

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>LINDA MANGELSDORF-OSHEL</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0468-107
<b>KANSAS REHABILITATION HOSPITAL</b>	)	CS-00-0316-417
Self-Insured Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent and Claimant appealed the June 2, 2022, Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on September 27, 2022.

**APPEARANCES**

Jeff Cooper appeared for Claimant. Ryan Weltz appeared for Self-Insured Respondent. Katherine Gonzales appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

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

1. Transcript of the Preliminary Hearing from October 16, 2017 without exhibits;<sup>1</sup>
2. Transcript of the Preliminary Hearing from March 1, 2019;
3. Transcript of the Preliminary Hearing from July 19, 2019;
4. Transcript of the Regular Hearing from October 29, 2021;
5. Transcript of the Continuation of Regular Hearing by Deposition of Linda Mangelsdorf-Oshel from November 22, 2021;

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<sup>1</sup> The ALJ did not consider the exhibits in this transcript as part of the record for award. Some of these exhibits contain medical records as K.S.A. 44-519 prohibits medical records from being considered as evidence outside of a preliminary hearing absent the establishment of foundation. With no stipulation on record waiving foundation ALJ Roth only reviewed the transcript.

6. Evidentiary Deposition of Richard L. Thomas, dated January 27, 2022, with exhibits;
7. Evidentiary Deposition of Pedro Murati, M.D., dated February 2, 2022, with exhibits;
8. Evidentiary Deposition of Robert W. Barnett, Ph.D., dated February 7, 2022, with exhibits;
9. Evidentiary Deposition of Steven Benjamin, dated February 14, 2022, with the exhibits;
10. Evidentiary Deposition of Daniel Stechschulte, M.D., from February 25, 2022, with exhibits;
11. Evidentiary Deposition of Theodore A. Moeller, Ph.D., from March 18, 2022, with exhibits;
12. Stipulated Exhibits (4/20/22):
  - Exhibit 1 Payments made by Insurer in Relation to Psychological Treatment
  - Exhibit 2 Medical Mileage paid after July 5, 2018
  - Exhibit 3 Temporary Total Disability Payment made after July 5, 2018
  - Reg. Hrg. Exhibit B Reed Internal Medicine/Reed Medical Group records
13. The Court ordered independent examination report of Dr. Molly Allen, Ph.D., dated January 11, 2019.

### ISSUES

1. Did Claimant suffer a compensable psychological/psychiatric injury?
2. Is Claimant eligible for work disability benefits or is she permanently and totally disabled?
3. Is Claimant entitled to future medical benefits?
4. Is Respondent entitled to reimbursement and credit from the Kansas Workers Compensation Fund for compensation paid in association with an psychological injury?

### FINDINGS OF FACT

On September 27, 2016, while assisting a patient, Claimant heard a pop, snap, rip and felt intense burning and pain in her left shoulder blade and shoulder joint.

Claimant began treatment for her left shoulder with Dr. Garrett, who ordered physical therapy and an MRI. At the initial visit, Claimant complained of shoulder pain, weakness and decreased range of motion. The constant pain was described as burning along with constant popping, all made worse with movement. Claimant went to 12 physical therapy sessions.

Dr. Daniel Stechschulte first saw Claimant on December 1, 2016, for evaluation of the left shoulder due to the September 27, 2016, injury. Claimant reported difficulty in performing activities of daily living secondary to her loss of range of motion. Claimant reported she needed to be able to lift 50 pounds to return to full duty. Dr. Stechschulte found left shoulder labral pathology, adhesive capsulitis and impingement syndrome. He opined the prevailing factor for her left shoulder complaints was the work accident.

Dr. Stechschulte continued to treat Claimant until June 2018. He performed two surgeries on her left shoulder. The first surgery was a diagnostic arthroscopy, debridement of glenohumeral joint, the labrum, rotator cuff and biceps tendon, along with a coracoplasty, biceps tenodesis, subacromial decompression with acromioplasty and AC joint excision. The second surgery was an examination under anesthesia, diagnostic arthroscopy, debridement, revision acromioplasty and dorsal excision. He released Claimant on June 28, 2018, with permanent restrictions of: no pushing or pulling over 50 pounds, no lifting over 25 pounds, and no overhead lifting. Dr. Stechschulte did not feel Claimant would need future medical treatment related to the work injury, but her shoulder arthritis will need to be treated which was not related to the work injury. He reviewed Steve Benjamin's task list and opined, Claimant can no longer perform 11 out of 21 tasks for a 52.38 percent task loss.

On June 29, 2018, Dr. Stechschulte provided a letter opining Claimant had a 14 percent permanent partial impairment to the left shoulder. His rating was based on the *American Medical Association Guides to the Evaluation of Permanent Impairment 6<sup>th</sup> Edition* (hereinafter referred to as *The Guides*). In performing his rating, Dr. Stechschulte considered *The Guides*, subjective complaints, objective occupational demands and competent medical evidence.

According to Claimant, she began having symptoms of depression when she was first taken off work for her left shoulder injury and the depression worsened the longer she was off work and placed on permanent restrictions. Claimant testified her depression started when Dr. Garrett took her off work due to the September 27 injury, but she had hope her left shoulder would improve. When Dr. Stechschulte told Claimant the impairment to her left shoulder was permanent and it would affect her ability to return to work and live, Claimant's depression worsened. Claimant felt her depression was manageable in June 2018, but it is not under the current circumstances.

Claimant has a history of depression and was first diagnosed and surviving stage 4 cancer in 1993. Claimant attributed her depression to post-traumatic stress disorder and then Seasonal Affective disorder due to being treated for cancer in the winter with little or no sunshine. Claimant was diagnosed with Seasonal Affective disorder in 1998. Claimant denies continuing to struggle with Seasonal Affective disorder. Claimant recalls last having symptoms of depression, or any sort of psychological symptoms in November 2010. Claimant testified despite her depression she was able to continue to function, earned her

bachelor's degree and started a new career in nursing. Claimant received treatment for her depression with Dr. Huerter.

Claimant believes the reason for her current depression is the work injury and what has happened to her since the work injury. Claimant attributes the loss of her job, her inability to work, her inability to do things, which includes lifting her grandson, and loss of social interaction, to the work injury.

Claimant denies being prescribed medication for depression or anxiety and claims the antidepressant medication she was prescribed were for hot flashes, restless leg syndrome, and smoking cessation. She admits while she was going through cancer treatment, she most likely took antidepressant medication in 1993. Claimant has been cancer-free since November 2, 2018.

Claimant met with Eric Huerter, M.D., her primary care physician, on June 12, 2018, for depression and pneumonia. Claimant's active problems were listed as anxiety, bronchitis, depression, head and neck cancer, injury of the left shoulder, radiating pain, rotator cuff syndrome of the left shoulder, sinusitis and tobacco abuse. Dr. Huerter noted Claimant's struggle with a left shoulder injury causing a worsening of her depression. Dr. Huerter found Claimant had anxiety and depression due to left shoulder injury and rotator cuff syndrome of the left shoulder. He opined the anxiety and depression were due to the work injury and the following surgeries leading to her inability to work. He recommended counseling/therapy and prescribed Wellbutrin.

Claimant met with Dr. Theodore Moeller, Ph.D., a licensed clinical psychologist, on August 1, 2018, for a psychological evaluation at Respondent's request. Dr. Moeller was to determine if any of Claimant's psychological complaints related to the physical injury and were the prevailing factor for her current psychological complaints. Claimant denied any prior mental health care prior to her injury. Claimant acknowledged bereavement counseling and being prescribed anti-depressant medication for smoking cessation.

Dr. Moeller performed the Paulhus Deception Scales test and the Structured Interview of Malingered Symptoms tests to evaluate how Claimant answers questions; the MBMD and MCMI tests to focus on physical issues to determine treatment. The MCMI-III test is psychologically-oriented and provides clinical scales to assess depression and anxiety. The MPPII-II and MPPII-RF tests were also utilized.

Dr. Moeller opined Claimant's work injury was not the prevailing factor for her current psychological complaints and her psychological complaints cannot be traced back to her physical injury. Dr. Moeller opined there was no data indicating the work-related injury was the prevailing factor for Claimant's psychological difficulties. According to Dr. Moeller, the causes of Claimant's psychological condition were anger with her employer for not returning her to work and participation in the workers compensation system, which

makes her feel not in control of her own treatment, but it cannot be traced back to the work accident. According to Dr. Moeller there is a probability of conscious exaggeration by Claimant.

Dr. Moeller opined Claimant was able psychologically to return to any job for which she is qualified and can accommodate any physical restrictions she may have.

Dr. Moeller provided a report from August 1, 2018, to October 12, 2018. After a review of Dr. Barnett's records, he found Dr. Barnett used the incorrect version of the MMPI-2 test on Claimant in providing an opinion on whether she did not explain as to how he arrived at his conclusions and diagnosis. Dr. Barnett's opinion did not alter Dr. Moeller's opinion.

Dr. Moeller performed a second psychological evaluation on Claimant on June 7 and 17, 2021, at Respondent's request. Claimant attended psychotherapy September 25, 2019, to July 1, 2021, with Dr. David Magill for major depressive disorder and severe and generalized anxiety disorder. She was prescribed medication, of Vyvanse and Wellbutrin. Dr. Moeller still believed Claimant's work accident was not the prevailing factor for Claimant's psychological complaints.

Dr. Moeller's review of Claimant's medical records show references to depression for 20 years prior to the work accident. He noted Claimant had a history of depression and experienced significant somatic symptoms for several years prior to the work-related injury. He agreed Claimant could benefit from additional mental health services, but not due to the work-related injury.

Dr. Moeller concluded to a reasonable degree of psychological probability, there was no data indicating the work-related injury was the prevailing factor for any psychological or emotional difficulties. This opinion was based on, but not limited to the results of psychological testing. He noted significant changes between the 2018 and 2021 test results and the inconsistency between the test results and Claimant's verbal report. He noted Claimant's health care records, contradicted her self-report to Dr. Allen and Dr. Barnett.

Claimant met with Dr. Robert Barnett, Ph.D., a clinical psychologist for psychological evaluation on September 6, 2018, at the request of her attorney. He tested Claimant with symptoms check list 90-R, MMPI-2 and memory malingering. Dr. Barnett examined Claimant and opined she does not appear to be suffering from major mental disease or defect such as psychosis, major depressive disorder, personality disorder or substance abuse disorder. He found Claimant was experiencing pronounced symptoms of depression, which he felt were reactive to and a direct result of her work injury. He diagnosed Claimant with Depressive Disorder, NOS, Severe. He related Claimant's depression to her work injury.

Dr. Barnett found Claimant was relatively high-functioning given her diagnosis. He found Claimant motivated to work and wanting to fix her shoulder so she could return to work. He determined the depression was debilitating and he was concerned if not treated, Claimant's condition would turn major and more difficult to treat. He recommended treatment with a licensed psychologist or clinical social worker.

Claimant met with Dr. Barnett again on April 22, 2021, at the request of her attorney. Claimant reported being prescribed Vyvance, Wellbutrin and Prozac. Claimant reported going to psychotherapy for a year and a half intermittently with Dr. Magill and it improved her mood. He noted Claimant appeared distracted primarily by physical problems and chronic pain, but was cognitively capable of simple and complex work tasks.

Dr. Barnett opined Claimant did not appear to be suffering from any major mental disease or defect such as psychosis, major depressive disorder, personality disorder or substance abuse disorder. Claimant was experiencing moderate symptoms of depression. He found the prevailing factor for Claimant's psychological injury and resulting neurosis was the work accident. He opined the connection between Claimant's work accident and the development of her moderate depression was reduction in gainful employment, reduced physical activity, inability to participate in previously enjoyable activities, interrupted sleep, poor appetite, weight gain, feeling of hopelessness and social isolation. He found no preexisting concerns, but noted the depression would have been diagnosed as an adjustment disorder, but due to the length of time Claimant has experienced, the symptoms and the severity, the diagnosis of Persistent Depressive Disorder, NOS, Moderate (DSM-5) was more appropriate.

Dr. Barnett did not recommend any further mental health treatment as it was unlikely to provide any further improvement. He found if Claimant's physical problems improved slightly, there would be an improvement in Claimant's mood.

Dr. Barnett found 10 percent impairment using *The Guides* as a starting point but using his clinical judgment and experience found 25 percent to be a more realistic and supportable impairment rating and more accurately reflected Claimant's psychological impairment related to the work injury.

Dr. Pedro Murati evaluated Claimant on September 5, 2018, at her attorney's request. Claimant complained of pain in the left shoulder, left upper extremity and upper back; radiating pain from the shoulder down the arm into the elbow and from the shoulder down into the shoulder blade; inability to use the left arm, reach above chest level; lift, push, and pull with the left upper extremity; difficulty performing activities of daily living due to left shoulder pain; difficulty sleeping due to pain; and difficulty driving long distances due to seatbelt hitting the shoulder. Claimant denied any significant injury to the left shoulder, neck and low back prior to the September 27, 2016, work accident.

Dr. Murati found Claimant had two left shoulder surgeries due to the work injury for left shoulder pain and degenerative joint disease. Dr. Murati found there was enough permanent structural change in the anatomy of the left shoulder to cause pain necessitating treatment. He found the prevailing factor in the development of Claimant's left shoulder injuries was the work accident. Claimant did not report any psychiatric concerns or symptoms to Dr. Murati.

Dr. Murati found Claimant had a 10 percent left upper extremity impairment for loss of range of motion to the left shoulder and an additional 10 percent left upper extremity impairment for status post subacromial decompression for a combined impairment of 19 percent to the left upper extremity under the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition*. Under *The Guides*, he awarded a 12 percent impairment for the left upper extremity for loss of range of motion of the left shoulder.

Dr. Murati's ratings were provided prior to the Kansas Supreme Court decision *Johnson v. U.S. Food Service*, which held the extent of functional impairment for a body as a whole injury is determined by competent medical evidence, using *The Guides* as a starting point.<sup>2</sup> When the *Johnson* analysis is applied, Dr. Murati determined Claimant's impairment is 25 percent to the left upper extremity at the shoulder. According to Dr. Murati, *The Guides* ignore anatomical parts of the left shoulder injured in the work accident. The 25 percent rating converts to 15 percent body as a whole impairment. Combining the 15 percent rating with the 10 percent impairment rating from Dr. Allen for psychological injuries, Claimant's total impairment is 25 percent to the body as a whole. Dr. Murati also found an impairment combining Dr. Barnett's 25 percent body as a whole psychological impairment with 15 percent body as a whole rating for the left shoulder results in a 36 percent whole body impairment.<sup>3</sup>

Dr. Murati opined Claimant will need shoulder replacement surgery. However, at the time he saw Claimant, she was not reporting neck and low back pain.

Dr. Murati assigned permanent restrictions in an eight-hour work day; of no climbing ladders, no heavy grasping or above shoulder work with the left upper extremity, no lifting, carrying, pushing or pulling more than 35 pounds, occasionally lift 35 pounds and frequently lift 20 pounds, and no work more than 24 inches from the body on the left side.

Dr. Murati reviewed the task list of Richard Thomas and determined Claimant can no longer perform 5 tasks out of 14 tasks for 37.5 percent task loss. When he was

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<sup>2</sup> *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

<sup>3</sup> See Murati Depo. at 13-14.

deposed he testified any task requiring frequent reaching and reaching more than 24 inches from her body lead Dr. Murati to conclude Claimant cannot perform 13 out of 14 tasks for 92.8 percent task loss.

Dr. Murati opined when he met with Claimant, with the restrictions he assigned, she would be able to do supervisory work such as case management, but no direct patient care.

Dr. Molly Allen, Ph.D., examined Claimant on December 3, 2018, at the request of the Court to determine if Claimant's psychological issues were related to her work injury. Dr. Allen opined Claimant had a history of treatment for depression while recovering from cancer 25 years ago and took an antidepressant off and on, and Claimant's psychological symptoms did not interfere with her daily functioning until after the 2016 work injury. Dr. Allen also noted some of the occasions Claimant took antidepressants were to help with smoking cessation and mild depression and anxiety.

Dr. Allen diagnosed Claimant with Major Depressive Disorder and Generalized Anxiety Disorder. Claimant met the criteria for these diagnoses due to the nature of her exposure to a stressful event, her description of symptoms, and observation of her presentation. Dr. Allen did not feel Claimant's condition was stable at the time of this evaluation and found stress exacerbated them. Claimant was not at maximum medical improvement and ongoing care was recommended to manage her symptoms and improve her coping skills. Dr. Allen found the September 2016 work accident and injury to be the prevailing factor for Claimant's Major Depressive Disorder and Generalized Anxiety Disorder.

Notwithstanding Claimant not being at maximum medical improvement Dr. Allen assigned a psychological impairment rating under *The Guides* and factored self-care, personal hygiene, activities of daily living; role function; social and recreational activities; travel; inter-personal relationships; concentration, persistence, and pace; and resilience and employability into the impairment rating. Dr. Allen opined Claimant's impairment due to her reaction to her work-related injury was 10 percent to the body as a whole. This impairment does not address the physical impairment for the injury.

Claimant met with Richard Thomas for a vocational assessment on August 5, 2021, at the request of her attorney. Claimant presented being depressed, no longer able to socialize, and only able to do one-handed work. Claimant seemed to have lost her purpose since the accident. She survived a rare cancer only to lose her ability to work after the accident leading to severe depression. Claimant had not worked since the accident and was now on Social Security Disability. Claimant wanted to work but cannot with one arm combined with her psychological issues. Mr. Thomas identified 14 tasks Claimant had performed in the five years preceding the accident. Mr. Thomas found Claimant was permanently and totally disabled and unable to engage in substantial gainful employment



due to Claimant's age, lack of transferable job skills, physical limitations and work experience. He acknowledged Claimant was educated and intelligent. However, even with Claimant's nursing training and education Claimant's psychological issues and her inability to concentrate Claimant render unemployable or capable of doing work. Mr. Thomas opined Claimant's restrictions due to her left shoulder injury were not sufficient to render Claimant permanently and totally disabled but coupled with her psychological problems made her permanently and totally disabled. He felt if Claimant were to receive some treatment for her psychological issues, she may be able to perform some kind of work, but he was not optimistic.

Claimant met with Steve Benjamin for a vocational assessment on September 3, 2021, at the request of Respondent. He identified 21 tasks Claimant had performed in the five years preceding the work accident. Mr. Benjamin identified five jobs Claimant could perform within the limitations of Dr. Stechschulte, Dr. Moeller and Dr. Murati. The five jobs were customer service representative, medical office clerk, nurse case manager and school nurse. He found Claimant had the ability to re-enter the open labor market and earn \$624.80 per week. When compared to her pre-injury average weekly wage of \$1,439.33, Claimant had a wage loss of \$814.53 or 56.6 percent.

Claimant did not return to work for Respondent because she was unable to lift 50 pounds and Respondent was unable to accommodate Claimant's permanent restrictions.

The ALJ ruled Claimant's left shoulder injury and her psychological injury arose of out of and in the course of employment, and Claimant's work injury was the prevailing factor for both injuries. The ALJ ruled Claimant had a 27.25 percent body as whole impairment. He combined the impairment ratings for the left shoulder only, of Dr. Murati's, 25 percent, and Dr. Stechschulte's 14 percent for a rating of an average rating of 19.5 percent to the left shoulder. The ALJ then combined the left shoulder rating of 19.5 with the psychological injury rating of 10 percent to the body as whole for a total functional impairment rating of 27.25 percent. The ALJ ruled Claimant was entitled to a work disability rating of 64.57 percent to the body as a whole. The ALJ ruled Claimant was not permanently and totally disabled. Claimant was entitled to future medical for her physical injuries, but not her psychological injuries.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Respondent argues Claimant is only entitled to compensation for a left shoulder injury only and the psychological complaints are not compensable because these complaints cannot be traced to the physical injury. Respondent contends future medical should be closed, and depending on the amount of functional impairment awarded, Respondent is entitled to reimbursement from the Fund.

Claimant argues the evidence proves she sustained a psychological injury directly traceable to her work accident. Claimant argues she is permanently and totally disabled because her physical injury and her depression render her unable to enter the labor market. In the alternative, Claimant argues she is entitled to a 96.4 percent work disability. Claimant argues the award of future medical for the left shoulder should be affirmed and asks for future medical for her psychological issues.

The Fund states it is involved for the sole purpose of possible reimbursement should all or a portion of the claim be found non-compensable. The Fund requests that if any part of the claim is found to be non-compensable, the Respondent's right to reimbursement be addressed in the finding. The Fund further requests to reserve any right it may have under the Kansas Workers Compensation Act to address issues which may come out of the Board's decision for purposes of any further appeal.

K.S.A. 2018 Supp. 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.

Claimant and Respondent agree Claimant's left shoulder injury is compensable. The major dispute is whether Claimant's work injury is the prevailing factor for Claimant's psychological injuries.

K.S.A. 44-508(2)(B) states in part:

An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

K.S.A. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The Kansas Court of Appeals has held:

In order to establish a compensable claim for traumatic neurosis under the Kansas

Workers Compensation Act , K.S.A. 44-501 et seq. the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.<sup>4</sup>

Applying the analysis of *Love* Claimant has a psychological injury traceable to the work injury and the prevailing factor for the psychological injury is physical injury caused by the work accident.

First, Claimant has a work-related physical injury to her left shoulder. Second, Claimant was diagnosed by three psychologists with depression and two diagnosed her with an anxiety disorder.

Dr. Barnett and Dr. Allen who examined Claimant both opined Claimant's depression and anxiety were due to her work injury and her work injury was the prevailing factor for her psychological injury. There is compelling evidence of a direct relationship between the physical injury and the psychological injury. It is acknowledged Claimant was prescribed anti-depressive medication prior to her work accident and there are references in her medical records of Claimant suffering from depression. However, prior to her work accident, Claimant continued to function with her every day activities and hobbies, she completed a nursing degree and began working for Respondent full-time with no limitations despite these earlier references to depression. In other word, Claimant's prior depression was in remission. After Claimant's injury to her left shoulder, which resulted in two surgeries and preventing her from returning to her nursing position she loved, Claimant's depression returned, worsened and became debilitating. Claimant's social interactions are very limited and she does not have much hope to have a productive life. The depression Claimant is suffering is different from before the work accident and it is due to her work-related injury.

Respondent cites *Williams v. City of Topeka*<sup>5</sup> being on point. *Williams* is distinguishable. There was a Court-ordered expert in the *Williams* who opined the injured worker's depressed mood was not traceable to his work injury. Secondly, the injured worker's symptoms in *Williams* did not rise to a level of neurosis. In this case, two experts have traced Claimant's psychological injury to the work injury and Claimant has been diagnosed by three medical experts with a neurosis.

The Board finds the opinions of Dr. Barnett and Dr. Allen more credible than Dr. Moeller. Dr. Allen was retained by the Court for an independent evaluation and opinion. Both Dr. Barnett and Dr. Allen found Claimant's psychological injuries traceable to the work

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<sup>4</sup> *Love v. McDonald's Restaurant*, 13 Kan. App.2d 397 ¶1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

<sup>5</sup> *Williams v. City of Topeka*, No. AP-00-0447-746, 2020 WL 719933 (WCAB January 16, 2020).

injury. Both their opinions are reinforced by Claimant's primary care physician Dr. Huerter.

The Board agrees with the ALJ. Claimant's impairment for her psychological injuries is 10 percent to the body as a whole, which is the opinion of the Court-ordered doctor. The Board also agrees with the ALJ's averaging of the two doctors' left shoulder ratings to determine Claimant's permanent impairment to the left shoulder.

The ALJ erred calculating Claimant's functional impairment. He averaged two scheduled injury impairment ratings with a body as a whole rating. The correct calculation is to convert the scheduled injury ratings to body as a whole ratings. Dr. Murati provided a body as a whole rating for his left shoulder rating of 15 percent. However Dr. Stechschulte only provided a 14 percent to the left shoulder rating.

*The Guides* provide a method to convert a scheduled injury rating to the body as a whole rating. The Board may take judicial notice of *The Guides* without *The Guides* being introduced into evidence.<sup>6</sup> The Board takes judicial notice of *The Guides* for the specific purpose of converting the 14 percent rating to the left shoulder to a body as whole rating. Referencing *The Guides* the 14 percent rating to the left shoulder is 9 percent to the body as a whole impairment rating.<sup>7</sup> Combining 9 percent rating and 15 percent rating is 12 percent and combining the 10 percent rating to the body as whole for the psychological injuries result in a 21 percent body as a whole rating for Claimant's functional impairment.<sup>8</sup>

Claimant contends she is entitled to an award of permanent total disability. Permanent total disability exists when an employee due to the injury is rendered completely and permanently incapable of engaging in any type of substantial employment.<sup>9</sup> In determining whether an individual is permanently and totally disabled a court can consider claimant's age, intelligence, education, training, previous work history and physical limitations.<sup>10</sup>

Claimant is not permanently and totally disabled, despite Mr. Thomas' opinion Claimant's depression renders her permanently and totally disabled. Claimant's depression can be treated. Claimant is of above-average intelligence, is educated, and has transferrable job skills based on training and education. Claimant demonstrated the ability

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<sup>6</sup> See *Perez v. National Beef*, 60 Kan. App.2d 489, 494 P.3d 268 (2021)

<sup>7</sup> *The Guides* at 419.

<sup>8</sup> *The Guides* Combined Values Chart.

<sup>9</sup> See K.S.A. 44-510c(a)(2).

<sup>10</sup> See *Wardlow v. ANR Freight Systems*, 19 Kan. App.2d 110, 114, 872 P.2d 299 (1993).

to change careers successfully and learn new skills. These factors all lead to the conclusion Claimant is not permanently and totally disabled.

The Board next addresses whether Claimant is eligible to receive work disability. 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,<sup>11</sup> and the employee sustains at least a 10% wage loss,<sup>12</sup> the employee may receive work disability compensation in excess of the percentage of functional impairment. Claimant's wage loss is not due to voluntary resignation or termination for cause. Claimant is unemployed because Respondent did not accommodate Claimant's permanent restrictions.<sup>13</sup> 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.<sup>14</sup>

Claimant is entitled to consideration of a work disability award because she has a functional impairment in excess of 7.5 percent and a wage loss in excess of 10 percent due to her work injury.

The only wage loss opinion offered was from Mr. Benjamin of 56.6 percent wage loss. Claimant's wage loss is 56.6 percent.

As for task loss the ALJ found Claimant had a task loss of 72.54 percent based on averaging the two task loss opinions of Dr. Stechsulte, 52.28 percent, and Dr. Murati, 92.8 percent. The Board agrees with the ALJ's calculation of task loss.

It is found and concluded Claimant has a work disability of 64.57 percent based on adding task loss of 72.54 percent and wage loss of 56.6 percent and dividing by 2.

With regard to future medical, 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

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<sup>11</sup> See K.S.A. 44-510e(a)(2)(C)(i).

<sup>12</sup> See K.S.A. 44-510e(a)(2)(E).

<sup>13</sup> See K.S.A. 44-510e(a)(2)(E)(i).

<sup>14</sup> See K.S.A. 44-510e(a)(2)(C)(ii).

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.

The Board agrees with the ALJ Claimant should be awarded future medical upon proper application for her left shoulder. However, Claimant is also entitled to an award of future medical treatment for her psychological injuries upon proper application pursuant to K.S.A. 44-510k. Dr. Barnett while not recommending treatment at this time, opined Claimant psychological injuries should be monitored and treatment available to her. Dr. Allen also recommended Claimant have ongoing psychological care to be certain her symptoms don't worsen. It is found and concluded Claimant should be granted future medical treatment upon proper application for her psychological injuries and the physical injury.

Respondent is not entitled to any reimbursement from the Kansas Workers compensation Fund because compensation has not been reduced or disallowed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth dated June 2, 2022, is modified. Future medical treatment for Claimant's psychological injuries and physical injury and should be granted upon proper application pursuant to K.S.A. 44-510k. Although the extent of Claimant's functional impairment is modified the award of work disability compensation is affirmed. In all other respects the award issued by ALJ Roth is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2022.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Jeff Cooper, Attorney for Claimant  
Ryan Wertz, Attorney for Self-Insured Respondent  
Katherine Gonzales, Attorney for the Fund  
Hon. Steven M. Roth, Administrative Law Judge