

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AMANY ORFY)	
Claimant)	
V.)	
)	AP-00-0464-570
WAL-MART ASSOCIATES, INC.)	CS-00-0448-866
Respondent)	
AND)	
)	
NEW HAMPSHIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appealed the March 29, 2022, Award by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on July 21, 2022.

APPEARANCES

Randy Stalcup appeared for Claimant. Timothy Emerson appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as the ALJ, consisting of the Independent Medical Examination report from Dr. Jarron Tilghman, dated September 17, 2021; Evidentiary Deposition of Amany Orfy, taken December 13, 2021; Transcript of the Regular Hearing, taken December 20, 2021; Deposition of Dr. Daniel Zimmerman, taken January 25, 2022, with exhibits attached; Deposition of Paul Hardin, taken January 26, 2022, with exhibits attached; Deposition of Leann McCurdy, taken February 10, 2022, with exhibits attached; Deposition of Dr. David Hufford, taken February 22, 2022, with exhibits attached; Deposition of Steve Benjamin, taken February 23, 2022, with exhibits; and the documents of record filed with the Division.

ISSUES

1. What is the nature and extent of Claimant's impairment, including whether Claimant is entitled to work disability benefits?
2. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant began working for Respondent on May 20, 2019, in the infant apparel and shoe department, working 40 hours a week earning \$11 an hour.

On November 27, 2019, Claimant slipped and fell due to some flour and sugar on the floor. Claimant suffered injury to her head, neck, back, hips, left upper extremity, and left lower extremity. Claimant received authorized medical treatment.

On July 7, 2020, Claimant underwent surgery by Dr. Wingate. Dr. Wingate performed a bilateral L4 hemilaminectomies, left hemilaminotomy with a foraminotomy and a left S1 hemilaminectomy with a foraminotomy. Claimant returned to work after her surgery on August 18, 2020, with restrictions, accommodated by Respondent.

Claimant continued treatment with Dr. Babb. On February 1, 2021, Claimant was found to be at maximum medical improvement. Dr. Babb assigned Claimant permanent restrictions of using a rolling walker for ambulation; no standing greater than 5 minutes; no lifting, pushing, pulling greater than 10 pounds; no overhead reaching; no bending; avoid excessive twisting and turning; no kneeling, squatting, or using ladders.

Since Claimant's accident, Respondent accommodated Claimant's restrictions with "alternative temporary duty". While Claimant was under the care of Dr. Wingate and after Claimant's surgery, Dr. Wingate restricted Claimant to working 20 hours a week. Claimant recalls being released to 20 hours a week and then to 30 hours a week when she needed to earn more money. She does not recall being released to work 40 hours a week. According to Claimant, none of the doctors she saw discussed the number of hours Claimant can work.

Claimant continues to work for Respondent in the apparel department working 20 hours a week. Claimant currently earns \$13 an hour. According to Claimant she started working 20 hours a week in February 2021. According to Claimant, she was physically unable to continue to work 30 hours a week.

Claimant uses a walker and has a pole to pick items off the ground. Claimant continues to have pain in her back, left leg, left shoulder and recently developed right leg pain. Claimant has headaches affecting her sleep. Claimant's left leg is worse than the right leg. She described the pain as going all the way to her toes with numbness, and an electric shock sensation when she stands for too long. Claimant takes three prescription medications to control pain; Cymbalta, Diclofenac and Cyclobenzapine.

Claimant complains of pain and numbness in her left arm. She reported the pain starts in her neck and goes all the way from her neck to her shoulder.

It is difficult for Claimant to perform her work duties. Working tires her and she is always being talked to about her duties. Claimant believes her employer does not appreciate the extent of her restrictions.

Leann McCurdy is a supervisor for Respondent who assists employees with hours and benefits. She believes there is nothing to prevent Claimant from working 40 hours a week within her restrictions, which can be accommodated. Ms. McCurdy can only recall one occasion, December 24, 2021, where Claimant was offered an 8 hour shift which Claimant refused. Respondent has not been provided a medical report showing Claimant needs to work reduced hours.

Claimant met with Steve Benjamin for a vocational assessment on November 3, 2021. Mr. Benjamin had the reports of Dr. Tilghman and Dr. Babb. Claimant reported she was working for Respondent part-time for 20 hours a week earning \$13 an hour. Mr. Benjamin identified 26 tasks Claimant performed in the five years preceding her work accident. He found Claimant has a 27.3 percent wage loss, as she was only working 20 hours a week, earning \$260 a week. At the time of her accident, she was earning \$357.44 per week, at \$11 an hour for 32.5 hours per week. Mr. Benjamin opined the wage loss was not linked to the restrictions of the doctors. He noted the medical records had no indication Claimant was unable to work full-time.

Claimant met with Paul Hardin, via telephone, for a vocational assessment on February 26, 2021. Mr. Hardin had the reports of Dr. Zimmerman and Dr. Tilghman. He identified 31 tasks Claimant had performed five years prior to her work accident. Mr. Hardin opined Claimant has a 50 percent wage loss because Claimant was only working 20 hours a week earning \$11.22 per hour. Mr. Hardin opined considering Claimant's current income, age, physical capabilities, education, training, prior experiences, and the area where she lives and works and Dr. Tilghman's assessment of Claimant's impairment, Claimant is incapable of engaging in any type of substantial and gainful employment. He opined substantial, gainful employment is full-time employment paying at least minimum wage, which is \$290 per week.

Dr. Daniel Zimmerman examined Claimant on November 2, 2020, at the request of her attorney. Claimant's chief complaints were pain and discomfort affecting the cervical spine, left shoulder and lumbosacral spine and range of motion restrictions. The November 27, 2019, work accident, Dr. Zimmerman opined, was the prevailing factor for Claimant's injuries to the cervical spine, left shoulder and lumbosacral spine.

Dr. Zimmerman assigned a 19 percent combined impairment to the body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* (hereinafter referred to as *The Guides*) and the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*. The 19 percent body as a whole rating includes a rating of 8 percent for cervical spinal stenosis with

chronic cervical paraspinous myofasciitis, 3 percent impairment rating for the left shoulder and a 9 percent impairment rating for the lumbar spine. These impairment ratings were offered using reasonable medical judgment.

Dr. Zimmerman found Claimant's condition to be stable and therefore not in need of further treatment. He found Claimant to be at maximum medical improvement. Dr. Zimmerman recommended Claimant continue with prescribed medication treatment for management of her musculoskeletal pain and discomfort. He was reluctant to recommend any injections due to previous complications. However, he felt Claimant should continue with the conservative treatment for the conditions he evaluated. Treatment should include medication.

Dr. Zimmerman reviewed the task list of Paul Hardin and opined out of the 31 non-duplicated and duplicated tasks listed Claimant could no longer perform 30 tasks, for a 97 percent task loss.

Claimant reported to Dr. Zimmerman she was working 4 hours per day for Respondent and he assumed that was 20 hours a week. If Claimant felt she can work 20 hours a week, he had no objection to that. Dr. Zimmerman does not currently know if Claimant is capable of working more than 20 hours a week, even within her restrictions.

At Respondent's request, Claimant met with Dr. David Hufford on March 19, 2021, for an examination to obtain a permanent partial impairment rating. Dr. Hufford determined Claimant suffered a work-related fall with injuries to the cervical spine, lumbar spine, left shoulder and a concussion without loss of consciousness with residual disequilibrium.

Dr. Hufford provided a combined impairment rating of 20 percent to the body as whole using *The Guides*. He found the permanent restrictions assigned by Dr. Babb to be appropriate given Claimant's overall physical condition. He opined if future medical is left open, surgery for the cervical spine and left shoulder could be an option, but the outcome would need to be optimal.

Dr. Hufford, in reviewing the Dr. Babb's restrictions, found no mention of a restriction limiting the hours Claimant could work. He testified:

My opinion would be that Dr. Babb as the treating physician determined that there was no need for any hourly limitations and I did not find during the time in my examination that there was any need for any hourly limitations in her overall ability to work as long as she otherwise conformed to the physical limitations confined to the sedentary category as I had mentioned earlier without any other limitations.²

² Hufford Depo. at 18-19.

Dr. Hufford reviewed the task list of Steve Benjamin and determined of the 26 nonduplicated tasks, Claimant could no longer perform 25 tasks for a 96 percent task loss. Claimant can continue to work if Respondent can accommodate her restrictions and she is capable of working within those limitations.

Dr. Jarron Tilghman examined Claimant on September 17, 2021, at the request of the Court. Claimant presented with a two-year history of chronic headaches, chronic neck and low back pain from a work-related slip and fall on November 27, 2019. Claimant reported landing in a splits position on her left side striking her head. Claimant had injuries to her left shoulder, left elbow, left forearm, left hip, left knee and left thigh. Claimant received immediate medical care. X-rays and CT scans showed degenerative changes.

Claimant's current complaints, to Dr. Tilghman, were ongoing headaches and dizziness, paresthesias and numbness, particularly while standing, in the bilateral lower limbs, left lower extremity pain and numbness while sleeping, ongoing pain and numbness in the bilateral upper limbs more on the left than the right. She rated her pain at a 10 out of 10 on the pain scale and characterized her discomfort as an aching and burning sensation in addition to the numbness and pins and needles sensation.

Dr. Tilghman diagnosed chronic conditions of posttraumatic headache, neck pain, low back pain, left hip pain, bilateral arm pain, lateral leg pain, traumatic brain injury, degenerative disc disease of the cervical region, degenerative disc disease of the lumbar region, debility status post lumbar fusion, chronic bilateral shoulder pain, myofascial pain syndrome involving the cervical thoracic junction, myofascial pain syndrome affecting the bilateral upper limbs greater on the left than the right, myofascial pain syndrome affecting the bilateral lower limbs greater on the left than the right, neurogenic bowel status post lumbar spine fusion, neurogenic bladder status post lumbar spine fusion and chronic bilateral knee pain.

The doctor opined Claimant's work injury on November 29, 2019, was the prevailing factor for the development of Claimant's current condition. Dr. Tilghman assigned a combined impairment rating of 64 percent to the body as a whole, with ratings for headaches, both shoulders, chronic neck pain, chronic low back pain, and bilateral knees. He assigned restrictions of no pushing, pulling, or lifting greater than 10 pounds; no overhead reaching; and no bending twisting, kneeling, squatting or climbing ladders.

Dr. Tilghman opined Claimant may benefit from pain medications and targeted image guided interventional pain procedures. Claimant was told to continue with her home exercise program and may need another round of formal physical therapy to improve range of motion and strength.

The ALJ found the work accident to be the prevailing factor causing Claimant's injury, medical condition, need for medical treatment and resulting disability. Claimant was

found to have a 20 percent functional impairment based on the opinion of Dr. Hufford and a 61.9 percent work disability based on a task loss of 96.5 percent and a wage loss of 27.3 percent. The ALJ found Claimant is entitled to future medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant is not entitled to work disability because her post injury wage is not directly attributable to her work injury as Claimant continues to work reduced hours as a personal choice. Respondent also argues the medical records indicate that Claimant is not in need of further medical treatment related to the work injury. Claimant should receive a permanent partial disability based on a maximum of 19.5 percent functional impairment.

Claimant argues she is entitled to a work disability of 64 percent which was assigned by Court appointed physician, Dr. Tilghman.

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 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?

K.S.A. 44- 510e(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 or 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 is determined by competent medical evidence, using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* as a starting point.³

Three physicians testified to the nature and extent of Claimant's permanent

³ *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

impairment. Dr. Zimmerman opined Claimant had a 19 percent body as a whole impairment. Dr. Hufford opined Claimant has a 20 percent body as whole impairment. Dr. Tilghman, the Court-ordered neutral physician, opined Claimant had a 64 percent body as a whole impairment. Deference is given to the opinion of the Court-ordered neutral physician's opinion. However, in this case, Dr. Tilghman's opinion is an outlier, compared with the other physician's opinions and is not persuasive. The Board agrees with the ALJ, Dr. Hufford's opinion; 20 percent to the body as a whole is Claimant's permanent partial functional impairment.

K.S.A. 44-510e(2)(C)(D)(E) states:

An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "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.

Claimant is entitled to consideration of a work disability award because Claimant's functional impairment exceeds the 7½ percent threshold.

Two opinions were offered as to the extent of Claimant's task loss, 96 percent and 97 percent. The best indicator of Claimant's task loss is the average of those two opinions or 96.5 percent.

The primary issue is whether Claimant's wage loss is attributable to her work accident. Claimant is currently working for Respondent and earning \$260.00 per week, working 20 hours a week at \$13.00 per hour.

Respondent argues Claimant is only working 20 hours a week based on her own volition. No physician has restricted Claimant to work only 20 hours a week. Respondent can offer Claimant 40 hours a week of work within her restrictions.

An injured worker's testimony may be sufficient evidence of his or own physical condition.⁴ There is rebuttable presumption the average weekly wage an employee is actually earning post injury is the wage Claimant is capable of earning. Claimant's uncontroverted testimony is working 20 hours a week or more is difficult for her. It is tiring, painful and Claimant feels at times her work demands more than her restrictions allow. Claimant suffers from a failed back surgery and uses a walker. Respondent has allowed Claimant to continue to work 20 hours a week since February 2021. Two doctors opined Claimant has a task loss of 96.5 percent and Claimant can only perform one task on the lists of tasks Claimant performed in the five years prior to her accident.

Claimant has demonstrated her earning capacity by what she is currently earning, which is \$260.00 per week. This is Claimant's post-injury wage. Claimant has a wage loss of 27.3 percent.

Claimant is entitled to a work disability award of 61.9 percent.

⁴ See *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999); see also *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 956, 379 P.3d 428 (2016), and *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

2. Is Claimant entitled to future medical treatment?

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.

Claimant is currently taking three prescription medications to control her pain. Cervical spine surgery and left shoulder surgery could be necessary to cure and relieve the effects of Claimant's injury. Dr. Zimmerman, Dr. Hufford and Dr. Tilghman all recommended future medical treatment. The evidence shows it is more probable than not Claimant needs future medical treatment. Claimant is awarded future medical treatment upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Gary K. Jones dated March 29, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Randy Stalcup, Attorney for Claimant
Timothy Emerson, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge