

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES MORRIS)	
Claimant)	
V.)	
SHILLING CONSTRUCTION CO., INC.)	AP-00-0474-055
Respondent)	CS-00-0434-953
AND)	
MIDWEST BUILDERS CASUALTY)	
MUTUAL COMPANY)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier (respondent) requested review of Administrative Law Judge (ALJ) Steven Roth's Award of the Court Upon Remand, dated February 23, 2023. Seth Jurcyk appeared for the respondent. Mitchell Rice appeared for the claimant. The Board heard oral argument on June 15, 2023.

RECORD

The Board considered the following record:

- (1) Regular Hearing Transcript, held October 14, 2019; and the depositions of
- (2) David Hufford, M.D., taken April 2, 2020;
- (3) Pedro Murati, M.D., taken January 10, 2020, and November 7, 2022;
- (4) Terry Cordray, taken March 31, 2020;
- (5) Robert Barnett, Ph.D., taken January 13, 2020;
- (6) Daniel D. Zimmerman, M.D., taken October 25, 2022;
- (7) John P. Estivo, D.O., taken December 13, 2022;
- (8) Stuart Ford, taken January 20, 2023;
- (9) Anthony Medina, taken on January 27, 2023;
- (10) Surveillance reports completed by Carla Coats, dated December 6, 2022, and December 19, 2022 (admissibility stipulated by the parties);
- (11) all exhibits;
- (12) the electronic case file maintained by the Division of Workers Compensation; and
- (13) the parties' briefs.

ISSUES

1. What is the claimant's average weekly wage (AWW)?
2. What is the nature and extent of the claimant's disability?

FINDINGS OF FACT

The claimant sustained compensable injuries arising out of and in the course of his employment on June 22, 2018.

The Board adopts the detailed factual findings previously ruled upon. Additional facts are listed below or reiterated as necessary.

The ALJ issued an Award dated April 27, 2020, concluding: (1) the claimant's AWW was \$695.55 by dividing the claimant's earnings over 11 calendar weeks; and (2) the claimant sustained a 6.5% whole body functional impairment based on a split of the ratings, including right wrist impairment.

The claimant appealed to the Board. In an Order dated September 9, 2020, the Board determined the claimant's AWW was \$782.56, by excluding partial weeks worked. The Board affirmed the ALJ's conclusion the claimant sustained 6.5% functional impairment to the body as a whole using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed., (*Guides*) on account of his work injury.

The claimant appealed to the Court of Appeals and the respondent cross-appealed. In a Memorandum Opinion,¹ the Court of Appeals found a remand was appropriate because: (1) the Board actually reversed the ALJ's finding of right wrist impairment; and (2) the Board erred in calculating the claimant's AWW by excluding partial weeks in the determination. The Court of Appeals instructed the Board to calculate the claimant's impairment without regard to the right wrist and to calculate the claimant's AWW using either 11 or 12 weeks.

In turn, the Board remanded the matter to the ALJ for two determinations: (1) the nature and extent of the claimant's disability under the *Johnson* standard using the *Guides* as a mere starting point, and, more importantly, when considering competent medical evidence, but excluding any impairment regarding the claimant's right wrist; and (2) the claimant's AWW.

¹ *Morris v. Shilling Constr. Co. Inc.*, No. 123,297, 2021 WL 5751704 (Kansas Court of Appeals unpublished opinion filed Dec. 3, 2021).

The ALJ reopened the record. At his attorney's request, the claimant saw Daniel Zimmerman, M.D., on July 22, 2022. The claimant complained of decreased grip strength in his right hand, pain affecting the cervical spine, cervical paraspinous musculature, and the mid-cervical spine associated with left-sided headaches, difficulty sleeping, low back pain and right lower extremity limitations.

Dr. Zimmerman diagnosed the claimant with chronic cervical paraspinous myofascitis, chronic lumbar paraspinous myofascitis, weakness in the right hand and digits and neuropathic sensory deficit of the right lower extremity. Dr. Zimmerman explained the 10% right upper extremity at the wrist level was "because of the electrocution injury affecting the nerves and the soft tissues within the hand and wrist."² The doctor testified his rating to the claimant's cervical spine was based on examination findings. Dr. Zimmerman believed the claimant achieved maximum medical improvement and the claimant's prognosis was acceptable. The doctor recommended medication and follow-up medical appointments. Dr. Zimmerman did not assign any work restrictions.

Using the *Guides*, Dr. Zimmerman assigned the claimant 9% whole person impairment, consisting of 3% for cervical paraspinous myofascitis, 3% for lumbar paraspinous myofascitis, 1% for the right upper extremity at the level of the wrist, and 2% for the right leg. Using the *Guides* as a starting point and competent medical evidence, the doctor testified:

Well, using the Johnson decision, the ratings that are set forth for the cervical spine was 5 percent of the body as a whole. The impairment rating to the lumbar spine diagnosis was 5 percent of the body as a whole. The impairment rating due to weakness of the right upper extremity was 10 percent of the right upper extremity at the wrist level, which converted to 6 percent of the body as a whole. The impairment rating due to the numbness in the entire right leg was 5 percent of the right lower extremity at the knee level, which converted to 2 percent of the body as a whole. Then using a combined values chart combining 6 percent with 5 percent is 11 percent, 11 percent combined with a 5 percent is 15 percent, 15 percent combined with 2 percent is 17 percent of the body as a whole.³

Dr. Zimmerman opined the claimant was unable to perform 9 of the 10 tasks listed on Dr. Barnett's task list for a 90% task loss. Dr. Zimmerman recommended future medical treatment. The doctor testified all of his opinions were within a reasonable degree of medical certainty.

Dr. Murati was previously deposed on January 10, 2020, and testified again on November 7, 2022. Dr. Murati did not see the claimant after 2019 and he did not know

² Zimmerman Depo. at 23.

³ *Id.* at 15-16.

how the claimant was doing currently. Based on the *Johnson* decision, Dr. Murati testified he would assign the claimant an additional 2% whole person impairment, for a total impairment of 10% to the body as a whole. The doctor modified his initial rating because the claimant had a positive sacroiliac exam in 2019 and, while the *Guides* allow a rating for such condition, the *Guides* restrict a doctor to only providing a rating for the “most significant clinical thing in a regional area.”⁴ Dr. Murati compared the situation to automobile insurance only paying for the most expensive part of a car that is broken.

Dr. Murati reaffirmed his prior testimony regarding task loss. Dr. Murati previously gave the claimant a 35 pound maximum lifting restriction occasionally and 20 pounds frequently. The doctor opined the claimant would require future medical treatment. Dr. Murati testified his opinions were within a reasonable degree of medical certainty.

At the respondent’s request, the claimant saw John Estivo, D.O., a board-certified orthopedic surgeon, on September 15, 2022. The claimant complained of neck and lower back pain, occasional right and left leg pain and numbness in the right leg from the knee down. The doctor’s report stated the claimant denied any right hand pain or difficulties. Dr. Estivo’s physical examination found no right upper extremity abnormalities.

Dr. Estivo diagnosed the claimant with: (1) status post electrical shock injury with right hand entry wound and right foot exit wound, now completely healed; (2) subjective complaints of nonanatomic, nonspecific right lower extremity loss of sensation; and (3) symptom magnification. Using the *Guides*, Dr. Estivo assigned the claimant 1% whole person impairment, stating:

The patient had very nonspecific complaints of numbness to his right lower leg, circumferential numbness from the knee all the way down to the right foot and extending across the top of the right foot, but absolutely no numbness across the bottom of the right foot. This was not across any anatomical distribution or peripheral nerve distribution. This was all subjective and really could not be tied to any specific nerve. His motor function was completely normal of his right leg.

The only category that I could find that he would fit within with those nonanatomic subjective complaints that really could not be correlated with any objective abnormalities was within Table 13-20, found on page 344, where it states, Miscellaneous peripheral nerves, and I placed him within Class 1 with a sensory loss, and this was being generous because the table actually states, Sensory loss only in anatomic distribution, and his sensory loss was not in a specific anatomic distribution. So giving him the benefit of the doubt, I gave him a one percent whole person impairment according to that table.⁵

⁴ Murati Depo. (Nov. 7, 2022) at 5.

⁵ Estivo Depo. at 13-14.

Dr. Estivo did not feel it was necessary to deviate from the *Guides* based on the *Johnson* decision. Dr. Estivo testified the *Guides* alone were sufficient for a rating. Dr. Estivo did not testify his rating was based on competent medical evidence, although he said he did not need to deviate from the *Guides* based on his knowledge, training and experience. The doctor testified he did not assign any impairment for the claimant's right wrist because he found no abnormalities with examination of the right wrist. Dr. Estivo did not feel the claimant required any future medical treatment or permanent work restrictions. The doctor believed the claimant is capable of completing all job tasks and performing heavy physical work without any difficulties. Dr. Estivo testified his opinions were within a reasonable degree of medical certainty. Had he strictly followed the *Guides*, Dr. Estivo testified he would likely have provided 0% impairment.

Stuart Ford is a private investigator. He conducted surveillance on the claimant. Mr. Ford testified he observed the claimant on August 3, 2022, and the claimant pulled out large steel ramps from underneath the bottom of a car dolly before driving a vehicle backwards up the ramp and onto the trailer. The claimant then secured the car to the car trailer using ratchet straps. The claimant replaced the ramps up underneath the belly of the car trailer and drove the truck with car trailer to Midwest Carplex. Mr. Ford denied seeing the claimant exhibit any limitations in movement.

Anthony Medina owned Midwest Carplex for about four years. Mr. Medina testified the claimant drove vehicles for him and earned \$10 per hour. Mr. Medina considered the claimant an independent contractor.

The ALJ found the claimant sustained 9% functional impairment, roughly based on splitting the impairment ratings from Drs. Zimmerman, Murati and Estivo. Further, the ALJ concluded the claimant sustained 49.3% work disability. The ALJ concluded the claimant's AWW was \$637.63 based on dividing the claimant's total earnings by 12 weeks.

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues all three (Drs. Zimmerman, Murati and Estivo) ratings should be averaged, giving the claimant 9% functional impairment to the body as a whole. The claimant further argues he suffered 59.5% task loss and 55% wage loss for 57.25% work disability. The claimant, in his brief, maintains his AWW was \$805.36.

The respondent argues the claimant's impairment should be limited to 1% to the body as a whole because Dr. Estivo is the only doctor who used objective medical evidence and reviewed the surveillance documenting the claimant's physical abilities. In the alternative, the respondent argues the claimant has 5.5% functional impairment based on an average of Dr. Murati's 10% rating and Dr. Estivo's 1% rating. The respondent contends it is unfair to average the ratings of three doctors when two of the doctors were retained by the claimant. Additionally, the respondent argues the claimant's rating should

not include impairment for his right wrist, as per the Court of Appeals' Memorandum Opinion.

1. The Board affirms the ALJ's AWW determination.

K.S.A. 44-511(b)(1) states the AWW "shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be."

In *Morris*, the Court of Appeals characterized *Stewart*⁶ as holding part-time weeks refer to weeks "actually worked" under K.S.A. 44-511(b)(1). The Court found Morris actually worked during 11 or 12 weeks, instead of nine calendar weeks as found by the Board. The Court noted the Legislature got rid of any distinction between full-time and part-time employees and all weeks worked must be included in the wage calculation. The Court remanded this matter to the Board to determine the claimant's AWW based on either 11 or 12 weeks. The Board sent this determination to the ALJ.

The ALJ determined 12 weeks should be used to compute the claimant's AWW. The Board agrees with this conclusion. Dividing the claimant's total earnings by 12 weeks results in an AWW of \$637.63. The Board affirms the ALJ's ruling on this issue.

2. The claimant sustained 6.5% functional impairment to the body as a whole based on the *Guides* and competent medical evidence.

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.

Under K.S.A. 44-510e, a worker may obtain an award of permanent partial disability benefits in excess of the value of a functional impairment rating, but there are preconditions. When the employee has no preexisting impairment, he or she must prove in excess of 7.5% impairment to the body as a whole caused solely by the injury. An employee must have at least 10% wage loss due to the injury and not other causes. If

⁶ *Stewart v. Access Control Solutions, LLC*, No. 1,064,743, 2015 WL 4071481 (Kan. WCAB June 26, 2015).

such hurdles are overcome, a work disability award is based on averaging the worker's wage loss and task loss.

Johnson held a worker's impairment rating starts by using the *Guides* as a starting point and "more important and decisive 'competent medical evidence'" thereafter is used to formulate a physician's rating opinion.⁷ *Johnson* observed K.S.A. 44-510e(a)(2)(B) never dictated an impairment rating is set by the *Guides*.

Dr. Hufford performed a court-ordered IME and rated the claimant under the *Guides* as 5% body as a whole for the low back and right leg combined. He was not deposed. K.S.A. 44-516 requires the finder of fact to consider a court-ordered physician's rating in a final determination. However, the Board does not know if his rating would represent his opinion if competent medical evidence was considered, using the *Johnson* standard. Therefore, the Board is not utilizing Dr. Hufford's rating in calculating the claimant's permanent impairment of function. However, other aspects of his report are still relevant, such as Dr. Hufford recording the claimant had no neck complaints, his opinion the claimant needed restrictions against lifting 20 pounds, as well as postural limitations, and the recommendation for an MRI and possibly medication.

Dr. Zimmerman provided a 17% body as a whole rating, which included impairment for the claimant's neck and right wrist. The Board was instructed by the Court of Appeals to disregard the right wrist. Regarding the neck, the claimant made no neck complaints to Dr. Hufford, Dr. Murati did not mention the claimant having neck complaints, and the claimant never testified he had neck symptoms or impairment. Based on these facts, Dr. Zimmerman's finding of neck impairment, even if credible, is not related to this accidental work injury. When not accounting for the neck (5% to the body as a whole) or the right wrist 6% to the body as a whole), Dr. Zimmerman's rating is 7% to the body as a whole when using the *Guides* and competent medical evidence (5% to the body as a whole for the low back combined with 2% to the body as a whole for the right leg equals 7% overall).

Dr. Murati provided a 10% body as a whole rating, which included impairment for the claimant's right wrist. The Board must disregard the claimant's right wrist. Dr. Murati's low back and right leg ratings were not questioned by the Court of Appeals, the Board or the parties after his initial testimony. His initial report diagnosed right sacroiliac dysfunction, but he did not rate the condition. Under *Johnson*, Dr. Murati added 2% impairment for sacroiliac dysfunction because the claimant had the diagnosis. Dr. Murati disagreed with a directive in the *Guides* to only rate the worst condition in a plethora of conditions, such that the sacroiliac dysfunction would not be ratable under a strict reading of the *Guides*. The Board has no concern over Dr. Murati adding a 2% rating for a positive sacroiliac test the claimant had when he was examined in 2019. The additional 2% impairment accounts for impairment Dr. Murati believed a strict reading of the *Guides*

⁷ *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 602, 478 P.3d 776 (2021).

precluded him from providing. Dr. Murati's explanation for the slight increase in impairment makes sense and is believable. When including the extra 2% figure and excluding any impairment for the right wrist, Dr. Murati's rating is 6% to the body as a whole using the *Guides* and competent medical evidence (2% to the body as a whole for the low back, combined with 2% to the body as a whole for the right leg, combined with 2% to the body as a whole for the sacroiliac condition equals 6% overall). The 4% body as a whole rating from Dr. Murati for the right wrist was excluded on the direction of the Court of Appeals.

Dr. Estivo assigned the claimant 1% impairment to the body as a whole, giving the claimant the benefit of the doubt. Dr. Estivo opined the claimant is a symptom magnifier. No other doctors, including Dr. Hufford, identified the claimant as a symptom magnifier. Unlike Dr. Estivo, all the other doctors either provided the claimant with significant work restrictions or task loss. Unlike Dr. Estivo, all other doctors recommended some form of additional or future medical treatment. The Board considered Dr. Estivo's rating and opinions, but do not find them credible in this instance.

Using the *Guides* and competent medical evidence, while excluding the claimant's right wrist based on the Court of Appeals' directive, and excluding the claimant's neck or cervical spine based on the greater weight of the credible evidence, namely lack of any documented testimony or medical records concerning the neck prior to Dr. Zimmerman's report, the Board finds the claimant sustained 6.5% functional impairment to the body as a whole due to his work accident. This rating is based on a split of the reduced ratings from Dr. Murati (6%) and Dr. Zimmerman (7%). The claimant is not entitled to an award for work disability benefits because he does not have impairment in excess of 7.5% to the body as a whole.

As for the respondent's argument the Board should average one rating from the claimant and one rating from the respondent, there is no statute or case law providing support. There are cases in which two competing ratings are averaged, but those cases do not suggest additional evidence of impairment should be disregarded. The Board's decision regarding the claimant's impairment is based on the totality of the credible evidence and the directive from the Court of Appeals to exclude any impairment for the claimant's right wrist.

AWARD

WHEREFORE, the Board affirms the ALJ's determination regarding the claimant's AWW. The Board modifies in part the Award on Remand, dated February 23, 2023, to reflect the claimant sustained 6.5% impairment to the body as a whole on account of his accidental work injuries affecting his low back, right SI joint and the right leg. The Board's prior ruling for future medical treatment remains undisturbed.

The claimant is awarded 26.98 weeks of permanent partial disability compensation at the rate of \$425.11 per week, or \$11,469.47 for a 6.5% functional impairment to the body as a whole, all due and owing in one lump sum.

IT IS SO ORDERED.

Dated this _____ day of July, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned concurs with the majority's determination on the average weekly wage issue. The line drawn through one of the weeks in the wage statement was made by Claimant's counsel to indicate it was a partial week worked. Claimant actually worked twelve weeks, the total wages earned was \$7,651.50, and the resulting average weekly wage is \$637.63.

The undersigned disagrees with the majority's determination on nature and extent. It appears the majority determined Dr. Zimmerman's rating was 7% of the body as a whole, and Dr. Murati's rating was 6% of the body as a whole, by combining the ratings attributable to the low back and right leg using the Combined Values Chart from the *Guides*. The majority also excluded Dr. Estivo's rating from consideration.

The undersigned disagrees with the majority's exclusion of Dr. Estivo's rating. Dr. Estivo reviewed all of the available treatment records, and performed a physical examination of Claimant. Dr. Estivo was the only physician who reviewed surveillance. Dr. Estivo generated a report containing extensive objective findings from his physical examination, including normal strength and reflexes of both upper extremities, normal grip

strength of the right hand with no evidence of instability, no abnormalities of the thoracic spine, non-anatomic loss of sensation of the right lower extremity, and overreaction during evaluation of the lumbar spine. Among the testifying physicians, Dr. Estivo reviewed the most information, and his objective findings support his opinion Claimant displayed symptom magnification. Dr. Estivo's objective findings also support his opinions Claimant did not require permanent restrictions or future medical treatment. Dr. Estivo's rating uses the *Guides* as a starting point, but is based on his review of the records, his examination and his professional training and expertise. Dr. Estivo's rating comports with *Johnson*. Dr. Estivo explained the bases for his opinions in his deposition and was subject to cross-examination. Dr. Estivo's 1% whole-body rating should be considered in determining the nature and extent of Claimant's impairment.

In excluding Dr. Estivo's rating, the majority suggests Dr. Estivo is an outlier because he was the only physician who thought Claimant displayed symptom magnification, because he did not impose physical restrictions, and because he did not recommend future medical treatment. Dr. Murati was the only physician who thought Claimant displayed sacroiliac dysfunction. Dr. Zimmerman was the only physician who thought Claimant sustained a nerve injury to the right upper extremity or cervical impairment. According to the majority's logic, the ratings of Drs. Murati and Zimmerman should also be excluded because they contain outlying opinions. The majority does not apply its logic to those ratings. The undersigned cannot join the majority in its selective exercise.

Dr. Murati did not re-examine Claimant or review additional records before testifying again. Dr. Murati based his opinions on one evaluation performed on January 23, 2019. Dr. Murati's opinion Claimant sustained sacroiliac dysfunction was contradicted by Claimant's other rating physician, Dr. Zimmerman. Dr. Zimmerman found no sacroiliac dysfunction, or rateable impairment attributable to the sacroiliac joint, when he evaluated Claimant on July 22, 2022. Although Dr. Murati characterized Claimant's sacroiliac dysfunction as serious, he only assessed 2% additional impairment and thought no additional work restrictions were required. In his first deposition, Dr. Murati did not mention the additional impairment from the sacroiliac dysfunction, or explain how he was prevented from assessing additional impairment attributable to the sacroiliac dysfunction under the *Guides*. Dr. Murati's opinions are inconsistent and contradicted by Claimant's other examining physician. The undersigned does not find Dr. Murati's opinions credible in this case, and would exclude them from consideration.

Dr. Estivo rated Claimant's permanent impairment at 1% of the body as a whole based on competent medical evidence after using the *Guides* as a starting point. Dr. Zimmerman apparently rated Claimant's permanent impairment at 7% of the body as a whole, attributable to the lumbar spine and right leg. Dr. Hufford did not provide an impairment rating based on competent medical evidence after using the *Guides* as a starting point. Pursuant to the decision of the Court of Appeals, the rating of Dr. Hufford

may not be considered. Based on the equally credible opinions of Drs. Estivo and Zimmerman, the undersigned finds Claimant's functional impairment is 4% of the body as a whole, attributable to the low back and right leg.

BOARD MEMBER

c: (via OSCAR)

Mitchell Rice

Seth Jurcyk

Hon. Steven Roth