

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|--------------------------------|---|----------------|
| GILMA DE PAZ SAGASTUME |) | |
| Claimant |) | |
| V. |) | |
| |) | AP-00-0463-778 |
| TYSON FRESH MEATS, INC. |) | CS-00-0329-059 |
| Self-Insured Respondent |) | |

ORDER

Claimant requested review of the February 17, 2022, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 9, 2022.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. Thomas G. Munsell appeared for self-insured 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 July 8, 2021; the transcript of the Regular Hearing by Deposition of Gilma de Paz Sagastume from June 8, 2021; the transcript of the Evidentiary Deposition of Doug Lindahl from May 24, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of George G. Fluter, M.D., from June 2, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Zaki Ibrahim, M.D., from June 8, 2021, with exhibits attached; the transcript of the Deposition of Terrence Pratt, M.D., from October 18, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Aly Gadalla, M.D., from October 29, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Sylvia Cohn from January 4, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Barbara Larsen from January 17, 2022, with exhibits attached; and the documents of record filed with the Division.

ISSUE

What is the nature and extent of Claimant's disability?

FINDINGS OF FACT

This claim is related to another claim, CS-00-0167-328, which has an accident date of August 19, 2015. The parties stipulated all ratings given by any health provider shall be divided between these two claims, with 75 percent attributed to the present claim and the remaining 25 percent to CS-00-0167-328.

Claimant worked for Respondent cutting beef. Claimant explained, due to her stature, she had to reach with effort and hold her head in an awkward position to perform her job duties. Claimant felt pain in the back of her head, in her neck, and in her right shoulder. The stipulated accident date for her repetitive trauma is July 29, 2015.

Claimant underwent extensive conservative treatment and worked an accommodated position at Respondent before she was terminated on June 30, 2016. Barbara Larsen, Respondent's complex HR manager at the time, explained Respondent does whatever it can to accommodate a worker on restricted duties. If the worker chooses not to work an accommodated position, a declination form must be completed. Additional policies state employees may only use a cell phone while on break, and employees may not leave the production floor without permission from a supervisor. Each employee is provided an ID badge by Respondent, which must be produced upon request.

Ms. Larsen testified Claimant was brought to her office by a supervisor on June 22, 2016. Ms. Larsen stated Claimant refused to work her accommodated position and also refused to sign a declination form. Ms. Larsen said Claimant began to get "pretty loud," so she asked Claimant for her ID in an attempt to provide a cool-down period.¹ Claimant refused to give her ID to Ms. Larsen. After the third request for her ID, Ms. Larsen informed Claimant she was insubordinate. Claimant then dialed 911, requested help, and left the premises in an ambulance.

Claimant reportedly did not remain in her work area, but could be found in the hallway away from her work area. Claimant also, against the employer's policy, used her cell phone when not on break. Ms. Larsen indicated Claimant was placed on indefinite suspension until she was terminated for insubordination on June 30, 2016. Claimant denied leaving her work area without permission. According to claimant, she followed her supervisors' instructions. Claimant testified she was not told the reason for her termination, and never completed any termination paperwork.

Claimant continued conservative treatment with various physicians, including two orthopedic surgeons. Claimant underwent diagnostic testing on her cervical spine and her hands, having been diagnosed with mild carpal tunnel syndrome.

¹ Larsen Depo. at 9.

Claimant began treatment at Compass Behavioral Health on October 3, 2016, where she was diagnosed with persistent adjustment disorder, with mixed anxiety and depression. Claimant attributed her complaints to chronic pain associated with her work injuries.

Dr. Aly Gadalla, board certified in internal medicine, examined Claimant on February 6, 2019, at Respondent's request. Claimant's chief complaint was pain in her right hand, arm, and neck. Dr. Gadalla reviewed Claimant's medical records, history, and performed a physical examination. Dr. Gadalla found Claimant sustained right hand and arm pain and right carpal tunnel syndrome related to her work activities. He found she sustained neck pain, anxiety, and depression unrelated to her employment. Dr. Gadalla determined Claimant to be at maximum medical improvement and recommended she take medication as needed for pain and inflammation.

Using the *AMA Guides*,² Dr. Gadalla initially rated Claimant with 1 percent whole person impairment. During his deposition, he raised his impairment rating to 2 percent whole person impairment. Dr. Gadalla limited his impairment opinion to Claimant's right hand. He testified he found an insignificant amount of evidence of soft tissue involvement in Claimant's neck and shoulder area, which did not warrant a rating. Dr. Gadalla did not impose permanent restrictions.

Claimant underwent a cervical MRI on May 22, 2019, which was read to reveal:

1. Mild spinal stenosis at C5-6 with slight spinal cord deformity due to a disc bulge and disc protrusion. No cord edema or myelomalacia is seen.
2. Mild disc bulges at C3-4 and C4-5, without spinal stenosis or nerve root compression.³

An MRI of Claimant's right shoulder, taken the following day, was unremarkable other than mild acromioclavicular osteoarthritis.

Dr. George Fluter, board certified in physical medicine and rehabilitation, examined Claimant on June 10, 2019, at her counsel's request. Claimant complained of constant sharp, shooting, burning pain affecting the back of her neck, her neck/upper back, her right shoulder, and her right upper extremity. Dr. Fluter reviewed Claimant's history, medical records, performed a physical examination, and found:

1. Status post work-related injury; 07/29/15 and 08/19/15.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

³ Ibrahim Depo., Ex. 1 at 21.

2. Neck/right upper extremity pain/dysesthesia.
3. Right shoulder impingement/tendonitis/bursitis.
4. Right elbow lateral epicondylitis.
5. Right De Quervain's tenosynovitis.
6. Headache, likely cervicogenic.
7. Cervicothoracic strain/sprain.
8. Probable upper extremity radiculitis.
9. Right carpal tunnel syndrome.
10. Adjustment disorder with mixed anxiety and depressed mood.⁴

Dr. Fluter determined Claimant's work was the prevailing factor in causing her conditions. He imposed permanent restrictions of a physical demand level between sedentary and light, with limitations on the use of Claimant's right upper extremity. Dr. Fluter recommended additional medical treatment.

Using the *AMA Guides*, Dr. Fluter determined Claimant sustained a combined 12 percent whole person impairment. He testified:

The Sixth Edition is a little bit different because it does have some diagnostic criteria for the upper extremities, including carpal tunnel syndrome and different conditions affecting the different joints of the upper extremity, the shoulder, the elbow and the wrist. So I used the appropriate sections of the Sixth Edition to determine upper extremity impairment for carpal tunnel, for the conditions affecting the shoulder, for impingement, at the elbow for epicondylitis, and at the wrist for de Quervain's tenosynovitis, and combined that with the whole – and combined those to a total upper extremity impairment, converted that to a whole person equivalent. And then combined it with whole person impairment of 2 percent for the cervical spine, soft tissue and nonspecific conditions, and also 2 percent whole person impairment for the thoracic spine, again, soft tissue and nonspecific conditions. Combining those values came – ended up with a 12 percent total whole person impairment.

I did not determine any impairment for any psychiatric, psychological or emotional conditions because that's really kind of beyond the scope of my education, training and experience.⁵

Dr. Terrence Pratt conducted a Court-ordered independent medical evaluation (IME) on December 10, 2019. Claimant complained of cervical discomfort and symptoms extending from the right shoulder to the thumb. Dr. Pratt reviewed Claimant's history and available medical records, which did not include radiographic studies. Dr. Pratt also

⁴ Fluter Depo., Ex. 2 at 9.

⁵ Fluter Depo. at 25-26.

conducted a physical examination. Claimant's responses were at times inconsistent, and Dr. Pratt noted his evaluation was limited. He provided the following impression:

Mild right carpal tunnel syndrome.
Cervical spondylosis without stenosis.
Chronic radial collateral ligament injury of the right thumb.
Right shoulder syndrome.
Reported pain disorder with both psychological features and general medical condition.
Reported adjustment disorder with mixed anxiety and depressed mood.⁶

Dr. Pratt opined Claimant's work event was the prevailing factor causing cervical soft tissue involvement and carpal tunnel syndrome. Dr. Pratt imposed restrictions, recommending Claimant avoid use of vibratory tools, no lifting in excess of 10 pounds or pushing/pulling in excess of 20 pounds, and avoid overhead activities. Dr. Pratt also recommended Claimant not perform constant activities with the distal right upper extremity. Dr. Pratt suggested Claimant be reassessed by a surgical specialist for carpal tunnel syndrome should she have an increase in symptoms. Dr. Pratt originally assigned Claimant with 4 percent whole person impairment utilizing the *AMA Guides*. In an addendum report dated May 24, 2021, Dr. Pratt determined, using the *AMA Guides* and competent medical evidence, Claimant sustained 8 percent impairment to the whole person as a result of her work injuries. Dr. Pratt attributed 6.75 percent of this impairment rating to the July 2015 accident.

Dr. James Eyman, licensed psychologist, examined Claimant on February 14, 2020, for a Court-ordered independent psychological evaluation (IPE). Dr. Eyman previously evaluated Claimant in March 2017. Dr. Eyman reviewed Claimant's history, medical records, performed a psychological evaluation, and concluded:

[Claimant's] health records, and the information obtained from the current evaluation, indicate that she began to experience psychological problems after her work-related injuries in July and August 2015. The information obtained from the current evaluation indicates that [Claimant] remains depressed and anxious because she is having difficulty adjusting to the work injury, and the resultant pain, physical limitations, family disruption, and financial constraints. Her psychological symptoms also worsen the experience of the pain. Her physical symptoms are a central focus of her life. [Claimant] has developed clinically significant psychological symptoms that are directly attributable to her work injury, and the work injury is the prevailing factor in the development of her psychological symptoms.⁷

⁶ Pratt Depo., Ex. 2 at 8.

⁷ Eyman IME (Feb. 14, 2020) at 5-6.

Dr. Eyman determined Claimant suffers from a major depressive disorder, single episode, moderate severity with anxious distress, as well as a severe somatic symptom disorder. He recommended Claimant continue with psychotherapy and behavioral pain management.

Using the *AMA Guides*, Dr. Eyman opined Claimant sustained 10 percent impairment for her mental and behavioral disorder. Dr. Eyman was later provided additional records, and opined his opinions remained unchanged in both an addendum report and a letter to the ALJ dated June 1, 2021.

On May 20, 2020, Claimant met with board-certified orthopedic surgeon Dr. Zaki Ibrahim. Claimant complained of severe pain in her neck, radiating down her right arm to her right thumb. She reported significant pain in her shoulder and weakness in the entirety of her right arm. Dr. Ibrahim found asymmetrical reflexes on examination. Dr. Ibrahim also reviewed the cervical MRI from May 22, 2019, and assessed Claimant with right-sided C6 radiculopathy secondary to a right C5-6 disc extrusion. Because Claimant treated conservatively for an extended period with no relief, Dr. Ibrahim suggested surgical intervention. Dr. Ibrahim noted the surgery would be elective, not an emergency.

Dr. Ibrahim ordered another cervical spine MRI, conducted May 27, 2020, which indicated Claimant's disc extrusion had receded since the prior year, but still correlated closely with her symptoms. Dr. Ibrahim testified this was not unusual. Claimant elected to go forward with surgery. Dr. Ibrahim performed a C5-6 anterior cervical discectomy and placed an artificial disc in the C5-6 space on June 23, 2020.

Claimant followed up with Dr. Ibrahim postoperatively and reported her headaches and right arm pain had resolved, with minimal neck pain. X-rays taken September 1, 2020, showed the instrumentation in very good position, and Dr. Ibrahim considered the surgery successful. By November, Claimant complained again of significant neck pain radiating into her shoulders. Dr. Ibrahim did not have an explanation for the increase in Claimant's symptomatology:

Primarily because, you know, her MRI prior to surgery was normal with the exception of the C5-C6 disk protrusion. Also, I felt there was a highly emotional component to this patient; and given the absence – you know, I offered her an MRI, but I told her that my index of suspicion that we had a – that we were going to find another problem is – is very low, but – but primarily for those reasons.

I mean, I didn't have another explanation. She initially had a good result and she seemed to recede and she seemed to be very emotional.⁸

⁸ Ibrahim Depo. at 23-24.

Dr. Ibrahim did not have any specific treatment recommendations or impairment opinions for Claimant.

Doug Lindahl, occupational rehabilitation counselor, interviewed Claimant at her counsel's request via telephone on October 13, 2020, for purposes of task assessment and employability. Mr. Lindahl testified Claimant has 100 percent loss of earning capacity based on her restrictions of sedentary work, significant restrictions on her right upper extremity, and her lack of English comprehension. Because Mr. Lindahl felt Claimant was not employable, he did not conduct a job search. Together with Claimant, Mr. Lindahl produced a task list of 13 unduplicated tasks she performed in the five years preceding the accident.

Drs. Gadalla, Pratt, and Fluter reviewed the task list generated by Mr. Lindahl. Of the 13 unduplicated tasks on the list, Dr. Gadalla opined Claimant could no longer perform 1, for a task loss of 7.7 percent. Dr. Pratt opined Claimant could no longer perform 9 tasks on the list, for a task loss of 69 percent. Dr. Fluter opined Claimant could no longer perform 12 tasks, for a task loss of 92 percent.

The ALJ found Claimant sustained a combined 14 percent impairment to the whole person as a result of her work-related injury. The ALJ determined Claimant was terminated for cause, and because she was terminated for cause and could have still been accommodated, Claimant was not entitled to a permanent partial general (work) disability award.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues she is entitled to a work disability compensation because she was never formally terminated by Respondent. Claimant contends she is entitled to a work loss of 96.5 percent under the opinions of Dr. Fluter, or 84.5 percent work disability using the opinions of Dr. Pratt. Respondent maintains the ALJ's Award should be affirmed.

The only issue is nature and extent of Claimant's disability. The ALJ concluded Claimant suffered 14 percent impairment to the whole person as a result of her work-related injury. Neither party challenges the ALJ's conclusion regarding functional impairment. The primary issue is whether Claimant is entitled to work disability. The ALJ found Claimant was terminated for cause and not entitled to work disability.

K.S.A. 44-510e(a)(2)(E) states, in part:

"Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors,

including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

...

The Court of Appeals, in the context of eligibility for work disability, defined “for cause” using the standard used in *Morales-Chavarin*:

[T]he proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer’s reason for termination is actually a subterfuge to avoid work disability payments.⁹

The burden of proving the employee’s termination was for cause belongs to the employer.¹⁰ The ALJ found Respondent met the burden of proving Claimant was terminated for cause and not entitled to work disability benefits. The Board agrees. Respondent provide accommodated employment for Claimant within her restrictions. Claimant refused to perform the accommodated work she was provided and was taken to Ms. Larsen’s office. Claimant acted irrationally during the meeting. She refused to sign the form declining the accommodated position, she refused to submit her ID to the human resources representative when asked, and disrupted the meeting with HR by calling 911.

Respondent sustained its burden of proving Claimant was terminated for cause. Claimant’s recovery is limited to the extent of her functional impairment.

⁹ *Morales-Chavarin v. Nat'l Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006).

¹⁰ *Dirshe v. Cargill Meat Solutions Corp.*, No. 1,062,817, 2015 WL 6776994, (Kan. WCAB Oct. 20, 2015).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Fuller dated February 17, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Stanley R. Ausemus, Attorney for Claimant
Thomas G. Munsell, Attorney for Self-Insured Respondent
Hon. Pamela J. Fuller, Administrative Law Judge