BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DIXIE PENNINGTON	)	
Claimant	)	
V.	)	
	)	AP-00-0459-530
CHEW PLUMBING & HEATING, INC.	)	CS-00-0446-692
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 9, 2021, Award issued by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on November 18, 2021.

APPEARANCES

Terry J. Torline appeared for the Claimant. Matthew J. Schaefer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and considered the same record as the ALJ, consisting of the Evidentiary Deposition of Kim Bryant from December 5, 2019; Evidentiary Deposition of Erik Bryant from December 19, 2019, with exhibits attached; Evidentiary Deposition of KayCee Pennington from January 8, 2020, with exhibits attached; Regular Hearing Testimony by Deposition of Dixie Pennington from May 15, 2020, with exhibits attached; the transcript of Regular Hearing via Telephone Conference from May 20, 2020, with exhibits attached; Evidentiary Deposition of Karen Terrill from June 24, 2020, with exhibits attached; Evidentiary Deposition of Pedro A. Murati, M.D., from November 2, 2020, with exhibits attached; Evidentiary Deposition of Matthew N. Henry, M.D., from November 17, 2020, with exhibits attached; Evidentiary Deposition of Pat D. Do, M.D., from December 7, 2020, with exhibits attached; Evidentiary Deposition of John P. Estivo, M.D., from December 15, 2020, with exhibits attached; Evidentiary Deposition of Steve Benjamin from December 18, 2020, with exhibits attached; Evidentiary Deposition of Kimberly (Kim) Bryant from January 5, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. What is Claimant's average weekly wage?

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

3. Is there an underpayment or overpayment of temporary total disability benefits?

4. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

The ALJ found Claimant's average weekly wage was $483.08 at the time of the accident and beginning July 1, 2019, increased to $520.20. Claimant was found entitled to 16.27 weeks of temporary total disability at $322.07 per week, which results in an overpayment of $254.37. The ALJ adopted the impairment rating of the court-ordered IME physician, Dr. Estivo, and found Claimant had a 12% functional impairment to the body as a whole. The ALJ found Claimant had not proven she sustained any additional impairment related to her L5-S1 condition as a result of her work accident, because the accident was not the prevailing factor causing that condition. The ALJ found Claimant voluntarily resigned her employment and if not for that, she would still be working for Respondent at a comparable wage. Therefore, the ALJ found Claimant was not entitled to work disability. Finally, the ALJ found Claimant proved she will require future medical related to her injuries.

Claimant began working for Respondent on November 14, 2005, as the office manager. Claimant's job duties included answering the telephone, assisting customers, doing accounts payables and receivables, preparing statements for work completed, ordering materials, stocking and cleaning.

On February 13, 2019, Claimant was cleaning counters and parts bins when she fell backwards off the stepladder she was standing on, landing on her left side, hitting her hip and back on the ground.

Claimant's daughter was present at the time of the accident and was sitting at Claimant's desk. Claimant's daughter called the owner, Erik Bryant, and reported the accident. Claimant's daughter drove her to the emergency room.

Claimant was hospitalized for three days. Claimant sustained injuries to her back, including an L2 compression fracture. Claimant received conservative medical treatment. Claimant was off work until March 5, 2019.

While Claimant was off work due to her accident, Kim Bryant, the owner's wife, took over Claimant's job duties, including accounts receivables and payables. Prior to Claimant's accident, Ms. Bryant had paid bills and some accounts payable from home. After Claimant's accident, Ms. Bryant came into the office every day to work. While Claimant was off work, Ms. Bryant found errors in the employer's accounts such as incorrect billings to customers and accounts not being credited properly with payments. Ms. Bryant was performing a complete review of employer's accounts and records. Her goal was to organize the employer's records and to be certain all accounts were current and correct.

When Claimant returned to work on March 5, she was working part-time with restrictions. Ms. Bryant was still reviewing and correcting the employer's accounts and records. Respondent provided light duty to Claimant, cleaning plumbing parts, answering the phone and ordering materials.

On March 15, 2019, Claimant was given an Employee Written Notice and Write-up form. On the form, it was stated "1) In Dixie's absence, we discovered several accounts not being added or subtracted properly. This has resulted in a company profit loss. 2) Phone Professionalism-Dixie commented/referred to an employee drinking too much to a sale rep."[1] These incidents occurred before Claimant's accident. This was Claimant's first writeup during her employment with Respondent. Ms. Bryant showed Claimant several accounts containing errors

When Claimant returned to work she noticed surveillance cameras had been installed and Claimant felt "spied on." The surveillance cameras had been purchased prior to Claimant's accident and the employer had them installed during Claimant's absence.

After Claimant returned to work, she was handed a box of the personal items she had on the desk where she worked and was told the personal items were not for the workplace. The desk was cleaned up because Ms. Bryant was using the desk in Claimant's absence. Ms. Bryant found personal financial documents of Claimant's in the desk. She believed these items did not belong in a shared desk at work. Ms. Bryant also used this desk as well as a part-time employee the employer hired in Claimant's absence to work afternoons until Claimant returned to work.

Upon her return to work, Claimant was also told her daughter was no longer allowed to be behind the counter in the office and to sit at the desk Claimant used. Ms. Bryant did not believe non-employees should be behind the counter because there were customer records and financial information non-employees should not see.

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[1] Erik Bryant Depo., Ex. 1.

After Claimant returned to work, she was unable to do the accommodated work Respondent gave her due to pain in her back. Claimant worked until April 2, 2019.

Claimant was sent for an MRI, and then to Dr. Matthew Henry, a board-certified neurosurgeon, for additional medical treatment. Dr. Henry diagnosed Claimant with a compression fracture. Dr. Henry recommended an L2 kyphoplasty procedure, which was performed on May 10, 2019. Kyphoplasty is an outpatient procedure in which bone cement is injected into the vertebra to stabilize the fracture. Dr. Henry believed Claimant's kyphoplasty was a success.

Claimant reported her symptoms greatly improved after the kyphoplasty. Claimant was released from Dr. Henry's care on June 19, 2019, with no restrictions and no additional medical treatment was recommended. At the time of Claimant's release, she was still experiencing occasional low back pain. Claimant was still taking occasional pain medications and Dr. Henry gave her one last refill of medications.

Dr. Henry opined Claimant's work-related accident was the prevailing factor causing Claimant's L2 compression fracture and related kyphoplasty, but the prevailing factor in Claimant's remaining MRI findings were degenerative in nature and not related to her work accident.

Dr. Henry did not believe Claimant needed future medical treatment related to her L2 compression fracture and related kyphoplasty. Dr. Henry explained he did not anticipate Claimant would need future medical treatment surgically, but acknowledged if Claimant continued to have discomfort related to the connected tissue and muscle, she may need access to anti-inflammatory medication and muscle relaxants, as well as possible epidural injections or physical therapy.

Claimant returned to work on June 25, 2019. At the time Claimant returned, her employer, especially Ms Bryant, was uncertain what Claimant's job duties would be in the future. According to Ms. Bryant, she was organizing employer records and continued to do "all the book work". The employer's accounting system was still going through a conversion, which required Ms. Bryant to do a detailed review of the employer's books and records. There was still a determination being made about Claimant's job. Upon her return to work, Claimant was assigned to cleaning the showroom.

Claimant testified she was not allowed to handle any of the office work she had done before her accident. According to Claimant, she was not allowed to answer the phones or interact with customers. When Claimant returned to work, she was not treated the same, and not given the time of day by her coworkers. Claimant felt unwanted and micromanaged. Claimant testified she tried to talk with the owner, Erik, several times but he was always too busy to talk.

According to Ms. Bryant, Claimant was allowed to answer the phone and interact with customers, which Claimant did. When Claimant asked Ms. Bryant what to do she would ask Claimant what she normally did and Claimant usually had no response except book work, which was being handled by Ms. Bryant. Claimant could file, answer the phone and take payments. Claimant testified she was no longer allowed in the owner's office and was asked to leave when she was in there resting her back in the only other chair available in the building. Claimant got the feeling she was being pushed out of her job.

On June 27, 2019, while Claimant was at lunch, she sent a text message to Erik Bryant telling him she was quitting her job due to the working conditions since returning to work. Claimant testified she did not know why her work was taken away from her until she received her writeup in March. Claimant did not agree with the writeup and was never provided with evidence she did anything wrong in her office duties, or a chance to explain anything in question. Claimant did not know if she would still be working for Respondent had she not quit. She was not performing the work she had been hired for, so she could see her employment possibly ending if she had no work to perform other than cleaning.

According to Erik Bryant, he did not know Claimant was so unhappy with her job. In his text message response to Claimant he told her he wished Claimant had talked to him about her concerns, so he could sit down with Claimant and Ms. Bryant to work things out. He defended his wife's involvement in the business, stating "she was passionate about the business succeeding. He did tell Claimant he appreciated her work.[2] He does not recall Claimant attempting to talk to him before she quit, but he acknowledges it was a busy time for him. Claimant did not try to call him or text him before she quit. Mr. Bryant acknowledges he was still trying to figure out Claimant's job going forward. Ms. Bryant was also not aware Claimant was unhappy in her job.

On July 10, 2019, Claimant was hired by Wellington Pharmacy. She is making $350 a week, based on $10 an hour. She is working 35 to 40 hours per week. She is not receiving any fringe benefits. Claimant's job duties with the pharmacy are to answer the telephone, take Rx numbers, check people out, stock shelves, cleaning, vacuum and order over-the-counter products. Claimant is on her feet all day and does not lift over 10 pounds. She also delivers medication to hospice patients. Claimant tries to work within the restrictions assigned to her by Dr. Murati and avoid anything which makes her pain worse.

Dr. Pat Do examined Claimant on September 4, 2019, at Respondent's request. Claimant reported falling off a ladder in February and undergoing a kyphoplasty in May 2019. Around July 2019, she started having on and off burning of the right anterior thigh. Claimant reported being unable to stand for long periods of time and walking without pain. She rated her pain at a 6 out of 10. On a pain diagram, Claimant noted pain in her right

[2] Erik Bryant Depo., Ex. 5.

shoulder, right hip and right wrist. She noted aching in the right hip and numbness and tingling in the right thigh. Dr. Do examined Claimant and identified tenderness in the lumbar spine. His impression was status post L2 kyphoplasty for a compression fracture.

Dr. Do rated Claimant's permanent impairment at 11% body as a whole, using the *American Medical Association Guides to the Evaluation Permanent Impairment 6th Edition*[3] for the L2 compression fracture.

Dr. Do opined the future medical treatment Claimant would need included muscle relaxants, over-the-counter anti-inflammatories and possible trigger point injections in the muscle area. He saw no need for further surgical intervention. Dr. Do agreed with Dr. Henry a compression fracture due to a trauma is unlikely to lead to other compression fractures, but compression fractures stemming from bone density issues could lead to additional compression fractures above and below.

Dr. Do acknowledged Claimant's complaints of numbness and tingling in her right thigh would be suggestive of an L5-S1 problem. A fall such as Claimant's, where she landed onto her buttocks resulting in a compression fracture, could be sufficient to cause the disc bulge in L5-S1 region. According to Dr. Do, if it was determined Claimant had a disc protrusion and right leg radiculopathy from L5-S1, in addition to her L2 compression fracture, her permanent impairment would increase by 10%. However, Dr. Do has not seen medical records for Claimant documenting an ongoing rateable L5-S1 injury related to Claimant's work accident. Dr. Do noted Claimant's MRI films from March 27, 2019, and August 20, 2020, just showed degenerative changes at L5-S1.

Dr. John P. Estivo examined on October 31, 2019, at the request of the Court. Claimant presented with lumbar spine pain radiating into the right thigh. Upon review of Claimant's prior medical records and examination of Claimant, Dr. Estivo diagnosed Claimant with status post L2 compression fracture of 40%, treated with a kyphoplasty. He opined the prevailing factor and need for medical treatment for the compression fracture was the February 13, 2019, work accident. Dr. Estivo opined Claimant received the proper treatment and had significant pain relief, but continues to have pain in the lumbar spine. He felt Claimant would benefit from physical therapy three times a week for a month to reduce pain and strengthen the lumbar spine. He recommended temporary restrictions of no lifting more than a maximum of 25 pounds and no constant bending or twisting.

On January 23, 2020, Dr. Estivo met with Claimant again. Claimant reported that the month of physical therapy had not improved her condition and she continued to have low back pain with occasional left thigh numbness. Claimant had some discomfort in the lumbar spine with palpation. She was able to forward flex and touch to her knees and she

[3] Hereinafter referred to as *The Guides*.

extended and side bended at the lumbar spine with some discomfort. She had some slight numbness and tingling across the right thigh anteriorly. She was able to walk with a normal gait.

Dr. Estivo continued with his diagnosis of status post 40% L2 compression fracture treated with a kyphoplasty. Claimant opted to finish her last two physical therapy sessions and then continue the exercises at home. Dr. Estivo found Claimant to be at maximum medical improvement. He did not feel Claimant needed future medical treatment for the injury and was released from care.

On February 13, 2020, Dr. Estivo rated Claimant's permanent impairment at 12% body as a whole based on *The Guides*.

On August 17, 2020, Claimant met with Dr. Estivo again for evaluation of low back and hip pain for a determination if she needed additional medical treatment. Claimant denied any new injury or additional medical treatment since the last visit. Claimant had been performing her normal work duties at the pharmacy. Claimant was examined and x-rays were taken of the lumbar spine, sacrum and coccyx. The x-rays revealed age-related degenerative changes at L5-S1. The L2 fracture was healed and there was no acute abnormalities. There were no abnormalities in the sacrum and coccyx.

Dr. Estivo found status post L2 compression fracture, lumboscral pain and age-related degenerative disc disease L5-S1. Dr. Estivo opined the degenerative disc disease developed as a natural consequence of aging and was not related to the work accident. He recommended an MRI of the sacrum and coccyx to investigate Claimant's pain extending from the low back into the pelvis posteriorly and occasionally extending over towards the right buttocks.

An August 20, 2020, MRI of the sacrum and coccyx revealed an intact sacrum and coccyx, no osseous lesion or insufficiency fractures, symmetric SI joint, and degenerative changes at the lumbosacral junction which had progressed since a previous MRI from March 27, 2019. There were no acute abnormalities found around the pelvis.

On September 3, 2020, Dr. Estivo reviewed the MRI results. Claimant continued to have lumbosacral pain and report occasional right leg pain extending into her right foot at times. Dr. Estivo still diagnosed status post L2 compression fracture, lumbosacral pain and age-related degenerative disc disease L5-S1. He continued to opine Claimant was at maximum medical improvement and she did not require future medical treatment for her work injury. He opined the lumbosacral pain with occasional right leg pain was directly related to the age-related degenerative disc disease at L5-S1, which developed as a natural consequence of aging. He recommended Claimant followup with her family physician for treatment of the age-related degenerative disc disease at L5-S1.

Dr. Pedro Murati examined Claimant on January 27, 2020, at the request of her attorney. Claimant presented to Dr. Murati with chief complaints of "1. Constant pain in the back and right side of hip area. 2. Numbness, tingling, and shooting pain in the right leg. 3. Occasional numbness in the left leg radiating in to the groin."[4] Dr. Murati reviewed Claimant's medical records and performed a physical examination and found the following: "1. Status post, "Postcutaneous reduction and stabilization of L2 compression fracture utilizing balloon kyphoplasty and methyl methacrylate. 2. Use of intraoperative fluroscopy interpretation of image," Dr. Henry 5-10-19 Lumbar radiculopathy. 3. Right SI joint dysfunction."[5]

Dr. Murati opined Claimant's February 13, 2019, work-related accident was the prevailing factor causing all Claimant's diagnosed conditions. Dr. Murati further opined it was beyond medical certainty Claimant will require future medical treatment due to her injuries. Dr. Murati recommended at least yearly follow-ups for any complications and indicated potential treatment include physical therapy, injections, radiological studies and medications. Dr. Murati assigned permanent work restrictions, including occasional sitting and standing, frequent walking, no bending, couching, or stooping, rare climbing stairs, climbing ladders, and squatting, no crawling, occasional driving, alternate sit, stand, and walk, and no lifting, carrying, pushing, or pulling more than 10 pounds, occasional lifting, carrying, pushing, or pulling 10 pounds, and frequent lifting, carrying, pushing or pulling 5 pounds.

Dr. Murati opined as result of Claimant's work-related injuries, Claimant had permanent impairment of 12% to the body as a whole for status post 40% compression fracture at L2 with lumbar radiculopathy based on *The Guides*.

Claimant still has pain complaints in her right hip area. Claimant tries not to treat her pain complaints with narcotic pain medications or muscle relaxants, but takes over-the-counter ibuprofen or Tylenol. However, there are some days she can barely climb the steps to her house at the end of the day due to pain. Claimant continues to use a TENS unit and lidocaine patches.

Mr. Bryant testified Respondent had an accident policy and Claimant was a part of, a 401k plan. A Christmas bonus was also provided to the employees. Claimant and one of the plumbers took out additional coverage beyond the provided accident policy. Mr. Bryant did not know the details of the policy and indicated his wife would know that information. He testified the company also provided to Claimant the benefit of cleaning her sewer every once and a while when it backed up.

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[4] Murati Depo., Ex. 2 at 3.

[5] *Id.* at 3.

The parties stipulated to the following information on Claimant's wage, but do not agree on calculation of Claimant's average weekly wage:

1. Claimant's straight hourly rate of the 26 weeks preceding the work accident is $460 per week;
2. Claimant was paid a bonus of $850 on December 21, 2018;
3. Claimant received an employer match of $384.04 in the 26 weeks preceding the work accident for contributions she made to a retirement plan;
4. Claimant was recipient of an insurance plan for which Respondent paid $6.00 per week.
5. In 2017 Claimant was promised a new sewer line in lieu of a raise. In November 2019, Claimant obtained a bid from another plumbing company indicating the cost of new sewer line is $1,800. The parties agree to the figure, but not its inclusion of the calculation of the average weekly wage.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues she did not voluntarily leave her employment with Respondent and asks the Board to find she has permanent restrictions and task loss. Claimant argues her average weekly wage should be recalculated and a wage loss combined with task loss to produce a work disability of 68% (36% wage loss and 100% task loss). Claimant also argues the Board should find she suffered injury to L5-S1 as a result the accident and increase her functional impairment accordingly. Claimant contends there is an underpayment of temporary total disability benefits and the ALJ made a clerical error by indicating "overpayment" instead of "underpayment" and would like the Board to clarify this by confirming how much was to be paid.

Respondent concedes the ALJ made a clerical error when stating the temporary total disability benefits had been "overpaid." The amount of overpayment should be determined by the Board's determination of the Claimant's average weekly wage. The ALJ determined the Claimant's wage loss was due to her voluntary resignation, and but for the voluntary resignation, she would be earning a comparable wage. Respondent asks the Board to affirm the same. As for the nature and extent, Respondent asks the Board to affirm the finding of 12% functional impairment to the body as a whole as determined by Dr. Estivo, the court-ordered IME physician. Finally, Respondent asserts the Claimant's future medical benefits should be closed as she will not need more medical care for the work-related injury, the L2 compression fracture.

In proceedings under the Workers Compensation Act, "the burden of proof is on the Claimant to establish the claimant's right to an award of compensation and to prove the various conditions upon which the claimant's right depends. In determining whether the

claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."[6]

Average Weekly Wage

Average weekly wage is calculated pursuant to K.S.A. 44-511, which states, in pertinent part:

> (1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis earned while employed by the employer, including bonuses and gratuities. Money shall not include any additional compensation, as defined in paragraph (2).
>
> (2) (A) The term "additional compensation" shall include and mean only the following: (i) Board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident or injury, or unless a higher weekly value is proved; and (ii) employer-paid life insurance, disability insurance, health and accident insurance and employer contributions to pension and profit sharing plans.
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> (B) In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system.
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> (C) Additional compensation shall not be included in the calculation of average wage until and unless such additional compensation is discontinued. If such additional compensation is discontinued subsequent to a computation of average weekly wages under this section, there shall be a recomputation to include such discontinued additional compensation.
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> (3) The term "wage" shall be construed to mean the total of the money and any additional compensation that the employee receives for services rendered for the employer in whose employment the employee sustains an injury arising out of and in the course of such employment.
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> (b)(1) Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.

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[6] K.S.A. 44-501b(c).

The parties made multiple stipulations regarding Claimant's average weekly wage, but disagree whether they should be included or how they should be included. The parties agree Claimant's base average weekly wage is $460 per week. The parties further stipulate Claimant was paid a Christmas bonus of $850 on December 21, 2018, Claimant received an employer match of $384.04 in the 26 weeks preceding her accident for contributions she made to a retirement plan, and Claimant was the recipient of an insurance plan for which Respondent paid $6.00 per week. The parties further agree that in 2017, Claimant was promised a new sewer line in lieu of a raise, and in November 2019, Claimant obtained a bid from another plumbing company that the cost of the new sewer line would be $1,800. The cost to Respondent to provide a sewer line is unknown.

The parties disagree whether the $1,800 value of the sewer line Respondent promised to Claimant in lieu of a raise in 2017 should be included in Claimant's average weekly wage calculation, and if so, how it should be included. Respondent argues K.S.A. 44-511 does not provide for including the value of a sewer line as a form of additional compensation when calculating the average weekly wage. Respondent further argues it promised to install the sewer line more than 26 weeks prior to Claimant's date of accident, so if it was considered to be compensation, it should not be included in Claimant's average weekly wage. Claimant argues the $1,800 value of the sewer line should be divided by 52 weeks to determine the average weekly value added to Claimant's average weekly wage.

The Board finds the value of the sewer line, which Respondent promised instead of giving Claimant a raise would be considered money as contemplated by K.S.A. 44-511(1) as it was offered in place of a salary increase. The Board believes the value of the sewer line should be spread out over the period of time from when it was promised in lieu of a pay increase through Claimant's date of accident. The parties have stipulated it was promised in 2017, and the testimony reflects it was likely sometime in mid to late 2017. The only evidence of the cost of the sewer line is the $1,800 estimate. As such, the Board will spread the value of the $1,800 sewer line over 78 weeks, which is one-and-a-half years prior to Claimant's date of accident, or September 27, 2017, which is a reasonable approximation of when the sewer line was promised. Dividing $1,800 by 78 results in an average weekly value of $23.08. Adding the $23.08 value of the sewer line to Claimant's base average weekly wage of $460 per week results in a base average weekly wage of $483.08. The Board finds that the average weekly value of Claimant's $850 yearly Christmas bonus paid on December 21, 2018, would be $850 divided by 52, which equals $16.35 per week. Thus, Claimant's average weekly wage before she quit was $499.43.

Claimant's additional compensation was terminated after she quit her job beginning July 1, 2019. The average weekly value of the $384.04 retirement plan match would be $384.04 divided by 26, which equals $14.77 per week. The average weekly value of the insurance plan Respondent provided was $6.00 per week. Adding those two values together results in a total of $20.77 per week in additional compensation. Adding Claimant's base average weekly wage of $499.43 to $20.77 per week of additional

compensation results in a total average weekly wage, inclusive of additional compensation, of $520.20 per week beginning July 1, 2019.

Nature and Extent of Impairment

K.S.A. 44-510e(a)(2)(B) provides:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Three physicians offered their opinions with regard to the nature and extent of Claimant's permanent partial functional impairment. All three doctors determined their impairment ratings based on the diagnosis of a 40% L2 vertebral compression fracture, with Dr. Murati and Dr. Estivo assessing 12% functional impairment to the body as a whole and Dr. Do assessing 11% functional impairment to the body as a whole. Claimant argues she has an additional 10% impairment to the body as a whole related to her condition at L5-S1 based upon hypothetical testimony by Dr. Do, who stated it was possible Claimant's work-related fall caused her injury at L5-S1. Dr. Estivo specifically examined Claimant's L5-S1 complaints and opined Claimant's age-related degenerative changes were the prevailing factor causing her L5-S1 complaints rather than her work-related fall. Dr. Murati did not make any findings regarding impairment at L5-S1.

The Board finds the opinions of Dr. Estivo, as the Court-ordered neutral examiner, to be the most credible and supported by the evidence and finds Claimant sustained a 12% functional impairment to the body as a whole related to her L2 compression fracture. This opinion is supported by the opinions of Dr. Murati, who assigned the same degree of impairment, and Dr. Do, whose impairment rating was only 1% less than Dr. Estivo and Dr. Murati. The Board further finds Claimant has not met her burden to prove by a preponderance of the evidence she sustained additional impairment related to her L5-S1 condition as a result of her February 13, 2019, work-related accident because her work-related accident was not the prevailing factor causing her condition at L5-S1.

Based upon the foregoing, the Board finds Claimant sustained a 12% permanent partial functional impairment to the body as a whole as a result of her February 13, 2019, work-related injury.

Claimant alleges she is entitled to a general body "work disability" award in excess of her functional impairment because she has sustained a wage loss as a result of her work-related injuries. Respondent, on the other hand, argues that Claimant is only entitled to an award based on her functional impairment because Claimant is capable of earning a comparable wage and thus does not have a wage loss. Respondent further argues that Claimant voluntarily resigned her employment with Respondent.

K.S.A. 44-510e provides:

> (a)(2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:
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> (i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and
>
> (ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.
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> In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.
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> (D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.
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> (E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in

> post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.
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> (i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.
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> (ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

Claimant has not worked for Respondent since she resigned her employment on June 27, 2019. Claimant argues her resignation was not voluntary but rather she was so intimidated, demeaned, and humiliated by Respondent she was forced to resign. Respondent argues the intention was to continue Claimant's employment and but for her resignation, she would still be working for Respondent earning a comparable wage.

Claimant testified that she felt like she was treated differently after she returned to work for Respondent after her accident. She felt she was being micro-managed by Kim Bryant. Claimant testified that Ms. Bryant gave Claimant a write-up for accounting errors and being unprofessional on the phone right after she returned to work for Respondent the first time. Ms. Bryant took over the majority of Claimant's job duties while Claimant was off work and did not give those job duties back to Claimant when she returned. Rather, Ms. Bryant continued doing Claimant's job duties and instead gave Claimant different duties, like cleaning bins full of plumbing parts. Respondent did not use Claimant's write-up as a justification for any discipline.

Claimant further testified Ms. Bryant packed up her personal items from the desk and gave them to her when she returned. Ms. Bryant also stopped allowing Claimant's daughter to sit at the desk. Claimant stated Respondent installed surveillance cameras while she was out, and Ms. Bryant pointed the new cameras out to Claimant when she returned. Claimant felt like Respondent was spying on her. Ms. Bryant, on the other hand, testified the desk Claimant used was a shared desk and Ms. Bryant cleaned it out because Claimant had left personal financial documents in the desk, which Ms. Bryant was concerned was unsafe for Claimant. Ms. Bryant and Mr. Bryant both testified Respondent had already planned to install surveillance cameras before Claimant's accident and just did not get it done until after Claimant's accident. It is clear from the testimony Claimant and Ms. Bryant had very different perceptions of the changes Ms. Bryant put into place when she started working for Respondent while Claimant was out.

When Claimant returned to work for Respondent the second time after she had her surgery, Claimant testified Respondent did not have a real job for her to do other than walking around and cleaning the same areas over and over again. Claimant testified Ms. Bryant would not let her do any of her old job duties other than cleaning. Ms. Bryant, on the other hand, testified that although she was still doing Claimant's former accounting duties to get the books back in shape, Claimant was still allowed to answer the phones, interact with customers who came into the store, filing, and cleaning as necessary. Ms. Bryant testified she did not prohibit Claimant from doing general office work except for posting of payments.

Ms. Bryant admitted she was still trying to figure out exactly what Claimant's job duties for Respondent were going to be after she returned to work following her release from treatment. Ms. Bryant had never worked in Respondent's office at the same time as Claimant, so it is not unreasonable Ms. Bryant did not know everything Claimant did. Ms. Bryant did not have a fully developed plan right away when Claimant returned to work as to what Claimant would do and what she would do.

In the text message Claimant sent to sent to Mr. Bryant stating she quit her job because she felt like she was being picked on and not wanted around by Ms. Bryant and was being questioned and told not to do job tasks.

Both Mr. and Ms. Bryant testified Claimant never talked to either one of them about how unhappy she was about her work when she returned to work after her surgery. Claimant testified she told Ms. Bryant she wanted to talk to Mr. Bryant but that Ms. Bryant told Claimant Mr. Bryant was too busy. However, it is evident from the text messages exchanged between Claimant and Mr. Bryant she could have contacted Mr. Bryant had she wanted to talk to him. In fact, in his text message response to Claimant's message telling him she was quitting, Mr. Bryant specifically told Claimant he wished she had talked to him about her concerns so he could sit down with her and Ms. Bryant and try to work things out.

Claimant only returned to work after her surgery for two days before she decided she could not do it anymore and quit. She did not make any attempts to talk to anyone at Respondent about her concerns beforehand, despite having worked for Respondent for more than a decade. Although Claimant and Ms. Bryant may not have gotten along and Ms. Bryant did not yet have a plan for what job duties Claimant would have after her release, Claimant's decision to abruptly quit on her third day back at work without talking to anyone does not constitute a good faith attempt to maintain her employment to justify a finding Claimant's resignation was not voluntary. The Board finds Claimant voluntarily resigned her employment, and but for her resignation, Claimant would still be working for Respondent at a comparable wage.

Based on the foregoing, pursuant to K.S.A. 44-510e(a)(2)(E)(i), the Court finds that Claimant's wage loss was caused by Claimant's voluntary resignation rather than by her

work-related injury, so Claimant is not entitled to an award of work disability in excess of her functional impairment.

Temporary Total Disability Benefits

Claimant alleges she is entitled to additional temporary total disability benefits because Respondent paid temporary total disability benefits using the incorrect average weekly wage. Claimant does not assert that she is entitled to additional dates of temporary total disability. Respondent paid 16.27 weeks of temporary total disability benefits at a rate of $306.44 per week, totaling $4,985.71. As discussed above, Claimant's average weekly wage at the time of her accident was $499.43. As such, Claimant is entitled to 16.27 weeks of temporary total disability benefits at a rate of $332.97, which amounts to $5,417.42 resulting in an **underpayment** in the amount of $431.71.

Future Medical Treatment

K.S.A. 44-510h(e) addresses the issue of future medical treatment:

> 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 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.

Claimant's treating physician, Dr. Henry, testified although Claimant would not need future surgical treatment related to her injuries, if she continues to have discomfort related to her connective tissue and muscle, she may need future medications and possible epidural injection or physical therapy. Dr. Do similarly testified at most Claimant may need medications and trigger point injections for her ongoing pain complaints. Dr. Murati also testified Claimant would require future medical treatment related to her injuries and recommended yearly follow-ups for complications. Dr. Estivo was the only physician to opine Claimant would not need any future medical treatment related to her injuries.

Given Claimant's ongoing pain complaints in her back as well as the testimony of Dr. Henry, Dr. Do, and Dr. Murati, the Board finds Claimant met her burden to prove it is

more probable than not that she will require future medical treatment related to her L2 compression fracture. Future medical will be considered upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Ali N. Marchant dated August 9, 2021, is modified.

Claimant is entitled to 16.27 weeks of temporary total disability compensation at the rate of $332.97 per week, or $5,417.42, followed by 3.44 weeks of permanent partial functional disability compensation at the rate of $332.97 per week, or $1,145.42, followed by 46.21 weeks of permanent partial disability compensation at the rate of $346.82 or $16,026.55 for a 12% permanent partial functional impairment to the body as a whole, making a total award of $22,589.39, all of which is ordered paid in one lump sum less any amounts previously paid.

In all other respects the ALJ's Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (Via OSCAR)

Terry J. Torline, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Ali N. Marchant, Administrative Law Judge