

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

**DAVID M. ROBINSON**

Claimant

VS.

**JOHNSON COUNTY BOARD OF  
COMMISSIONERS**

Self-Insured Respondent

Docket No. 256,931

**ORDER**

Respondent requested review of the October 23, 2003 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) heard oral argument on March 30, 2004.

**APPEARANCES**

David R. Hills, of Lenexa, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

The ALJ awarded claimant permanent partial disability compensation based upon a total of 12 percent functional impairment for claimant's cervical myofascial pain and occipital neuralgia.

The respondent requests review of the ALJ's decision. Respondent alleges the 12 percent awarded by the ALJ is excessive under these facts and circumstances.

Claimant argues the ALJ's finding as to permanency is well founded and should be affirmed.

**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 sustained a compensable accident on April 20, 2000. On that date, claimant was a passenger in a vehicle that was struck by a truck. Claimant's head snapped backwards and was pushed through the rear window of the vehicle. Following the accident claimant developed persistent headaches with numbness and tingling in the extremities and was referred to Dr. Michael Ryan, a neurologist, for evaluation and treatment.

Dr. Ryan ruled out a variety of other conditions and referred claimant for pain management and injections in the hopes of minimizing the ongoing headaches. He diagnosed a whiplash injury and on August 13, 2002, assigned a 5 percent permanent partial impairment rating pursuant to the A.M.A. *Guides*.<sup>1</sup>

On March 20, 2003, claimant was examined by Dr. Daniel Zimmerman, at the request of his attorney. Dr. Zimmerman issued a total impairment rating of 16 percent to the body as a whole based upon the *Guides*. This figure is comprised of a total of 12 percent for range of motion limitations in the cervical levels and an additional 4 percent for greater occipital nerve entrapment syndrome. According to Dr. Zimmerman, the severity of claimant's pain and discomfort as well as the chronicity of his headaches, warrant the additional 4 percent impairment.<sup>2</sup> The maximum impairment allowed under the *Guides* for greater occipital nerve entrapment syndrome or neuralgia is 5 percent.

Claimant was also examined and rated by Dr. Jennifer Finley, a pain management specialist who treated claimant for his ongoing pain issues. Dr. Finley diagnosed cervical myofascial pain, occipital neuralgia and muscle tension headaches. When asked about permanency, Dr. Finley utilized the diagnosis related estimates (DRE's) contained within the *Guides*, and assigned a 5 percent permanent impairment to the whole body based upon Category II for the cervical pain issues. According to her testimony, claimant showed no signs of radiculopathy or loss of motion segment integrity, thus justifying the Category II classification.

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<sup>1</sup> Ryan Depo. at 11-12. All references are to the 4<sup>th</sup> edition of the *Guides* unless otherwise noted.

<sup>2</sup> Zimmerman Depo. at 17.

Dr. Finley testified that the *Guides* suggest the DRE's are the preferred methodology, assuming the impairment falls within the stated DRE categories.<sup>3</sup> In this instance, Dr. Finley believes claimant's impairment falls squarely within Category II. She did, however, testify that the range of motion model can be used in those instances where the injured individual's symptoms do not fall within the DRE categories.

When asked if she considered assigning any impairment for the occipital neuralgia, Dr. Finley agreed that the *Guides* provide for a maximum rating of 5 percent, depending on the different variables, such as severity and duration of pain complaints, designated within the *Guides*. Dr. Finley further testified that although she did not do so originally, it would be reasonable under these circumstances to assign an impairment somewhere between 0 to 3 percent, depending on whether claimant was having a good day or a bad day.<sup>4</sup>

The ALJ considered all aspects of the medical testimony and concluded claimant's true impairment fell somewhere in between the physicians' estimates. The ALJ assigned a 12 percent permanent impairment to the whole body. It is unclear from the Award if this 12 percent is solely attributable to the cervical impairment or takes into account the greater occipital neuralgia as well.

The Board has reviewed all of the evidence contained within the record and believes the ALJ's Award should be modified. The Board finds the greater weight of the medical evidence, particularly Drs. Finley and Ryan, supports a finding of 5 percent impairment to the body as a whole for the cervical complaints and resulting impairment. Both Dr. Finley and Dr. Ryan utilized the DRE's and assigned a 5 percent impairment. The Board is not persuaded by Dr. Zimmerman's utilization of the range of motion model under these facts and circumstances.

The Board also finds claimant is entitled to an additional 2 percent impairment for the occipital nerve injury based upon the testimony of Dr. Finley. When combined, this yields a total of 6 percent permanent partial impairment to the body as a whole. Accordingly, the Board modifies the ALJ's Award to reflect a 6 percent permanent partial impairment to the body as a whole.

### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated October 23, 2003, is modified as follows:

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<sup>3</sup> Finley Depo. at 17.

<sup>4</sup> *Id.* at 20-21.

The claimant is entitled to 24.9 weeks of permanent partial disability compensation at the rate of \$383 per week or \$9,536.70 for a 6% functional disability, making a total award of \$9,536.70.

As of March 30, 2004 there would be due and owing to the claimant 24.9 weeks of permanent partial disability compensation at the rate of \$383 per week in the sum of \$9,536.70 for a total due and owing of \$9,536.70, which is ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the Award are hereby affirmed to the extent they are not modified herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: David R. Hills, Attorney for Claimant
- Eric T. Lanham, Attorney for Self-Insured Respondent
- Robert H. Foerschler, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director