work event on 2/22/11."<sup>9</sup> Using the *AMA Guides*, Dr. Fevurly opined claimant has no new impairment to any part of his body as the result of injury or permanent aggravation from the February 22, 2011, work event.

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> Fevurly Depo. at 28.

<sup>9</sup> *Id.*, Ex. 2 at 11.

Claimant was interviewed by two vocational rehabilitation counselors, Dick Santner and Steve Benjamin. Both counselors obtained a 15-year prior work history from claimant and generated a task list. Mr. Santner met with claimant on August 12, 2013, at his counsel's request. Mr. Santner testified claimant's requirement to be able to physically restrain a student at any given time was not a separate task, and thus he incorporated that requirement into every task on his list. Dr. Prostic reviewed the task list generated by Mr. Santner. Of the 11 unduplicated tasks on the list, Dr. Prostic originally opined claimant was unable to perform 6 for a 54.6 percent task loss. Dr. Prostic changed his opinion during deposition to state that if it is true claimant must physically restrain during every task, then claimant cannot perform any task on the list.

Mr. Benjamin met with claimant on November 18, 2013, at respondent's request. Mr. Benjamin disagreed that the ability to physically intervene in accidents is an element of every task of claimant's at respondent. Mr. Benjamin generated a task list with 13 unduplicated tasks. Mr. Benjamin stated claimant could return to work in a similar position and earn a similar or comparable wage should he renew the required teaching certification. Drs. Strickland and Fevurly reviewed the task list produced by Mr. Benjamin, and both opined claimant could perform all tasks on the list.

Claimant is a member of the Kansas Public Employees Retirement System (KPERS), a defined benefit plan. Claimant elected to receive his KPERS benefits effective December 1, 2011. Claimant has not renewed his teaching certification and has been unemployed since Fall 2011. Claimant receives Social Security disability benefits for his medical issues.

#### PRINCIPLES OF LAW

The 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>10</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>11</sup>

K.S.A. 2010 Supp. 44-501(h) states:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount

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<sup>10</sup> See K.S.A. 2010 Supp. 44-501(a).

<sup>11</sup> K.S.A. 2010 Supp. 44-508(g).

of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A. 44-510c(a)(2) (Furse 2000) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510d(b) (Furse 2000) states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e (Furse 2000) states, in part:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . .

K.S.A. 2010 Supp. 44–510k(a) states, in part:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment.

### ANALYSIS

#### **1. What is the nature and extent of claimant's disability?**

Claimant alleges the presumption of permanent total disability as a result of bilateral scheduled injuries. In support of this argument, claimant alleges an injury to the left elbow from overuse due to compensation for the left upper extremity injury. Nowhere in the 15 months of treatment with Drs. Hufford and Strickland did claimant mention left elbow complaints. The first notation in any record of left elbow involvement was in Dr. Prostic's examination report, two and one-half years after the injury.

Dr. Prostic provides no explanation in his report or his testimony regarding what caused the left ulnar nerve condition. When asked on direct examination, Dr. Prostic agreed that use of the left arm as compensation for the right shoulder injury, as described on pages 16, 36, and 40 of the regular hearing transcript, was the cause of his left upper extremity condition. Claimant's testimony on page 16 of the regular hearing transcript does not discuss specific compensation activities. On page 36, claimant stated he had been doing everything with his left arm, but he did not elaborate and explain what specific activities he performed or how the activities affected his left elbow. Again, on page 40, claimant does not cite any specific aggravating activity which could have caused the left elbow injury.

Based upon the absence of medical treatment for the elbow and lack of any specific activity causing a new condition as the result of compensation for the right shoulder injury, the Board finds claimant did not suffer an injury to his left elbow arising out of and in the course of his employment with respondent. As such, the presumption of permanent total disability contained in K.S.A. 44-510c(a)(2) does not apply.

Claimant also alleges injury to the neck as a result of his work-related injury. The ALJ found the neck injury and impairment did not arise out of and in the course of claimant's employment with respondent. The Board agrees. The best evidence of causation for neck involvement is Dr. Prostic's testimony stating it is common for people who have difficulty with a shoulder to aggravate preexisting disease in the neck.<sup>12</sup> Dr. Prostic, however, did not explain how this theory applied to this particular claimant. Nowhere in his testimony or written report does Dr. Prostic identify any specific

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<sup>12</sup> Prostic Depo. at 8.

compensation activity that resulted in an aggravation to claimant's preexisting degenerative neck condition.

Dr. Strickland testified he did not think the neck symptoms were related to the right shoulder injury. Dr. Fevurly agreed claimant's neck complaints were not causally related to the work-related injury. Claimant has failed to establish a neck injury arising out of and in the course of his employment with respondent. Claimant is limited to recovery for a scheduled injury pursuant to K.S.A. 44-510d.

Dr. Prostic assessed a 15 percent impairment to the right shoulder with half of that preexisting, resulting in a 7.5 percent shoulder impairment as a result of this accident. Dr. Strickland assigned a 3 percent upper extremity impairment of the right shoulder. The Board finds claimant suffers a 5.25 percent functional impairment to the right upper extremity at the level of the shoulder. Pursuant to K.S.A. 44-510d(b) claimant is entitled to compensation for an injury to the shoulder, and no additional compensation for permanent partial or total disability is found.

## **2. Does a retirement offset apply in this claim?**

K.S.A. 2010 Supp. 44-501(h) does not allow for an offset that would reduce claimant's benefits below the compensation benefit payable for the employee's percentage of functional impairment. In this claim, claimant's benefits are limited to functional impairment and cannot be reduced. Based upon the plain language of K.S.A. 2010 Supp. 44-501(h), respondent is not entitled to an offset for contributions made for retirement benefits.<sup>13</sup>

## **3. What is claimant's average weekly wage?**

Claimant, in his Request for Appeal, lists average weekly wage as an issue. In the Award, the ALJ indicated the parties stipulated to an average weekly wage of \$1,785.91. This is an error. At the Regular Hearing, the parties stipulated and the ALJ acknowledged the base average weekly wage is \$1,178.81, without fringe benefits.<sup>14</sup> Claimant did not raise the issue in his briefs to the ALJ or the Board. The stipulated average weekly wage is sufficient to reach the statutory maximum compensation benefit of \$545.00.

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<sup>13</sup> See *Hurlburt v. T-Mobile USA, Inc.*, No. 97,779, 187 P.3d 608 (Kansas Court of Appeals unpublished opinion filed July 18, 2008, *rev. denied* Nov. 4, 2008).

<sup>14</sup> R.H. Trans. at 4-5.

**4. Is claimant entitled to future medical treatment?**

It is unclear why claimant listed future medical treatment as an issue in his application for appeal. He also made a request for future medical treatment, without supporting argument, in his brief to the Board. The ALJ awarded future medical benefits upon application to the Director. The Board considers this issue to be moot.

**CONCLUSION**

Claimant sustained a 5.25 percent functional impairment to the right upper extremity at the level of the shoulder. Respondent is not entitled to an offset for contributions made for retirement benefits pursuant to K.S.A. 2010 Supp. 44-501(h). Claimant’s average weekly wage is \$1,178.81.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Gary K. Jones dated March 6, 2014, is modified to reflect a 5.25 percent functional impairment to the right upper extremity at the level of the shoulder.

The claimant is entitled to 11.81 weeks of permanent partial disability compensation, at the rate of \$545.00 per week, in the amount of \$6,436.45 for a 5.25 percent loss of use of the shoulder, for a total award of \$6,436.45.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Gary K. Jones, Administrative Law Judge