

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JERRY L. SHINN** )  
Claimant )  
V. )  
**TONY'S DRYWALL, INC.** )  
Respondent ) Docket No. 1,062,822  
AND )  
**KANSAS BUILDERS INSURANCE GROUP f/k/a** )  
**KANSAS BUILDING INDUSTRY WORKERS** )  
**COMPENSATION FUND** )  
Insurance Carrier )

**ORDER**

Claimant appealed the October 7, 2015, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on February 4, 2016.

**APPEARANCES**

Elizabeth M. Labrin of Hutchinson, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, claimant stipulated that he can only receive a work disability or be permanently partially disabled as a result of either his July 16, 2012, (hereinafter July accident) or September 19, 2012, (hereinafter September accident) work injury, not from a cumulation or combination of both injuries. In spite of the arguments beginning on page 6 of claimant's brief to the Board, at oral argument claimant conceded that if the Board affirmed the ALJ's findings concerning functional impairment, he is not entitled to a work disability.

### ISSUES

Claimant's amended application for hearing alleged two work accidents on July 16, 2012, and September 19, 2012. Respondent stipulated claimant suffered personal injuries by accident arising out of and in the course of his employment on both dates. The Award granted claimant benefits for a 22 percent left upper extremity functional impairment for the July accident and benefits for a 5 percent whole person functional impairment for the September accident. The ALJ determined claimant was not entitled to work disability benefits because his whole body functional impairment for his neck injury did not exceed 7½ percent pursuant to K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i). The ALJ found claimant did not prove he was permanently and totally disabled.

Claimant contends he sustained permanent injuries to both his left shoulder and neck as a result of his July accident. Therefore, pursuant to K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i), he is entitled to a work disability because his overall whole person functional impairment exceeds 7½ percent when considering both impairments.

In the alternative, claimant asserts that as the result of his September accident he injured his neck, aggravated his prior shoulder injury and sustained a whole person functional impairment greater than 10 percent. He contends that because his overall whole person functional impairment exceeds 10 percent when there is prior impairment, under K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i), he is entitled to a work disability.

Finally, claimant contends that if the ruling is affirmed that his 5 percent whole person functional impairment resulted from his September accident, he is permanently and totally disabled as a result of the injuries he suffered in said accident.

Respondent maintains the Award should be affirmed.

The issues are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to a work disability?
3. Is claimant permanently and totally disabled as a result of his September accident?

### FINDINGS OF FACT

At the time of his July accident, claimant had worked for respondent 17 or 18 years, hanging and finishing drywall. Claimant's July accident occurred when he fell off scaffolding onto the floor of a home on which he was working. Claimant indicated the scaffolding was approximately 20 feet above the floor. He landed on his left shoulder and

had left shoulder pain. Claimant testified that after landing on his left side, he went over to his right and he hit his head on the floor. His head was hurting, "Like, I was dizzy like somebody knocked me upside the head."<sup>1</sup>

Claimant testified that after he fell, his symptoms extended from his whole back to the top of his head. After falling, claimant drove himself to the Via Christi emergency room. He reported having neck pain and testified, "My doctor said I had nothing wrong with that."<sup>2</sup> Claimant testified that prior to the July accident, he did not have neck pain. Claimant was sent to physical therapy for his shoulder and his left arm was placed in a sling. He returned to work wearing the sling and was restricted to light duty.

Respondent sent claimant to William C. Simon, D.O., whom he saw on July 25, August 8 and August 14, 2012. Claimant testified he reported all his symptoms to Dr. Simon, including neck, back, left shoulder and left wrist pain. Claimant indicated the doctor was focused on his left arm because it was "real bad."<sup>3</sup> Dr. Simon determined claimant had a fractured left wrist and a torn tendon in his left shoulder.

Claimant testified his September accident occurred when he was spraying ceiling texture in a house and tripped over a ladder that was behind him. The hose claimant used to spray texture had a four- or five-foot metal part with gauges. As claimant tripped and fell, the metal part of the hose hit his left shoulder and then his left shoulder struck the ladder. When claimant fell, the right part of his back struck the floor. According to claimant, after his September accident, his neck symptoms worsened.

Claimant indicated that after his second accident, he saw Dr. Donna St. Clair and reported all his symptoms to her, including numbness and tingling into his neck. A form signed by claimant when he saw Dr. St. Clair indicated he injured his left shoulder when he tripped over a ladder and does not note a neck injury.

According to claimant, he reported his neck injury to all the doctors he saw after his September accident, but received no treatment. He received treatment only for his left shoulder. Claimant testified he still has left shoulder, neck and back pain.

Claimant testified his employment was terminated on September 24, 2012, because he left respondent's vacuum cleaner on his porch, covered by a tarp, and it got wet, ruining it. According to claimant, after being fired, he was hired by respondent on two occasions and was paid cash. He was unable to complete the work on the first job because of his injuries and was assisted by Frank Shinn, his brother. The second job lasted four or five

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<sup>1</sup> R.H. Trans. at 23.

<sup>2</sup> *Id.* at 39.

<sup>3</sup> *Id.* at 57.

hours and involved patching a wall crack. Claimant indicated that because of his injuries, he can no longer work and retired. He applied for and is receiving Social Security disability benefits.

Dr. Simon testified that on July 25, 2012, he examined claimant's neck, left wrist, left shoulder, hand and elbow. Claimant completed a form indicating he injured his left shoulder and hand when he tripped off scaffolding. No mention was made of a neck injury. Dr. Simon diagnosed claimant with a left rotator cuff injury, a left shoulder strain/sprain, shoulder muscle inflammation and a wrist sprain. The doctor testified claimant made no complaints of cervical spine pain. The doctor noted claimant's neck was fairly normal, had good range of motion and was not tender to examination. Dr. Simon indicated claimant's neck was supple, which the doctor testified meant was soft, not spasmed. The doctor indicated claimant's neck muscles were normal and the cervical spine was unremarkable.

Dr. Simon indicated he examined claimant's neck because of the height from which claimant fell and because claimant reported a neck injury at the emergency room. Dr. Simon confirmed x-rays of claimant's neck were taken when claimant was in the emergency room. He also testified:

Q. So you don't have any doubt that he had a neck injury in the accident, just at the time you saw him he wasn't having symptoms with it?

A. That is correct.<sup>4</sup>

Dr. Simon's notes from an August 8 visit do not mention neck complaints by claimant. Claimant was seen again by Dr. Simon on August 14, after claimant underwent a left shoulder MRI. The MRI showed a full thickness tear of the left supraspinatus tendon with retraction of the rotator cuff. According to the doctor, claimant made no cervical spine complaints.

On October 24, 2012, claimant's left shoulder injury was surgically repaired by Dr. Daniel Prohaska.

At the request of his attorney, claimant was evaluated by George G. Fluter, M.D., on October 29, 2013. The doctor reviewed medical records and imaging studies.

Claimant reported to Dr. Fluter of having no neck or left shoulder injury prior to his July accident. Claimant related falling off a scaffold in the July accident, breaking his fall and injuring his left shoulder. He did not mention injuring his neck in the July accident. Claimant reported tripping over a ladder in the September accident, resulting in increased left shoulder pain and neck pain.

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<sup>4</sup> Simon Depo. at 18.

Dr. Fluter indicated left elbow, hand, wrist and shoulder x-rays were taken when claimant went to the emergency room on July 16, 2012, as well as cervical spine and bilateral acromioclavicular joint x-rays. The doctor noted the cervical spine x-rays showed good overall alignment at the thoracic cervical region, body height and disc spaces were well maintained, axial joint was normal, no malalignment was noted and there were no fractures or subluxation.

Dr. Fluter's report indicated a September 27, 2012, cervical spine CT showed no evidence of acute fracture or dislocation, normal prevertebral soft tissues, scattered degenerative changes, small disc bulges at C5-6 and C6-7, a minimal osteophyte at C5-6 and borderline spinal stenosis at C5-6. The impression was no acute abnormality. A cervical spine MRI was also performed the same day. Many of the findings were similar to that of the CT scan. The impression of the MRI was posterior disc bulging at C5-6 and smaller disc bulges at C4-5 and C6-7.

Dr. Fluter's physical examination of claimant showed his cervical range of motion was limited in right lateral rotation and extension and there was pain at the end range in all planes. Dr. Fluter made several assessments: (1) status post work-related injuries, (2) left shoulder pain/impingement/tendinitis/bursitis, (3) left shoulder internal derangement, (4) status post left shoulder arthroscopy, (5) neck/upper back/left shoulder girdle pain, (6) cervicothoracic strain/sprain and (7) myofascial pain affecting the neck/upper back/left shoulder girdle.

According to Dr. Fluter, claimant had a 25 percent left upper extremity functional impairment. For claimant's cervical spine, the doctor placed claimant in DRE Category II and opined he had a 5 percent whole person functional impairment. Dr. Fluter's rating for claimant's cervical spine was based on claimant's subjective complaints. The two functional impairments combined for a 19 percent whole person functional impairment.

Dr. Fluter imposed work restrictions of: lifting, carrying, pushing and pulling no more than 35 pounds occasionally and 15 pounds frequently; avoid holding his head and neck in awkward or extreme positions; performing overhead activities no more than occasionally; performing activities over and above the shoulder with the left arm no more than occasionally and performing activities greater than 24 inches from the body with the left arm no more than occasionally. Applying claimant's restrictions to the ten job tasks identified by Robert W. Barnett, Ph.D., a rehabilitation counselor and evaluator, Dr. Fluter testified claimant lost the ability to perform either nine or ten tasks, depending on the requirements of the task "Operate company truck," for a 90 percent or 100 percent task loss.

Prior to testifying, Dr. Fluter was provided claimant's July 2012 emergency room records. Dr. Fluter testified claimant's July and September accidents were the prevailing factor causing his left shoulder and neck injuries. The doctor testified claimant's July

accident caused his left shoulder injury as noted on the August 2012 MRI. The doctor opined claimant's neck injury also resulted from the July accident and testified:

. . . when I saw him I did not have access to the emergency room note from July of 2012. There is some indication that he had neck pain at that time. And they also did X rays of the neck at that time, so, again, that would seem like that would be the precipitating event for the neck.<sup>5</sup>

Dr. Fluter confirmed that a cervical spine complaint was not noted on a pain diagram completed at the emergency room after claimant's July accident. He also indicated the only items circled on the Emergency Physician Record with regard to location of pain/injuries dealt with the left upper extremity and the neck was not circled. On the Emergency Nursing Record, neck and back were circled in addition to the parts of the left upper extremity. Dr. Fluter acknowledged that when claimant provided a history of the July accident, he made no complaints of neck pain or symptoms. The doctor indicated claimant reported his left shoulder and neck pain worsened after tripping over the ladder in September.

On September 16, 2014, claimant underwent a court-ordered independent medical evaluation by Peter V. Bieri, M.D. The doctor's IME report stated claimant injured his left rotator cuff as a result of his July accident and his September accident aggravated the left rotator cuff injury and caused cervicgia with clinical radiculopathy. Dr. Bieri indicated his opinion concerning claimant's cervicgia with clinical radiculopathy was based solely on the records he reviewed, which indicated claimant had no neck complaints until after the September accident. When asked if medical documentation that claimant complained of neck pain after the July accident would change his mind, Dr. Bieri testified:

Possibly. It seems based on the documentation and the history that the majority of diagnostic and treatment interventions regarding neck complaints occurred after the second injury. I cannot say that he didn't suffer some type of complaints after the first. The claimant was uncertain as to the extent of it but the documentation reflect significant diagnostic and treatment interventions after the second one.

. . .

. . . I generally ask, did you hurt your neck at that first or second injury or something of that nature. And the answer was not significant to one or the other. Certainly the symptomology became worse after the second one.

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<sup>5</sup> Fluter Depo. at 14.

There may have been some at the first but it was my conclusion that the initial injury primarily involved the left shoulder. Any permanent impairment I believe in my report was the result of two injuries and probably the second.<sup>6</sup>

After being shown July 16, 2012, Via Christi emergency room records and asked if his opinion changed, Dr. Bieri testified:

I don't know. He certainly may have had some neck pain. It was my original conclusion that the predominance of the impairment was related to the second injury. I don't know that I could truthfully attribute any impairment to the original injury or certainly apportionment. I just don't know. There's too much conflicting documentation.<sup>7</sup>

Dr. Bieri opined claimant had a 22 percent left upper extremity functional impairment. The doctor placed claimant in DRE Cervicothoracic Category II for his cervical injury and assigned a 5 percent whole person functional impairment. The doctor assigned work restrictions of: lifting with both hands no more than 40 pounds occasionally, 20 pounds frequently and 10 pounds constantly; unilateral lifting with the left upper extremity of no more than 15 pounds occasionally, 10 pounds frequently and 5 pounds constantly and no shoulder-level and overhead use of the left upper extremity. Applying claimant's restrictions to the ten job tasks identified by Dr. Barnett, Dr. Bieri testified claimant could not perform eight job tasks for an 80 percent task loss.

Tony Weatherbee, owner/operator of respondent, was asked about claimant's wages, hours worked, work restrictions, the circumstances of claimant's two accidents and terminating claimant's employment, among other things. Mr. Weatherbee's wife and respondent's bookkeeper, Sherl Weatherbee, testified concerning terminating claimant's employment, claimant's wages and his work restrictions. Mr. and Mrs. Weatherbee's testimony sheds no light on the issues of claimant's functional impairment and whether he is permanently and totally disabled.

Dr. Barnett conducted an evaluation and task assessment of claimant. Dr. Barnett was provided the medical records of Dr. Fluter and interviewed claimant. Dr. Barnett noted claimant was born in 1961, completed the eighth grade, had no GED or other education, had no other licensure or certificate and reportedly cannot read or write. Dr. Barnett testified claimant is on several very strong medications for significant pain and indicated he has few transferrable job skills. Dr. Barnett opined claimant is incapable of earning a wage in the open labor market and if he did find employment, it would be at minimum wage.

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<sup>6</sup> Bieri Depo. at 17.

<sup>7</sup> *Id.* at 25-26.

PRINCIPLES OF LAW AND ANALYSIS

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>8</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 unless a higher burden of proof is specifically required by this act.”<sup>9</sup>

K.S.A. 2012 Supp. 44-510e(a)(2) provides, in part:

(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 . . . .

Claimant contends he sustained permanent injuries to both his left shoulder and neck as a result of his July accident. The Board disagrees. While claimant may have sustained a neck injury as the result of his July accident, there is insufficient evidence in the record proving he sustained a permanent functional impairment for his neck.

At the emergency room after the July accident, claimant reported a neck injury and a cervical spine x-ray was taken, which showed no injury. Claimant saw Dr. Simon on three occasions in July and August 2012 and did not mention a neck injury. Nevertheless, Dr. Simon examined claimant’s neck because of the height from which claimant fell and because he made neck complaints at the emergency room. While it is true Dr. Simon had no doubt claimant suffered a neck injury in the July accident, the doctor indicated claimant’s neck was supple, his neck muscles were normal and his cervical spine was unremarkable. Also, Dr. Simon was the only physician who examined claimant shortly after his July accident.

Dr. Bieri, who conducted a court-ordered IME, concluded claimant’s September accident caused cervicgia with clinical radiculopathy and resulting functional impairment. Dr. Bieri’s opinion did not change after he was shown July 2012 emergency room records, wherein claimant complained of neck pain. The doctor also opined claimant’s September accident aggravated his left shoulder injury.

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<sup>8</sup> K.S.A. 2012 Supp. 44-501b(c).

<sup>9</sup> K.S.A. 2012 Supp. 44-508(h).

Claimant was evaluated by Dr. Fluter, who testified it would “seem” claimant’s July accident was the “precipitating event” for his neck injury. Dr. Fluter based his opinion on claimant’s emergency room neck pain complaints and the fact x-rays of claimant’s neck were taken. Dr. Fluter’s opinion is contradicted by the history he took from claimant. Claimant reported to Dr. Fluter of breaking his fall with his left hand and injuring his left shoulder in the July accident, but did not report a neck injury. Claimant reported to Dr. Fluter of having a neck injury as the result of his September accident. Moreover, Dr. Fluter ignored Dr. Simon’s findings concerning claimant’s neck.

Claimant’s alternative theory is that he aggravated his left shoulder injury and injured his neck in the September accident, resulting in a whole person functional impairment greater than 10 percent, which qualifies him for a work disability under K.S.A. 2012 Supp. 44-510e(a)(2)(C)(i). The Board also rejects this theory. Neither Dr. Fluter nor Dr. Bieri apportioned any of their left shoulder functional impairment ratings between claimant’s July and September accidents. In fact, both attributed claimant’s left shoulder injury to his July accident. Simply put, there is insufficient evidence in the record to support claimant’s alternate theory.

Claimant asserts that even if his September accident caused only a whole person functional impairment for his neck injury, he is permanently and totally disabled as a result of said injury. As noted above, claimant concedes he must prove the injuries from his September accident caused him to become permanently and totally disabled.

K.S.A. 2012 Supp. 44-510c(a)(2) 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. Expert evidence shall be required to prove permanent total disability.

The Board recognizes that under *Wardlow*,<sup>10</sup> the Kansas Court of Appeals looked at all the circumstances surrounding Mr. Wardlow’s condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to whether Mr. Wardlow was permanently and totally disabled.

Claimant has an eighth-grade education, no GED, licenses, certificates or other formal education and testified he cannot read or write. His work experience for the last 17 or 18 years has been limited to installing and finishing drywall. Those factors, admittedly, limit his employment options. The Board also must take into consideration claimant is only

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<sup>10</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

54 years of age, the nature and extent of his neck impairment and his permanent work restrictions.

Dr. Fluter and Dr. Bieri's work restrictions were for claimant's neck injury and left shoulder injury. Their task loss opinions were based upon the work restrictions they imposed for both claimant's neck and left shoulder injuries. Neither Dr. Fluter nor Dr. Bieri indicated what claimant's task loss was for only his neck injury. Dr. Bieri stated he could not make such a determination. Dr. Barnett's opinion that claimant was incapable of earning a wage in the open labor market was based upon Dr. Fluter's work restrictions for claimant's neck **and** left shoulder injuries. Dr. Barnett did not, and could not, give an opinion as to whether the work restrictions for claimant's neck injury rendered him incapable of engaging in any type of substantial and gainful employment.

Dr. Fluter's assessments of claimant included neck/upper back/left shoulder girdle pain, cervicothoracic strain/sprain and myofascial pain affecting the neck/upper back/left shoulder girdle. Dr. Bieri's diagnosis was cervicalgia with clinical radiculopathy. Both doctors gave claimant only a 5 percent whole person functional impairment for his neck injury. Although claimant's neck was evaluated, he received no treatment for his neck injury following his July and September accidents; he only underwent diagnostic studies. Simply put, claimant's neck injury was not so severe as to render him permanently and totally disabled.

Taking into consideration all of claimant's circumstances, the Board finds claimant failed to prove the injuries he suffered in his September accident rendered him permanently and totally disabled.

### CONCLUSIONS

1. As a result of his July accident, claimant sustained left upper extremity and neck injuries, a 22 percent left upper extremity functional impairment for his left shoulder injury, but no functional impairment for his neck injury.

2. As a result of his September accident, claimant injured his left shoulder and neck and sustained a 5 percent whole body functional impairment for his neck injury, but no additional left shoulder functional impairment.

3. Claimant is not permanently and totally disabled as a result of the injuries he suffered in his September accident.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>11</sup> Accordingly, the findings

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<sup>11</sup> K.S.A. 2014 Supp. 44-555c(j).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board affirms the October 7, 2015, Award entered by ALJ Jones.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2016.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge