

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

JEREHME A. MAHONEY)
Claimant)
V.)
APAC KANSAS INC/SHEARS DIVISION)
Respondent)
AND)
LIBERTY MUTUAL INSURANCE CORP.)
Insurance Carrier)

Docket No. 1,062,178

ORDER

Claimant requested review of Special Administrative Law Judge (SALJ) C. Stanley Nelson's February 26, 2014 Award. The Board heard oral argument on June 18, 2014.

APPEARANCES

Matthew L. Bretz of Hutchinson appeared for the claimant. Kip A. Kubin of Leawood 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 SALJ concluded claimant sustained a 10% permanent partial lower extremity impairment due to an August 20, 2012 accidental injury, based upon the rating of Erik Severud, M.D. Claimant requests the Award be modified to reflect a 15% whole body functional impairment based upon Dr. Murati's rating, which also involved a rating for the lumbar spine. Further, claimant notes the workers compensation insurance carrier paid for his chiropractic treatment. Respondent maintains the Award should be affirmed.

The only issue for the Board's review is: what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began working as a flagger for respondent in April 2012. His job duties included stopping traffic and occasionally driving traffic through construction zones.

On August 20, 2012, claimant sustained a right femoral shaft fracture. He described the accident:

I was doing a job I've never done before. Boss had walked off without explaining anything to me, and as I was cleaning the equipment with the shovel, from what I'd seen other employees do, before I knew it, there was a truck backing up behind me and crushed my right leg, broke the right femur, and at the same time, this was causing me to bend over, putting pressure on my back, but I got out to the left side, made it out alive.¹

Claimant was transported by ambulance to Pratt Regional Medical Center. In addition to the obvious problems of a broken leg, which was x-rayed, claimant complained of a small amount of pain to his back and to his right arm where it was scraped or scratched. Claimant was then transferred to Hutchinson Regional Medical Center, where he underwent surgery by Erik Severud, M.D., a board certified orthopedic surgeon. On August 23, 2012, claimant was discharged and instructed to use crutches and weight bearing as tolerated. He was prescribed Percocet and Xarelto. Claimant testified he did not immediately notice back pain as a result of laying down in the hospital. However, once he was sitting up in a chair, walking around with crutches and "getting up and working,"² the back pain started.

On August 28, 2012, claimant was seen for follow up of his right femur fracture by Dr. Severud. Claimant reported his pain was aggravated by bending, going up and down stairs, lifting and movement, while elevation, exercise, pain medication and physical therapy provided relief. Claimant rated his pain as a 3 out of 10, presumably on a 0 to 10 pain scale. Dr. Severud encouraged claimant to elevate his right leg as much as possible and to ice his leg for 20 minutes, 4 times daily. Dr. Severud restricted claimant against prolonged sitting with leg down and prohibited driving. Claimant made no mention of back complaints.

Claimant returned to Dr. Severud on September 6, 2012, with complaints of deep, sharp and throbbing pain in his right femur. Claimant rated his pain as a 3 out of 10. Dr. Severud noted range of motion was acceptable and motor and sensory exams were grossly intact without deficits. Dr. Severud released claimant to return to sedentary work, but no driving.

¹ R.H. Trans. at 10.

² *Id.* at. 15.

The following day, claimant called Dr. Severud's office to advise he was going overseas and requested a script for a wheelchair.

On September 17, 2012, claimant flew to Bangladesh, in what appears to be a mission trip in which he "[t]ransported the gospel"³ in book bags. He denied doing any lifting or carrying. The flight time was 14-15 hours, but claimant was able to cope with the pain as best as he could. When in Bangladesh, he experienced back problems from the hard beds and took pain medication, but did not seek medical treatment.

On October 1, 2012, claimant was seen by James Bothwell, D.C., on referral from his attorney. Claimant told Dr. Bothwell about his accident and that standing resulted in low back pain. Dr. Bothwell recorded "[m]oderate to severe pain in lumbar area with dull, burning and sharp pain radiating down his right leg and lower back. He cannot sit or sleep without discomfort. Also dull and burning pain in T2/T4 with cervical pain noted and muscle tightness throughout."⁴ Dr. Bothwell performed spinal adjustments on claimant's neck, middle back and low back.

Claimant returned to Dr. Severud on October 2, 2012, with complaints of intermittent, dull pain with no radiation. Associated symptoms included limping and popping. Dr. Severud provided restrictions of no ladders, lifting limited to 20 pounds, walking and standing up to 2 hours per day and not more than 30 minutes straight, avoid uneven ground, avoid squatting and kneeling, and able to drive without restrictions. While he had complained to Dr. Bothwell about back pain the day prior, claimant made no mention of back complaints to Dr. Severud.

Claimant returned to Dr. Bothwell on October 3, 6, 9, 15 and 25 for spinal adjustments. The records from these visits were essentially identical to the prior one except for October 25, 2012, which revealed flexion with standing and walking was irritable and claimant's pain was improving.

On October 30, 2012, claimant returned to Dr. Severud with complaints of occasional, dull pain with no radiation. Associated symptoms were crepitus, limping, weakness and tenderness. Dr. Severud allowed claimant to lift up to 40 pounds and walk and stand up to 4 hours per day. Claimant made no mention of back complaints.

Claimant returned to Dr. Bothwell on November 9, 2012, with increased back pain. Dr. Bothwell noted "[h]e has had a relapse of this condition for the last two days." A spinal adjustment was performed and it was recommended claimant recline, lay back, put ice on his back and return in five days.

³ *Id.* at 21.

⁴ Bothwell Depo., Ex. 1 at 2.

On November 19, 2012, claimant had a follow up with Dr. Bothwell and indicated his pain was improving. A spinal adjustment was performed and it was recommended claimant attempt to stretch, walk and ice on a daily basis or at least walk three to four times a week and stretch every day.

On December 4, 2012, claimant returned to Dr. Severud reporting rare, dull pain with no radiation. Associated symptoms included limping and weakness, Dr. Severud noted normal hip strength. Claimant was released to full duty with restrictions of no lifting greater than 50 pounds and no ladders. Claimant made no mention of back complaints.

Claimant returned to Dr. Bothwell on December 3 and 27, 2012, for spinal adjustments but indicated his pain was improving. While treatment was not complete, Dr. Bothwell testified claimant never returned. Claimant testified he stopped seeing Dr. Bothwell “[b]ecause the funds were unavailable.”⁵

Dr. Bothwell testified he submitted his bills totaling \$465 to the workers compensation insurance carrier because claimant’s injury was directly work related and the carrier paid the bills.⁶

On January 3, 2013, claimant returned to Dr. Severud with complaints of intermittent, dull pain with no radiation. Associated symptoms included weakness and tenderness. Dr. Severud noted identical range of motion and strength in both hips. Claimant was placed at maximum medical improvement and released with no restrictions. Claimant referenced no back complaints.

On January 28, 2013, Dr. Severud issued an impairment rating, stating:

It is possible, but not necessarily probable, that the patient may require some removal of hardware in the future. There is no medical reason to remove the hardware if it is otherwise asymptomatic. Aside from potential removal of hardware, do not foresee the need for any additional medical treatment in the future. The patient’s rating was based upon the 4th edition Guide to Evaluation of Permanent Impairment and kind of utilizing table 64 as a guide and reference in comparison to other fractures. The patient does not have any type of malrotation or angulation that fits the criteria in table 64, but there is certainly some degree of malrotation or leg length difference, although it is relatively small. But, because of that and the significant nature of the injury, the patient is given a 10% permanent partial impairment to the right lower extremity.⁷

⁵ R.H. Trans. at 24.

⁶ Bothwell Depo. at 9-10.

⁷ Severud Depo., Ex. 3.

Dr. Severud testified there is no mention in any of his notes that claimant made complaints about hip or back pain. In addressing whether claimant showed any thigh atrophy, Dr. Severud testified:

- Q. Now, with weakness, did he have some atrophy or was that measured?
- A. I didn't - - I didn't. I don't see that I did anything as far as, you know, a measurement of his thigh itself. By just testing he had good strength, so the manual muscle testing he had good strength.
- Q. Would you expect some atrophy given the reported weakness and the kind of injury that this was?
- A. Oh, not necessarily. I mean, early on, yes. Down the road, once they have gone through rehabilitation, no.⁸

Dr. Severud testified he treats backs on a limited basis, and if claimant had mentioned he was having a significant problem with his back, he would have referenced it in his notes and evaluated the problem. Dr. Severud acknowledged the history and physical from the hospital may have mentioned a back complaint, but it was his recollection the primary complaint was the femur fracture.

On May 6, 2013, claimant was seen at his attorney's request by Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, electrodiagnosis and independent medical evaluations. Claimant's complaints included occasional right leg pain and occasional low back pain. Claimant did not complain about pain radiating down either leg and denied leg numbness or tingling.

Dr. Murati performed a physical examination. Among other findings, claimant had missing bilateral hamstring reflexes and missing bilateral ankle reflexes. Leg sensation was intact. The right great toe extensor was slightly weak, but leg strength was otherwise normal. Claimant's L5 spinous process was tender to palpation, with increased tone on the right. Straight leg raise testing was negative. There was a positive right SI joint examination. Dr. Murati noted claimant had an antalgic gait. When measuring claimant's thighs 10 centimeters above the patella, claimant's right thigh was two centimeters smaller than the left thigh.

Dr. Murati diagnosed claimant with status post intramedullary fixation for right closed femoral shaft fracture, low back pain with radiculopathy and right SI joint dysfunction. Dr. Murati opined claimant's diagnoses were related to work. Dr. Murati recommended at least yearly follow ups on his right lower extremity and low back, as well continued chiropractic treatment for low back flare-ups.

⁸ *Id.* at 13.

Dr. Murati assigned a 15% whole person impairment pursuant to the AMA *Guides*⁹ (hereafter *Guides*) as follows:

- a 15% right lower extremity impairment, of which 10% was based on right thigh atrophy using table 37 and 5% was based on pain using the Pain Chapter (15% to the lower extremity converts to 6% whole person); and
- a 10% whole person impairment under Lumbosacral DRE Category III.

A 6% whole body rating combined with a 10% whole body rating results in a 15% whole body rating using the Combined Values Chart in the *Guides*. The figures are not simply added together.

Dr. Murati testified, “this is a very obvious case of a young person that is involved in an accident that breaks his leg and produces low back complaints.”¹⁰ Dr. Murati further noted the accident caused permanent structural changes in claimant’s leg and low back.

While claimant made no complaints of radiculopathy, Dr. Murati testified, “He’s got a significant loss of strength in the left toe, which is consistent with an L5 radiculopathy, which is consistent with him missing that left hamstring reflex, so that’s an abnormal finding.”¹¹ He later clarified that claimant did not have left-sided weakness, but rather had right great toe extensor weakness.

Dr. Murati further testified he opined claimant had radiculopathy based on the abnormal finding of missing bilateral hamstring and ankle reflexes, plus the weakness in the right great toe extensor.¹² He testified he had to assume claimant’s reflexes were normal before the accident because there was no history of a preexisting injury.¹³ Dr. Murati acknowledged a positive straight leg test would be consistent with radiculopathy. Further, he acknowledged leg numbness and/or tingling would be consistent with radiculopathy.

⁹ 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.

¹⁰ Murati Depo. at 14.

¹¹ *Id.* at 23.

¹² *Id.* at 25.

¹³ *Id.* at 22.

At the regular hearing, claimant testified he has daily leg pain. Regarding his back he testified, "it's good. It feels a little bit disabled, like, a little bit in pain every now and then."¹⁴ He also testified he has pain in his back every day at work associated with walking. He indicated flexion, standing and walking irritate his leg and back. Claimant does not take any pain medication. He testified Dr. Murati was the first medical doctor to whom he voiced low back complaints. Claimant acknowledged never telling Dr. Severud about back pain. He denied having back pain that goes down his legs and denied any numbness or tingling in his legs. He is currently working his regular job with no restrictions.

In his February 26, 2014 Award, SALJ Nelson stated:

The Court concludes: that, utilizing Table 64 of the guides as implemented by Dr. Severud, Claimant sustained a 10% permanent partial lower extremity impairment as result of his femoral shaft fracture on 8/20/12 and that Claimant has failed to persuade the Court that it is more probably true than not true that Claimant sustained any impairment to his lower extremity as result of pain or atrophy of his thigh or that he sustained any whole person impairment that arose out of and in the course of 8/20/12 accidental injury.¹⁵

Claimant appealed.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident . . . 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. 2012 Supp. 44-508 states, in part:

(h) "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 unless a higher burden of proof is specifically required by this act.

¹⁴ R.H. Trans. at 11.

¹⁵ ALJ Award at 9.

...

(u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2012 Supp. 44-510d states, in relevant part:

(b) 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:

...

(15) For the loss of a lower leg, 190 weeks.

(16) For the loss of a leg, 200 weeks.

...

(23) Loss of or loss of use 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.

...

(c) 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

K.S.A. 2012 Supp. 44-510e(a) states, in part:

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. 2012 Supp. 44-551(i)(1) provides, in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2012 Supp. 44-555c(a) provides, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

From July 1, 1993 forward, the Board assumed the de novo review of the district court.¹⁶ “It is the function of the [Board] to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability.”¹⁷

ANALYSIS

Claimant proved a 10% impairment to his right lower extremity; he did not prove low back or whole body impairment.

The SALJ specifically concluded claimant failed to prove whole body impairment. The Board affirms the SALJ’s conclusion that claimant sustained a 10% impairment to his right lower extremity only, but such impairment is based on the 200 week schedule, not the 190 week schedule.

For the reasons listed in the SALJ’s Award, claimant did not prove whole body impairment. Claimant never voiced low back complaints to the authorized treating physician, Dr. Severud. The first physician claimant told about low back pain was his hired expert, Dr. Murati. Regarding claimant’s overall impairment, based on the evidence in this case, we place more weight in the opinions of the authorized treating physician who evaluated claimant many times, and less weight in the opinions of Dr. Murati, the hired expert witness.

¹⁶ See *Nance v. Harvey Cnty.*, 263 Kan. 542, 550-51, 952 P.2d 411 (1997).

¹⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The fact Dr. Severud did not have the hospital history and physical report does not lead to the conclusion claimant had permanent low back impairment. Such report, as based on claimant's testimony, would show claimant reported a small amount of back pain, perhaps where he was scraped or scratched. A small amount of back pain does not rise to the level of permanent impairment.

Claimant argues Dr. Severud might not have recorded claimant's low back complaints, if claimant would have made such complaints. Dr. Severud testified that he would have made note of any low back complaints, unless such complaints were made in passing or were minimal. Because claimant acknowledged never telling Dr. Severud about any back complaints, what the doctor might have done if complaints had been made to him is of little consequence.

Respondent paid for some chiropractic treatment, possibly as authorized, possibly as unauthorized medical treatment. The fact respondent paid for some chiropractic treatment does not lead to the conclusion claimant has permanent low back impairment. Claimant never complained to a health care provider until after his trip to and from Bangladesh. Thereafter, claimant told Dr. Bothwell on October 1, 2012, that he had low back pain, which such chiropractor classified as moderate to severe, in addition to thoracic and cervical pain. If claimant had low back pain from his work injury, we would expect him to have relayed such complaints to Dr. Severud.

Dr. Murati's opinions do not convince us otherwise. As acknowledged by Dr. Murati, had claimant had complaints of pain, numbness or tingling from his back going down one or both legs and positive straight leg raise testing, such facts would support a diagnosis of lumbar radiculopathy. The absence of such findings or complaints weigh against Dr. Murati's diagnosis.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board affirms the Award, but concludes benefits should be based on the 200 week level under K.S.A. 2012 Supp. 44-510d.

AWARD

WHEREFORE, the Board affirms Special Administrative Law Judge C. Stanley Nelson's February 26, 2014 Award, with the minor computation modification noted above.

The claimant is entitled to 6.71 weeks of temporary total disability compensation at the rate of \$537.25 per week in the amount of \$3,604.95 followed by 19.33 weeks of permanent partial disability compensation, at the rate of \$537.25 per week, in the amount of \$10,385.04 for a 10% loss of use of the leg, making a total award of \$13,989.99.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz
matt@byinjurylaw.com; colleen@byinjurylaw.com

Kip A. Kubin
kak@kc-lawyers.com; cdb@kc-lawyers.com

Honorable C. Stanley Nelson