

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BARTON BECK)
Claimant)
V.)
) Docket No. 1,059,728
NUTRIJECT, INC.)
Respondent)
AND)
)
GRANITE STATE INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent and its insurance carrier requested review of the February 24, 2015, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on July 7, 2015.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

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

ISSUES

The ALJ found claimant sustained injury arising out of and in the course of his employment, which was the prevailing factor in causing low back complaints. Claimant provided timely notice and was found to be permanently and totally disabled.

Respondent appeals, arguing claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment; failed to prove the prevailing factor in causing his low back condition, need for treatment and any resulting disability or impairment was claimant's work activities and failed to provide timely notice of the alleged injury. Respondent contends claimant is not permanently and totally disabled and compensation should be denied. Respondent further argues, should the Board find

claimant's injury compensable, claimant should be found to have no more than a 5 percent permanent partial impairment to the body as a whole.

Claimant contends the Award should be affirmed. In the alternative, should the Board find claimant is not permanently and totally disabled, claimant should still be found to have a work disability based on a 43 to 64 percent task loss and a 100 percent wage loss.

The issues on appeal are as follows:

1. Did claimant sustain a low back injury by repetitive trauma arising out of and in the course of his employment with respondent?
2. Were claimant's work activities the prevailing factor in causing his low back and shoulder injuries, need for treatment, and resulting disability or impairment?
3. Did claimant provide respondent with timely notice of his alleged injury?
4. If claimant's injuries are deemed compensable, what is the nature and extent of any permanent impairment?

FINDINGS OF FACT

Claimant began working for respondent on June 15, 2004, as a project manager/truck driver. During the course of his employment claimant's job expanded into performing mechanical work also.¹ Claimant testified his job was to contact farmers to arrange to have biosolids, which are waste from fertilizer treatment plants, hauled to farm fields as fertilizer. The product would be spread by driving semi-trailer trucks through the fields. Claimant testified he worked 10 to 12 hours a day, five days a week and some weekends, weather permitting. Claimant testified he spent 8 to 10 of those hours driving. Claimant was not paid overtime.

Claimant testified he primarily farmed and did mechanic work in his life. He testified he owns 80 acres of land that is all grass, and he does no farming.

As claimant continued to work for respondent, over time he began to develop physical problems in his low back, right shoulder, right hand, right leg, right hip, buttocks and thigh, left shoulder. Claimant attributes his physical problems to driving the trucks and the mechanical work he began doing in either 2009 or 2010. Claimant acknowledged he originally injured his left shoulder at work in 2005. In 2007, claimant underwent left shoulder rotator cuff surgery.

¹ This included changing brakes and springs, maneuvering in awkward positions, crawling underneath parts and climbing on equipment. A lot of bending was involved with the mechanical work.

Claimant admits to prior back and leg injuries in 1993 and was treated by Dr. Arnold. He filed and settled a claim for \$10,000. He received an impairment rating of 10 percent to the body as a whole for the back and leg injuries. Claimant has been treated for back pain, off and on, since 1993. He began receiving treatment on a more regular basis with Dr. Doubek in 2007. Claimant also had treatment for his back pain with Dr. Palmgren. Dr. Palmgren also performed surgery on claimant's shoulders. Claimant had an MRI on his back in 2007, which revealed slight degenerative disc disease.

Claimant testified he spoke with Bruce Jensen, the co-owner of the company and operations manager, on at least two occasions about his physical problems. Claimant testified the first conversation was in July or August 2011, at which time claimant reported being unable to sit in trucks all day because his job was causing him back pain.² At that time, claimant was told to do what he could. The next conversation was in November 2011, after the MRI of claimant's back. Claimant testified he told Mr. Jensen about his problems and about the MRI and he was sent to a surgeon, Dr. Mellion. The next conversation with respondent was by telephone conference on February 3, 2012, involving Mr. Jensen, Scott Wienands, claimant's supervisor, Brian Latusick, the HR representative and claimant. In this conversation, claimant reported his back pain was severe enough he felt he could not continue to drive. Claimant testified at the preliminary hearing that he specifically stated that his low back was hurting because of his work with respondent.³

Claimant originally testified his last day of work for respondent was February 3, 2012, the day the telephone conference was held to discuss his request for modified duty. Claimant testified he made it clear he was not resigning. He also indicated he declined surgery because he was afraid it would make him worse. Claimant did not mention a workers compensation claim, as his main concern was keeping his job. Claimant later testified that he worked part of the day on February 6, 2012 and February 7, 2012, with February 7 being his last partial day. However, claimant is not sure he was actually paid for the time spent on February 7.⁴

On February 6, 2012, while working at respondent's Southwest plant in Junction City, claimant received a letter from respondent via UPS, requesting his resignation. Claimant testified that when he received the resignation request he was shocked. He did not work a full day because, after he received the letter, he went home. Claimant testified he didn't call anyone to inquire because he had been waiting on Mr. Wienands to call with a response to his job modification request. A week later, Mr. Jensen called claimant asking him to stay on and manage the operation. Claimant agreed to do so, but nothing was ever worked out. Claimant never officially resigned from his job. Respondent later came to his home and retrieved all of the company equipment.

² Claimant's Discovery Depo. at 58.

³ P.H. Trans. at 30.

⁴ *Id.* at 24.

Claimant filed an Application for Hearing on February 21, 2012, indicating he suffered injury to his low back and left shoulder in the course of his employment with respondent. This Application, along with the representation letter from claimant's attorney, was received by respondent on February 27, 2012.

Claimant testified he started having pain in 2011 while driving. When claimant met with Dr. Doubek, Dr. Mellion and Dr. Palmgren for his low back pain, Dr. Mellion was the first to recommend back surgery. Claimant testified Dr. Palmgren was the only doctor to tell him he needed to stop doing what he was to avoid hurting his back. Claimant never had a doctor tell him he was having back pain or left shoulder pain because of his job.

Claimant received treatment in the form of pain medication, physical therapy and injections. He indicated that because he had the injections in 2010, it was possible his low back pain started in 2010 and got worse in 2011.

Claimant testified the only other thing that could have caused his back pain, besides driving, was an incident in 2005 where he fell off the tanker while on an emergency job. He testified it was 11:00 p.m., and it was pouring down rain and he slipped and fell off the ladder he was using to get on top of the tanker. He fell on his left shoulder and had some soreness in his back. Claimant testified he did not think he had seriously injured anything in this fall and did not report it.⁵ Respondent found out about the incident, but no accident report was filled out. Claimant eventually went to see Dr. Doubek with shoulder pain. An MRI was ordered and he was sent to Dr. Palmgren for surgery on his rotator cuff in 2007. He also remembers having physical therapy and injections for his back after the 2005 fall, but he does not recall the dates.

In March 2009, claimant fell at his nephew's house while helping pull a calf from a cow. He testified it was dark and he tripped over a stick, dislocating his left shoulder. In December 2009, claimant injured his back picking up a bag of concrete at his home. Claimant believes his back and shoulder problems started in 2005 when he fell off the tanker. He admits to taking as many as three days off in 2011 for back pain. He does not recall telling respondent that his work was causing his back pain or that was why he needed the time off. He does recall reporting that he was no longer able to sit in the truck for all the hours because it was causing him pain. He never asked for medical treatment while he worked for respondent.

Claimant described his pain as an 8 out of 10. He testified driving, walking long distances and sitting for more than 45 minutes cause him pain. Claimant also testified he was having trouble sleeping because the aching in his back and shoulders wakes him up. Claimant testified the pain radiates into his left leg and is sharp. He testified this pain is different from the pain in 1993.

⁵ Claimant's Discovery Depo. at 44.

Claimant indicated he does not believe he can perform office work or drive to farms because of his back. The increase in back pain is the reason claimant stopped working for respondent. Claimant testified that his back has gotten worse since he stopped working because he didn't have surgery. He continues to ride a 4-wheeler on occasion out in the pasture of his 80 acre property to check fencing or to get the mail.

Cindy Beck, claimant's wife, testified she spoke with Mr. Wienands in the spring 2011, about how the mechanic work claimant performed was hurting him. She did not specify the problems claimant was having. Mr. Wienands denies this conversation ever took place.⁶ Mrs. Beck was present when claimant had his conference call on February 3, 2012, and heard him report that he was struggling and his back was hurting. She could not hear what the people on the other end of the line were saying.

Mr. Jensen has been operations manager for 18 years. He testified claimant was hired in 2004 and was with the company until February 3, 2012, in Junction City, Kansas. Mr. Jensen indicated claimant's job duties included driving a truck, preparing paperwork and performing repairs on the trucks. He indicated the company had two trucks in Junction City in 2012, a 1990 Volvo and a 2002 Volvo. Mr. Jensen testified claimant drove the 1990 Volvo most of the time. He indicated the trailers were old. The trucks and trailers were driven over pastures and crop fields and a lot of the farms were located on dirt or gravel roads.

Mr. Jensen acknowledged several occasions when claimant mentioned having a sore back, but claimant never specifically related a work accident to the back pain. Mr. Jensen testified the first he learned of claimant alleging a work injury to his back was after February 3, 2012. However, he acknowledged claimant told him he had been to the doctor for his back and it was recommended he not drive a truck. On cross-examination, Mr. Jensen acknowledged that, from the conference call of February 3, 2012, he knew claimant's back was bothering him and driving the vehicle was what claimant was attributing the back problems to.⁷

Mr. Jensen indicated he does not recall a conversation in 2011, where claimant complained of back pain and the need to get off the road. Mr. Jensen indicated it was assumed claimant was submitting his resignation on February 3, 2012, and it was accepted rather than split his job duties. He did not ask, and did not assume, the truck driving was the cause of claimant's pain and the reason he wanted to stop driving.

Scott Wienands, president of respondent, testified he had limited interaction with claimant and only spoke with him when Mr. Jensen was out of the office. Mr. Wienands indicated that, on a couple of occasions, claimant complained of back problems, stating his back was sore and that it was something he's had for years. It was never attributed to his

⁶ Wienands Depo. at 15.

⁷ Jensen Depo. at 10.

work, nor did claimant ever indicate his work aggravated his back problems. Mr. Wienands testified the first notice the company received of claimant alleging a back injury at work was when Brian Latusick got notice from the workers compensation carrier three weeks to a month after the conference call.

Claimant did mention to Mr. Wienands an instance where he was chasing a calf or something on a farm and his foot got caught in a gopher hole and he went flying. However, Mr. Wienands did not feel it was important so he did not write it down. This was before February 2012. Mr. Wienands testified he has no recollection of speaking with claimant's wife about claimant getting away from driving and doing repairs on the trucks.

Brain Latusick, human resources and safety director for respondent, testified he met with claimant at claimant's home on January 31, 2012, and noticed claimant was limping and moving gingerly. When Mr. Latusick made a comment about it, claimant indicated his doctor told him he shouldn't be doing the job anymore, but made no mention of a work-related injury or of any kind of back problems. Claimant requested another position with the company.

The next time Mr. Latusick spoke with claimant was at the February 3, 2012, conference call with claimant, Mr. Wienands and Mr. Jensen. This call involved claimant again indicating he felt he was no longer able to do the job. He still did not mention any work-related injury. Mr. Latusick was first notified of claimant claiming a work injury from workers compensation via mailed letter.

Claimant met with Paul S. Stein, M.D., for an examination on April 19, 2012, at the request of his attorney. Claimant presented with multiple complaints including pain in his left shoulder and pain in the low back that extended into the left buttock and back of the thigh. The back pain was constant and the lower extremity pain was worse with weightbearing. Claimant could walk for two blocks at a time and could stand for 15 minutes in one location. Sitting for too long in one position caused him pain and he had numbness and tingling intermittently into the left foot. Occasional numbness would develop in his right arm and hand if he slept in a chair. Claimant reported his symptoms developed over time.

Dr. Stein noted considerable pain in claimant's lower back with some radiation into his left posterior thigh and left shoulder pain with limitation of motion, both of which claimant relates to repetitive work activity since 2004. He opined for the left shoulder, while claimant's work activity is the type to provide aggravation of the left shoulder pathology, which was preexisting and had been previously symptomatic, he could not determine that such work activity represents the prevailing factor with claimant's current symptoms and the need for additional treatment. He recommended an orthopedic consultation.

For the lumbar spine, Dr. Stein determined it is more likely than not claimant's work activity represents an aggravation and exacerbation of the lower back, but the prevailing factor is the preexisting and previously symptomatic condition. He felt therapy and injections would be appropriate, with possible surgical intervention.

Dr. Stein testified the difference in the 2007 and 2011 MRIs, primarily the disc protrusion at L5-S1, represents a structural change in the lower back.⁸

On June 14, 2012, Dr. Stein provided a separate report stating that, assuming the accuracy of claimant's job description as provided by claimant's attorney, claimant's work activity was the prevailing factor regarding the current symptoms in claimant's lower back.

Claimant met with Dr. Stein for another evaluation on July 29, 2013, again at the request of his attorney. Claimant had not worked since February 2012, but his condition seemed to have gotten worse. Claimant's low back pain extended into his left buttock and down the back of the left thigh to the knee. He had some numbness and tingling into his left lower extremity.

Dr. Stein opined:

Mr. Beck continues to have lower back pain with some left posterior thigh radiation. The pathology is degenerative disk disease with a mild-moderate L3-4 disk protrusion noted in the MRI scan of November, 2011. Posterior annular tearing with disk bulging to the left was also present at L5-S1. No subsequent studies have been done.

When I initially evaluated this individual in April of 2012 there were no records regarding the lumbar spine prior to 2007 provided. Mr. Beck had indicated a period of lower back symptomatology in 1993 from a farming incident. None of records provided today show any other chronic lower back problems prior to his employment at Nutriject. The records seen today do not alter my final causation opinion provided in the report of 6/14/12. Based on my understanding of his chronic work activity from 2004 until 2012, I believe this activity represents a primary and prevailing factor in the cumulative lower back pain which he currently has.

Permanent partial impairment of function is assessed under the AMA Guides to the Evaluation of Permanent Impairment, fourth edition. 5% impairment is assessed to the body as a whole under DRE lumbosacral category II. If an EMG/NCT of the left lower extremity were performed and documented radiculopathy changes under the requirements of the Guides there would be 10% impairment under category III. Absent such evidence, 5% is assessed under category II.

The following permanent work restrictions are recommended: 1. Avoid lifting more than 40 pounds with any single lift up to twice per day, 30 pounds very occasionally, and no repetitive lifting. 2. No lifting from below knuckle height or above chest height. 3. Avoid repetitive bending and twisting of the lower back. 4. Have the

⁸ Stein Depo. at 7.

opportunity to alternate sitting, standing, and/or walking on a 30-minute basis as needed.⁹

Dr. Stein did not have any records from Dr. Arnold, so he did not know the extent of claimant's 1993 injuries to his low back. Dr. Stein was unaware Dr. Arnold stated claimant's back pain would never completely resolve as long as he continued to do his farming job. He was also unaware of the 10 percent functional impairment provided by Dr. Arnold at that time. Dr. Stein also testified he was not aware of claimant's March 2009 fall while assisting his nephew deliver a calf.

Dr. Stein reviewed the task list of Doug Lindahl and found claimant no longer able to perform 6 out of 14 tasks, for a 43 percent task loss. Dr. Stein testified he had no problem with claimant driving a four-wheeler slowly and carefully, but careless driving the way people do for fun would not be appropriate because of all the bouncing up and down on irregular terrain.

At the request of his attorney, claimant met with Pedro Murati, M.D., for an examination on July 10, 2012. Claimant had complaints of low back pain with radiation down the left leg and foot with numbness; difficulty sitting, standing and walking for a long period of time; inability to bend over; his right shoulder would tire quickly, and claimant had bilateral hand numbness and tingling.

Dr. Murati diagnosed claimant status post right shoulder arthroscopy, subacromial decompression and open rotator cuff repair at MMI; bilateral carpal tunnel syndrome; right ulnar cubital syndrome; myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals and low back pain with symptoms of radiculopathy. Dr. Murati opined the diagnoses are within all reasonable medical probability, a direct result of the work-related injury that occurred in a series of accidents through February 3, 2012, during claimant's employment with respondent.

Dr. Murati recommended, for the low back pain, an MRI of the lumbar spine to rule out any disc pathology, a bilateral lower extremity NCS/EMG to include the lumbar paraspinals to evaluate and/or document any radiculopathy and a series of lumbar epidural steroid injections.

For the carpal tunnel and ulnar cubital syndromes, Dr. Murati recommended a bilateral upper extremity NCS/EMG to evaluate and/or document any nerve entrapments; appropriate physical therapy, splinting, anti-inflammatory and pain medications. For the myofascial pain syndrome, the doctor recommended physical therapy, cortisone trigger point injections, anti-inflammatory and pain medications and Zanaflex to reduce muscle spasm. He opined should this conservative treatment fail, a surgical evaluation would be recommended.

⁹ *Id.*, Ex. 2 at 3 (IME report dated July 29, 2013).

Dr. Murati assigned temporary restrictions based on an eight hour work day of: no bending, crouching or stooping; no climbing ladders; no crawling; no heavy grasping with the right or left; no above shoulder work with the right; no lifting carrying, pushing or pulling more than 20 pounds, 20 pounds occasionally and 10 pounds frequently; rarely climb stairs; rarely squat; occasionally drive or sit; frequently stand or walk; frequent repetitive hand controls; no work more than 24 inches from the body with the right and left; avoid awkward positions of the neck, alternative sitting, standing, and walking; avoid trunk twist; no use of hooks or knives with the right and left; no keyboarding and no use of vibratory tools with the right and left.

Dr. Murati opined the following regarding prevailing factor:

The claimant sustained a series of repetitive traumas at work that resulted in right shoulder, bilateral hand complaints and low back pain. . . . His injuries at work have restricted his hobbies to the extent that they do not pose a reasonable risk for his injuries. He has extensive and significant preexisting history to his back for which at one time was considered for chronic pain management. There is no apparent preexisting history to his neck, upper back or bilateral hands. Therefore, the prevailing factor in the above named injuries, except for his lower back, is the series of repetitive traumas at work.¹⁰

Dr. Murati testified that he needed more information before determining prevailing factor for the low back. When he received the additional information, his opinion was that work was the prevailing factor for the low back problems.¹¹

Claimant met with Dr. Murati for another examination on July 11, 2014. Claimant had complaints of soreness in his right shoulder; numbness and tingling in his right hand; low back pain that goes into his left leg and numbness in his left foot. Dr. Murati diagnosed status post apparent right shoulder arthroscopy, subacromial decompression, and open rotator cuff repair, at MMI; bilateral carpal tunnel syndrome - secondary to repetitive nature of job; low back pain with bilateral S1 radiculopathy. Dr. Murati opined the diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred in a series of accidents through February 3, 2012, during claimant's employment with respondent. He recommended yearly follow-ups on the right shoulder, wrists, and low back.

Dr. Murati assigned permanent restrictions based on an eight hour work day of: no bending, crouching or stooping; no climbing ladders; no crawling; no heavy grasping with the right or left; no above shoulder work with the right; no lifting carrying, pushing or pulling more than 20 pounds, 20 pounds occasionally and 10 pounds frequently; rarely climb stairs; rarely squat; occasionally drive or sit; frequently stand or walk; frequent repetitive hand controls;

¹⁰ Murati Depo. (Aug. 22, 2014), Ex. 2 at 9 (July 10, 2012 IME report).

¹¹ *Id.* at 11,17-19.

no work more than 24 inches from the body with the right and left; avoid awkward positions of the neck, alternative sitting, standing, and walking; avoid trunk twist; no use of hooks or knives with the right and left; keyboarding 15 minutes on and 45 minutes off; no use of vibratory tools with the right and left.

Dr. Murati assigned the following impairment: for left carpal tunnel syndrome, 10 percent impairment to the left upper extremity; for right carpal tunnel syndrome, 10 percent impairment to the right upper extremity; for loss of range on motion of the right shoulder, 8 percent right upper extremity impairment; for right shoulder status post subacromial decompression, 10 percent right upper extremity. The right upper extremity impairments combine for a 25 percent impairment (15 percent whole body); for the low back pain with signs of radiculopathy, 10 percent whole body impairment. The whole body impairments combine for a 29 percent whole body impairment. All impairment ratings were pursuant to the 4th ed. of the *AMA Guides*.

Dr. Murati opined that under all reasonable medical certainty and probability, the prevailing factor in the development of claimant's conditions is the multiple repetitive traumas at work.

Dr. Murati reviewed the task list of Doug Lindahl and found claimant is no longer able to perform 9 out of 14 tasks for a 64 percent task loss.

Dr. Murati testified he was not aware of claimant's 2009 incident that caused the low back pain. Dr. Murati testified claimant had chronic back pain before working for respondent, but nothing to the point he had to stop working.

At respondent's request, claimant met with David Clymer, M.D., an orthopedic surgeon, for an evaluation, on September 10, 2012. Dr. Clymer noted claimant's complex history of upper extremity injuries and low back complaints. He also noted some confusion with regard to specific events, claimant's shoulder injuries and the timing and sequence of various shoulder surgeries, as claimant had multiple procedures on both the right and left shoulders over the years. There was also confusion regarding the chronic and progressive nature of claimant's low back symptoms.

Claimant's complaints included bilateral shoulder discomfort and ongoing lower back discomfort with some pain radiating into the left leg. Claimant indicated he did not recall any specific major accident or injury to the low back or left leg at work, aside from the fall from a tanker in 2005. Claimant also indicated his work activities involved a good deal of jarring, causing strain on his low back and resulting in a gradual increase in his low back discomfort.

Dr. Clymer noted claimant's low back and shoulder symptoms started in the mid 1990s, with claimant's back symptoms being present to some extent since 1993, including some assessment of permanent partial impairment. Claimant elected to avoid surgery, continuing with conservative treatment.

Dr. Clymer stated:

I feel this history is most compatible with a gradually progressive degenerative process in the low back which is principally the result of gradual progression in the degenerative changes which were present and noted prior to 2005 and well documented in an MRI study in 2007. While the repetitive nature of his work from 2004 up through 2012 may have been a contributing aggravating factor in this regard, I do not feel that this contribution is so significant as to rise to the level of being the primary and prevailing factor in this regard. Instead, I feel the primary and prevailing factor with regard to these chronic and progressive low back symptoms is clearly the preexisting degenerative process which has been documented in the past and noted by multiple physicians to correlate with some chronic lower back pain and is also consistent with the 2 MRI studies performed in 2007 and 2011 which show multilevel degenerative disk disease and degenerative spondylosis. I suspect the work-related activities may be a contributing factor in this regard probably causing some gradual progression in the degenerative process and some gradual increase in lower back and leg discomfort. However, I would also expect this gradual progression would occur simply with time, aging and other non-work-related activity. It is difficult to determine to what extent these symptoms might have been lessened if Mr. Beck worked in another position without such repetitive activity. Undoubtedly, he would have had some ongoing low back symptoms which would gradually progress with time. This progression might have been less severe had his work activities been more moderate. At most, however, I feel this work activity results in a contributing factor or aggravating factor but not the principal and prevailing factor in this regard.¹²

Dr. Clymer opined claimant's continued use of his four-wheeler to get his mail and to check fences on his land may cause ongoing symptoms. However, he had no evidence that claimant suffered a structural change in his back from those activities.¹³

Dr. Clymer found claimant at maximum medical improvement and urged him to continue with conservative management, avoid repetitive bending or lifting activities and driving very rough and vibrating equipment. Based on the *AMA Guides*, 4th ed., Dr. Clymer assigned claimant a 5 percent permanent partial impairment to the body as a whole, which is consistent with DRE Category 2 lumbar lesion with degenerative disc disease, without radiculopathy.

As for ongoing medical treatment, Dr. Clymer recommended continuing with a conservative general fitness program and the use of moderate anti-inflammatory medications and mild pain medications, which would primarily be over-the-counter. When asked to elaborate on a conservative general fitness program, Dr. Clymer indicated this would include such activities as walking or cycling or in a pool, light aerobic exercise, weight reduction,

¹² Clymer Depo., Ex. 2 at 6-7.

¹³ *Id.* at 20-21.

core strengthening, etc. He also recommended claimant avoid frequent or constant driving of trucks or other equipment which result in severe jarring or vibration to the low back and limit lifting to 40 pounds.

Dr. Clymer reviewed the task list of Doug Lindahl and found claimant is no longer able to perform 6 out of 14 tasks for a 43 percent task loss.

At the request of his attorney, claimant met with Edward J. Prostic, M.D., for examination on October 14, 2013. Claimant had complaints of pain in the left side of his low back at waist level with radiation down into his foot and into his toes, without numbness or paresthesia. Claimant was worse with sitting, standing, walking, bending, squatting, twisting and lifting. Claimant continued to have aching in his right shoulder, which was worsened with the use of his hand at or above shoulder level. He also had shoulder popping. He noted claimant had a prior history of low back problems in 1993.

Dr. Prostic found claimant's posture to be abnormal because he was standing flexed forward at the waist. Claimant had tenderness in the right upper extremity and significant weakness of the supraspinatus.

Dr. Prostic opined that during the course of claimant's employment through February 3, 2012, claimant sustained injuries to his right shoulder and low back. He felt that driving a tractor-trailer over uneven and unpaved terrain for several hours each workday, along with significant lifting and other activities as a mechanic, are certainly competent to injure claimant's low back.

Dr. Prostic assigned a 20 percent permanent partial impairment to the right upper extremity and 10 percent permanent partial impairment to the body as a whole for the lumbar spine, for a combined impairment of 21 percent to the body as a whole on a functional basis.

Dr. Prostic determined claimant was able to return to light/medium level employment with occasional lifting of 35 pounds to waist height and 20 pounds to shoulder height with minimization of work above shoulder level or below knee level. He felt claimant would benefit from additional medical treatment, including at a minimum, medication and possibly injections and/or surgery.

Dr. Prostic found claimant's repetitious trauma through February 3, 2012, while employed with respondent, is the prevailing factor in the injuries to the right shoulder and low back, the need for medical treatment and the resulting disability or impairment.

Dr. Prostic reviewed the task list of Doug Lindahl and found claimant is no longer able to perform 6 out of 14 tasks for a 43 percent task loss.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) 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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp 44-508(e) states:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(A)

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant alleges a series of micro traumas arising out of and in the course of his employment with respondent. Of the four physicians to testify in this matter, three, Dr. Stein, Dr. Murati and Dr. Prostic, determined that claimant's work for respondent, both driving the vehicle over rough fields and roads, and the mechanical work performed on those vehicles, were the prevailing factors leading to claimant's low back problems. While Dr. Stein's opinion is not as strong as that of Dr. Murati or Dr. Prostic, he did determine that claimant's work activity was the prevailing factor regarding the current symptoms in claimant's low back. He also agreed that claimant displayed a structural change in the low back between the 2007 and 2011 MRIs. Only Dr. Clymer, respondent's expert, determined the work for respondent was only an aggravating factor and not the prevailing factor. The Board finds the preponderance of the medical evidence supports the determination that claimant suffered personal injury by repetitive trauma which arose out of and in the course of his employment with respondent, with that repetitive trauma being the prevailing factor leading to claimant's injuries, medical conditions, resulting disability, and need for medical treatment.

K.S.A. 2011 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been

communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Respondent has denied claimant provided timely notice of this accident. In order to determine whether claimant's notice of February 27, 2012, is timely, the date of accident must first be established. The ALJ found the last day worked to be February 7, 2012, the day claimant went into the plant to check on his co-worker and to ensure the worker had everything he needed to continue the operation. This testimony by claimant is persuasive. If February 7, 2012, is the date of accident, then the notice received by respondent on February 27, 2012, would be timely.

Mr. Jensen alleged that, during the telephone conference of February 3, 2012, claimant never claimed that his sore back was related to the job with respondent. However, he acknowledged that claimant had ongoing low back problems and claimant had been advised by his doctor to not drive a truck for respondent. Mr. Jensen acknowledged that he was not familiar with the concept of a repetitive trauma injury. Likewise, Mr. Wienands testified claimant never attributed his back pain to his job with respondent. But, just like with Mr. Jensen, he agreed claimant had been advised by his doctor to not drive in the farm fields any more. Finally, Mr. Latusick agreed that claimant advised them, during the telephone call, that his doctor had advised against claimant doing the job for respondent. Claimant even went so far as to request a job that did not require he drive. If February 3, 2012, was claimant's last day worked, the Board would find the telephone conference with respondent's representatives would satisfy the notice provisions of the statute.

However, none of respondent's witnesses contradicted claimant's testimony regarding his presence at the plant on February 7, 2012, to check on his co-worker. Under the statute, claimant has 20 days from his last day worked to provide notice of a date of accident. The Board agrees with the finding by the ALJ that claimant's last day worked was February 7,

2012. As respondent acknowledges, and the record supports, receipt of claimant's claim letter on February 27, 2012, the notice provided by claimant was timely.

K.S.A. 2011 Supp. 44-510e(a) states:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

K.S.A. 2011 Supp. 44-510e(a)(2)(A)(B)(C) states:

(2)(A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

(i) The loss of or loss of use of a shoulder, arm, forearm or hand of one upper extremity, combined with the loss of or loss of use of a shoulder, arm, forearm or hand of the other upper extremity;

(ii) the loss of or loss of use of a leg, lower leg or foot of one lower extremity, combined with the loss of or loss of use of a leg, lower leg or foot of the other lower extremity; or

(iii) the loss of or loss of use of both eyes.

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

Dr. Stein assessed claimant a 5 percent functional whole body impairment for his low back injuries. He agreed that if an EMG/NCT displayed radiculopathy in the lower

extremities, claimant's impairment under the *AMA Guides* would be 10 percent to the whole person. Dr. Murati also assessed claimant a 10 percent functional whole body impairment for the low back, as did Dr. Prostic. The Board finds claimant suffered a 10 percent functional whole person impairment to his low back as the result of the injuries suffered while working for respondent.

In his E-1, Application for Hearing, claimant alleges injury to his left shoulder as the result of his work for respondent. However, this record contains testimony regarding claimant's long history of shoulder injuries, problems and prior surgeries. While both Dr. Murati and Dr. Prostic assess impairment to claimant for his shoulder injuries, this record does not adequately identify the amount of impairment assessed to claimant's work for respondent. The Board finds claimant has failed to prove he suffered permanent functional impairment to the left shoulder as the result of his work for respondent.

K.S.A. 2011 Supp. 44-510e(D)(E) states:

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

Based upon the opinions of the testifying physicians, claimant has proven a task loss of 43 percent from the injuries suffered while working for respondent. Likewise, claimant has also proven a wage loss of 60 percent based upon the opinion of vocational expert Terry Cordray. In averaging the task loss with claimant's demonstrated post-injury wage loss, claimant has suffered a permanent partial general (work) disability of 51.5 percent. Further, based upon the opinions of Mr. Cordray and the restrictions and task loss opinions of the testifying physicians in this record, the Board finds claimant has failed to prove that he is permanently and totally disabled as the result of his work for respondent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in that claimant has satisfied his burden of proving that he suffered injury by repetitive trauma to his low back which arose out of and in the course of his employment with respondent, but modified to award claimant a 10 percent functional whole person impairment to his low back, followed by a 51.5 percent permanent partial general disability. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated February 24, 2015, is modified to award claimant a 10 percent functional impairment to the whole body, followed by a work disability of 51.5 percent.¹⁴

Claimant is entitled to 30.47 weeks of temporary total disability compensation at the rate of \$555.00 per week totaling \$16,910.85, followed by 203.47 weeks of compensation at the weekly rate of \$555.00, for a total award not to exceed \$130,000.00.

As of September 11, 2015, claimant is entitled to 30.47 weeks of compensation at the rate of \$555.00, per week, totaling \$16,910.85 followed by 156.96 weeks of compensation at the weekly rate of \$555.00, totaling \$87,112.80, for a total due and owing of \$104,023.65. Thereafter, claimant is due 46.80 weeks of compensation at the weekly rate of \$555.00, for an award not to exceed \$130,000.00, until fully paid or until further order of the Director. In

¹⁴ While the Board has assessed claimant a functional whole person impairment, it is unnecessary to calculate the impairment, as claimant's work disability starts as of claimant's last day worked with respondent, the same day as the functional impairment would start. Therefore, the only calculation is the work disability.

all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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