

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DERON BUTLER)	
Claimant)	
)	
V.)	CS-00-0285-928
)	AP-00-0456-096
THE GOODYEAR TIRE AND RUBBER COMPANY)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Deron Butler requested review of the January 26, 2021, Award entered by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on May 6, 2021. Roger D. Fincher of Topeka, Kansas, appeared for Mr. Butler. John D. Jurcyk of Kansas City, Kansas, appeared for self-insured respondent.

The ALJ found Mr. Butler sustained 11 percent impairment to the right shoulder by averaging the two physicians' opinions. The ALJ cited the Kansas Supreme Court's decision in *Johnson v. U.S. Food Service*,¹ noting the *AMA Guides*, 6th ed. (Sixth Edition)² can be used in addition to "competent medical evidence" for whole body injuries pursuant to KSA 44-510e(a)(2)(B), but only the Sixth Edition may be used to rate scheduled injuries based upon the plain language of KSA 44-510d(b)(23), which does not reference "competent medical evidence." The ALJ also found it is more likely than not Mr. Butler will require future medical treatment as the result of his work-related injury.

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

ISSUES

Mr. Butler argues he sustained 28 percent impairment of the whole body. Mr. Butler contends the ALJ erroneously applied the law, and use of the Sixth Edition is not mandatory for determining impairment ratings. Mr. Butler also argues the Sixth Edition

¹ *Johnson v. U.S. Food Service*, ___ Kan. ___, 478 P.3d 776, 780 (2021).

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

mandate fails to provide an adequate remedy and violates Section 18 of the Kansas Constitution.

Respondent argues Mr. Butler sustained 7 percent impairment to the right shoulder. Further, respondent argues Mr. Butler failed to sustain his burden of proving his entitlement to future medical treatment.

At oral argument, neither party requested this matter be remanded to the ALJ for further proceedings.

The issues for the Board's review are:

1. What is the nature and extent of Mr. Butler's disability; more specifically, are the ALJ and the Board bound by the Sixth Edition in determining the extent of Mr. Butler's impairments?
2. Is the mandated use of the Sixth Edition for scheduled injuries under K.S.A. 44-510d unconstitutional?
3. Is Mr. Butler entitled to future medical treatment?

FINDINGS OF FACT

Mr. Butler worked for respondent for 10 years before sustaining an injury on January 11, 2018. On that day, Mr. Butler was performing his duties as a radial truck tire builder when he felt immediate pain in his right shoulder. Mr. Butler reported the injury to respondent and was provided medical treatment.

On January 19, 2018, Mr. Butler began treatment with Dr. Michael Dempewolf, a board certified orthopedic surgeon. Dr. Dempewolf initially diagnosed Mr. Butler with a rupture of the long head of his biceps tendon, which is not necessarily a surgical problem. Dr. Dempewolf ordered an MRI of Mr. Butler's right shoulder to rule out any other possible abnormalities. In his January 24, 2018, notes, Dr. Dempewolf reviewed the MRI and wrote:

An MRI done recently at St. Francis Hospital was reviewed which revealed complete rupture of the long head of the biceps. There is partial-thickness articular sided tearing of the supra spinatus without evidence of full-thickness tear. Cystic changes in the greater tuberosity humeral head consistent with chronic repetitive trauma. Otherwise no significant full-thickness tear.³

³ Dempewolf Depo., Ex. 2 at 8.

Dr. Dempewolf provided a steroid injection and recommended physical therapy. Mr. Butler had some improvement but continued to have symptoms. Surgery was discussed and eventually performed on April 3, 2018.

Dr. Dempewolf performed a right shoulder arthroscopic repair of a massive rotator cuff tear and right shoulder extensive debridement on April 3, 2018. Dr. Dempewolf testified he was surprised to see the size of the tear in Mr. Butler's right shoulder because it did not match what was seen on the MRI. Mr. Butler's rotator cuff tear involved the entire subscapularis, supraspinatus, and infraspinatus tendons, and he had traumatic rupture of the long head of the biceps with degenerative labral tearing. Dr. Dempewolf explained he repaired Mr. Butler's rotator cuff tear by inserting "little plastic anchors" to secure the tendons to the bone.⁴ Mr. Butler's postoperative care included use of a sling and physical therapy.

Over the next few months, Mr. Butler's function began to decline and his pain level increased. Dr. Dempewolf ordered another MRI on September 26, 2018, which revealed full-thickness tears of the supraspinatus and infraspinatus tendons, which were retracted to near the superior glenoid. Dr. Dempewolf testified these recurrent tears were a natural, direct, and probable consequence of the original injury and not caused by any intervening trauma.

On November 6, 2018, Dr. Dempewolf completed a superior capsular reconstruction, a surgery performed for an irreparable rotator cuff tear. A piece of cadaver dermis tissue was used to essentially patch a hole in Mr. Butler's rotator cuff. Mr. Butler again followed surgery with extensive physical therapy and made better progress. Dr. Dempewolf released Mr. Butler to full-duty work on August 12, 2019.

Mr. Butler returned to work at respondent in a different position, but continued to have pain complaints. He returned to Dr. Dempewolf, who ordered a functional capacity evaluation to better determine Mr. Butler's capabilities. Based on the results, Dr. Dempewolf provided permanent restrictions of no lifting more than 10 pounds overhead with the right arm and no lifting more than 20 pounds overhead with both arms. Dr. Dempewolf determined Mr. Butler to be at maximum medical improvement (MMI) on October 4, 2019. He did not believe Mr. Butler required additional medical treatment.

Using the *AMA Guides*, 4th ed. (Fourth Edition), Dr. Dempewolf opined Mr. Butler sustained 20 percent impairment to the right upper extremity. Dr. Dempewolf concluded Mr. Butler sustained 7 percent impairment to the right upper extremity utilizing the Sixth Edition.

⁴ Dempewolf Depo. at 6-7.

On November 1, 2019, Mr. Butler was evaluated at his counsel's request by Dr. William Hopkins, a board certified orthopedic surgeon. Dr. Hopkins reviewed Mr. Butler's medical records, history, and performed a physical examination. Dr. Hopkins agreed Mr. Butler was at MMI and opined the work accident was the prevailing factor causing Mr. Butler's condition. Dr. Hopkins found Mr. Butler would require future medical treatment in the form of a physician's care, including possible steroid injections.

Under the Fourth Edition, Dr. Hopkins opined Mr. Butler sustained a combined 26 percent permanent partial impairment of the upper extremity, consisting of 20 percent for musculoskeletal components of the injury and 7 percent for loss of range of motion. Using the Sixth Edition, Dr. Hopkins determined Mr. Butler sustained a combined 16 percent impairment of the shoulder, consisting of 9 percent impairment from musculoskeletal injuries and 8 percent from loss of motion.

Mr. Butler continues to work for respondent in another position, as he was unable to perform his former job with his restrictions. Mr. Butler testified his shoulder is weak, with occasional bouts of numbness and tingling. He has not had any medical treatment for his shoulder since ending physical therapy, and he takes over-the-counter medication for his pain.

PRINCIPLES OF LAW

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

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.

K.S.A. 44-510d(b)(23) states:

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. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

1. What is the nature and extent of Mr. Butler's disability; more specifically, are the ALJ and the Board bound by the Sixth Edition in determining the extent of Mr. Butler's impairments?

Statutes are meant to be interpreted based on plain language.⁵ Judicial blacksmithing is not permitted.⁶ Words not contained in a statute should not be added to the law.⁷ In *Johnson v. U.S. Food Service*, the Supreme Court wrote:

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *In re Joint Application of Westar Energy & Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821 (2020). In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. 311 Kan. at 328, 460 P.3d 821. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). But if a statute's language is ambiguous, we

⁵ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

⁶ See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

⁷ 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.").

will consult our canons of construction to resolve the ambiguity. See *In re Westar Energy*, 311 Kan. at 328, 460 P.3d 821.⁸

K.S.A. 44-510e(a)(B) requires the extent of permanent partial general disability for unscheduled injuries to be established by competent medical evidence and based on the Sixth Edition. In *Johnson*, 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.”⁹ *Johnson* held K.S.A. 44-510e(a)(2)(B) requires functional impairment ratings be proved by competent medical evidence and use of the Sixth Edition is only a starting point for any medical opinion.¹⁰

Johnson states:

The use of the phrase “based on” indicates the Legislature intended the Sixth Edition to serve as a standard starting point for the more important and decisive “competent medical evidence.” That is, “the application of a standard, while setting the legal parameters of any possible final resolution, leaves work to be done. See Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 959-68 (1995) (in depth analysis of the ‘continuum from rules to untrammelled discretion, with factors, guidelines, and standards falling in between’).” *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting).¹¹

The language mandating the use of the AMA *Guides* in K.S.A. 44-510e(a)(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.”

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.

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).

⁸ *Johnson*, 478 P.3d at 779.

⁹ *Id.* at 780.

¹⁰ *See id.*

¹¹ *Id.*

2. Is the mandated use of the Sixth Edition for scheduled injuries under K.S.A. 44-510d unconstitutional?

The Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.¹² The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.¹³ This issue is reserved for a court of competent jurisdiction.

3. Is Mr. Butler entitled to future medical treatment?

The Board agrees with the ALJ's conclusion Mr. Butler is entitled to future medical treatment. K.S.A. 44-510h(e) requires Mr. Butler to prove it is more probably true than not true there is a need for medical treatment after reaching MMI, as based on medical evidence. Dr. Hopkins definitively stated he believed Mr. Butler would need future care by a physician. Dr. Hopkins' opinion is consistent with Mr. Butler's history of multiple surgeries and is given more weight than Dr. Dempewolf's opinion Mr. Butler will need no additional treatment.

CONCLUSION

Use of the Sixth Edition is mandated by K.S.A. 44-510d(b)(23) in this matter. The Board does not have jurisdiction to rule on constitutional issues. Claimant is entitled to future medical treatment under K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth dated January 26, 2021, is affirmed.

IT IS SO ORDERED.

¹² See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (Holding use of the AMA Guides, 6th Edition, for a scheduled injury was unconstitutional as applied in that case only).

¹³ *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

Dated this _____ day of May, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Mr. Butler
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Hon. Steven M. Roth, Administrative Law Judge