BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMIE R. BROWN	)	
Claimant	)	
V.	)	
	)	AP-00-0473-153
PAYNE & JONES, CHTD.	)	CS-00-0468-661
Respondent	)	
AND	)	
	)	
OWNERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, through Zachary Kolich, requested review of Administrative Law Judge (ALJ) Troy Larson's Award dated January 13, 2023. Kevin Johnson appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on May 18, 2023.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of: (1) regular hearing transcript, held November 15, 2022; (2) deposition transcript of Daniel Zimmerman, M.D., dated November 21, 2022; (3) deposition transcript of Kenneth Unruh, M.D., dated November 16, 2022; (4) written fee agreement between the claimant and the Wallace, Kolich & Slocum, LLC, law firm, dated July 6, 2022; (5) all exhibits attached to items 2-3; (6) the Division's file; and (7) the parties' briefs.

ISSUES

1. What is the nature and extent of the claimant's disability?

2. Is the statutory mandate requiring the application of the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*), for scheduled injuries under K.S.A. 44-510d unconstitutional?

FINDINGS OF FACT

On June 4, 2021, the claimant sustained a compensable work injury when she fell off a ladder onto a concrete patio, fracturing her right wrist.

Kenneth Unruh, M.D., a board-certified orthopedic surgeon, began treating the claimant on June 9, 2021. The doctor diagnosed the claimant with a right distal radius fracture and pending possible carpal tunnel syndrome. On June 10, 2021, Dr. Unruh performed an open reduction internal fixation of the distal radius. On August 16, 2021, the doctor noted the claimant was not taking narcotic medication. On October 14, 2021, Dr. Unruh released the claimant to full duty with no permanent work restrictions.

Using the *Guides*, Dr. Unruh assigned the claimant 3% right upper extremity impairment at the wrist level. In arriving at this impairment, Dr. Unruh testified:

> So [the claimant's] carpal tunnel is a pending possible carpal tunnel syndrome, so there is a good chance that had I not performed the carpal tunnel release at the same time as her index procedure that she would have suffered from complications of potential carpal tunnel syndrome or complex regional pain syndrome postoperatively. So it's not that she has a diagnosis of carpal tunnel syndrome, she's got a pending possible carpal tunnel syndrome. So in taking that into account in doing a rating I only have to focus on the distal radius fracture rating. I don't have to include a diagnosis of carpal tunnel syndrome, it's a pending possible carpal tunnel syndrome. So in using the Sixth Guide I used the diagnosis impairment rating through a distal radius fracture diagnosis.[1]

Dr. Unruh assigned the claimant 0% impairment under the AMA *Guides to the Evaluation of Permanent Impairment,* 4th Edition. The doctor testified all of his opinions were rendered within a reasonable degree of medical probability.

At her attorney's request, the claimant saw Daniel Zimmerman, M.D., on August 4, 2022. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Zimmerman noted the claimant was taking ibuprofen for pain and discomfort. Using the *Guides*, Dr. Zimmerman assigned the claimant 5% right upper extremity impairment at the wrist level. In arriving at this impairment, Dr. Zimmerman testified:

> I used table 3 or 15-3, page 396, from class one for a fracture, which permits, I think it's 3 to 5 percent impairment rating from the A through E values. Using the grade modifier tables I offered an E value, which was 5 percent of the affected upper extremity at the wrist level.[2]

Dr. Zimmerman provided a second impairment of 32% to the right upper extremity at the wrist level using the *Guides* and competent medical evidence, including the

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[1] Unruh Depo. at 13-14.

[2] Zimmerman Depo. at 15.

claimant's history and his examination findings showing severe weakness in the upper extremity and difficulty with range of motion limitations. Dr. Zimmerman believed this impairment more accurately reflected the true and accurate level of the claimant's impairment. The doctor testified all of his opinions were rendered within a reasonable degree of medical certainty.

The claimant continues to work for the respondent doing the same job. She currently has pain and numbness in the palm of her right hand, with pain at the incision site. She takes over-the-counter medication for pain relief. The claimant testified the range of motion and grip strength in her arm, wrist and hand have decreased because of the fall and indicated weather affects how her upper extremity feels on a daily basis.

The ALJ stated:

> 1. Claimant has sustained permanent partial impairment of 4% to the right wrist based on competent medical evidence using the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment.
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> . . .
>
> Dr. Unruh issued his impairment rating report on November 9, 2021. Dr. Unruh assigned Claimant 3% to the right wrist based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment.
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> After performing an examination on behalf of Claimant on August 4, 2022, Dr. Zimmerman issued a report assigning 5% to the right wrist based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Zimmerman also provided an impairment rating based on the Kansas Supreme Court *Howard Johnson* decision, utilizing the Sixth Edition as a starting point, and assigning Claimant 32% impairment to the right wrist.
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> Claimant argues the court should apply the reasoning found in the Kansas Supreme Court case *Howard Johnson v. US Foods*, 312 Kan. 597 (2021), only utilizing the Sixth Edition as a starting point for determining impairment. While the Court appreciates the arguments Claimant is making, Appeals Board precedence dictates that the Sixth Edition must be followed for scheduled injuries.
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> The Court finds the expert opinions to be substantially similar and affords them equal weight. As a result, the Court awards Claimant 4% to the right wrist based on the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment.[3]

[3] ALJ Award at 3.

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues she is entitled to permanent partial disability benefits based on 32% functional impairment of the right upper extremity at the wrist level based upon Dr. Zimmerman's use of the *Guides* as a starting point and competent medical evidence. The claimant argues K.S.A. 44-508(u), the definition of functional impairment, requires competent medical evidence for scheduled and non-scheduled injuries alike, and K.S.A. 44-508(u) must be harmonized with K.S.A. 44-510d(b)(23). Additionally, the claimant stresses the requirement in K.S.A. 44-510e for impairment to be "based on" the *Guides* and the requirement in K.S.A. 44-510d for impairment to be determined by "using" the *Guides* have the same meaning, so the *Guides* should be used as a starting point for determining impairment, to be supplemented by competent medical evidence. The claimant further contends interpretation of K.S.A. 44-510d(b)(23) as mandating use of the *Guides* as the sole basis of functional impairment is unconstitutional. The respondent argues the use of the *Guides* is mandated, must be followed, and the ALJ's decision should be affirmed. In particular, the respondent argues the words "shall be determined" within K.S.A. 44-510d(b)(23) mandates using only *Guides* to arrive at an impairment rating.

1. As a result of her work injury, the claimant sustained 4% permanent impairment of function to her right forearm determined by the *Guides*.

K.S.A. 44-508(u) states, ""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. 44-510d states, in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i, and amendments thereto.
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> . . .
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> (b)(12) For the loss of a forearm, 200 weeks.
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> . . .
>
> (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, until January 1, 2015, but for injuries occurring on and after January 1, 2015, shall be determined by using

> the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

K.S.A. 44-510e(a)(2)(B) states:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury 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, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

When a workers compensation statute is plain and unambiguous, the Board must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[4] Judicial blacksmithing is not permitted.[5] Words not contained in a statute should not be added to the law.[6]

K.S.A. 44-510e explicitly requires competent medical evidence; K.S.A. 44-510d(b)(23) does not mention the words "competent medical evidence." The language mandating the use of the *Guides* in K.S.A. 44-510e(a)(2)(B) is different than the language of K.S.A. 44-510d(b)(23), which says impairment of function related to a scheduled injury shall be determined by using the *Guides*, if the impairment is contained therein. The claimant concedes this difference.

In *Johnson,*[7] the Kansas Supreme Court stated, "K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides."[8] *Johnson* held K.S.A. 44-510e(a)(2)(B) requires functional impairment ratings be proven by competent medical evidence and use of the Sixth Edition is only a starting point for any

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[4] See *Bergstrom v. Spears Mfg. Co.,* 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

[5] *See Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[6] *See State v. Pattillo*, 311 Kan. 995, 1004, 469 P.3d 1250 (2020) ("Courts apply the plain language of statutes and avoid adding, deleting, or substituting words.").

[7] *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

[8] *Id.* at 603.

medical opinion.[9] The ruling in *Johnson* was based on the plain language of K.S.A. 44-510e, not K.S.A. 44-510d.[10]

In *Butler,* the Board ruled:

> The language mandating the use of the AMA *Guides* in K.S.A. 44-510e(a)[2](B) is different than the language of K.S.A. 44-510d(b)(23), which says impairment of function related to a scheduled injury shall be determined using the Sixth Edition, if the impairment is contained therein. K.S.A. 44-510d(b)(23) does not contain the phrase "competent medical evidence."
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> The plain language of K.S.A. 44-510d(b)(23) requires the functional impairment to be based upon the Sixth Edition. There is no requirement the impairment rating be based upon any other criteria, including substantial competent evidence.
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> The ALJ was correct in concluding he was bound by the Sixth Edition when assessing functional impairment under K.S.A. 44-510d(b)(23).[11]

The Board understands the claimant's arguments. She argues K.S.A. 44-508(u) requires competent medical evidence for scheduled and non-scheduled injuries alike, and the law must be read in harmony or *in pari materia*. The claimant also argues the language in K.S.A. 44-510e for impairment to be "based on" the *Guides* and the language in K.S.A. 44-510d for impairment to be determined "using" the *Guides* have the same meaning, such that *Johnson* be applied to both scheduled and unscheduled injuries.

As for the claimant's first argument, the Legislature included "competent medical evidence" in K.S.A. 44-510e, but no such language is in K.S.A. 44-510d. Had the Legislature intended for "competent medical evidence" to apply to scheduled injuries under K.S.A. 44-510, it certainly could have included such language. Reading statutes in harmony is a principle of statutory construction.[12] However, it is unnecessary to rely on statutory construction if a statute is unambiguous. K.S.A. 44-510d(b)(23) is not ambiguous. As such, there is no reason to resort to statutory construction or graft the language "competent medical evidence" onto K.S.A. 44-510d(b)(23).

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[9] *See id.*

[10] See *id.*

[11] *Butler v. Goodyear Tire and Rubber Co.*, No. AP-00-0456-096, 2021 WL 2287732, at *4-5 (Kan. WCAB May 27, 2021).

[12] See *Redd v. Kansas Truck Center*, 291 Kan. 176, 195-96, 239 P.3d 66 (2010).

As to the claimant's second argument, *Johnson* only applies to non-scheduled injuries under the purview of K.S.A. 44-510e. *Johnson* does not address scheduled injuries under K.S.A. 44-510d. *Johnson* also addresses the phrase "based on." *Johnson* does not address the phrase "determined by using" contained in the provision of K.S.A. 44-510d(b)(23) applying to injuries occurring after January 1, 2015. " *Johnson* does not control.

The plain language of K.S.A. 44-510d(b)(23) states permanent partial disability shall be assessed solely under the *Guides* without independent consideration of competent medical evidence. The impairment ratings in the record based solely upon the *Guides* are 3% and 5% to the forearm. The ALJ split the two ratings under the *Guides* to arrive at 4% impairment to the claimant's right forearm.

Dr. Zimmerman considered other competent medical evidence in assessing permanent impairment of 32% and opined he could deviate from the *Guides*. However, Dr. Zimmerman's rating does not comport with K.S.A. 44-510d(b)(23). Instead, the doctor relied on what he viewed as competent medical evidence, namely his experience and the claimant's physical findings, such as decreased strength and range of motion. Pursuant to *Butler*, and the plain language of K.S.A. 44-510d(b)(23), competent medical evidence is not part of determining an injured worker's impairment. Also, physician judgment based on experience and physical examination are not part of the impairment equation. As such, the Board finds a split of the ratings using the *Guides* persuasive and comports with K.S.A. 44-510d. The Board affirms the ALJ's finding.

2. The Board may not address the constitutionality of K.S.A. 44-510d(b)(23).

The Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.[13]

AWARD

WHEREFORE, the Board affirms ALJ Larson's Award dated January 13, 2023.

IT IS SO ORDERED.

Dated this _____ day of May, 2023.

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[13] *See, e.g., Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the Sixth Edition AMA *Guides* for a scheduled injury was unconstitutional as applied in that case only); *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

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BOARD MEMBER

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DISSENT

For the reasons set forth in *Weaver*,[14] which I incorporate fully herein, I dissent. All impairment ratings, whether for a scheduled injury or an injury to the body as a whole, must be supported by competent medical evidence based on the definition of functional impairment contained in K.S.A. 44-508(u) and the implied, if not explicit, requirement for competency set forth in the *Guides*. Based on the definition of functional impairment in K.S.A. 44-508(u), competent medical evidence is a "baked-in" requirement for any impairment determination. If K.S.A. 44-510d is read as excluding "competent medical evidence," we are ignoring the very definition of K.S.A. 44-508(u), which is incorporated into K.S.A. 44-510d when the latter statute refers to the term defined in the former statute. In essence, K.S.A. 44-510e, in mentioning "competent medical evidence," is superfluous, because the requirement of providing a functional impairment rating necessarily requires competent medical evidence by definition. There is only one definition of functional impairment and it is contained in K.S.A. 44-508(u). K.S.A. 44-510d does not alter the statutory definition of functional impairment.

Further, I see no material distinction between K.S.A. 44-510d(b)(23) requiring a rating under the schedule to be "determined by using" the *Guides* and K.S.A. 44-510e(a)(2)(B) requiring a whole body rating to be "based on" the *Guides*.

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BOARD MEMBER

c: (via OSCAR)
Zachary Kolich
Kevin Johnson
Hon. Troy Larson

[14] *Weaver v. Unified Government of Wyandotte Co.*, AP-00-0464-459, 2022 WL 4086270 (Kan. WCAB Aug. 31, 2022).