

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LOIS SCHUSTER-CROUSE

Claimant

v.

SKF USA, INC.

Respondent

AP-00-0463-804

CS-00-0446-629

and

ACE AMERICAN INSURANCE COMPANY

Insurance Carrier

ORDER

Respondent and Insurance Carrier requested review of the February 18, 2022, Award issued by Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board heard oral argument on June 16, 2022.

APPEARANCES

Bradley E. Avery appeared for Claimant. Christopher J. McCurdy appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the same record as the ALJ, consisting of Transcript of Proceedings, held September 23, 2021, including Claimant's Exhibits 1, 4-5 and Respondent Exhibit B; Transcript of Evidentiary Deposition of Lois Schuster, taken November 11, 2021, including Exhibits 1-5; the transcript of Remote Evidentiary Deposition of Kimberly Reynolds, Corporate Representative for SKF USA, Inc., taken January 7, 2022, including Exhibits A-B and 1; the transcript of Evidentiary Deposition via Telephone of Harold A. Hess, M.D., taken November 24, 2020, including Exhibits 1-5; the transcript of Evidentiary Deposition of Harold Hess, M.D., taken November 15, 2021; the transcript of Evidentiary Deposition of Harold Hess, M.D., taken December 16, 2021, including Exhibit 1; the transcript of Evidentiary Deposition via Telephone Conference Call of Karen Terrill, taken September 21, 2020, including Exhibits 2-4, and

excluding Exhibit 1 after sustaining the objection; the transcript of Evidentiary Deposition of Karen C. Terrill, taken December 16, 2021, including Exhibits A-B, after overruling the objections; the transcript of Evidentiary Deposition of John Ciccarelli, M.D., taken December 20, 2021, including Exhibits 1-3; the transcript of Evidentiary Deposition of Alexander Bailey, M.D., taken January 4, 2022, including Exhibits 1-6 and B, and excluding Exhibits A and C after sustaining the objections; the transcript of Evidentiary Deposition of Steve Benjamin, taken January 13, 2022, including Exhibits 1-2; and the pleadings and orders contained in the administrative file. All other objections were overruled. The Board also reviewed the parties' briefs.

ISSUES

1. Did the ALJ err in sustaining the objections to the admission of Exhibit 1 from the September 21, 2020, Terrill deposition, and Exhibit A from Dr. Bailey's deposition?
2. Is Claimant entitled to an award of future medical treatment?
3. What is the nature and extent of Claimant's disability, including whether Claimant is permanently and totally disabled or whether Claimant is eligible to receive work disability compensation?

FINDINGS OF FACT

Claimant worked for Respondent for four years. During this time, Claimant performed various jobs, including work as a HIS operator. On July 10, 2018, Claimant was working for Respondent as a cell operator. Claimant's medical history was notable for treatment to the low back, including nerve blocks, by a physician in Nebraska in 1997. Between receiving treatment for the low back in 1997 and the work-related accident, Claimant denied having problems with her low back.

On July 10, 2018, Claimant was performing her usual work as a cell operator. Claimant turned and ducked to pick up parts. As Claimant rose, she felt an onset of back pain. Claimant notified her supervisor and went home. Claimant was subsequently referred to a physician for treatment. Claimant was ultimately diagnosed with a herniated disc at L3-4, was initially taken off work by the authorized treating physician and later released to perform light-duty work. Respondent provided Claimant light-duty work within her temporary restrictions until August 17, 2018.

Respondent closed the plant where Claimant worked on August 17, 2018. Respondent chose to close the plant in October 2017 because the geographic area did not have sufficient labor to meet Respondent's needs. Some employees in the HIS department were offered a transfer to a different plant in another state, but Claimant was

not offered a transfer. Claimant continued working for Respondent through August 17, 2018. Under the terms of the severance agreement negotiated between Respondent and the union, Claimant received a bonus after her last day worked, for continuing to work though the plant closure, as well as severance pay. According to Ms. Reynolds, Respondent's Recruitment Specialist, if the plant had not closed it would have continued to provide Claimant accommodated work permanently.

Claimant continued to receive fringe benefits from Respondent through April 29, 2019, under the severance agreement. The parties stipulated Claimant's average weekly wage through April 29, 2019, was \$754.01. The parties also stipulated Claimant's average weekly wage increased to \$896.55, effective April 30, 2019.

Claimant did not work between August 17, 2018 and April 19, 2019. During this time, Claimant continued receiving medical treatment for her low back. On November 16, 2018, Claimant underwent a discectomy at L3-4 by Dr. Bixenmann. Claimant was released without restrictions by Dr. Bixenmann on March 18, 2019.

From April 19, 2019, through May 28, 2019, Claimant worked at Koch and Company. Claimant was paid \$16.00 per hour and worked forty hours per week, producing an average weekly wage of \$640.00. Claimant's low back symptoms returned, and she was unable to continue working. Claimant returned to Dr. Bixenmann on June 6, 2019. Dr. Bixenmann took Claimant off work for two weeks, prescribed medication and recommended another MRI scan. Claimant was terminated by Koch and Company. Claimant has not worked elsewhere.

Dr. Bixenmann recommended another surgical procedure for Claimant's low back, which was not authorized by Respondent. Respondent had Claimant evaluated by Dr. Ciccarelli on July 23, 2019. Dr. Ciccarelli opined Claimant sustained a work-related disc herniation at L3-4, with preexisting degenerative changes at adjacent levels. Dr. Ciccarelli thought Claimant reached maximum medical improvement for the work-related injury, and required no permanent work restrictions on account of the work-related injury. Dr. Ciccarelli, however, thought Claimant should avoid jobs requiring heavy bending and lifting to avoid aggravating her preexisting degenerative condition. On March 11, 2021, Dr. Ciccarelli issued a supplemental report, after being provided copies of records generated by Dr. Hess, stating his opinions were unchanged. Dr. Ciccarelli also testified Claimant did not sustain a task loss after reviewing a task list prepared by Mr. Benjamin.

At Respondent's request, Dr. Bailey performed a second opinion evaluation of Claimant for treatment on October 10, 2019. Dr. Bailey confirmed Claimant sustained a work-related disc herniation at L3-4 treated by discectomy. Dr. Bailey also identified unrelated, preexisting degenerative changes of the lumbar spine. Dr. Bailey thought Claimant required additional treatment for the work-related injury, and recommended a pain management referral. Dr. Bailey also imposed light-duty restrictions of lifting up to

twenty pounds. Dr. Bailey subsequently issued a narrative report dated December 2, 2019, stating Claimant required light-duty restrictions of lifting up to twenty pounds and changing positions. Dr. Bailey reiterated the pain management referral, followed by an FCE.

On November 8, 2019, Dr. Hess examined Claimant at her attorney's request. Dr. Hess noted residual low back pain with no leg pain. Numbness of the toes on the right side and the left foot reportedly remained. Dr. Hess thought Claimant had unrelated degenerative spondylolisthesis at L4-5. Dr. Hess also opined Claimant sustained an annular tear at L3-4 with discogenic pain. Dr. Hess recommended a discogram and CT study, and suggested a fusion if indicated by the studies. If no additional treatment was provided, then Claimant would be at maximum medical improvement. Dr. Hess issued a subsequent report rating Claimant's functional impairment at 12% of the body as a whole under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth edition (*AMA Guides*).

In the end of 2019 or in early 2020, Claimant applied for Social Security Disability (SSD) benefits. Claimant listed medical conditions affecting her back, left wrist, bladder, bilateral knees, hip, shoulder, neck, trigger finger and toe numbness in her application. Claimant's application was approved by the Social Security Administration. Claimant acknowledged she is not working or looking for work because she is receiving SSD. Claimant also acknowledged she is receiving SSD and not working because of the combination of her back and other body parts.

Dr. Bailey saw Claimant again on July 26, 2021. Claimant's condition was essentially unchanged. Dr. Bailey did not believe a fusion would be a reasonable option because he did not believe it would relieve Claimant's symptoms. Dr. Bailey recommended Claimant undergo facet injections at L3-4, but had no other future medical recommendations. Dr. Bailey restricted Claimant from lifting more than twenty pounds, and recommended Claimant undergo an FCE. Dr. Bailey rated Claimant's functional impairment at 8% of the body as a whole under the *AMA Guides*. Claimant subsequently underwent an FCE, and Dr. Bailey issued updated work restrictions on September 29, 2021, stating Claimant could lift and carry up to thirty-five pounds occasionally and should change sitting, standing or walking every two hours.

Ms. Terrill performed a vocational evaluation of Claimant at her attorney's request on April 7, 2020. Ms. Terrill prepared a list of the essential job tasks Claimant performed for the five-year period preceding the work-related accident. Ms. Terrill noted Claimant had a tenth-grade education, and Claimant's job skills were industry-specific and not transferable. Ms. Terrill also reviewed the SSD award, and records from Drs. Ciccarelli, Hess and Bailey. Based on Dr. Hess' restrictions, Ms. Terrill did not believe Claimant had a wage-earning capacity. Based on Dr. Bailey's restrictions, Ms. Terrill believed Claimant

could earn minimum wage, or \$7.25 per hour. Ms. Terrill did not consider Claimant's post-injury work for Respondent, but was aware of Claimant's work for Koch and Company.

Ms. Terrill subsequently reviewed a copy of the FCE report. Based on her review of the FCE report, Ms. Terrill thought Claimant was unable to engage in any work and had 100% wage loss. Ms. Terrill also opined Dr. Hess' subsequent work restrictions rendered Claimant incapable of working. During Ms. Terrill's first deposition, Claimant's counsel offered an uncertified copy of the SSD award into evidence, to which Respondent's counsel objected based on relevance and foundation.

Mr. Benjamin performed a vocational assessment of Claimant at Respondent's request. Mr. Benjamin reviewed medical reports from Drs. Ciccarelli, Hess and Bailey, and reviewed Claimant's employment history for the fifteen-year period prior to the accident to address Claimant's job skills and employability. Mr. Benjamin was aware of Claimant's post-injury work for Respondent and for Koch and Company. Mr. Benjamin prepared a list of job tasks.

Mr. Benjamin performed a wage-market analysis, and looked at websites with actual job openings. Mr. Benjamin confirmed he reviewed Claimant's age, physical capabilities, education, training, prior work experience and availability of jobs in determining Claimant's wage-earning capacity. Based on Dr. Ciccarelli's opinion on restrictions, Mr. Benjamin believed Claimant could earn \$640.80 per week performing production work. Based on Dr. Bailey's September 29, 2021 restrictions, Mr. Benjamin believed Claimant could earn \$640.00 per week. Based on Dr. Bailey's earlier restrictions, Claimant's wage-earning capacity was \$363.70. Based on Dr. Hess' initial restrictions, Mr. Benjamin believed Claimant could earn \$363.60 per week, and based on Dr. Hess' later part-time work restrictions Claimant could earn \$181.30 per week.

Mr. Benjamin did not believe Claimant's SSD award would impact his opinions because the SSD award was based on the totality of Claimant's medical conditions, and not solely the work-related injury. Mr. Benjamin did not review the FCE report.

Over the course of three depositions, Dr. Hess initially testified Claimant was capable of working, but permanent work restrictions were indicated. Dr. Hess initially testified Claimant should be limited to lifting no more than ten pounds and avoid frequent bending. Dr. Hess reviewed Ms. Terrill's job task list, and opined Claimant lost the ability to perform ten of sixteen tasks, which produced a task loss of 63%. Dr. Hess later reviewed the FCE report and subsequently testified Claimant could lift twenty-five pounds occasionally, although he would limit Claimant's repetitive lifting capacity to ten pounds and restrict Claimant to working part-time. In his final deposition, Dr. Hess testified he would further modify his restrictions to include Dr. Bailey's recommendation of position changes. Dr. Hess also changed his opinion on task loss, and believed Claimant lost the ability to perform thirteen of sixteen tasks, which produced a task loss of 81.25%.

In his deposition, Dr. Bailey reiterated his opinions on Claimant's restrictions after the FCE was performed. Dr. Bailey testified Claimant lost the ability to perform nine of twenty-eight tasks based on his review of Mr. Benjamin's task list, which produced a task loss of 32%. Claimant offered the FCE report, as well as a photograph of the therapist who administered the FCE, into evidence. Respondent objected to the FCE report on the bases of hearsay and foundation, and to the photograph on the basis of relevancy.

Claimant is not currently seeing a physician for her back. Claimant sees a chiropractor. Claimant has good and bad days, but the extent of Claimant's residual symptoms is unknown. Claimant takes Meloxicam for her ongoing symptoms, but acknowledged taking it before the work-related accident.

On February 18, 2022, ALJ Moore issued the Award. The objections to the introduction of the SSD award and FCE report were sustained. ALJ Moore found Claimant sustained a compensable low-back injury resulting in 10% functional impairment to the body as a whole. ALJ Moore did not find Claimant was permanently and totally disabled because Ms. Terrill was the only witness who believed Claimant was unable to work and Dr. Hess changed his opinions regarding Claimant's work capacity. ALJ Moore found Claimant was eligible to receive work disability because she was terminated by Respondent and not working. ALJ Moore imputed earnings of \$640.00 to Claimant, which produced a wage loss of 15%. ALJ Moore found Claimant's task loss was 38%, based on an average of the opinions of Drs. Bailey, Hess and Ciccarelli, and Claimant's wage loss was 41.5% based on a split of the wage-capacity opinions of Ms. Terrill and Mr. Benjamin. Claimant's resulting work disability was 40%, which was awarded to Claimant. Future medical was also awarded based on Dr. Bailey's recommendation. These proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent contends the Award is erroneous because Claimant is not eligible to receive work disability benefits in excess of her functional impairment. Respondent argues Claimant's wage loss was not caused by her work-related injury, but due to an unrelated economic layoff. Respondent also argues Dr. Hess' opinion concerning task loss should not be considered, and future medical should be denied. Claimant argues the FCE report and SSD award were improperly excluded from the record. Claimant also argues she is eligible to receive permanent total disability compensation, or alternatively work disability compensation, because her loss of wage-earning capacity arose after her job ended. Claimant also argues the award of future medical should be affirmed.

Generally, it is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the

provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

1. The SSD award and FCE report were properly excluded from admission into the record.

The Appeals Board first addresses the evidentiary issues raised by Claimant. Claimant argues the SSD award and FCE report were erroneously excluded from admission into the record. Claimant focuses particularly on the FCE report, arguing it is unnecessary to take the deposition of the physical therapist who administered the FCE because the therapist is not a “health care provider” under K.S.A. 44-519. Therefore, the FCE report may be admitted into evidence without foundational testimony.

An administrative law judge is not bound by the rules of civil procedure or evidence, and hearsay evidence may be admissible unless irrelevant or redundant.⁴ Claimant’s position, however, is contradicted by K.A.R. 51-3-5a, which provides,

Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. If medical reports are not available or have not been produced before the preliminary hearing, either party shall be entitled to an ex parte order for production of the reports upon motion to the administrative law judge.⁵

Moreover, K.S.A. 44-519 states,

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination or any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.A.R. 51-3-8(c).

⁵ See K.A.R. 51-3-5a(a).

the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent medical evidence in any case where testimony of such health care provider is not admissible.⁶

Where the language of a statute is unambiguous, a court is obligated to apply the statute as written, without reading the statute to add something not readily found in it.⁷ Claimant asks the Board to read K.S.A. 44-519 as stating all reports generated by non-health care providers are admissible without testimony from the declarant. Claimant invites the Board to read something into K.S.A. 44-519 not readily found within it. Under *Bergstrom*, the Board must decline Claimant's invitation.

K.A.R. 51-3-5a(a) requires all reports, records and statements to be supported by testimony or the parties' agreement to be admitted into the record. The SSD award and FCE report fall within the scope of "any other records or statements." Respondent did not agree to the SSD award or the FCE report being admitted into evidence. No foundational or supporting testimony concerning the SSD award or FCE report is contained in the record. Therefore, the SSD award and FCE report were properly excluded.

2. The award of future medical treatment is affirmed.

The Board next considers Respondent's argument the award of future medical treatment was erroneous. 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

Both Dr. Hess and Dr. Bailey recommended future medical treatment requiring the services of a physician. Dr. Hess recommended surgery and Dr. Bailey recommended pain management modalities. Claimant met her burden of presenting medical evidence proving it is more probably true than not additional medical treatment will be necessary. The award of future medical treatment is affirmed.

⁶ See K.S.A. 44-519.

⁷ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

⁸ See K.S.A. 44-510h(e).

3. Claimant did not meet her burden of proving she is permanently and totally disabled, but Claimant met her burden of proving she is entitled to permanent partial general disability compensation based on work disability.

The primary issue concerns the nature and extent of Claimant's disability. Claimant sustained a compensable low back injury resulting in a herniation at L3-4 necessitating a discectomy. It is undisputed Claimant was terminated by Respondent as part of a general economic layoff after Respondent closed the plant where Claimant worked. Claimant argues she is now permanently and totally disabled. In the alternative, Claimant argues she is entitled to receive work disability compensation. Respondent disputes this, and argues Claimant's award of permanent partial disability compensation should be limited to her functional impairment. The Board addresses these arguments in turn.

A. Claimant did not prove she is entitled to permanent total disability compensation.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.⁹

The only expert who believed Claimant was permanently incapable of engaging in any substantial and gainful employment was Ms. Terrill, who based her conclusion on Dr. Hess' opinions and the FCE report. Ms. Terrill was not fully aware of Claimant's post-injury work. Dr. Hess, however, believed Claimant was capable of working within his restrictions. Mr. Benjamin, Respondent's vocational expert, performed a more detailed analysis of the jobs available to Claimant and thought Claimant was capable of substantial and gainful employment. Dr. Ciccarella and Dr. Bailey also believed Claimant was capable of working. Claimant testified she is receiving SSD based on a combination of her work-related injury and her personal health conditions. After considering the evidence, the Board finds Ms. Terrill's opinion is an outlier, and the more credible evidence establishes Claimant is capable of engaging in substantial and gainful employment. Claimant failed to prove she is entitled to permanent total disability compensation.

⁹ See K.S.A. 44-510c(a)(2).

B. Claimant met her burden of proving she should receive an award of permanent partial general disability based on work disability.

The extent of functional impairment from an unscheduled injury is determined by competent medical evidence, using the *AMA Guides* as a starting point.¹⁰ Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss, as defined in K.S.A. 44-510e(a)(2)(E), directly attributable to the work injury and not to other causes or factors, the employee may receive work disability compensation in excess of the percentage of functional impairment.¹¹ In such cases, work disability is determined by averaging the post-injury task loss caused by the injury with the post-injury wage loss caused by the injury.¹²

In determining wage loss, the Court is required to impute an appropriate post-injury wage based on the employee's age, physical capabilities, education and training, prior experience, the availability of jobs in the open labor market, and other relevant factors.¹³ Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption the actual earnings constitute the post-injury average weekly wage the employee is capable of earning, which may be overcome by competent evidence.¹⁴

The Board first determines Claimant's functional impairment. Both Dr. Bailey and Dr. Hess assessed permanent impairment for the compensable injury to the disc at the L3-4 level, and confirmed the degenerative changes elsewhere in the lumbar spine were unrelated to the work-related accident. Dr. Bailey rated Claimant's functional impairment at 8% of the body as a whole under the *AMA Guides*, and Dr. Hess rated Claimant's functional impairment at 12% of the body as a whole under the *AMA Guides*. Dr. Ciccarelli did not rate Claimant's impairment. The Board finds both functional impairment ratings equally credible, and based on the competent medical evidence finds Claimant's functional impairment is 10% to the body as a whole, attributable to the herniated disc at L3-4 necessitating surgery. Claimant's functional impairment satisfies the threshold for work disability eligibility.

¹⁰ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

¹¹ See 44-510e(a)(2)(C).

¹² See *id.*

¹³ See K.S.A. 44-510e(a)(2)(E).

¹⁴ See *id.*

The Board next considers whether Claimant proved she sustained at least 10% wage loss, as defined in K.S.A. 44-510e(a)(2)(E), directly attributable to the work injury and not to other causes or factors. Respondent argues Claimant's wage loss was caused by a general economic layoff, and was not directly attributable to her work-related injury. Claimant initially experienced no wage loss while she performed accommodated work for Respondent paying the same as her regular work. When Respondent closed the plant where Claimant worked, her accommodated work ended and she no longer engaged in employment for wages. At that point, Claimant's capability to earn post-injury wages became apparent. The restrictions imposed on Claimant on account of her work-related injuries, and her residual symptoms, limited Claimant's wage-earning capacity. Claimant's resulting wage loss was directly related to her work-related injury.

To determine the post-injury wage Claimant is capable of earning, the Board considers the evidence of Claimant's wage-earning capability, pursuant to K.S.A. 44-510e(a)(2)(E). Mr. Benjamin testified Claimant's earning capacity based on Dr. Bailey's restrictions was \$640.80, or 15% wage loss. Ms. Terrill testified Claimant's earning capacity ranged from \$0 under Dr. Hess' varying restrictions to \$290.00 under Dr. Bailey's restrictions, which would produce an average 81% wage loss. The Board finds both vocational experts equally credible on Claimant's wage-earning capabilities, and finds Claimant's wage loss is an average of the vocational opinions, or 48% wage loss. During the time Claimant worked for Koch and Company, she earned \$640.00 per week, which produced 15% wage loss until April 30, 2019, when Claimant's wage loss increased to 29%. After Claimant's employment with Koch and Company ended, her wage loss reverted to 48%. Because Claimant's wage loss exceeds 10%, Claimant is eligible to receive work disability compensation.

Respondent cites two Appeals Board decisions: *Wichman*¹⁵ and *Hepner*.¹⁶ Both cases are distinguishable. In *Wichman*, the Appeals Board determined the employee was eligible to receive work disability after finding the alleged performance basis for the employee's layoff was suspect, and the employee proved his layoff and wage loss was directly attributable to his work injury.¹⁷ In *Hepner*, the Appeals Board denied a claim for work disability compensation after finding the employer's vocational expert's wage-earning capacity opinion was more credible than the employee's vocational expert, and concluding the evidence failed to support finding the employee suffered a wage loss due to the work-

¹⁵ *Wichman v. Hammersmith Mfg. & Sales, Inc.*, No. 1,074,650, 2016 WL 6584730 (Kan. WCAB Oct. 12, 2016).

¹⁶ *Hepner v. Master Teacher, Inc.*, AP-00-0441-414, CS-00-0160-950, 2019 WL 4253352 (Kan. WCAB Aug. 30, 2019).

¹⁷ See 2016 WL 6584730 at *9.

related injury.¹⁸ Here, all the vocational experts' opinions and Claimant's actual earnings during the short time she worked at Koch and Company establish a wage loss greater than 10% directly attributable to the work injury.

Having determined Claimant is eligible to receive work disability compensation, the Board is tasked with determining Claimant's work disability and resulting award. "Task loss" is the percentage to which the employee, in the opinion of a physician, has lost the ability to perform the work tasks performed in any substantial and gainful employment during the five-year period preceding the injury, using the permanent restrictions imposed by a licensed physician.¹⁹ Dr. Ciccarelli testified Claimant sustained no task loss, but his opinion is undermined by the extent of Claimant's injuries, surgery and residual problems necessitating further treatment. Dr. Hess initially testified Claimant's task loss was 63%, but later changed his task loss opinion to 81.25% after modifying his restrictions to include Dr. Bailey's restrictions and part-time employment. The average of Dr. Hess' opinions is 72%. Dr. Bailey testified Claimant's task loss was 32%. The Board finds both physicians equally credible on task loss, and adopts an average of the opinions, or 52%, as Claimant's task loss.

Work disability is the average of the wage loss and task loss.²⁰ Claimant's task loss is 52%. Claimant's wage loss was 48% through April 18, 2019; 15% from April 19 through 29, 2019; 29% from April 30 through May 28, 2019; and 48% from May 29, 2019, to the present. Claimant's resulting work disability is 50% through April 18, 2019; then 33.5% from April 19 through 29, 2019; then 40.5% from April 30 through May 28, 2019; then 50% from May 29, 2019, to the present. The award of compensation should be modified accordingly.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Bruce E. Moore, dated February 18, 2022, be modified. Claimant is awarded 18.45 weeks of temporary total disability compensation, paid at \$502.70 per week, totaling \$9,274.82; followed by 21.98 weeks of permanent partial general disability compensation based on 50% work disability, paid at \$502.70 per week, totaling \$11,049.35; followed by 1.57 weeks of permanent partial general disability compensation based on 33.5% work disability, paid at \$502.70 per week, totaling \$789.74; followed by 4.14 weeks of permanent partial general disability compensation based on 40.5% work disability, paid at \$597.73 per week, totaling \$2,474.60; followed by 178.03 weeks of

¹⁸ See 2019 WL 4253352 at *7.

¹⁹ See K.S.A. 44-510e(a)(2)(D).

²⁰ See K.S.A. 44-510e(a)(2)(C)(ii).

permanent partial general disability compensation based on 50% work disability, paid at \$597.73 per week, totaling \$106,411.99; for a total award of \$130,000.00. In all other respects, the Award issued by ALJ Moore is affirmed.

As of September 9, 2022, there is due and owing 18.45 weeks of temporary total disability compensation, paid at \$502.70 per week, totaling \$9,274.82; followed by 21.98 weeks of permanent partial general disability compensation, paid at \$502.70 per week, totaling \$11,049.35; followed by 1.57 weeks of permanent partial general disability compensation, paid at \$502.70 per week, totaling \$789.24; followed by 4.14 weeks of permanent partial general disability compensation, paid at \$597.73 per week, totaling \$2,474.60; followed by 171.43 weeks of permanent partial general disability compensation, paid at \$597.73 per week, totaling \$102,468.85; for a total due and owing of \$126,056.86, which shall be paid by Respondent and Insurance Carrier in one lump sum, less any compensation previously paid. Thereafter, the remaining permanent partial general disability compensation shall be paid at \$597.73 per week for 6.6 weeks, totaling \$3,943.14, until paid in full or modified by the Director pursuant to K.S.A. 44-528.

IT IS SO ORDERED.

Dated this _____ day of September, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Bradley E. Avery
Christopher J. McCurdy
Hon. Bruce E. Moore