

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA NUNEZ RABELO)	
Claimant)	
V.)	
)	AP-00-0467-925
CARGILL MEAT SOLUTIONS CORP)	CS-00-0447-245
Respondent)	
AND)	
)	
OLD REPUBLIC INS. CO)	
Insurance Carrier)	

ORDER

Respondent appealed the May 25, 2022 Award issued by Special Administrative Law Judge (SALJ) Mark E. Kolich. The Board heard oral argument on September 15, 2022. Stanley R. Ausemus appeared for Claimant. D Shane Bangerter appeared for Respondent and its insurance carrier

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the SALJ:

- (1) Regular hearing held March 1, 2022;
- (2) Regular Hearing by deposition taken March 8, 2022;
- (3) Report of David W. Hufford, M.D., dated March 26, 2020;
- (4) Report of Pat D Do, M.D., dated February 24, 2021;
- (5) Report of George D. Fluter, M.D., dated May 11, 2021;
- (6) Report of Terrance Pratt, M.D., dated July 30, 2021;
- (7) The documents of record filed with the Division.

ISSUES

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

FINDINGS OF FACT

On July 11, 2019, Claimant slipped on a platform, causing her to twist her right ankle and fall backwards. Claimant felt pain in her lower back and right ankle. The next day, she experienced pain in her right shoulder.

Claimant received conservative treatment for her injuries through January 2020, which included medication, physical therapy and injections. Claimant received six injections in her back and two in her shoulder. MRIs of Claimant's right foot, shoulder and low back were provided. The results of the foot and back MRIs were unremarkable. The shoulder MRI revealed mild diffuse rotator cuff tendinitis without evidence of a superimposed tear. There was mild acromioclavicular osteoarthritis and a small effusion at the subacromial-subdeltoid bursa which may represent bursitis.

At Respondent's request, Claimant was evaluated by David W. Hufford, M.D., on March 26, 2020. Dr. Hufford's evaluation was limited to Claimant's low back and right ankle. He opined Claimant was at maximum medical improvement (MMI) for her low back. Dr. Hufford opined, based on the *AMA Guides to the Evaluation of Permanent Impairment*, 6th and 4th Editions (*Guides*), Claimant has a 5% functional impairment to the body as a whole for her back. He opined Claimant should maintain the permanent restrictions already in place, which were no lifting more than 10 pounds, and no pushing or pulling greater than 15 pounds.

Regarding Claimant's right ankle, Dr. Hufford stated:

There is no means to provide impairment for this aspect of her injury based on the methodology from the 4th and 6th edition of the *AMA Guides*. Consideration of referral to a foot and ankle specialist may be warranted to complete her care.¹

Claimant was referred to Pat D. Do, M.D. for treatment to her right shoulder. Dr. Do provided conservative treatment, which included two injections, from July 11, 2020, through February 4, 2021. Claimant was offered surgery, but declined. Dr. Do released Claimant without restrictions for her shoulder and opined she has a 3% functional impairment to the right upper extremity at the shoulder level based on the *Guides*, 6th Edition. He opined Claimant may benefit from right shoulder arthroscopy in the future should her symptoms warrant.

At her attorney's request, Claimant was evaluated by George G. Flutter, M.D., on May 11, 2021. He diagnosed Claimant's injuries as:

¹ Hufford IME Report, 3/26/20, P.2.

1. Right shoulder pain/impingement/tendinitis and bursitis.
2. Possible right shoulder internal derangement.
3. Neck/upper back pain.
4. Cervicothoracic strain/sprain.
5. Low back pain.
6. Lumbosacral strain/sprain.
7. Probable sacroiliac joint dysfunction.
8. Right foot/ankle pain/sprain.²

Dr Fluter provided functional impairment ratings using the *Guides*, 6th and 4th Editions. Under the 6th Edition, Dr. Fluter opined Claimant has a 10% functional impairment to the body as a whole. This rating included impairments for Claimant's right shoulder, right ankle, cervical, thoracic and lumbar spine. Under the 4th Edition, Dr. Fluter opined Claimant has a 17% functional impairment to the body as a whole. This rating included impairments for Claimant's right shoulder, right ankle, cervicothoracic and lumbosacral spine and bilateral sacroiliac joint dysfunction.

Dr. Fluter adopted the 4th Edition functional impairment rating as the appropriate rating for Claimant's injuries. He stated:

A general principle when using the Guides has been that, if there are multiple methods of determining an impairment rating, then the method resulting in the greatest value should be used. Item 12 in Table 2-1-Fundamental Principles of the Guides (Sixth Edition, page 20) specifically states this.

The Kansas Supreme Court has ruled that referencing the Sixth Edition of the Guides can reasonably be interpreted as a guideline rather than a mandate. Due to Ms. Nunez-Rabelo's ongoing pain and dysfunction resulting from the work-related injury, it is my opinion that deviating from the Sixth Edition of the Guides is reasonable. Given the circumstances of this particular case, it is my opinion that the impairment rating calculated under the Fourth Edition of the *Guides* better represents her degree of functional impairment (whole person impairment of 17%).³

Dr. Fluter placed permanent restrictions on Claimant's activities and opined she would need future medical treatment.

Claimant was sent to Terrence Pratt, M.D., for a Court-ordered evaluation on July 30, 2021. He diagnosed Claimant's injuries as:

² Fluter IME Report, 5/11/21, P. 5-6.

³ Fluter IME Report, 5/11/21, P.8.

1. Right shoulder syndrome with tendinosis, acromioclavicular arthrosis and possible bursitis.
2. Lumbosacral syndrome without significant evidence of radiculopathy.
3. Right ankle sprain/strain.⁴

Dr Pratt provided functional impairment ratings using the *Guides*, 6th and 4th Editions. Under the 6th Edition, Dr. Pratt opined Claimant has a 4% functional impairment to the body as a whole. This rating included impairments for Claimant's right shoulder and lumbar spine. Under the 4th Edition, Dr. Pratt opined Claimant has a 9% functional impairment to the body as a whole. This rating provided functional impairments for Claimant's right shoulder and lumbar spine. Dr. Pratt opined Claimant did not have permanent functional impairment in her right ankle using either edition of the *Guides*.

Dr. Pratt placed permanent restrictions on Claimant's activities and opined she would need future medical treatment for her right shoulder. He shared Dr. Do's opinion Claimant was a candidate for right shoulder arthroscopy. He opined Claimant would not need future medical treatment for her right ankle or lumbosacral region.

Claimant testified she suffered injury to her lower back, right foot/ankle and right shoulder. When Claimant testified, she reported constant pain in the lower back (belt high) down her left leg to her knee. She reported intermittent pain in her right shoulder. She reported intermittent pain and inflammation in her right ankle. She takes over-the-counter ibuprofen daily to control her pain and discomfort. Claimant reported the same injured body parts and pain/swelling complaints to Dr. Fluter and Dr. Pratt. Claimant did not report injury or pain complaints for her cervical or thoracic spine to either physician.

The Special Administrative Law Judge awarded compensation for a 15% whole person functional impairment and future medical benefits. Respondent argues the SALJ erred in completely disregarding the opinions of the two treating physicians (Dr. Hufford and Dr. Do) and requests the award be modified to reflect their opinions and the opinions of the Court-ordered evaluator, Dr. Pratt. Claimant maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant has a 9% functional impairment to the body as a whole based on the opinions of the Court-ordered evaluator, Dr. Pratt.

⁴ Pratt IME Report, 7/30/21, P. 4-5.

In awarding Claimant a 15% functional impairment to the body as a whole, the SALJ cited *Johnson*⁵ and *Garcia*⁶ setting forth functional impairments for unscheduled injuries are determined by competent medical evidence and the *Guides*, 6th Edition is the starting point in this determination.

Respondent argues the SALJ completely disregarded the opinions of two treating physicians, Dr. Hufford and Dr. Do. This argument is considered and rejected. In rejecting the ratings of Dr. Hufford and Dr. Do, the SALJ stated,

The ratings of Dr. Do and Dr. Hufford strictly adhere to the criteria in the 6th edition. Neither doctor expressed his independent opinion regarding impairment. Their ratings are viewed as no more than starting points.⁷

The Board agrees with Respondent's assertion a rating based solely on the *Guides*, 6th Edition can be sufficient to make a medically competent assessment of a worker's functional impairment rating. The physician, however, must make clear they are adopting a specific functional impairment, using the *Guides*, 6th Edition as a starting point. Here, neither Dr. Hufford nor Dr. Do, made clear their functional impairment ratings were based on competent medical evidence or they used the *Guides*, 6th Edition as a starting point. They simply provided ratings based on the *Guides*, 6th Edition. Also, Dr. Hufford was not a treating physician. He was an independent evaluator retained by Respondent.

Dr. Fluter provided a functional impairment rating of 17%. This rating included functional impairment for injuries to Claimant's cervical and thoracic spine. Claimant did not report cervical and thoracic complaints to Dr. Fluter or Dr. Pratt. She testified her injuries, and residual pain and discomfort, were to her right ankle, shoulder and low back. Dr. Fluter's ratings to the cervical and thoracic spines are not supported by the evidence in the record. Dr. Pratt, the Court-ordered evaluator, provided ratings to Claimant's right shoulder and low back. He detailed his evaluation of Claimant's right ankle and why he did not believe she should receive functional impairment under the *Guides*, 6th and 4th Editions. The Board finds the functional impairment rating of Dr. Pratt to be more credible and awards Claimant a 9% functional impairment of function to the body as a whole.

2. Claimant is entitled to future medical treatment.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or relieve the effects of the injury. It

⁵ *Johnson v. US Foods*, 312 Kan. 597, 478 P.3d 776 (2021).

⁶ *Garcia v. Tyson Fresh Meats, Inc.*, ___ Kan. App. 2d ___, 506 P.3d 283 (2022).

⁷ ALJ Award (5/25/22) at 4.

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 improvement⁸

The ALJ awarded future medical benefits based upon the opinions provided by the four physicians whose reports are the medical evidentiary record. All four physicians opined additional medical treatment for her various injuries would be necessary. Of note, Dr. Do and Dr. Pratt opined the potential need for shoulder surgery. Dr. Do recommended surgical intervention while providing Claimant's shoulder treatment.

Claimant provided sufficient medical evidence showing it is more probably true additional medical treatment will be necessary after maximum medical improvement, satisfying the prerequisite for awarding future medical treatment under K.S.A. 44-510h(e). The Award of future medical treatment is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board, the Award of Special Administrative Law Judge Mark E. Kolich, dated May 25, 2022 is modified to reflect Claimant is entitled to permanent partial disability compensation based on a 9% functional impairment to the body as a whole, and affirms the Award of future medical benefits.

⁸ See K.S.A. 44-510h(e).

IT IS SO ORDERED.

Dated this _____ day of September, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Staley R. Ausemus, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Hon. Mark E. Kolich, Special Administrative Law Judge