

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

JORDAN M. MASSONI)	
Claimant)	
VS.)	
)	Docket No. 1,029,645
CITY OF LIBERAL)	
Respondent)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the September 26, 2008 Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded benefits after the ALJ found claimant had suffered a 12 percent permanent partial disability to the body as a whole.

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on November 21, 2008.

ISSUE

What is the nature and extent of claimant's injuries and disability? Respondent relies upon its submission letter to the ALJ, in which it asserted the basis for the Award should be Dr. Paul S. Stein's 14 percent right lower extremity functional impairment rating. In his submission letter to the ALJ, claimant asserted Dr. Terrence Pratt's opinion (12 percent whole person functional impairment as was awarded by the ALJ) should be adopted, and the Award affirmed. Claimant is making no claim for a permanent partial general work disability.

FINDINGS OF FACT

In November 2005, claimant lived in Liberal, Kansas, and was employed by the Liberal Police Department, as a police officer. On or about November 14, 2005, claimant “wrapped up” a suspect after pursuing him. Claimant testified that the front bumper of an approaching patrol car struck the back of claimant’s right calf. At the time, claimant did not feel any pain. After a lengthy confrontation with the subject, claimant and other officers finally subdued and handcuffed the subject. After claimant got the subject handcuffed, claimant got up and started to notice quite a bit of pain in his right lower leg. Claimant had been employed just under a year at the time of his accident.

After claimant got the suspect into custody, claimant noticed that he was having some discomfort with his right leg. Soon, it became very difficult to even walk due to the pain and stiffness that was starting to set in. Within 20 or 25 minutes, claimant could not continue with his duties. Claimant explained to Corporal Avery, one of the other officers involved in the confrontation with the subject, that he was having severe pain. Claimant lifted up his pant legs and his right calf was two times the size of his left. Claimant drove his patrol car back to the station, with difficulty. He could hardly walk once he got out at the station. Corporal Avery filled out the proper paperwork to authorize claimant to seek treatment at the emergency room, then drove claimant to the emergency room where claimant was admitted. Claimant was then hospitalized for several days for observation at Southwest Medical Center.

When claimant was released, he was given restrictions and prescribed physical therapy. After going home, claimant’s calf enlarged even more and he had more pain. After calling the doctor, claimant went back to Southwest Medical Center where he was admitted again and told he needed emergency surgery. That surgery involved a fasciotomy, wherein claimant’s calf muscle was split open to relieve the pressure in the muscle compartment. Claimant later had a second surgery to remove the hematoma (blood clots inside the calf and the muscle). Claimant had a third surgery to remove one more hematoma, and a skin graft was conducted. The skin graft was harvested from claimant’s left hip. Claimant was then released and again given limitations and restrictions.

At some point in time, claimant developed additional pains and discomfort separate from those in the right calf. Claimant began to experience lower back pain and also ankle pain and pain in his right knee. This occurred after claimant went back to work, sometime around January 24, 2006.

After claimant returned back to work, and began experiencing these additional pains, claimant came under the care of orthopedic surgeon Dr. Kenneth Jansson. Dr. Jansson performed surgery on claimant’s knee in late March 2006. Dr. Jansson did not provide claimant any treatment for claimant’s ankle or back.

After claimant's knee surgery, claimant had fluid drawn from his knee at Dr. Jansson's office. The doctor's office also injected a steroid into claimant's knee to help with the pain. Post-operative wound care was provided by Dr. Kenton Schoonover, a plastic surgeon. He treated claimant's leg with the wound open and explained how claimant had to have his leg debrided to get rid of the infection that had occurred. That was done after the skin grafting.

Dr. Jansson released claimant from care, and claimant returned to work, under light duty. The pain and discomfort in claimant's right calf, right ankle, right foot, right knee, hip and back did not go away. Once claimant was released back to full duty, the pain continuously progressed and got worse in the right knee, right ankle and right lower back.

Claimant still has popping or grinding in the joints in his right lower extremity. There is popping and grinding in his lower back. His right hip grinds and snaps. There is popping or a snapping in the top of claimant's right foot. Claimant's right knee snaps and pops. When his right knee pops, it causes "extreme" pain.

Claimant's leg did not ever return back to the same size. His right calf is substantially larger than his left. It continues to swell and get large while walking. Standing and walking for a prolonged period increases claimant's pain.

Ultimately, claimant discontinued work as a police officer. After the accident and for a long time after getting back on the road (while working as a police officer for respondent), claimant had a hard time dealing with any stressful situations. He was basically scared to pull over anyone in fear he would get in a fight. Claimant knew if it was necessary for him to do any running or jumping or kneeling, he could not do it efficiently. Claimant's knee was giving out so badly that if he got in a fight, he would be afraid he would lose. When claimant would wear the duty belt which was around 15 to 20 pounds, it put a lot of pressure on his lower back. Sitting in the car caused a lot of pinpoint pressure. It was constant nonrelenting pain while wearing the duty belt. Driving the patrol car caused claimant discomfort.

Claimant left respondent's employment as a police officer the first of August 2007. After leaving that employment, claimant worked with Haliburton in Liberal, Kansas. He basically was an operator for Haliburton, which involved going to the well site, hooking up a wire line and dropping tools into the hole. There were definitely aspects of that job that would add to his discomfort.

Claimant did not have any other accidents while at Haliburton. The discomfort in rigging up and dealing with what is called a gun (a long metal tube full of explosives) for Haliburton was the same as the problems he was experiencing when he was at respondent. Those problems have continued to date, and, in fact have gotten worse.

Claimant currently lives in Tennessee, working with his father-in-law who owns a construction business. With him as claimant's boss, claimant is able to limit his activities quite a bit. Claimant does basic labor for his father-in-law's business. They do a lot of residential remodeling. Claimant's employment with Haliburton and with his father-in-law are the only employments claimant has had since leaving his employment with respondent. Claimant's father-in-law is with claimant in the evenings when claimant is at home in a lot of pain. He knows what claimant's limitations are. The pain and discomfort that claimant has described have not dissipated in any way over time. Claimant still has discomfort and pain in his back, knee, calf and ankle.

Claimant has not had any treatment for his low back other than Dr. Jimenez, a chiropractor, nor has he sought any medical or chiropractic care from anyone since he left Liberal in April 2008.

Chiropractic treatment with Dr. Jimenez before the November 14, 2005, injury was entirely for his middle to upper back, between the shoulder blades. Claimant has never had any prior treatment to his low back, either with Dr. Jimenez or anyone else.

Claimant was referred by his attorney to and examined by board certified orthopedic surgeon C. Reiff Brown, M.D., on two occasions. The first, on or about November 9, 2006, was to elicit Dr. Brown's opinions on treatment recommendations. The second, on September 6, 2007, was to obtain Dr. Brown's opinion on permanent partial impairment.

Dr. Brown noted claimant's history of injury, including the fact that claimant was struck in the posterior aspect of the right hip and low back by the bumper of a police car (a history different from that provided by claimant at the regular hearing), underwent four compartment fasciotomies of the right calf, suffered a post-operative infection, had complaints regarding the right knee, right hip and lumbosacral spine, and right ankle, and underwent knee surgery by Dr. Jansson in May 2006 involving a partial medial meniscectomy and chondroplasty. Dr. Jansson had found a tear of the posterior horn of the medial meniscus and chondromalacia of the lateral facet of the patella.

Dr. Brown noted that claimant was released to return to work in August 2006, but claimant had two aspirations to his knee, the last being in August 2006. Claimant was again released in September 2006 and has not had any additional treatment

At the time of the November 9, 2006, visit, claimant was complaining of discomfort associated with wearing his duty belt, the service revolver and things associated with police work. Wearing a heavy duty belt would aggravate the symptoms. Prolonged sitting also tends to aggravate claimant's low back condition.

By the time Dr. Brown saw claimant the second time on September 6, 2007, Dr. Brown understood that claimant had to stop his work as a police officer because of the difficulties just discussed, that being wearing the duty belt and prolonged sitting. Between

claimant's two visits to Dr. Brown, claimant was getting worse. His back pain and hip pain were worse.

At the time of the first visit to Dr. Brown, claimant had ankle symptoms that had not really been addressed yet. Claimant's posterior hip pain was undiagnosed. Dr. Brown felt claimant should be referred to an orthopedist who could evaluate claimant's back and hip difficulties. He suggested possible diagnostic studies and possible specific treatment to these areas depending on what the studies showed. When Dr. Brown saw claimant the second time (September 6, 2007), in light of the fact that no additional medical care has been provided and based upon his history and examination findings that day, Dr. Brown reached the following opinions as to claimant's permanent partial functional impairment, based upon the fourth edition of the *AMA Guides*¹: Dr. Brown found that claimant had a 7 percent right lower extremity impairment for loss of dorsiflexion of the right foot. He had an additional 5 percent right lower extremity impairment for quadriceps atrophy. He had an additional 5 percent right lower extremity impairment for crepitus on active movement and an additional 2 percent right lower extremity for his partial medial meniscectomy. He also had a 5 percent whole body impairment for scarring from skin grafts. He had a 5 percent whole body impairment for chronic lumbosacral strain (DRE Lumbosacral Category II). These values convert and combine to total 16 percent permanent partial whole body functional impairment.

Dr. Brown set forth work restrictions in his September 6, 2007, report,² noting that it will be necessary for claimant to permanently avoid work that involves frequent climbing of stairs and ladders, frequent squatting, sitting and working in a full squat position. Frequent long walks and lifting should be limited to 50 pounds occasionally, 40 pounds frequently. And all lifting should be done utilizing proper body mechanics. Dr. Brown opined that claimant's work-related accident caused his residual signs and symptoms.³

Claimant told Dr. Brown at the time of his first visit that he had not had any significant problem with his skin grafts. Claimant also told Dr. Brown at the time of his first visit to Dr. Brown that he was not any better after treatment. The second time he saw Dr. Brown, claimant said his symptoms were apparently getting worse.

In the first report, Dr. Brown indicated that he did not feel that claimant's calf needed any more attention. Dr. Brown thought some additional investigation should be done in the form of MRIs, which were done at the direction of Dr. Stein and reviewed and discussed by Dr. Brown at the second visit. The MRI scans of the right ankle and lumbar spine were normal.

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

² Brown Depo., Ex. 3.

³ Brown Depo. at 15.

Claimant was not taking any medications when Dr. Brown saw him the second time, despite the fact that claimant said the severity of his symptoms involving several body parts was actually worse.

Dr. Paul S. Stein, a board-certified neurological surgeon, saw claimant at the request of the insurance carrier on January 11, 2007, with a follow-up visit on April 24, 2007.

At the time of the first examination, there were no radiologic studies to review. Claimant was exhibiting some mild tenderness in the left lower back. Dr. Stein recommended an MRI and stress x-rays for claimant's ankle and foot and x-rays and an MRI of the low back.

Dr. Stein made some comments in his initial report about the right ankle and lower back. He did not assess any impairment rating for those body parts, but suggested the potential for further investigation. Dr. Stein recommended an MRI scan and stress x-rays for the ankle. For the lower back, he recommended x-rays at various views and an MRI scan. Claimant was back in Dr. Stein's office on April 24, 2007, and at that time Dr. Stein ordered those studies, which were done.

In his May 4, 2007, report, Dr. Stein indicated the MRI scan of the foot and ankle was reported as negative. The stress x-rays of the foot and ankle showed no evidence of instability. The x-rays and MRI scan of the lower back were within normal limits. Dr. Stein's opinion about the foot and ankle are based on the radiologist's report. Dr. Stein reviewed the lumbar x-rays and MRI scan himself.

Dr. Stein rated the right lower extremity at 8 percent (2 percent right lower extremity impairment for the partial medial meniscectomy and 6 percent right lower extremity impairment for atrophy of the right quadriceps muscle) based on the fourth edition of the *AMA Guides*.⁴

Dr. Stein estimated the rating for the skin grafts is an approximate 3 percent whole person impairment. The chart on page 280 only gives whole person impairments. Using the *AMA Guides* formula that is in the chapter on the lower extremity, this converts to a 7 percent lower extremity impairment.

If Dr. Stein were to combine the right lower extremity rating for the skin disorder with the 8 percent he previously assessed, the result would be a 14 percent right lower extremity rating using the combined values chart of the *AMA Guides*.

⁴ *AMA Guides* (4th ed.).

Regarding the ankle and lower back, Dr. Stein did not have any indication for a need for further treatment. He found no permanent functional impairment to the ankle or lower back based on his examination and the imaging findings.

Claimant did not exhibit pathology that would allow a doctor to assess the ratings under the fourth edition of the *AMA Guides*⁵ for the lower back, in Dr. Stein's opinion and based upon his examination and the imaging studies. The imaging studies were all normal.

Dr. Stein opined that even if the donor site for the skin graft was in a location that would be a whole body injury under the Kansas workers compensation laws, claimant would not be entitled to a rating. The few times he has been asked to rate skin grafting when it has been necessary in regard to other trauma, Dr. Stein has not rated the donor site unless there has been a problem because the site does not require any specific care. It is the graft site that gets a rating because you have to keep it out of the sun, keep it moist. There are potential problems with the graft site but not with the donor site. In the doctor's examination, he did not have any reason to believe there was a problem with the donor site, only with the graft site

The tenderness Dr. Stein noted in claimant's low back was in the sacroiliac joint area. A problem with the sacroiliac joint may or may not, depending on the degree of problem, create a specific limitation in range of motion. It would probably more likely limit range of motion in flexion and rotation. Dr. Stein suggested that range of motion can be different, depending upon when a person is examined, their activity level, whether they have traveled long distances and the weather, which can affect a person's range of motion.

Dr. Stein acknowledged that the weight of a police officer duty belt on the low back could continue to deteriorate an otherwise symptomatic sacroiliac joint. In claimant's case, Dr. Stein does not know that it did.

Claimant was referred to board certified orthopedic surgeon Terrence Pratt, M.D., by the ALJ for an independent medical examination (IME). Dr. Pratt's examination and report were completed on January 17, 2008.

Claimant's chief complaint to Dr. Pratt included discomfort involving the low back and right lower extremity, with more severe pain involving the right knee, but also involving the leg and ankle.

Dr. Pratt's findings from the physical examination included: lumbosacral region palpable tenderness overlying the right sacroiliac joint; 110 degrees of flexion, 30 degrees of extension, some limitations in lateral flexion with 17 degrees of right and 23 degrees on

⁵ *AMA Guides* (4th ed.).

the left; claimant reported a decrease in sensation over the skin graft regions; palpable tenderness in the right lower extremity was limited to the anterior aspect of claimant's skin graft medially; the right lower extremity was increased at the calf level vs. the left (measuring 29 cm proximal to the medial malleolus, claimant had a 3 cm increase on the right); on assessment 10 cm proximal to the patellae, claimant had a decrease on the right at 1.5 cm for the thigh; patellofemoral crepitus noted bilaterally; and claimant reported discomfort on patellar compression on the right (negative on the left).

Dr. Pratt summarized his findings as follows: (1) claimant's accident resulted in compartment syndrome, right leg with fasciotomy, removal of hematoma and subsequent skin grafting; (2) status post right medial meniscectomy for a medial meniscus tear; (3) low back pain with findings suggestive of sacroiliac joint dysfunction; and (4) complaints of right ankle discomfort without significant findings on examination.

Dr. Pratt placed the following restrictions on claimant: In relationship to claimant's current work tasks (employed by Haliburton as a logging operator), Dr. Pratt would not recommend any specific restrictions. Claimant reported that he is able to lift in excess of 100 pounds and perform the duties of his vocation. Claimant would have difficulties with higher level gait activities, such as running and jumping, and should avoid kneeling.

Dr. Pratt rated claimant as follows: The fourth edition of the *AMA Guides*⁶ was utilized to assess for permanent partial impairment; the total impairment is 12 percent whole person impairment (5 percent whole person impairment for lumbosacral, 4 percent whole person impairment for skin disorder, and 3 percent whole person impairment (converted from 8 percent extremity -- 6 percent for decrease in thigh circumference and 2 percent for status post partial meniscectomy) for right lower extremity.)

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact 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.⁸

⁶ *AMA Guides* (4th ed.).

⁷ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁹

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹⁰

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.¹¹

A claimant's testimony alone is sufficient evidence of his own physical condition.¹²

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.¹³

The fact of claimant's accident is not in dispute here. The accident happened while claimant was attempting to subdue a suspect, and the injury when claimant was struck was caused by a vehicle owned by respondent and being operated by one of respondent's employees. Here, claimant suffered more than the normal injuries from this type of accident. The resulting compartment syndrome with the multiple surgeries necessitated are not a normal result. However, in workers compensation litigation, the award is not always controlled by a "normal result". As noted in *Gillig*, the respondent is responsible for any natural consequence which flows from an injury.

Here, claimant's right leg was injured on the date of accident. The later development of the other right lower extremity problems and the low back problems are a natural consequence of that original injury, at least in the opinions of Dr. Brown and Dr. Pratt. While Dr. Stein may disagree with the low back causation factors, the Board

⁹ K.S.A. 2005 Supp. 44-501(a).

¹⁰ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹¹ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

¹² *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

finds the opinions of Dr. Brown, claimant's hired expert, and Dr. Pratt, the court appointed IME doctor, carry more weight in this instance.

The Board finds that claimant did injure his lower extremity including the knee and ankle and also aggravated his low back as a result of the original injuries and subsequently developed problems.

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 Permanent Impairment, if the impairment is contained therein.¹⁴

The ALJ, in comparing the opinions of the various physicians who provided ratings in this matter, found the opinions of Dr. Stein and Dr. Pratt to be very comparable for the lower extremity. The Board agrees and finds claimant has suffered a 14 percent impairment of the right lower extremity. The only disagreement centered around the inclusion of the low back. In this regard, Dr. Pratt and Dr. Brown were in agreement. Here the Board again finds the opinion of Dr. Pratt to carry the most weight, finding that claimant did suffer injury to his low back as a natural consequence of the original injury to his right leg. The 5 percent whole person rating is also found to be appropriate for the back injury. In combining the ratings, the ALJ found claimant had suffered a 12 percent whole person impairment, which the Board affirms.

The dissenting Members of the Board contend claimant's award should be split, with separate calculations for any whole body portion of the award and separate calculations for any scheduled members. This contention is contrary to the Supreme Court's discussion in *Bryant*,¹⁵ which states:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.¹⁶

Pursuant to *Bryant*, the majority will combine the scheduled and nonscheduled ratings and award claimant compensation for a permanent partial disability under K.S.A. 44-510e.

¹⁴ K.S.A. 44-510e(a).

¹⁵ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

¹⁶ *Id.* at 689.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has satisfied his burden of proving that he suffered an accidental injury on November 14, 2005, which resulted in impairments to his right lower extremity as well as his low back.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 26, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The majority awards claimant a 12 percent permanent partial disability to the body as a whole for his injuries. The 12 percent is based upon the opinion of Dr. Pratt. Dr. Pratt rated claimant's right lower extremity and back. The Kansas Supreme Court in *Casco*¹⁷ emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d,

¹⁷ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, *rev. denied* ____ Kan. ____ (2007).

then the compensation for that injury must be calculated pursuant to that schedule. The leg is on the schedule.¹⁸ Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment rating for the right leg must be calculated pursuant to K.S.A. 44-510d(a)(16). The back is not contained within the schedules of K.S.A. 44-510d. It is an unscheduled injury. Accordingly, the portion of the 12 percent permanent partial disability award that corresponds to the back injury should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under K.S.A. 44-510e. By combining the impairment rating for claimant's scheduled injury to his right leg with the ratings for his unscheduled injury to his back, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that combinations of scheduled injuries be compensated separately regardless of whether the injuries occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

¹⁸ K.S.A. 44-510d(a)(16).