

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

HELADIO RIVAS)	
Claimant)	
)	
VS.)	Docket No. 250,364
)	
IBP, INC.)	
Self-Insured Respondent)	

ORDER

Claimant requested review of the May 5, 2003 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on November 4, 2003.

APPEARANCES

Thomas R. Fields of Kansas City, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

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

ISSUES

On July 26, 2002, the Administrative Law Judge (ALJ) entered a decision finding claimant did not meet with personal injury by accident arising out of and in the course of employment. On review, the Board determined claimant had met his burden of proof that he suffered injury by a series of accidents arising out of and in the course of his employment with respondent. At oral argument before the Board, the respondent requested that if the claim was found compensable the matter be remanded for the ALJ to determine the remaining issues. Consequently, the case was remanded for determination of the remaining issues. On remand the ALJ awarded the claimant a 5 percent permanent partial general disability based upon claimant's whole body functional impairment.

The sole issue raised on review by the claimant is the nature and extent of disability. Claimant argues that he has sustained a 25 percent permanent whole body functional impairment. In the alternative, claimant argues that at a minimum the Board should increase the functional impairment to 15 percent based upon a split of the ratings provided in this case.

Conversely, the respondent requests the Board to affirm the ALJ's Decision.

Because claimant has returned to work for respondent at a comparable wage, the sole issue for Board determination is the nature and extent of claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began experiencing numbness and weakness in his upper and lower extremities in August and September 1999. Ultimately, Dr. William M. Shapiro, performed an anterior cervical discectomy with bony interbody fusion at C5-6 on December 15, 1999. Claimant improved post-operatively and returned to work.

At his attorney's request, claimant was examined by Dr. Edward J. Prostic on December 6, 2000. Dr. Prostic opined that claimant suffered repeated minor trauma to his cervical spine and as a result of the disk herniation at C5-6 claimant developed cervical myelopathy. The doctor noted claimant had a good outcome from his surgery but the doctor cautioned that claimant appeared to be developing non-union of his arthrodesis. Based upon claimant's cervical myelopathy and bilateral radiculopathy the doctor placed claimant in Cervicothoracic DRE Category IV of the *AMA Guides*¹ which is a 25 percent permanent partial impairment to the whole body. The doctor further noted that the *AMA Guides* provide that if the DRE models are used to rate the impairment then the original impairment rating remains the same irrespective of the results following surgery.

At respondent's request, claimant was examined by Dr. Sergio Delgado on March 2, 2000, and re-evaluated on June 11, 2002, by a limited physical examination as well as taking cervical x-rays. Dr. Delgado opined that claimant's condition was a natural progression of his preexisting degenerative disk disease which would have continued regardless of his employment activities. After Dr. Delgado re-examined claimant on June 11, 2002, he sent a letter of that date to respondent which noted that his radiographic

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed).

studies confirmed a solid union of the interbody grafting at C5-6.² And the doctor testified that on the basis of his last examination he would place claimant in Cervicothoracic DRE Category II of the *AMA Guides* which provides a 5 percent permanent partial functional impairment to the whole body.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.³ Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.⁴

As previously noted, work disability is not an issue in this case because respondent returned claimant to work after his surgery earning 90 percent or more of his pre-injury average weekly wage. Accordingly, claimant's entitlement to permanent partial disability benefits is based on claimant's permanent functional impairment as established by competent medical evidence and based on the fourth edition of the *AMA Guides*, if the impairment is contained therein.⁵

Both Drs. Delgado and Prostic expressed opinions on claimant's permanent functional impairment. Both doctors utilized the *AMA Guides* in determining claimant's functional impairment rating. But the ALJ adopted Dr. Delgado's 5 percent impairment rating.

The Board disagrees with the ALJ and finds that Dr. Prostic's functional impairment rating should be given equal weight with Dr. Delgado's rating.

The *AMA Guides* emphasize that impairment percentages arrived at by using the *AMA Guides'* criteria represent estimates rather than precise determinations.⁶ Factors that go into estimating the degree of the patient's impairment are the physician's judgement, experience, training, skill, and the thoroughness in examining the patient and applying those findings to the *AMA Guides'* criteria. Other considerations and variables also apply such as the interpretation of laboratory tests and clinical procedures.⁷

² Delgado Depo., Resp. Ex. 5.

³ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁵ See K.S.A. 1999 Supp. 44-510e(a).

⁶ *AMA Guides* at V.

⁷ *Id.* at 3.

The Board finds that both of these physicians, under the circumstances and facts of this case, simply disagree as to the interpretation and application of the *AMA Guides* in determining claimant’s permanent functional impairment rating. Both physicians utilized the *AMA Guides* in determining claimant’s permanent functional impairment as required by statute. The Board finds that neither physician misapplied or misinterpreted the *AMA Guides* to a point that their opinions should be disregarded. These two physicians simply disagreed not only as to the interpretation as to how the *AMA Guides* should be applied but they also made different physical findings in regards to claimant’s permanent condition as a result of his injuries.

The Board, therefore, concludes that both testifying physician’s functional impairment ratings should be given equal weight in determining the appropriate functional impairment. Accordingly, the Board finds claimant has a 15 percent permanent functional impairment.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Pamela J. Fuller dated May 5, 2003, should be, and is hereby, modified as follows:

The claimant is entitled to 62.25 weeks permanent partial disability compensation at the rate of \$351.26 per week or \$21,865.94 for a 15 percent functional whole body disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director