**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **EVA RINCON** | ) | |
| Claimant | ) | |
| | ) | |
| V. | ) | |
| | ) | |
| | ) | AP-00-0468-619 |
| **EXIDE TECHNOLOGIES** | ) | CS-00-0053-629 |
| Respondent | ) | |
| | ) | |
| AND | ) | AP-00-0468-621 |
| | ) | CS-00-0449-505 |
| **AMERICAN ZURICH INS. CO.** | ) | |
| Insurance Carrier | ) | |

# ORDER

Claimant requested review of the July 1, 2022, Award issued by Administrative Law Judge (ALJ) Bruce E Moore. The Board heard oral argument October 20, 2022. Scott J. Mann appeared for Claimant. Mererdith L. Moser appeared for Respondent and its insurance carrier.

## RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the documents of record filed with the Division and the following:

1. Agreed Award (CS-00-0053-629 and AP-00-0468-619), filed March 27, 2012.
2. Independent Evaluation Report (IME) of Paul Stein, M.D., December 12, 2011.
3. Deposition of Lowry Jones, M.D., taken December 7, 2021 with exhibits attached.
4. Regular Hearing Transcript held February 10, 2022.
5. Deposition of Steve Benjamin taken February 23, 2022 with exhibits attached.
6. Deposition of Terry Cordray taken May 9, 2022 with exhibits attached.
7. Deposition of Lowry Jones, M.D. taken May 10, 2022 with exhibits attached.
8. Wage Stipulation filed May 25, 2022.
9. Stipulation Admitting Occupational Health Partners, LLC (OHP) Medical Records, filed May 25, 2022.

## ISSUES

**Case No. CS-00-0449-505 and AP-00-0468-621**

1. Did Claimant suffer personal injury by repetitive trauma arising out of and in the course of her employment, including whether Claimant's work activities were the prevailing factor causing her injuries, medical condition, need for treatment and resulting impairment?

2. Nature and extent of Claimant's disability.

3. Is Claimant entitled to future medical benefits?

**Case No. CS-00-0053-629 and AP-00-0468-619**

1. Is Claimant entitled to review and modify the March 27, 2012 Award, including the nature and extent of Claimant's disability?

## FINDINGS OF FACT

Claimant, fifty-six years of age, immigrated from Mexico to the United States thirty-six years ago. She has a grade school education from Mexico. Claimant began working for Respondent in December 2000 as a stacker. A stacker places six plates, each weighing five pounds, into a battery, and then stacks the finished batteries. Claimant worked Wednesday through Saturday, six hours on Wednesday and twelve hours each day from Thursday through Saturday. Claimant worked some overtime.

On January 28, 2010, Claimant suffered injury to her right shoulder, which was surgically repaired by Brad Daily, M.D., on March 1, 2011. The surgical procedures included shoulder manipulation under anesthesia, rotator cuff repair and arthroscopic distal clavicle excision. While receiving post-operative physical therapy, Claimant reported neck symptoms multiple times. Dr. Daily released Claimant to full duty, without restrictions, on August 24, 2011.

On December 12, 2011, Claimant was evaluated by Paul S. Stein, M.D. Claimant reported injuries to her right shoulder and neck. Dr. Stein diagnosed Claimant with an intra-articular injury to the right shoulder with exacerbation of impingement and tendinitis and probable right cervical muscular strain with improvement. He opined both of the diagnoses were causally related to her work with Respondent. Based on the *AMA Guides to the Evaluation of Permanent Impairment,* (*Guides*) 4th Edition, Dr. Stein opined Claimant

had a 19% functional impairment at the shoulder level. Regarding the cervical spine, Dr. Stein stated, "Despite some continued neck discomfort, physical examination of the cervical spine is relatively benign. There is no evidence of a structural lesion affecting the neck and no definitive evidence of functional impairment related to the neck. 0% impairment is assessed under DRE cervicothoracic category I."[1]

Claimant returned to work for Respondent as a stacker and continued to do so until September 19, 2019. During this time, Claimant also performed blocking, which was essentially the same as stacking. Claimant pulled a battery case with her right hand, opened it and put the already assembled lead plates (5) into the battery. On September 19, Claimant's pain in her right shoulder and neck became intolerable. She reported her pain to the nurse. Claimant was given pills and advised to get patches for her neck. Claimant continued to work.

Claimant was referred to Occupational Health Partners on October 31, 2019. She was placed on temporary restrictions and removed from her stacking and blocking jobs. She returned to work in a light duty job which included cleaning floors, machines and the supervisor's office. Claimant did not work overtime after she was placed on light duty. She received the same hourly wage and worked the same shifts. Claimant filed an Application for Benefits (E-1) alleging a new injury by repetitive trauma on February 19, 2020. She continued in light duty cleaning until her employment was terminated on August 14, 2021. Claimant filed a Request for Review and Modification under the 2012 Agreed Award on March 30, 2021.

Claimant was sent for a Court-ordered independent medical evaluation with Lowry Jones, Jr., M.D., a board-certified orthopedic surgeon, on November 9, 2020. Dr. Jones noted Claimant had a prior shoulder injury which was surgically repaired. Dr. Jones opined Claimant was suffering from subacromial bursitis and chronic cervical myofascial pain syndrome. He recommended additional treatment (physical therapy, shoulder injection and cervical MRI) and issued temporary work restrictions. Dr. Jones opined Claimant's 2010 injury was the prevailing factor for her medical condition and need for treatment.

Dr. Jones was authorized to provide medical treatment beginning April 20, 2021. Claimant reported her symptoms were unchanged. Dr. Jones' diagnosis remained unchanged. He injected Claimant's right shoulder, ordered a cervical MRI and continued temporary restrictions. Dr. Jones saw Claimant on May 18, 2021. The cervical MRI had

[1] Stein IME Report (filed Dec. 12, 2011) at 6-7.

been performed, but the scan and report had not been received. Physical therapy had not been authorized.

Dr. Jones saw Claimant for the last time on June 29, 2021. Claimant reported the injection helped the pain, but physical therapy did not. Dr. Jones reviewed Claimant's MRI films which showed some arthritic changes, no significant narrowing, no central or foraminal stenosis or any disc herniations. As a result, he opined no treatment was warranted for the cervical spine. Dr. Jones placed Claimant at MMI and assigned functional impairment of 7% to the whole body based on the *Guides*, 4th Edition. The 7% rating consists of 5% for the neck and 5% to the shoulder which converts to 2% whole body. Dr. Jones opined Claimant has a 5% whole body functional impairment based on the *Guides*, 6th Edition. He assigned permanent work restrictions of 10-pound maximum lift at chest and no repetitive reaching, pushing, or pulling above the shoulder level on the right. Dr. Jones' working diagnosis and prevailing factor opinion did not change.

Dr. Jones testified:

> Q... Doctor, is it true that from a general standpoint, that when Eva Rincon continued to work at her - 2012 up through the time she saw you, that she suffered additional injury to her neck and right shoulder?
>
> A. I think she just exacerbated what she already had.
>
> Q. All right. And when you're saying that, just from a physical standpoint or maybe medical standpoint, what's happening in her shoulder and neck that is causing her additional problems and the need to seek treatment?
>
> A. Okay. So she had an injury, it was documented. We could go back through her records in 2011. She had neck pain almost·identical to what she's still having. She got better. She kept working and it just got·worse.
>
> What my opinion was was that she didn't have anything new. There wasn't an new pathology, there wasn't a new injury. This was just exacerbation of her preexisting injury.
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> And what it is is like anything else she's got chronic muscle injury and she keeps working and it hurts over time. So I don't think there was a new injury there.[2]

[2] Jones Depo. (Dec. 7, 2021) at 27-28.

Claimant reported to Dr. Jones her pain continued, worsened and became more significant as she continued to work after her first injury. Dr. Jones testified:

> Q. The continued work activity, in general, for when she was released in 2012 through when she saw you, that would, again, aggravate or cause inflammation to her bursa, correct?
>
> A. Yeah. Yes, very likely.
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> Q. And that's what caused her increased pain; true?
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> A. Yes. If you ask her and she says that she·always had it, so... I mean, she specifically told me, on multiple occasions, that she always had it. It was never really gone, so...
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> So I think it was pain that was still present after her surgery. I think it still there. She worked through it. I'm not sure that it was significantly greater in '19 than in 2012. She said she'd had it the whole time, so...[3]
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> So she's got primarily neck pain at this point. I think it got worse over time. It certainly got worse since 2012, when she was released. It's the same pain, just worse. And to a point that it was really bothering her ability to work.· So the purpose of doing the restrictions is to try to keep her from having that pain get increasingly worse.[4]

Claimant continued to work under Dr. Jones' permanent restrictions performing the cleaning job until August 13, 2021. At the conclusion of her shift on August 13, Claimant was advised "due to my restrictions that the doctor had given me, that they had nothing else for me and that she was releasing me, letting me go."[5]

Claimant has not worked nor has she looked for work since she was laid off. She testified:

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[3] *Id* at 30-31.

[4] *Id* at 31.

[5] RH Trans. at 43.

> A. I haven't, and I can't. I simply just can't, just for the pain that I have in my shoulder and my neck, I can't even do my own cleaning in my own home.[6]
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> ...
>
> A. How can I work? I have pain at all times. I have to take pills all the time. I have to take pills at night to sleep. I have to take pills.[7]

Regarding Claimant's symptoms, she testified:

> Q. From the time you were released back in 2012, after the doctor did surgery to your shoulder, until you again reported problems with your shoulder and neck in 2019, did the problems in your neck and shoulder get better, get worse, or just stay the same?
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> A. They stayed the same. I have not felt, and I do not feel, any better.[8]
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> ...
>
> Q. Okay. And in fact, that essentially is what happened is, you went back and the pain didn't ever get better because you were continuing to do the work; is that right?
>
> A. Correct.[9]

Two vocational experts interviewed Claimant, Steve Benjamin at her attorney's request, and Terry Cordray for Respondent. Mr. Benjamin prepared a list of five non-duplicative tasks the Claimant performed for the five years preceding her second accident, while Mr. Cordray identified ten tasks.

Mr. Benjamin testified he reviewed Claimant's relevant factors, which included past work history, education, training, transferable skills, age, place of residence, length of time out of the open labor market, inability to speak English and Dr. Jones' restrictions. After

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[6] *Id* at 43.

[7] *Id*. at 52.

[8] *Id*. at 43-44.

[9] *Id*. at 47-48.

reviewing these factors, Mr. Benjamin opined Claimant is not able to re-enter the open labor market and is essentially unemployable. He noted Dr. Jones' restrictions limited Claimant to maximum lifting of ten pounds, which limits her to sedentary work. Claimant has not performed sedentary type work.

Mr. Cordray testified the work performed by Claimant was unskilled as a cleaner and semi-skilled as a machine operator; Claimant has limited education and lacks functional English skills; Claimant's age is not relevant; Claimant has permanent work restrictions; Claimant was capable of performing work as an office cleaner; and, her post-injury wage-earning ability is $11 per hour in Salina, Kansas.

Mr. Cordray noted, "Ms. Rincon is an unskilled production worker who has been provided restrictions."[10] In addition, "Given these restrictions and noting Ms. Rincon's work background and limited English abilities, in my opinion, she is capable of working at jobs as an office cleaner."[11]

In arriving at his opinions regarding Claimant's employablility and wage-earning capacity, Mr. Cordray identified three jobs available in the Salina area. Mr. Cordray found the first two jobs on his April 5, 2022 search, the third was found on his March 7, 2022 search. They are:

1. Housekeeping aid at Minneapolis Healthcare and Rehabilitation in Minneapolis, paying $10 per hour. Physical demands were not listed.
2. Custodian at PKM Steel, in Salina paying $10-11 per hour. The physical demands of the job were not provided, but Cordray opined it would likely exceed the 10 pound restriction.
3. Pilot Flying J Travel Center posted a job in Spanish seeking a person to keep the food display area well organized and tidy, control the hot food counter, maintain the stock of fresh products, prepare food, and clean and order dishes and utensils. Wages and physical demands were not posted.[12]

In describing the current labor market, Mr. Cordray testified:

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[10] Cordray Depo. Ex. 2 at 10.

[11] *Id* at 11.

[12] Cordray Depo. at 26-28 and Ex. 2 at 11.

> A. Here's where we have to be careful because I testify a lot and I really believe that we are at full employment right now. And, of course, there's tons and tons of jobs available. Now is the time to get a job while the getting is good, but that's not always necessarily true for the disabled because the disabled still experience a higher unemployment than the nondisabled.
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> And so there are tons of jobs that if you can wait tables or if you can do those kinds of jobs that are hospitality jobs, they are everywhere. If you can drive, do driving jobs, they are everywhere. Manufacturing jobs, they are everywhere, but we still have to do select job placement with the handicapped. I really do believe that. They need to do a close look, which I did in this case, and there are jobs for the handicapped, but certainly I don't want the Judge to believe that I am going to testify that they have the same ability, the same abundance that the nondisabled do.[13]

The Administrative Law Judge found Claimant suffered a symptomatic exacerbation of her 2010 work injury; Claimant failed to establish she suffered a new injury and is not entitled to additional compensation; Claimant failed to establish she is entitled to review and modification of her 2012 Award because she is not permanently and totally disabled and more than 415 weeks elapsed since her first date of accident; and Claimant continues to have medical treatment available under her 2012 Agreed Award.

Claimant argues she suffered new injuries as a direct result of her repetitive work from 2011 through October 31, 2019; she is entitled to additional compensation in the form of permanent total or permanent partial disability compensation (work disability); and, she should be awarded future medical treatment. Claimant argues, in the alternative, she is entitled to review and modify her 2012 Agreed Award and is entitled to permanent total disability compensation. Respondent argues the July 1, 2022 Award should be affirmed.

## PRINCIPLES OF LAW AND ANALYSIS

**Case No. CS-00-0449-505 and AP-00-0468-621**

**1. Claimant did not sustain personal injury by repetitive trauma arising out of and in the course of her employment. Claimant's work activities were not the prevailing factor causing her injuries, medical condition, need for treatment and resulting impairment.**

[13] Cordray Depo. at 17-18.

K.S.A. 44-508(f)(2)(A) states an injury by repetitive trauma shall be deemed to arise out of employment only if the employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life; the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment. "Prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[14]

In finding Claimant did not suffer a new injury, the ALJ stated:

> Rincon has failed to present any evidence whatsoever that she suffered an "injury" as a result of the described work activity through October 21, 2019. Dr. Jones, the only physician to testify, opined that there was no new injury [regardless of whether it was continued work as a stacker or blocker], just a continuation of the symptoms of the 2010 injury, and her current complaints are all just a natural and probable consequence of the 2010 injury. Rincon has failed to sustain her burden of proof that she suffered personal injury by repetitive trauma between September 19, 2019 and October 31, 2021.[15]
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> ...
>
> Rincon suffered a symptomatic exacerbation of her 2010 work injury, but did not suffer any additional or new impairment, and has failed to establish her entitlement to additional compensation. She has failed to establish a new injury, but continues to have medical care available, upon proper application, under her 2012 Agreed Award.[16]

The facts are not in dispute regarding Claimant reporting pain and discomfort in her right shoulder and neck necessitating Respondent to provide medical treatment. The issue is whether Claimant suffered a new and distinct work-related injury or do her symptoms relate back to her 2010 injury. Dr. Jones is the only physician to testify and he was deposed twice. He believed Claimant's condition was related to her original injuries. His working diagnosis and causation opinion did not waver from the first time he evaluated Claimant until he released her at MMI. Claimant's testimony regarding her pain and

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[14] K.S.A. 44-508(d), (g).

[15] ALJ Award at 8-9.

[16] *Id* at 10-11.

discomfort was consistent – her pain was constant from the time of her original injury. In short, her pain was the same, it just got worse over time.

Based on the record as a whole, Claimant has not met her burden of proving she suffered a new injury in 2019, which is the prevailing factor in her medical condition, need for treatment and resulting impairment. Dr. Jones opined Claimant's injury related back to her original injury. Claimant's testimony generally supports his conclusion. The ALJ's finding Claimant did not suffer a new injury by repetitive trauma and was not entitled to additional benefits is affirmed. Accordingly, the nature and extent of Claimant's disability and entitlement to future medical treatment under this claim are moot.

**Case No. CS-00-0053-629 and AP-00-0468-619**

**1. Claimant is entitled to review and modification of the March 27, 2012 Award, as she has met her burden of proving she is permanently totally disabled.**

Permanent partial disability compensation is limited to 415 weeks from the date of the work-related injury. [17] The date of accident under the 2012 Agreed Award is January 28, 2010. The 415 week time frame ends on January 11, 2018. Claimant filed her request for review and modification on March 30, 2021. Claimant is not eligible for permanent partial disability compensation under CS-00-0053-629/AP-00-0468-619. Permanent total disability compensation is not subject to the 415 week limitation.[18]

K.S.A. 2009 Supp. 44-510c(a)(2) defined permanent total disability:

> ... 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. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases, permanent total disability shall be determined in accordance with the facts.

In finding Claimant did not meet her burden of proving she was permanently totally disabled, the ALJ stated:

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[17] See *Ponder-Coppage v. State*, 32 Kan. App 2d 196, 200 92002.

[18] See *Hull v. State of Kansas*, 1998 WL 599389.

> In **Wardlow v. ANR Freight Systems, 19 Kan. App.2d 110, 114, 872 P.2d 299 (1993)**, the Court of Appeals looked to the claimant's age, training, previous work history, and physical limitations to determine whether he was permanently and totally disabled.
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> **Rincon has failed to establish that she is permanently and totally disabled**. While Benjamin opined that Rincon's language limitations, coupled with Dr. Jones' restrictions, left her essentially unemployable, he acknowledges he really doesn't know how significant her language limitations are, and that there are "plenty" of jobs available in the open market place within Dr. Jones' restrictions. Cordray confirmed that the cleaning job Rincon performed between September 19, 2019 and October 31, 2021 was a real job, with similar positions available throughout the state, and certainly in Rincon's home community. He also noted that some job ads are being placed in Spanish, for positions like those within Rincon's permanent restrictions, undermining Benjamin's concerns about language limitations. Finally, Dr. Jones opines that Rincon is capable of working and earning wages within her permanent work restrictions. Rincon has failed to establish that she is permanently and totally disabled, and has failed to establish her entitlement to review and modify her 2012 Agreed Award.[19]

The Board disagrees. Mr. Cordray, despite noting the disabled do not have the same abilities as the non-disabled and experience a higher unemployment rate than the non-disabled, presents an optimistic view of Claimant's employability. He opined there were similar jobs to the one Claimant was performing at the time of her lay-off. His own search, on two separate occasions, suggests otherwise. The Minneapolis job did not list physical demands and Mr. Cordray acknowledged the PKM Steel job was outside Claimant's restrictions. The third job at Flying J is essentially a food preparer, for which Claimant has no experience performing. Neither the Minneapolis or Flying J job listings posted physical demands. Mr. Cordray assumes these jobs would be within Claimant's restrictions. Mr. Cordray's two separate job searches, demonstrate the flaws in his analysis and renders his opinions less credible than those of Mr. Benjamin.

Mr. Benjamin reviewed Claimant's past work history, education, training, transferable skills, age, place of residence, length of time out of the open labor market, inability to speak English and Dr. Jones' restrictions. He opined Claimant is not able to re-enter the open labor market and is essentially unemployable. He noted Dr. Jones' restrictions limited Claimant to maximum lifting of ten pounds which limits her to sedentary

[19] ALJ Award at 10-11.

work, which she has not performed in the past. The Board finds Mr. Benjamin's vocational opinion more credible than Mr. Cordray's.

Dr. Jones' opinion Claimant is capable of returning to work within his restrictions is limited in its application to this issue. He was commenting on Claimant's physical capabilities from a medical perspective. He readily admits he would defer to a vocational expert regarding specific jobs and their availability in the open labor market.

In *Wardlow*,[20] the injured worker was an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The Court, in *Wardlow*, looked at all the circumstances surrounding his condition, including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions, as being pertinent to the decision whether the claimant was permanently totally disabled.

The Kansas Supreme Court has held when a worker with a preexisting condition sustains a subsequent work-related injury that aggravates, accelerates, or intensifies his or her condition resulting in disability, he or she is entitled to be fully compensated for the resulting disability.[21] To prove their entitlement to additional compensation under review and modification, the injured worker must establish the original award is inadequate or the functional impairment or work disability of the injured worker has increased. [22]

Claimant is a 56-year-old, non-English speaking person with limited education. Her job history is limited to two jobs with Respondent over the past 21 years of repetitive manual labor and light duty cleaning. She is now limited to non-repetitive work and cannot lift more than 10 pounds. Her employer of over twenty years chose not to continue her employment within her restrictions. Claimant is realistically unemployable under *Wardlow* and unable to engage in any type of substantial and gainful employment as defined by 44-510c(a)(2).

Claimant was released to return to work without restriction by Dr. Dailey on August 24, 2011. The 2012 Agreed Award was based on the medical opinions of Dr. Stein, who

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[20] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[21] *Baxter v. L.T. Walls Construction Co.*, 241 Kan. 588, 738, P. 2d 445 (1987).

[22] K.S.A. 2009 Supp. 44-528 (a).

also released Claimant to return to work without restrictions. He opined Claimant did not have neck impairment as a result of her injury. Dr. Jones testified Clamant needs permanent restrictions "to try to keep her from having that pain get increasingly worse."[23] He opined she has 5% functional impairment in her cervical spine which was not present when the 2012 Agreed Award was entered. In short, Claimant did not have functional impairment in her neck or require permanent restrictions at the time the 2012 Agreed Award was entered into by the parties. She does now.

Based on the record as a whole, Claimant met her burden of proving she is permanently and totally disabled. Accordingly, the ALJ's denial of Claimant's request for review and modification of the 2012 Agreed Award is reversed. Claimant is awarded permanent total disability compensation.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 1, 2022, is affirmed in part and reversed in part. Claimant is awarded permanent total disability compensation under the 2012 Agreed Award in CS-00-0053-629/AP-00-0468-619. An award of compensation in CS-00-0449-505/AP-00-0468-621 is denied.

In CS-00-0053-629/AP-00-0468-619, Claimant is entitled to 16.48 weeks of temporary total disability compensation at the rate of $546 per week in the amount of $8,996.17, followed by 39.62 weeks of permanent partial disability benefits at the rate of $546 per week in the amount of $21,632.52 for a 19% functional impairment at the shoulder level, making a total award of $30,628.69. All of these benefits were previously awarded under the terms of the Agreed Award dated March 27, 2012. Thereafter, starting August 15, 2021, Claimant is entitled to 172.84 weeks of permanent total disability compensation at the rate of $546 per week, not to exceed $125,000, less any amounts previously paid.

As of November 15, 2022, Claimant is entitled to 64 weeks of permanent total disability compensation in permanent partial disability compensation at the rate of $546 per week in the amount of $34,944, which is ordered paid in one lump-sum. The remaining balance in the amount of $59,427.31 shall be paid at the rate of $546 per week until fully paid or until further order

[23] Jones Depo (Dec. 7, 2021) at 31.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Scott J Mann, Attorney for Claimant
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge