

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TAMMY CLINE)	
Claimant)	
v.)	
)	AP-00-0462-623
SPIRIT AEROSYSTEMS INC.)	CS-00-0128-103
Respondent)	
and)	
)	
NEW HAMPSHIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the November 23, 2021, Award by Administrative Law Judge (ALJ) Ali Marchant. The Board heard oral argument on March 24, 2022.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Vince Burnett and Brock Baxter appeared for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Court-Ordered Independent Medical Examination (COIME) report of John Babb, M.D., dated March 26, 2018; Transcript of regular hearing dated April 8, 2021, with exhibits A1-3; Evidentiary deposition of Pedro A. Murati, M.D., dated April 15, 2021, with exhibits 1-5; Evidentiary deposition of John R. Dickerson, M.D., with exhibits 1-4; Evidentiary deposition of John P. Estivo, D.O., dated June 8, 2021, with exhibits 1-3; Evidentiary deposition of Chris D. Fevurly, M.D., dated June 22, 2021, with exhibits 1-2; Evidentiary deposition of John R. Babb, M.D., dated July 12, 2021, with exhibits 1-3; the stipulations and documents of record filed with the Division, and the parties' briefs.

ISSUES

1. Did Claimant's cervical spine injury arise out of and in the course of her employment and was the work accident of September 26, 2017, the prevailing factor causing injury to Claimant's cervical spine and subsequent need for surgery?

2. What is the nature and extent of Claimant's disability?
3. Is Claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant is 55 years old and has worked for Respondent and its predecessor, Boeing, since 1997. Since 2017, Claimant has worked for Respondent as a process mechanic, finishing airplane parts. Claimant deburs sharp edges and smooths imperfections from the airplane parts.

The parties stipulated Claimant suffered personal injury by accident on September 26, 2017, when an L dolly struck a metal table pinning Claimant between it and another metal table. Both tables were bolted to the floor. Claimant was unable to ambulate and was taken by ambulance to the St. Francis emergency room (ER). Claimant reported pain in her hips and low back. X-rays were taken, Claimant was given a shot for pain and referred to her primary care physician (PCP) for follow up.

Claimant received medical treatment from Spirit Medical before Respondent authorized John P. Estivo, D.O., to continue her care. Dr. Estivo provided Claimant with conservative care and treatment, medication, physical therapy, injections and temporary work restrictions, from October 11, 2017, until her release at maximum medical improvement (MMI) on February 1, 2018. Throughout her treatment, Claimant did not have cervical pain complaints. Dr. Estivo performed cervical exams on all of Claimant's appointments. None of those exams revealed any cervical abnormalities. Dr. Estivo released Claimant to full duty. He opined she has an 11% whole person impairment using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*) for her lumbar spine and bilateral hips.

Claimant was evaluated by John R. Babb, M.D., on March 26, 2018, for a Court-ordered independent medical evaluation (IME). Claimant presented to Dr. Babb with bilateral hip pain radiating into her back, and bilateral buttock pain. Dr. Babb diagnosed low back pain with degenerative disc disease, bilateral hip pain, and bilateral sacroiliac joint pain. Dr. Babb recommended additional treatment for Claimant's hips including a repeat MRI of her pelvis. He did not recommend further treatment for the lumbar spine. Dr. Babb was authorized to provide treatment which included physical therapy and SI joint injections. The May 18, 2018, MRI showed a complete resolution of Claimant's bilateral superficial gluteal fluid collections and there was no new soft tissue or bony abnormalities.

Dr. Babb saw Claimant on November 30, 2018. She reported walking without pain and doing well. Claimant also reported she had neck surgery. Dr. Babb released Claimant at MMI and returned her to work, with no limitations. Throughout her treatment, Claimant did not have cervical pain complaints. Dr. Babb testified had Claimant reported cervical

complaints, he would have examined her and would have tried to obtain authorization for treatment if treatment was indicated.

Claimant returned to Dr. Babb on July 1, 2019, because of renewed complaints of pain and tenderness in her hips. Claimant did not mention her cervical spine complaints or associate them to her workers compensation injury. Dr. Babb injected Claimant's right and left hips, recommended physical therapy, and prescribed anti-inflammatory medication. At the request of Claimant, Dr. Babb did not assign work restrictions. Claimant's bilateral hip pain persisted, so she returned to Dr. Babb on July 26, 2019. Dr. Babb injected Claimant's right hip, but released her at MMI with no restrictions for her left hip.

Claimant followed up with Dr. Babb on August 16, 2019. Claimant reported she got 80 percent relief from the right SI joint injection and physical therapy. Dr. Babb recommended Claimant finish her physical therapy, continue working without restrictions and return in six weeks. Dr. Babb saw Claimant on September 27, 2019, Claimant reported receiving relief from her pain, was ready to be released, but wanted to keep her medical open for additional injections if needed. Dr. Babb agreed periodic injections would most likely be needed in the future and released Claimant at MMI without restrictions.

Claimant sought work restrictions from Dr. Babb on October 19, 2020, due to a change in her job duties which were aggravating her hip. Dr. Babb ordered a functional capacity evaluation (FCE). Dr. Babb ordered permanent restrictions consistent with the FCE results.

Dr. Babb testified Claimant did not report any cervical or neck complaints during the time he provided treatment. He did not perform any physical examinations of her cervical spine. Claimant, on one occasion, mentioned she had undergone neck surgery. Dr. Babb testified, if Claimant injured her neck at work, it should have presented within the first couple of weeks after the accident and he would have expected Claimant to express some cervical or neck complaints.

Claimant testified she never shared her cervical complaints with Dr. Babb because she did not associate them with her September 26, 2017, accidental injury. Claimant testified she reported her cervical complaints to Respondent, but does not recall whom she talked to at Spirit Medical. When Respondent refused to provide treatment for her cervical complaints, Claimant used her personal health insurance to pay for her cervical spine treatment, and surgery.

At her attorney's request, Claimant saw Pedro A. Murati, M.D., on four separate occasions. Claimant's first two appointments (January 2, 2018 and April 4, 2019) with Dr. Murati were for treatment recommendations for her back and hips. Dr. Murati did not have medical records prior to Claimant's injury to review. Claimant did not report any symptoms or complaints regarding her cervical region.

On May 2, 2019, Claimant was examined by Dr. Murati for the third time for the purpose of providing a functional impairment rating. Dr. Murati's impressions were essentially the same as his prior reports except he added "Status post anterior spinal fusion extending from C4 through C7." He opined the prevailing factor for all Claimant's diagnosed conditions was the June 26, 2017, work-related accidental injury. At Claimant's request, he did not assign any permanent work restrictions. Dr. Murati indicated future medical treatment would be required. He opined Claimant has a 34% whole person impairment for all of her injuries using the *Guides*, with 28% of that rating assigned for Claimant's cervical radiculopathy with status post C4 through C7 fusion.

On November 24, 2020, Claimant was examined by Dr. Murati for the fourth and final time. Dr. Murati's impressions remained the same except he added bilateral SI joint dysfunction. He maintained his opinions regarding prevailing factor, the need for future medical treatment and assigned permanent work restrictions. Dr. Murati altered his functional impairment rating, but the overall impairment remained the same at 34% to the whole person using the *Guides*. His 28% functional impairment rating for the neck did not change.

Regarding Claimant's cervical spine injury, Dr. Murati changed his prevailing factor opinion when he testified Claimant's cervical injury and need for treatment arose out of the "repetitive nature of her activities at Spirit."¹

- A. Well, if that's in the report, that might be correct. However, this really came on over time. If she had had an injury that needed a three-level fusion suddenly, there would have been severe trauma, so this came on as a result of her work over time.
- Q. So you're changing your opinions on prevailing factor from the neck being related to the specific accident of September 26th of 2017 to a repetitive injury claim?
- A. Correct.²

At Respondent's request, Claimant saw Chris D. Fevurly, M.D., on December 5, 2019. He diagnosed Claimant with injuries occurring directly from the impact of her lower half being pinched between two tables. He opined there were no acute fractures to the pelvis, hips, or lumbar spine. Further, Claimant initially suffered soft tissue injuries to the upper thighs and pelvis later developing into low back pain and inflammation in the bilateral hip trochanter bursa. He opined the September 26, 2017, work-related accidental injury was the prevailing factor causing the injuries to her hips, thighs and low back.

¹ Murati Depo. at 10.

² *Id.* at 24.

Regarding Claimant's cervical complaints, Dr. Fevurly opined the mechanism of Claimant's injury, "essentially a pinch or crush of her lower half of her body, would not produce injury to her cervical spine." This, coupled with the lack of cervical complaints found in the medical records, caused Dr. Fevurly to conclude Claimant's September 26, 2017, work-related accidental injury was not the prevailing factor for Claimant's cervical complaints.

Dr. Fevurly opined Claimant has a 5.8% whole person impairment using the *Guides*, for injuries sustained to her hips and low back. Dr. Fevurly opined Claimant did not need permanent restrictions or future medical treatment.

Claimant first noticed symptoms in her neck approximately 6-7 months after her injury. She testified when her hip pain began to subside, she noticed numbness in her hands and arms. Claimant testified she requested treatment from Spirit medical for her upper extremity numbness, but was denied. She sought medical treatment for her cervical spine complaints from her family physician. Claimant received physical therapy and epidural steroid injections which failed to provide relief. Her primary care physician referred her for a surgical consultation.

Claimant was referred to John R. Dickerson, M.D., a neurosurgeon for a surgical consultation. Claimant saw Dr. Dickerson on June 7, 2018. She reported neck pain and numbness down the right arm. Claimant advised the symptoms started after an accident at work. Dr. Dickerson's review of the March 29, 2018, MRI revealed acute herniated discs at C4-5 and C6-7. Dr. Dickerson noted he was unaware of any neck problems prior to her work-related injury.

Following an unsuccessful trial of conservative treatment, Dr. Dickerson performed an anterior cervical discectomy and three level fusion at C4-5, C5-6 and C6-7, on October 19, 2018. On December 6, 2018, Claimant reported to Dr. Dickerson her neck pain and radiating arm pain had completely resolved and denied any numbness or tingling in her upper extremities. Dr. Dickerson placed a 30 pound weight restriction on Claimant for eight weeks while she completed physical therapy. After completion of therapy, Claimant was released without restrictions.

Dr. Dickerson initially opined Claimant's neck injury was related to her work injury. He did so believing Claimant's neck complaints began immediately after her injury and she did not have any prior neck complaints or treatment. When informed, Claimant had not expressed any cervical complaints for six months following the injury and she was involved in a motor vehicle accident approximately eight months prior to the work injury, Dr. Dickerson admitted his causation opinion could be questioned.

- Q. So if the history is that her first report of neck complaints wasn't until March of 2018, six months after the work injury, that kind of places that in question, doesn't it?

- A. Well, for our history, you know, she had said that her neck pain started after the work - - you know, like immediately temporarily related to the work injury. That was my understanding. But, you're right, if she didn't have any symptoms for six months and then has symptom in six months, then, yeah, that's probably not caused it. Because it should be, your neck pain should come first from a whiplash injury. Whether it's a car accident or getting hurt at work, your neck should hurt. I mean, that's the idea of a whiplash injury, you damage the ligaments, tendons and the connection points in the muscle in your neck and the fibers and the lining around the disc. And then as time goes by those fibers weaken and then the disc herniates. That's the idea behind a whiplash leading to a disc herniation.
- Q. So if the evidence doesn't support that she reported any neck complaints for six months then your conclusions as to causation are in question?
- A. Correct.³

The ALJ found Claimant did not meet her burden of proving she met with personal injury by accident arising out of and in the course of her employment with Respondent regarding her cervical spine injury; Claimant did give Respondent timely notice of her alleged cervical spine injury; Claimant was not entitled to payment of medical bills or temporary total disability benefits; Drs. Estivo, Murati, and Fevurly's opinions regarding functional impairment ratings were equally credible, averaged them, and awarded Claimant an 8.93% permanent partial functional impairment to the body as a whole; Claimant was awarded future medical benefits.

Claimant requests the Board find her cervical spine injury and subsequent medical treatment compensable based upon Claimant's testimony and the opinions of Dr. Murati and Dr. Dickerson. Claimant urges the court to award Dr. Murati's 34% to the body as a whole and future medical benefits based upon the opinions of Dr. Murati and Dr. Babb. Finally, Claimant asks the Board to award TTD, payment of outstanding medical bills and out of pocket expenses incurred by Claimant for her cervical spine medical treatment.

Respondent request the Board affirm the ALJ's finding Claimant's cervical injury is not compensable; if the Board finds the cervical spine injury compensable, Claimant's recovery should be limited to unauthorized medical reimbursement of \$500; Claimant's whole body permanent functional impairment rating should be 8.4%, based on the opinions of Dr. Fevurly and Dr. Estivo; and, the ALJ's award of future medical benefits should be reversed.

³ Dickerson Depo. at 26-27.

PRINCIPLES OF LAW AND ANALYSIS

1. **Claimants cervical spine injury, did not arise out of and in the course of her employment and is not the prevailing factor causing injury to her cervical spine and subsequent need for surgery.**

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁴ The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁵ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁶

The parties stipulated Claimant suffered personal injury by accident on September 26, 2017, to her hips and low back. The main issue is whether Claimant's neck injury and subsequent treatment is compensable as a part of the claim. The ALJ found Claimant failed in her burden of proving her cervical spine injury arose out of and in the course of her employment and the admitted accidental injury was the prevailing factor causing her cervical spine injury and subsequent treatment. In so doing, the ALJ relied upon the following evidence:

1. The absence of cervical complaints made to Dr. Estivo in the treatment he provided immediately after her injury.
2. Dr. Estivo examined Claimant's cervical spine at each appointment. None of those examinations revealed any abnormalities to the cervical spine.
3. Claimant was examined by Dr. Murati on September 26, 2017 and Dr. Babb on March 26, 2018, and Claimant made no complaints of cervical or neck pain.
4. Dr. Babb provided authorized medical care and treatment. There is no reference in any of his medical records of complaints of cervical or neck pain.
5. Claimant testified she requested medical treatment for her cervical spine from Respondent, but none was provided. No formal request for medical treatment was made.
6. Claimant testified she did not notice cervical spine complaints until six months had passed since her injury. Drs. Estivo, Babb and Fevurly testified they would expect symptoms to be present before six months had passed.

⁴ See K.S.A. 44-508(d).

⁵ See K.S.A. 44-508(d),(g).

⁶ See K.S.A. 44-508(f)(2).

7. Dr. Fevurly testified being pinched between two tables would not have caused the requisite forward/backward motion of the head to cause a whiplash injury.
8. Dr. Dickerson was the only physician to opine Claimant's injury was the prevailing factor causing her cervical spine injury and subsequent treatment. His opinion, however, was based on his understanding Claimant developed neck symptoms immediately after her accidental injury. Moreover, he opined it would not be uncommon for Claimant not to experience numbness for six months after her injury, but he would expect her to have neck pain.

After noting the above evidence, the ALJ reasoned and found:

The Court finds that the evidence does not establish that Claimant's neck pain began immediately after her work-related accident. Claimant's own testimony during the regular hearing was that she did not develop cervical spine or neck pain complaints until approximately six months after the accident. There is no evidence in any of Claimant's medical records to support a finding that Claimant had neck pain immediately after her accident. Dr. Dickerson testified that Claimant would have to have had neck pain immediately after the accident in order for the accident to have caused her cervical disk herniation and the need for surgery, and the evidence does not demonstrate that Claimant had neck pain until six months after the accident.

Based on the foregoing, the Court finds that Claimant has not met her burden to prove that she met with personal injury by accident arising out of and in the course of her employment with Respondent with regard to her cervical spine injury and associated surgery. Claimant's request for workers compensation benefits related to her cervical spine injury and surgery is hereby considered and denied.⁷

The ALJ's Award is well-reasoned and supported by the evidence. The Board agrees with those findings and conclusions. Accordingly, the determination denying compensability of Claimant's cervical complaints in the Award is affirmed. Because Claimant did not meet her burden of proving she sustained a compensable injury to her cervical spine, the Award denying Claimant's request for payment of medical bills, reimbursement of out of pocket expense and temporary total disability benefits associated with Claimant's cervical spine surgery is also affirmed.

2. Nature and extent of Claimant's disability.

Claimant's award was limited to her functional impairment. The ALJ further found the opinions of Drs. Estivo (11% body as a whole), Murati (10% body as a whole), and

⁷ See ALJ Award (Nov. 23, 2021) at 21.

Fevurly (5.8% body as a whole) regarding functional impairment ratings to the back and hips to be equally credible, averaged them, and awarded Claimant an 8.93% permanent partial functional impairment to the body as a whole as a result of her September 26, 2017, work-related injuries. The Board agrees with the ALJ's analysis. Accordingly, the award of permanent partial disability based on an 8.93% functional impairment of the body as a whole is affirmed.

3. Claimant is entitled to future medical benefits.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.⁸ 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.⁹ Here, the ALJ found:

Dr. Babb, who was Claimant's authorized treating physician, agreed that Claimant has needed SI joint injections since her accident, it is possible that she will continue to need those injections periodically in the future. Dr. Babb recommended that Claimant return to him for additional medical treatment if she has a recurrence of symptoms. Dr. Murati similarly testified that Claimant will more likely than not require future medical treatment as a result of her work-related injuries and identified several possible future treatment modalities. Dr. Fevurly was the only physician who believed that Claimant had maximized her recovery and would not require any future medical treatment related to her work-related injuries.

In light of Claimant's need to return to Dr. Babb for additional treatment on more than one occasion since her release, the Court finds the opinions of Dr. Babb and Dr. Murati to be supported by the evidence. The Court finds that Claimant has met her burden to prove by a preponderance of the evidence that it is more likely than not that she will require future medical treatment as a result of her work-related injuries. Future medical treatment will be considered upon proper application.¹⁰

The Award of future medical treatment by the ALJ is well-reasoned and supported by the record. Therefore, the award of future medical treatment contained in the Award is affirmed.

⁸ See K.S.A. 44-510h(a).

⁹ See K.S.A. 44-508h(e).

¹⁰ See ALJ Award (Nov. 23, 2021) at 24.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Ali Marchant dated November 23, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant
Vince Burnett, Attorney for Respondent and its Insurance Carrier
Hon. Ali Marchant, Administrative Law Judge