

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VIOLETA AGUIRRE,)
Claimant,)
V.)
) AP-00-0471-137
SYSTEMAIR MFG. INC.) CS-00-0457-629
Respondent,)
AND)
)
HARTFORD CASUALTY INSURANCE COMPANY,)
Insurance Carrier.)

ORDER

Respondent appealed the September 23, 2022, Award issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. Claimant filed a cross appeal and an amended cross appeal. This matter was scheduled for oral argument on February 9, 2023, but by agreement of the parties, was placed on the summary docket calendar and considered heard without oral argument on February 9, 2023.

APPEARANCES

Zachary K. Mark appeared for Claimant. Patricia A. Wohlford appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

1. Transcript of Regular Hearing, held June 2, 2022;
2. Deposition of Violeta Aguirre, held June 27, 2022;
3. Deposition of Daniel D. Zimmerman, M.D., held July 6, 2022, including exhibits;
4. Deposition of Brian Divelbiss, M.D., held August 4, 2022, including exhibits;
5. Deposition of Valerie Ann Deardorff, M.D., held August 4, 2022, including exhibits.

ISSUES

1. Did Claimant's alleged shoulder injuries arise out of and in the course of her employment and was the work accident the prevailing factor causing injury to Claimant's shoulders and resulting impairment?

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

3. Is Claimant entitled to future medical benefits?

4. Did the ALJ err in his application of K.S.A. 44-510f(a)(4) by deducting temporary total disability benefits previously paid from the cap of \$75,000.

FINDINGS OF FACT

Claimant has been employed with Respondent since 2009. In October 2019, Claimant was the supervisor of the assembly line. Claimant assembled air conditioners, which required her to use her hands, arms and shoulders in a rapid and repetitive fashion. Claimant assembled units, which required her to weld, use drills, cables, and rivet and glue guns. On October 17, 2019, Claimant experienced pain, numbness and inflammation in her hands. She reported her injuries to her supervisor and was provided authorized medical treatment at Concentra. Claimant's Application for Benefits was filed on April 26, 2021, and included injuries to her shoulders.

Claimant was referred to Valerie Anne Deardorff, M.D., an orthopedic surgeon who limits her practice to the treatment of the hand, wrist and elbow. She diagnosed Claimant with bilateral carpal tunnel syndrome. Dr. Deardorff performed carpal tunnel releases on both wrists, the right on March 3, 2020 and the left on June 15, 2020. Surgery was followed by a short course of physical therapy. Dr. Deardorff released Claimant to return to work without permanent work restrictions on November 6, 2020. She opined no future medical treatment was needed, but recommended intermittent brace wear and symptomatic treatment.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th edition (*Guides*, 6th ed.), Dr. Deardorff gave Claimant a 4% whole person impairment, which represents 3% impairment to each upper extremity at the elbow level. The doctor opined Claimant had an overall 12% functional impairment to the whole person under the AMA *Guides to the Evaluation of Permanent Impairment*, 4th edition (*Guides*, 4th ed.), which represents 10% impairment to each upper extremity at the elbow level. Dr. Deardorff testified using the *Guides*, 6th ed., as a starting point and based on competent medical evidence, her training, education and experience, Claimant has a 4% whole person

functional impairment for her injuries to her wrists for her carpal tunnel condition. She testified her functional impairment rating was limited to the body parts she treated, the hands and wrists.

In arriving at her functional impairment ratings, Dr. Deardorff testified she utilized QuickDASH, a form completed by Claimant at her last appointment. In it, Claimant reported ongoing symptoms in her hands, arms and shoulders while at work and during her regular daily activities.

Q. And then finally in that first section, severe difficulty doing recreational activities that take some force or impact –

A. Yes.

Q. -- to her upper extremity?

A. Uh-huh.

Q. Item 2, she says, moderate difficulty over the past week at that time with her arm, shoulder or hand problems interfering with her normal social activities.

A. Yes.

Q. Finally, No. 8, "Very limited in her work, her other regular daily activities." Is that correct?

A. Yes.

Q. Going down to Nos. 9 and 10, "Severe arm, shoulder or hand pain and tingling." Is that correct?

A. Yes.

Q. Going to No. 11, "Severe difficulty sleeping because of the pain in her arm, shoulder or hand."

A. Yes. That would appear to be what she writes.¹

Due to continued complaints, Claimant was referred to Brian Divelbiss, M.D., an orthopedic surgeon who limits his practice to the treatment of the upper extremities, on February 9, 2021, for a second opinion regarding wrist pain, hand numbness and tingling. He testified 90% of his practice is treatment of the hand, wrist and elbow, and 10% is the

¹ Deardorff Depo. (Aug. 4, 2022) at 37.

shoulder. Dr. Divelbiss diagnosed Claimant with bilateral cubital tunnel and tendinitis to both elbows. He performed bilateral cubital tunnel releases, the left on May 10, 2021 and the right on July 26, 2021. Surgery was followed by a short course of physical therapy on the left. Claimant did not believe physical therapy was needed on the right. On October 26, 2021, Claimant reported to Dr. Divelbiss she had returned to full duty work and requested she be released from treatment. Dr. Divelbiss released Claimant to full duty without permanent work restrictions and opined she would not need future medical treatment. Dr. Divelbiss had a functional capacity evaluation and Claimant's job description available to him in forming his opinion permanent work restrictions were not necessary.

Using the *Guides*, 6th ed., and based on Claimant's subjective complaints, the clinical exam, objective findings, clinical judgment, his experience, a complete review of all the available records, and imaging, Dr. Divelbiss gave Claimant a 4% whole person impairment, which represents 3% impairment to each upper extremity at the arm level for her cubital tunnel syndrome and tendinitis. He testified his functional impairment rating was limited to the body parts he treated, the elbows and wrists.

Dr. Divelbiss attributed Claimant's ongoing symptoms to her diagnosis of rheumatoid arthritis. He testified:

Q. If she's continuing to complain of inflammation, swelling in her hands and arms up to her shoulders, would that be related to your cubital tunnel diagnosis, or would that more likely be related to rheumatoid arthritis?

A. So I don't believe it's related to the cubital tunnel diagnosis. I think it is -- there's certainly -- based on her lab values, which demonstrated a rather high sed rate which is a sign of inflammation, it's not surprising that she had sort of systemic musculoskeletal pain.

...

Q. Do activities cause the condition, or do they do something else to the condition?

A. No. The activities would not cause rheumatoid. Rheumatoid is an intrinsic issue with the patient's genetic make-up and so certainly -- obviously if you have muscles and tendons and joints that are inflamed, they are going to be more susceptible to hurting with activity.²

My suspicion is that her uncontrolled rheumatoid arthritis is playing a significant role in her musculoskeletal pain, but as it specifically relates to the cubital tunnel, those aren't necessarily -- the complaints that she's having are not necessarily referable

² Divelbiss Depo. (Aug.4, 2022) at 20-21.

to her cubital tunnel. They are referable to her musculoskeletal system certainly, but I don't believe specifically referable to her cubital tunnel.³

In response to Claimant's testimony she continues to experience symptoms in her upper extremities, Dr. Divelbiss testified:

Q. Are you aware Ms. Aguirre complains of bilateral pain, limited range of motion in her bilateral elbows, as well as difficulty with bending and flexing her elbows?

A. At no time after her surgeries or the visits that I saw her did she have those sorts of complaints with the exception of having some discomfort at the medial side of her elbow.

Q. You're talking about the left elbow?

A. I am talking about the left elbow.⁴

Q. The records indicate that she had been working full duty and was requesting MMI; is that correct?

A. Yes.

Q. So the subjective complaints in the notations of her exam, what did that indicate to you as her physician?

A. So it appeared as though she was tolerating her full duty activity and she didn't feel like she needed to be -- have any additional visits with me and she's requesting she be placed at MMI.

Q. Is her course of treatment for bilateral cubital tunnel pretty typical of your patients?

A. The only thing that's just maybe a I would say most people don't necessarily come in at six weeks and tell me that they don't need any therapy. Not everyone needs therapy, that's true, but I would say more often than not that I wouldn't hear someone say, I don't need to do therapy.

Q. So did that indicate to you that she had a decent result?

³ Divelbiss Depo. (Aug. 4, 2022) at 30.

⁴ *Id* at 27.

A. It appeared to.⁵

Claimant did not return to her previous position following her release from treatment by Dr. Divelbiss. She moved to quality control. Claimant inspects products to ensure they are being made correctly and receives products from customers, which she repairs. Claimant testified she still has the same pain and inflammation in her hands, elbows and shoulders, along with numbness in her hands. She takes over-the-counter medicine for her discomfort. Although her symptoms remain, they do not occur as often because her current work is less intense and not as fast paced as her previous work on the line. When Claimant accepts overtime work, she is required to work on the assembly line. This work increases her symptoms, especially in her hands.

In the fall of 2021, Claimant saw her primary care physician for a physical exam. Claimant reported she was having pain in her hands and knees. The doctor's notes reflect Claimant's complaints were limited to her hands. Claimant was referred to the rheumatology clinic at KU where she was seen in March, 2022. Blood testing was performed and Claimant was diagnosed with rheumatoid arthritis, osteoarthritis in her neck and vitamin D and B12 deficiencies. Claimant was prescribed methotrexate for the arthritis, which she took for approximately two months, but stopped taking because it was hurting her more than it was helping.

At her attorney's request, Claimant was examined by Daniel D. Zimmerman, M.D., on December 28, 2021. Dr. Zimmerman arrived at his opinions based upon his evaluation of the medical records provided, the results of his physical examination and the history he received from Claimant. Dr. Zimmerman did not have medical records from Claimant's primary care physician or from KU Medical Center relating to treatment she received for her upper extremities. Claimant provided Dr. Zimmerman with her job description and reported pain and discomfort affecting her bilateral upper extremities.

Dr. Zimmerman opined the prevailing factor for Claimant's medical condition and resulting impairment to her hands, arms and shoulders was the repetitive work duties/tasks she performed in her employment with Respondent. He did not provide any permanent work restrictions. He testified Claimant will require future medical treatment for her shoulders, elbows and wrists. Specifically, Dr. Zimmerman recommended nonsteroidal anti-inflammatory medication in a therapeutic dosing schedule and injections of a steroid and local anesthetic into the shoulders, elbows and wrists.

Claimant told Dr. Zimmerman she received treatment for her shoulder pain and discomfort by the physical therapist, but when she attempted to discuss her shoulder symptoms with Dr. Deardorff and Dr. Divelbiss, she was informed they were not authorized

⁵ Divelbiss Depo. (Aug. 4, 2022) at 14.

to provide care for her shoulders. Dr. Zimmerman testified in his review of the medical records, he did not see a diagnosis of a shoulder condition(s) or shoulder treatment provided by either Dr. Deardorff or Dr. Divelbiss. He also testified upon review of the physical therapy records, he did not see Claimant was provided an evaluation or treatment for any shoulder condition(s), right or left.

Using the *Guides*, 6th ed., Dr. Zimmerman gave Claimant 20% whole person functional impairment, which represents 9% each to the right and left shoulder, 5% to the right elbow, 2% to the left elbow, 6% each to the right and left wrist. Dr. Zimmerman testified if his shoulder ratings were removed, using the *Guides*, 6th ed., Claimant has a 12% whole person functional impairment.

Dr. Zimmerman opined using the *Guides*, 6th ed., as a starting point and based on competent medical evidence, his training, education and experience, the history and physical examination findings, Claimant has a 39% whole person functional impairment, which represents 11% to the shoulder, 10% to the elbow and 10% at the wrist on the right for a total right upper extremity functional impairment of 28%, which converts to a 17% whole person functional impairment. For the left upper extremity, Claimant has 10% to the shoulder, 30% to the elbow and 10% at the wrist for a total left upper extremity functional impairment of 43%, which converts to a 26% whole person functional impairment.

Dr. Zimmerman testified he was not aware Claimant was diagnosed with rheumatoid arthritis, with positive lab studies. Had he been aware of this information, it might have impacted his conclusions. He also testified a diagnosis of rheumatoid arthritis affects inflammation in her body. He acknowledged inflammation and pain can affect range of motion findings, and other mechanical issues. He noted pain and inflammation are the most significant contributors to loss of range of motion.

Claimant testified she continues to have pain and inflammation in her upper extremities from her hands through her shoulders, which she described as still very strong. Claimant reports numbness in her fingers, especially if she works extra hours on the line. She takes over-the-counter medication to relieve her pain. Claimant's injuries have affected her ability to perform her work duties/tasks and her ability to do things at home such as cleaning and making tortillas. Claimant was prescribed medication for her rheumatoid arthritis, which she discontinued using after a couple of months because it was hurting more than it was helping. The medication caused her feet to swell. Claimant is self-medicating with natural ingredients based upon recommendations from a physician in Mexico, which have helped with her symptoms.

The ALJ found Claimant met her burden of proving she met with personal injury by accident arising out of and in the course of her employment with Respondent regarding injuries to her shoulders and her work duties/tasks were the prevailing factor causing the medical condition and resulting impairment or disability. He stated:

Here, the claimant's testimony and the medical opinions clearly showed the carpal tunnel and cubital tunnel conditions were work related as defined by K.S.A. 44-508(f)(2). The fact shoulder complaints appeared late in the record (Dr. Zimmerman's testimony) and close to the March, 2022 rheumatoid arthritis diagnosis, raised a suspicion the shoulder problems were arthritis related versus work related. However, the only medical opinion on the claimant's shoulders (Dr. Zimmerman) found physical injuries related to repetitive job duties. The preponderance of the evidence proved a work related injury to the shoulders, also.⁶

The ALJ found the opinions regarding Claimant's functional impairment ratings provided by Dr. Deardorff, Dr. Divelbiss and Dr. Zimmerman were competent medical evidence and equally credible. He averaged the ratings provided and awarded Claimant a 39% permanent partial functional impairment to the whole body. The ALJ awarded Claimant future medical treatment.

Respondent requests the Board find there was no compensable injuries to Claimant's shoulders and award an 8% permanent functional impairment for Claimant's wrist and elbow injuries based upon the combined opinions of the treating physicians, Dr. Deardorff and Dr. Divelbiss. Respondent further requests the Board deny future medical treatment.

Claimant requests the Board affirm the Award finding Claimant suffered work-related injuries to her bilateral wrists, elbows and shoulders and award 39% permanent functional impairment based on the opinions of Dr. Zimmerman. Claimant also requests the Board affirm the award of future medical benefits. Lastly, Claimant requests the Board should find the ALJ erred in his application of K.S.A. 44-510f(a)(4) by deducting temporary total disability benefits previously paid from the cap of \$75,000.

PRINCIPLES OF LAW AND ANALYSIS

- 1. Claimants shoulder injuries did not arise out of and in the course of her employment and her work is not the prevailing factor causing the medical condition and resulting impairment.**

An injury by repetitive trauma shall be compensable only if the employment exposes the worker to an increased risk of injury, the employment is the prevailing factor in causing the repetitive trauma and the repetitive trauma is the prevailing factor in causing the medical condition.⁷ The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on

⁶ ALJ Award (Sept. 23, 2022) at 4.

⁷ See K.S.A. 44-508(f)(2).

consideration of all relevant evidence.⁸ The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests.⁹

The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation depends.¹⁰ “Burden of proof” generally means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence the party’s position on an issue is more probably true than not on the basis of the whole record.¹¹ The trier of fact considers the whole record in determining if the employee satisfied the burden of proof.¹²

Respondent does not dispute Claimant suffered compensable injuries to her hands and arms due to repetitive trauma with a date of accident of October 17, 2019. The issue is whether Claimant’s shoulder injuries are compensable. The ALJ found Claimant met her burden of proving her shoulder injuries arose out of and in the course of her employment, including the repetitive work performed was the prevailing factor causing her shoulder injuries, medical condition and resulting impairment. In so doing, the ALJ found Dr. Zimmerman’s opinions regarding causation for Claimant’s shoulders to be “the only medical opinion.” The Board disagrees with this finding. Dr. Divelbiss testified Claimant’s ongoing symptoms, including those to her shoulders, were due to her diagnosis of rheumatoid arthritis.

Claimant reported to Dr. Zimmerman she made shoulder complaints of pain to the treating physicians and to the physical therapists. She advised Dr. Zimmerman she received treatment for her shoulders from the physical therapists. Other than her shoulder complaint found in the QuickDASH form completed for Dr. Deardorff, these assertions are not supported by the medical records. Claimant argues her shoulder complaints of pain were ignored because the authorized treating physicians were not authorized to provide treatment to the shoulders. Claimant, however, did not make a formal request, by way of preliminary hearing, to secure treatment for her shoulders.

Claimant testified she continues to experience pain, inflammation and numbness in her fingers which affect her ability to perform her job and home tasks. Following her second surgery with Dr. Divelbiss, she advised him she had returned to full duty, was tolerating it

⁸ See K.S.A. 44-508(g).

⁹ See K.S.A. 44-508(e).

¹⁰ See K.S.A. 44-501b(c).

¹¹ See K.S.A. 44-508(h).

¹² See *Id.*

well, did not believe she needed physical therapy and requested being released from treatment.

The Board finds the medical evidence of Dr. Divelbiss to be more credible than Dr. Zimmerman. Dr. Zimmerman was not aware of Claimant's diagnosis of rheumatoid arthritis and subsequent treatment. He admitted knowledge of this information could have affected his opinions. Unfortunately, Dr. Zimmerman did not offer an opinion if, in fact, this information did affect his opinions. Dr. Divelbiss was the only physician who had the benefit of reviewing the medical records regarding Claimant's arthritic condition and treatment. He was also the last treating physician to provide treatment to Claimant. Her condition at the time of her release was much different than what she testified to.

The Board finds Claimant's testimony regarding her current symptoms credible. However, it is Claimant's burden to prove it is more probably true than not the medical condition and resulting impairment in her shoulders arose out of and in the course of her employment and the work duties/tasks she performed for Respondent were the prevailing factor. The Board finds she has not met this burden of proof. Accordingly, the Board denies compensability of Claimant's claim for her bilateral shoulders.

2. Nature and extent of Claimant's disability.

Claimant's award was limited to her functional impairment. The ALJ found the opinions of Drs. Deardorff (4% whole body), Divelbiss (4% whole body), and Zimmerman (39% whole body) regarding functional impairment ratings to the upper extremities to be equally credible, averaged them, and awarded Claimant 39% permanent partial functional impairment to the whole body as a result of her October 17, 2019, work-related injuries. The Board agrees with the ALJ's findings the physician's ratings are equally credible and should be averaged. Combining Drs. Deardorff (4%) and Divelbiss' (4%) upper extremity ratings reveal 8% functional impairment to the whole body. Dr. Zimmerman's functional impairment to the whole body, after deducting the functional impairment ratings for the shoulders is 31%. The ratings have been added together and divided by two ($8 + 31 = 39/2$), revealing a 19.5% functional impairment. Based on the *Guides*, 6th ed., the percentage shall be rounded up, revealing a 20% permanent functional impairment to the whole body. Accordingly, the award of permanent partial disability compensation is 20% permanent functional impairment to the whole body.

3. Claimant is entitled to future medical benefits.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.¹³

¹³ See K.S.A. 44-510h(a).

It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement.¹⁴

Here, the ALJ awarded future medical treatment based on the opinions of Dr. Zimmerman. The Board notes the initial treating physician, Dr. Deardorff recommended intermittent brace wear and symptomatic treatment for her wrists. The Award of future medical treatment by the ALJ is supported by the record. Therefore, the Award of future medical treatment contained in the Award is affirmed.

4. Did the ALJ err in his application of K.S.A. 44-510f(a)(4) deducting temporary total disability benefits previously paid from the cap of \$75,000.

Claimant's award of permanent partial disability compensation has been modified to 20% permanent functional impairment to the whole body resulting in an award less than the \$75,000 cap, thereby rendering Claimant's arguments moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 23, 2022, is reversed in part, modified in part and affirmed.

The Claimant is entitled to 5.24 weeks of temporary total disability at the rate of \$645.47 per week, or \$3,382.26, followed by 83 weeks of permanent partial disability at the rate of \$645.47 per week, or \$53,574.01, for a 20% permanent partial functional disability, making a total award of \$56,956.27, which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this day of March, 2023.

¹⁴ See K.S.A. 44-508h(e).

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Zachary K. Mark, Attorney for Claimant
Patricia a. Wohlford, Attorney for Respondent and its Insurance Carrier
Hon. Kenneth J. Hursh, Administrative Law Judge