

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHELBY LOGSDON
Claimant

v.

SEDGWICK COUNTY EMS
Self-Insured Respondent.

AP-00-0464-541
CS-00-0451-164

ORDER

Claimant requests review of the third Award Nunc Pro Tunc, dated April 1, 2021 [sic], issued by Administrative Law Judge (ALJ) Thomas Klein. The Appeals Board heard oral argument on July 14, 2022.

APPEARANCES

Phillip B. Slape appeared for Claimant. William L. Townsley, III, 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 Regular Hearing (Stipulations) via Phone, held January 26, 2021; the transcript of Regular Hearing Deposition via Zoom of Shelby Logsdon, taken February 17, 2021, after sustaining the foundation objection made on Page 31; the transcript of Evidentiary Deposition of Brennen Lucas, M.D., taken April 28, 2021, including Exhibits 1-3, after overruling the objections; the transcript of Zoom Evidentiary Deposition of Pedro A. Murati, M.D., taken February 19, 2021, including Exhibits 1-2; the Stipulation to Average Weekly Wage filed by the parties on or about March 17, 2021; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

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

FINDINGS OF FACT

Claimant worked for Respondent as a paramedic. On May 30, 2019, Claimant was carrying a patient out of a basement using a stair chair. As Claimant was lifting the patient, she felt a sharp pain in her right shoulder. Claimant reported a shoulder injury and was referred to an authorized health care provider.

Claimant initially received conservative treatment at Via Christi. Claimant reported right shoulder and neck pain, and treated from May 30 through June 12, 2019. Claimant was referred to an orthopedic specialist.

Claimant received treatment from Dr. Lucas from June 19, 2019, through May 27, 2020. Dr. Lucas previously treated Claimant's left shoulder. Dr. Lucas saw Claimant on referral from a spine specialist who evaluated Claimant's neck. The patient intake form in Dr. Lucas' chart states Claimant reported a right shoulder injury. Dr. Lucas evaluated the right shoulder, diagnosed an AC strain, bursitis and rotator cuff strain, and ultimately recommended surgery. On August 27, 2019, Dr. Lucas performed an arthroscopic rotator cuff repair, distal clavicle excision and subacromial decompression. Claimant's initial post-operative recovery was unremarkable.

While undergoing post-operative physical therapy in February 2020, Claimant felt a sudden onset of neck and right shoulder pain while lifting a crate. Claimant testified the pain was similar to the pain she experienced on May 30, 2019. Dr. Lucas thought Claimant sustained a trapezius strain on account of the event, and ordered additional physical therapy. At a follow-up appointment, Dr. Lucas administered a corticosteroid injection because Claimant still had pain. On May 26, 2020, Claimant was released from physical therapy and work hardening after reaching her goals. Dr. Lucas released Claimant from his care on May 27, declared Claimant at maximum medical improvement, and imposed no permanent restrictions.

Dr. Lucas subsequently issued an impairment rating with regard to the shoulder. Dr. Lucas testified the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*), was a competent means of assessing impairment. Dr. Lucas did not assess impairment referable to Claimant's neck, but acknowledged if Claimant had cervical impairment he would defer to a cervical spine specialist. Dr. Lucas rated the right shoulder at 5% of the upper extremity under the *AMA Guides*, based on Claimant's shoulder diagnosis, surgery, range of motion and loss of strength. Dr. Lucas believed his rating was based on competent medical evidence, and testified a strict reading of the *AMA Guides* could produce a lower rating.

Claimant resigned her employment with Respondent due to an unrelated bleach allergy. Claimant began working as a paramedic at Hutchinson Regional Medical Center in June 2020. Claimant is currently working as a paramedic without permanent restrictions.

Dr. Murati evaluated Claimant on August 26, 2020, at her attorney's request. Claimant reported a right shoulder injury from the work-related event, as well as a history of a prior resolved neck injury. Dr. Murati was not aware of Claimant's prior left shoulder injury. Claimant reported current complaints of neck pain, headaches and right shoulder pain radiating to the neck. Physical examination was notable for reduced strength of the right shoulder and signs of impingement. Dr. Murati also noted trigger points of the right shoulder to the paraspinal muscles. Dr. Murati diagnosed post-rotator cuff repair of the right shoulder, post-distal clavicle excision of the right shoulder, post-subacromial decompression of the right shoulder, post-labral debridement of the right shoulder, impingement syndrome of the right shoulder and myofascial pain syndrome of the right shoulder girdle to the cervical paraspinals.

Dr. Murati thought all of the diagnoses were caused by the work-related accident. Dr. Murati testified Claimant's neck injury was caused by repetitive overcompensation due to the right shoulder injury. Dr. Murati also thought the accident during physical therapy caused a new injury to the neck producing a change in the physical structure of the cervical spine.

Dr. Murati did not recommend permanent work restrictions, and recommended future medical treatment in the forms of surgery, prescription medication, injections and physical therapy. Dr. Murati rated Claimant's impairment under the *AMA Guides* at 8% of the right shoulder, or 5% of the body as a whole, for loss of range of motion, and 2% of the body as a whole for the myofascial pain syndrome, which totaled 7% of the body as a whole. Dr. Murati also rated Claimant's impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition (*AMA Guides*, 4th edition), at 23% of the upper extremity, or 14% of the body as a whole, attributable to the right shoulder and 5% of the body as a whole for the myofascial pain syndrome, which totaled 18% of the body as a whole. Dr. Murati testified the 14% whole-body rating under the *AMA Guides*, 4th edition, for the shoulder and 2% of the body as a whole for myofascial pain syndrome, totaling 16% of the body as a whole, was a more reasonable representation of Claimant's impairment because of her treatment and future medical needs.

Claimant has residual neck pain at the center of the base of her neck, which flares up one to two times per week. Claimant has headaches once per week. Claimant has daily right shoulder pain, which averages 2-3 out of 10 in severity. Claimant develops muscle tension in her neck and right shoulder when she uses the shoulder more. Claimant obtained a TENS unit on her own to treat her residual symptoms, as well as heat packs and over-the-counter pain medication. Claimant acknowledged no treating physician prescribed medication to use in the future.

On March 23, 2022, ALJ Klein issued the initial Award, erroneously dated March 23, 2021. ALJ Klein found Dr. Lucas' rating of 5% of the right shoulder more credible than Dr. Murati's shoulder rating. ALJ Klein also found Dr. Murati's 2% whole-body rating for the neck more credible because Dr. Lucas deferred providing an impairment rating for the neck. ALJ Klein concluded Claimant's total functional impairment was 5% of the body as a whole, and awarded permanent partial disability compensation based on this rating. ALJ Klein also awarded future medical. On March 23, 2022, ALJ Klein issued an Award Nunc Pro Tunc, removing the name of an attorney representing the Kansas Workers Compensation Fund. ALJ Klein subsequently issued a second Award Nunc Pro Tunc, dated March 25, 2022, correcting the date of the Award. Finally, on April 1, 2022, ALJ Klein issued the third Award Nunc Pro Tunc correcting Respondent's counsel's name. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

The sole issue on review is the nature and extent of Claimant's disability. It is undisputed an accident arising out of and in the course of Claimant's employment occurred on May 30, 2019. The parties contest whether Claimant's injuries are limited to the right shoulder, or whether the neck is also involved. The extent of Claimant's functional impairment is also in dispute.

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

These proceedings involve review of ALJ Klein's credibility determinations in his findings and conclusions concerning nature and extent. The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges,⁴ and the Board possesses the authority to grant or refuse compensation, or to increase or diminish an award of compensation.⁵ A *de novo*

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-555c(a).

⁵ See K.S.A. 44-551(l)(1).

hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.⁶ Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,⁷ the Board is not required to do so.⁸ The Board is as equally capable as an administrative law judge in reviewing evidence when a witness does not testify live.⁹

The Board first addresses whether Claimant sustained a scheduled right shoulder injury or a whole-body injury. Claimant testified she told the occupational medicine clinic where she initially treated she had right shoulder and neck pain on account of the work-related accident. Dr. Lucas testified he was referred to Claimant to treat her right shoulder after Claimant was evaluated by a spine specialist for neck symptoms. Claimant subsequently developed a trapezius injury, confirmed by Dr. Lucas, after Claimant was injured while undergoing authorized physical therapy for her work-related injuries. An injury to the trapezius is considered a whole-body injury.¹⁰ Dr. Murati also confirmed Claimant sustained injuries to the right shoulder and cervical spine. Having considered the whole record, the Board finds Claimant sustained compensable injuries to the neck and right shoulder on account of the work-related accident of May 30, 2019.

The Board next considers the extent of Claimant's functional impairment on account of her compensable whole-body injuries. 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 *AMA Guides* if the impairment is contained therein.¹¹ A functional impairment rating for injuries occurring after January 1, 2015, cannot be based solely on the *AMA Guides*, 4th edition.¹² In whole-body injury cases involving the analysis from *Johnson*,¹³ the methodology of the *AMA*

⁶ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555, at *4 (Kan. WCAB Jun. 22, 2017).

⁷ See, e.g., *Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471, at *9 (Kan. WCAB Oct. 14, 2014).

⁸ See *Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241, at *3 (Kan. WCAB Jun. 22, 2011).

⁹ See *Gilmore v. Henke Manufacturing Co.*, No. 1,074,792, 2016 WL 3208237, at *3 (Kan. WCAB May 12, 2016).

¹⁰ See *Salvador v. Tyson Fresh Meats*, CS-00-0002-204, 2020 WL 7130914, at *15 (Kan. WCAB Nov. 9, 2020).

¹¹ See K.S.A. 4-510e(a)(2)(B).

¹² See *Zimero v. Tyson Fresh Meats*, 61 Kan. App. 2d 1, 6, 499 P.3d 1153 (2021).

¹³ *Johnson v. U.S. Foods, Inc.*, 312 Kan. 597, 478 P.3d 776 (2021).

Guides, 4th edition, may be considered by a physician if the physician finds it reliable and authoritative.¹⁴ A rating, however, may not be based solely on the *AMA Guides*, the *AMA Guides*, 4th edition, or an arithmetic combination of the two, absent consideration of competent medical evidence.¹⁵

Dr. Lucas rated Claimant's functional impairment of the right shoulder at 5% of the upper extremity. The Appeals Board may take judicial notice of the *AMA Guides*.¹⁶ Under the *AMA Guides*, 5% of the right shoulder converts to 3% of the body as a whole.¹⁷ Dr. Lucas did not rate Claimant's neck and deferred to other physicians on the extent of functional impairment at the neck.

Dr. Murati rated Claimant's right shoulder impairment at 5% of the body as a whole under the *AMA Guides*. Dr. Murati also rated Claimant's right shoulder impairment at 14% of the body as a whole under the *AMA Guides*, 4th edition, and testified the rating under the *AMA Guides*, 4th edition, gave a more reasonable depiction of Claimant's impairment. *Johnson* dictates using the *AMA Guides* as a starting point, then arriving at a rating based on competent medical evidence, which Dr. Murati did not do with the rating based on the *AMA Guides*, 4th edition. Dr. Murati also testified Claimant's myofascial pain syndrome at the cervical paraspinals produced 2% functional impairment of the body as a whole.

The Board finds both physicians' opinions equally credible with regard to Claimant's right shoulder impairment. Dr. Lucas saw Claimant on multiple occasions as the treater, but did not provide much explanation for his rating. Dr. Murati saw Claimant one time, but provided only slightly more explanation for his rating. Therefore, the Board finds Claimant's right shoulder impairment is a split of the two ratings using the *AMA Guides* as a starting point, or 4% of the body as a whole. With regard to the neck, Dr. Murati rated Claimant's impairment at 2% of the body as a whole, and Dr. Lucas deferred to other physicians. Thus, the Board finds Claimant's neck impairment is 2% of the body as a whole. Under the *AMA Guides*, 4% impairment combines with 2% impairment to produce 6% total impairment of the body as a whole.¹⁸ The Board concludes Claimant is entitled to an award of permanent partial disability compensation based on 6% functional impairment of the body as a whole attributable to the right shoulder and neck. In all other

¹⁴ See *Garcia v. Tyson Fresh Meats*, 61 Kan. App. 2d 520, 533, 506 P.3d 283 (2022).

¹⁵ See *id.* at 532-33.

¹⁶ See *Perez v. National Beef Packing Co.*, 60 Kan. App. 2d 489, 507-08, 494 P.3d 268 (2021).

¹⁷ See *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, p.422, t.15-1.

¹⁸ See *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, App. 1, Combined Values Chart.

respects, the award of compensation is affirmed, including the award of future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the third Award Nunc Pro Tunc issued by ALJ Klein, dated April 1, 2021, but issued April 1, 2022, is modified. Claimant is awarded compensation to be paid by Self-Insured Respondent: 34.055 weeks of temporary total disability compensation, paid at \$645.00 per week, totaling \$21,965.61; followed by 23.76 weeks of permanent partial disability compensation based on 6% functional impairment of the body as a whole attributable to the right shoulder and neck, paid at \$645.00 per week, totaling \$15,325.20, for a total award of \$37,290.81. As of the date of this award, all the compensation awarded herein is due and owing, and shall be paid in one lump sum by Self-Insured Respondent, less any compensation previously paid. In all other respects, including the provision for future medical, the third Award Nunc Pro Tunc is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Phillip B. Slape
William L. Townsley, III
Hon. Thomas Klein