BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LAWRENCE GOMEZ	)	
Claimant	)	
V.	)	
	)	AP-00-0472-874
SEABOARD TRANSPORT, LLC	)	CS-00-0439-907
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

All parties requested review of the December 30, 2022, Award issued by Administrative Law Judge (ALJ) Troy A. Larson. The Board heard oral argument on May 11, 2023.

APPEARANCES

Daniel L. Smith appeared for Claimant. J. Scott Gordon appeared for Respondent and its insurance carrier (Respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held August 2, 2022; the transcript of the Telephonic Evidentiary Deposition of Claimant from December 18, 2018; the transcript of the Deposition of Claimant from May 18, 2021; the transcript of the Deposition of Claimant from September 22, 2022; the transcript of the Evidentiary Deposition of Claimant from October 14, 2022; the transcript of the Evidentiary Deposition of Daniel D. Zimmerman, M.D., from August 29, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Daniel D. Zimmerman, M.D., from October 17, 2022, with exhibits attached; the transcript of the Remote Evidentiary Deposition of Chris Fevurly, M.D. from September 15, 2022, with exhibits attached; the transcript of the Remote Evidentiary Deposition of Amit Sahasrabudhe, M.D., from November 17, 2022, with exhibits attached; and the documents of record filed with the Division. The Board also reviewed the parties' briefs.

ISSUES

1. What is the nature and extent of Claimant's impairment?

2. Did the ALJ err by finding Claimant was examined by Dr. Fevurly on April 20, 2018?

3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as an over-the-road truck driver. He was hired under a Kansas contract in August 2014. On July 28, 2016, Claimant was working for respondent in California. Claimant fell from a trailer approximately 3.5 to 4 feet to the pavement. Claimant struck his left knee on the trailer when he fell, and he struck his low back, left shoulder and head on the pavement. Claimant lost consciousness for a time and was found by a warehouse dock worker.

Claimant was transported to Kaiser Permanente Medical Center in Ontario, California, and treated in the emergency department. A CT scan of Claimant's left knee revealed a displaced transverse fracture involving the inferior patella with mild joint effusion/hemarthrosis, or bleeding into the knee compartment. No arthritic change of the left knee was reported. Claimant also sustained multiple rib fractures and a concussion from the fall. Claimant was provided a knee immobilizer and discharged. Claimant eventually returned to his home in Lake Havasu, Arizona.

Claimant was examined on August 8, 2016, by Dr. Kevin Kline with Lakeside Orthopedics Institute in Lake Havasu. Dr. Kline diagnosed a closed displaced transverse fracture of the patella and performed an open reduction and internal fixation of the patellar fracture on August 19, 2016. Wire and mesh were utilized to repair the fractured kneecap.

An MRI of Claimant's left shoulder, conducted November 2, 2016, revealed a large retracted full thickness tear with retraction of the supraspinatous tendon, partial tears of the infraspinatous and subscapularis tendons, and a glenoid labrum tear.

Dr. Kline retired from practice in November 2016, and Claimant's care was transferred to Dr. William Binder.

Dr. Chris Fevurly, board certified in internal medicine, preventative medicine, and occupational medicine, examined Claimant at Respondent's request on February 16, 2017. Dr. Fevurly acquired a medical history from Claimant. Claimant denied neck, back, left

knee, or left shoulder pain prior to July 28, 2016. Claimant was not working at the time of the visit but was attending physical therapy.

After reviewing Claimant's available medical records and conducting a physical examination, Dr. Fevurly found Claimant's work accident resulted in a displaced transverse left patella fracture; multiple rib fractures with subsequent resolution; blunt trauma to the head, neck, and low back with subsequent resolution; and left shoulder pain with a full thickness supraspinatous tendon tear, a partial tear of the infraspinatous tendon, and a glenoid labrum tear. Dr. Fevurly opined Claimant would require removal of the wire and hardware from the left knee once unionization of the patella fracture is confirmed. Dr. Fevurly further recommended surgical repair of Claimant's left shoulder.

Dr. Binder performed a left shoulder arthroscopy and removed the tension band wire fixation on the left patella on May 16, 2017. Claimant underwent physical therapy for five months. Claimant indicated he attempted to return to Respondent once he was released to return to work, but Respondent declined and terminated his employment. Claimant remained off work until he gained new employment in late 2017.

On January 8, 2018, Claimant returned to Dr. Binder with complaints of left knee instability. Claimant was wearing a knee brace and had recovered from left shoulder surgery. Dr. Binder ordered an MRI of Claimant's left knee, conducted January 26, 2018. The MRI revealed a healed patella fracture with mild to moderate osteoarthritis in all compartments of the left knee. There were small tears noted in the medial and lateral menisci.

After reviewing the MRI, Dr. Binder felt there may be redundance in the posterior cruciate ligament (PCL), representative of a tear. Claimant continued to need a knee brace to drive, and there was an increase in the anterior and posterior laxity (instability) of Claimant's left knee. Dr. Binder also reported residual quadriceps atrophy contributing to weakness in Claimant's left knee. Dr. Binder concluded a complex reconstruction of the PCL would require a super-orthopedic (athletic) specialist referral as the procedure was beyond his normal scope of practice. Dr. Binder advised Claimant to see a specialist regarding the left PCL. Claimant stated he was placed in another knee brace by Dr. Binder due to hyperextension of the left knee.

On April 20, 2018, Dr. Fevurly produced a supplemental report in response to a rating request. Dr. Fevurly reviewed notes from Claimant's treatment through March 12, 2018, the date of the most recent note from Dr. Binder. He also reviewed the MRI report from January 26, 2018. Dr. Fevurly did not perform a physical examination of Claimant. Dr. Fevurly testified he based his rating opinions on the physical examination and records provided by the treating orthopedist (Dr. Binder), in addition to the findings and records from the physical examination of Claimant he conducted in 2017. Dr. Fevurly wrote, "Based on the available information, it is probable that [Claimant] has reached MMI

[maximum medical improvement] from the injuries which resulted from the work event on 7/28/16."[1]

Dr. Fevurly found the work accident was the prevailing factor causing Claimant's left knee patellar fracture, possible PCL/posterolateral corner insufficiency, and left shoulder rotator cuff injury. Dr. Fevurly stated the prevailing factor causing Claimant's osteoarthritis was Claimant's age and BMI. Dr. Fevurly confirmed osteoarthritic changes of Claimant's left knee were not reported until the January 2018 MRI. Dr. Fevurly noted Claimant has permanent restrictions as a result of his conditions but did not specify future treatment recommendations in his report.

Using the AMA *Guides*,[2] Dr. Fevurly opined Claimant sustained 0 percent impairment related to his left shoulder due to full resolution of pain and regainment of full function. Regarding Claimant's left knee, Dr. Fevurly opined Claimant sustained 7 percent left lower extremity impairment for a non-displaced patellar fracture with abnormal examination findings, and 10 percent left lower extremity impairment for a cruciate ligament injury with mild laxity. These ratings combined for a total 16 percent impairment to the left lower extremity.

Claimant stated he continued to experience limping and instability of his left knee while walking. On occasion, Claimant lost his balance due to his knee instability. Claimant explained he developed stiffness and pain in his low back because of his altered gait.

Dr. Daniel Zimmerman, board certified in independent medical evaluations, first examined Claimant at his counsel's request on July 23, 2018. Claimant's chief complaint was pain and discomfort affecting the lumbosacral spine and left knee. Dr. Zimmerman reviewed Claimant's available medical records and history. He obtained x-rays of Claimant's left knee. Dr. Zimmerman reported the x-rays revealed some slight joint space narrowing laterally and osteoarthritic change affecting the lateral femoral condyle. He noted the patellar fracture line was clearly visible, not calcified, and may have healed with a fibrous union. Dr. Zimmerman also noted a scooped-out appearance of the distal portion of the patella.

Dr. Zimmerman conducted a physical examination. Claimant had pain and discomfort on examination of his lumbar spine and range-of-motion restrictions at the lumbar level, and pain over the anterolateral joint surface, infrapatellar bursa and suprapatellar bursa of the left knee. Dr. Zimmerman concluded Claimant sustained paraspinous myofascitis, left knee medial and lateral meniscal tears, and residuals of the

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[1] Fevurly Depo., Ex. 3 at 3.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

patella fracture. Dr. Zimmerman attributed Claimant's conditions to the work accident of July 2016, and noted Claimant was not yet at MMI related to the lumbosacral spine and left knee. Dr. Zimmerman recommended additional conservative medical treatment and a possible referral to an orthopedist.

Claimant returned to Dr. Zimmerman on February 5, 2020. Claimant continued to complain of pain and discomfort affecting the lumbosacral spine and left knee. Claimant also complained of pain and discomfort affecting his left foot and ankle due to the awkwardness of his gait. Claimant continued to wear a knee brace at the time of the examination. Dr. Zimmerman obtained additional x-rays of Claimant's lumbosacral spine, left knee, and left ankle/foot. After reviewing Claimant's medical records and history and performing a physical examination, Dr. Zimmerman concluded Claimant sustained chronic lumbar paraspinal fasciitis with disc space narrowing at L5-S1, lateral femoral cutaneous nerve entrapment syndrome, an ununited left patellar fracture, and left ankle chronic strain/sprain with plantar fasciitis. Dr. Zimmerman found the prevailing factor causing Claimant's conditions was the July 2016 work accident. Dr. Zimmerman noted although Claimant had achieved MMI, he would require additional future medical treatment.

Beginning with the AMA *Guides,* deviating as he deemed appropriate based upon competent medical evidence, Dr. Zimmerman opined Claimant sustained 20 percent impairment to the whole body as a result of the work accident. Dr. Zimmerman attributed 14 percent impairment at the level of the knee, or 6 percent whole person impairment, for the ununited left patellar fracture.

For Claimant's lumbar spine diagnoses, Dr. Zimmerman provided 9 percent impairment to the whole person for chronic lumbar paraspinous myofasciitis, disc space narrowing at L5-S1 and lateral femoral cutaneous nerve entrapment syndrome, citing Table 17-4, page 570, from "Motion Segment Lesions" using the Grade Modifier Tables, Tables 17-6, 17-7, 17-9 and the Net Adjustment Formula from the AMA *Guides*.

Dr. Zimmerman attributed 2 percent impairment at the ankle level, or 1 percent whole person impairment, for left ankle chronic strain/sprain with plantar fasciitis. Dr. Zimmerman testified Claimant's left ankle rating could potentially be retracted if it were found, on examination, Claimant's left ankle and foot condition had resolved.

Dr. Zimmerman testified the arthritic changes in Claimant's left knee were post-traumatic and a result of the work accident. Dr. Zimmerman noted osteoarthritic changes were not reported in Claimant's imaging studies until the MRI dated January 26, 2018.

Following a preliminary hearing held April 6, 2021, on the issue of additional medical treatment, Respondent was ordered to provide an evaluation of Claimant by an orthopedic surgeon qualified to treat PCL injuries. Dr. Amit Sahasrabudhe, a board certified orthopedic surgeon, evaluated Claimant for this purpose on December 1, 2021.

Dr. Sahasrabudhe reviewed Claimant's history and medical records, including the MRI from January 26, 2018. Dr. Sahasrabudhe noted the MRI, in his opinion, did not reveal evidence of an obvious PCL tear. Dr. Sahasrabudhe conducted a physical examination and recorded the following impression:

> On my exam today the PCL appears stable. The PCL is not the ligament that is responsible for the ligament preventing hyperextension of one's knee. When individuals have hyperextension type of clients [sic] it is typically the results of weak quadriceps muscles. This, coupled with the fact that the PCL appears stable on clinical exam, [Claimant] is obese, and has comorbidities, would lead this examiner to conclude that PCL reconstruction surgery is not indicated, even if the PCL were theoretically torn.[3]

The ALJ found Claimant sustained 14 percent permanent partial impairment to the whole body as a result of his work-related injuries to the low back and left knee. ALJ Larson also awarded future medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues he sustained 19 functional impairment to the whole body as a result of his work accident. Claimant contends the only competent medical opinion in the record is Dr. Zimmerman's, and the opinion of Dr. Fevurly is incompetent and contrary to the requirements of the AMA *Guides*. Claimant further argues the ALJ's finding Dr. Fevurly conducted an examination on April 20, 2018, is erroneous and unsupported by the record.

Respondent maintains the weight of the evidence supports the ALJ's finding Claimant sustained 14 percent permanent partial impairment to the whole body. Respondent argues Claimant is not entitled to future medical treatment because he was placed at MMI in 2018 and received no medical treatment since 2017.

K.S.A. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is

[3] Sahasrabudhe Depo., Ex. 2 at 5.

> more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

1. What is the nature and extent of Claimant's impairment?

Claimant seeks permanent partial disability compensation based on his functional impairment. 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.

The extent of functional impairment shall be based on competent medical evidence, using the AMA *Guides* as a starting point.[4]

Dr. Zimmerman assessed 19 percent[5] permanent partial impairment to the whole body as a result of his work-related injuries, including the left lower extremity and low back, with 9 percent of the overall impairment to the whole person for the low back condition. Dr. Zimmerman noted the specific conditions for which he was assessing impairment and cited to the specific provisions of the AMA *Guides* he used as a starting point. There is no indication Dr. Zimmerman's conclusions are not supported by his examination of Claimant.

Dr. Fevurly assigned Claimant 16 percent impairment to the left lower extremity, related to the knee, which converts to 6 percent whole body impairment.[6] Dr. Fevurly noted no low back complaints when he examined Claimant on February 16, 2017, but agreed an altered gait can cause low back pain.

In addition to suffering an altered gait, Claimant fell approximately four feet from the trailer of an over-the-road truck, striking his low back, left shoulder, and head on the pavement. Claimant has also walked with an altered gait since the accident. It is

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

[5] One percent of Dr. Zimmerman's initial 20 percent whole body impairment assessment was for a non-compensable ankle condition and excluded, resulting in 19 percent.

[6] *See* AMA *Guides* at 530, Table 16-10.

reasonable to conclude Claimant's suffers low back involvement resulting from his work-related injury.

Claimant argues Dr. Fevurly's impairment rating opinions are not competent medical evidence because Claimant was not at MMI when he was evaluated. The same is true with Dr. Zimmerman, because Claimant sought additional medical treatment after Dr. Zimmerman provided an impairment rating. The Board finds both Drs. Fevurly and Zimmerman equally credible.

Combining Dr. Zimmerman's 9 percent impairment to the whole person for the low back with Dr. Fevurly's 6 percent whole body impairment for the left knee, and utilizing the Combined Values Chart contained in the AMA *Guides*, produces 14 percent impairment to the body as a whole. The Board finds this a reasonable finding of overall impairment suffered by Claimant.

2. Did the ALJ err by finding Claimant was examined by Dr. Fevurly on April 20, 2018?

The ALJ noted Dr. Fevurly examined Claimant on April 20, 2018. This is incorrect. Dr. Fevurly examined Claimant on February 16, 2017. Dr. Fevurly provided a supplemental report, dated April 20, 2018, which included his assessment of impairment based upon a review of updated medical records. The ALJ's cite to the wrong date of the examination is harmless error and does not affect the weight of Dr. Fevurly's opinions.

3. Is Claimant entitled to future medical treatment?

It is the employer's duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of a compensable injury.[7] It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.[8]

Dr. Zimmerman opined Claimant could be treated with nonsteroidal medications or steroid injections. He also opined Claimant would be a candidate for a left total knee joint

[7] *See* K.S.A. 44-510h(a).

[8] *See* K.S.A. 44-510h(e).

replacement in the future, acknowledging the osteoarthritic changes in Claimant's knee were part of the reason for the potential knee replacement.

Dr. Fevurly agreed Claimant would require a total knee replacement, but believed it related to a preexisting degenerative condition, not the work-related injury by accident. When discussing future medical, the ALJ wrote:

> [W]hether Claimant will need a knee replacement in the future because of the current work injury is not the relevant question for the Court at this time. The only question is whether "it is more probably true than not that additional medical treatment will be necessary." Dr. Fevurly does not conclusively answer that question; his opinion concerns the cause of a potential knee replacement. At this point the Court can only address the question of whether future medical benefits should be left open. The question of whether a knee replacement Claimant may or may not need in the future is related to the work injury is not ripe. Such a question will be addressed at a future Post-Award Medical Hearing if the need arises.[9]

The Board agrees. Through the testimony of Dr. Zimmerman, Claimant met the burden of proving the need for future medical treatment pursuant to K.S.A. 44-510h(e). Whether the need for a knee replacement is related to a preexisting condition or the compensable work-related injury by accident is an issue to be determined in post-award medical treatment proceedings. At the present time, Claimant is not asking for a total knee replacement. The issue is premature. The award of future medical is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of ALJ Troy A. Larson, dated December 30, 2022, is affirmed.

[9] ALJ Award at 5.

IT IS SO ORDERED.

Dated this _____ day of August, 2023.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Daniel L. Smith, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Hon. Troy A. Larson, Administrative Law Judge