

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DEBRA ORTEGA</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0460-821
<b>ENCORE REHABILITATION SERVICES</b>	)	CS-00-0435-279
Respondent	)	
AND	)	
	)	
<b>TWIN CITY FIRE INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Debra Ortega requested review of the August 23, 2021, Award Nunc Pro Tunc issued by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on December 16, 2021.

**APPEARANCES**

Mitchell W. Rice appeared for Ms. Ortega. Bruce L. Wendel appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held October 28, 2020; the transcript of the evidentiary deposition of Pedro A. Murati, M.D., taken November 11, 2020, with exhibits attached; the transcript of the evidentiary deposition of Vito J. Carabetta, M.D., taken December 10, 2020, with exhibits attached; the transcript of the telephonic deposition of Robert W. Barnett, Ph.D., taken November 16, 2020, with exhibits attached; and the transcript of the evidentiary deposition of Steve Benjamin taken December 21, 2020, with exhibits attached; together with the documents of record filed with the Division.

**ISSUE**

The issue for review is: what is the nature and extent of Ms. Ortega's impairment?

### FINDINGS OF FACT

Ms. Ortega worked for respondent as a licensed physical therapist assistant when she suffered a compensable injury to her right hip on December 27, 2017. Ms. Ortega initially underwent conservative treatment for right trochanteric bursitis. When her symptoms did not improve, an MRI was conducted March 1, 2018, which revealed a complete tear/detachment of the anterior medial insertion of the gluteus medius tendon. A surgical repair of her right gluteus medius abductor tendon was performed on April 18, 2018. Ms. Ortega continued to have problems with her right hip, and another MRI was done on August 28, 2018. The radiologist interpreted the study as showing:

Findings consistent with moderate recurrent subsurface tear of the gluteus medius at its insertion on the greater trochanter. Postoperative fluid collection likely representing a seroma extending from the greater trochanter to the skin surface. Mild osteoarthritis the right hip with tear of the superior labrum extending from 10:00 to 2:00.<sup>1</sup>

Surgical exploration and repair of Ms. Ortega's gluteus maximus/iliotibial (IT) band tendon was performed on October 4, 2018. Ms. Ortega was treated postoperatively with physical therapy and injections. Another MRI of Ms. Ortega's right hip, conducted April 22, 2019, was read by the radiologist to reveal:

Intact repair of the gluteus maximum tendon/IT band. Tear of the anterior fibers of the gluteus medius tendon at its insertion. Tear of the superior labrum extending from 11:00 to 2:00 with mild chondromalacia of the superior hip joint space and a small right hip joint.<sup>2</sup>

In October 2019, a functional capacity evaluation (FCE) was performed to determine Ms. Ortega's permanent work restrictions. Ms. Ortega's results placed her in the medium work category.

Dr. Pedro Murati examined Ms. Ortega at her counsel's request on November 21, 2019. Dr. Murati reviewed Ms. Ortega's medical records, history, and performed a physical examination. He listed the following diagnoses:

1. Status post repair of right Gluteus Medius abductor tendon on 04-18-18 by Dr. Loewen.
2. Status post, "Exploration, with repair of the gluteus maximus/IT band tendon." Dr. Loewen 10-04-18

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<sup>1</sup> Murati Depo. at 8.

<sup>2</sup> *Id.* at 10.

3. Progressive arthritis of the right hip with tear of the superior labrum from 10:00 to 2:00 per MRI dated 08-28-19 and from 11:00 to 2:00 per MRI dated 04-22-19.
4. IT band sprain on the right.
5. Right trochanteric bursitis.
6. Low back sprain.<sup>3</sup>

Dr. Murati placed restrictions on Ms. Ortega and noted she would require future medical treatment. Dr. Murati determined the prevailing factor in the development of Ms. Ortega's conditions was the work accident of December 27, 2017.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (*AMA Guides*, 6th Edition), Dr. Murati determined Ms. Ortega sustained 8 percent whole person impairment, consisting of 14 percent right lower extremity impairment for right trochanteric bursitis and arthritis of the hip secondary to a labral tear, or 6 percent whole person impairment, and 2 percent whole person impairment for a lumbar spine sprain. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition (*AMA Guides*, 4th Edition), Dr. Murati assessed 12 percent whole person impairment.

Dr. Vito Carabetta examined Ms. Ortega at the Court's request on August 26, 2020. Ms. Ortega complained of pain in her right hip area. Dr. Carabetta reviewed Ms. Ortega's history, medical records, and performed a physical examination. He determined Ms. Ortega suffered from right trochanteric bursitis, right IT band syndrome, and was status-post gluteus medius tendon and gluteus maximus tendon repair. Dr. Carabetta noted Ms. Ortega's FCE was a valid presentation, and he recommended work restrictions of moderate work activity.

Using the *AMA Guides*, 6th Edition, Dr. Carabetta found:

For the condition of the chronic trochanteric bursitis with a documented abnormal gait pattern, this is assessed with the use of Table 16-4 on page 512. This shows the equivalent of a 7% impairment of the right lower extremity. This does translate to a 3% whole person impairment with the use of Table 16-10 on page 530. Her history of ruptured tendons at the gluteal musculature is assessed with the use of Table 16-4 on page 512 as well. Though the degree of impairment could be considered at a lower level, I would suggest that a 5% impairment of the right lower extremity is appropriate, despite the fact that she does not have motion deficits or significant weakness. This translates to a 2 percent whole person impairment with the use of Table 16-20 on page 530. The iliotibial band syndrome component is not specifically listed in the Sixth Edition. Physician judgment and experience are utilized under the circumstances, and the presentation is compared to other similar conditions. For this, I would recommend a 2% impairment for the body as a whole.

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<sup>3</sup> Murati Depo, Ex. 2 at 4.

The Combined Values Chart is used and the net result is purely additive in nature at 7% for the whole person with the use of the Sixth Edition.<sup>4</sup>

Using the *AMA Guides*, 4th Edition, Dr. Carabetta found Ms. Ortega suffered 10 percent whole person impairment.

Robert Barnett, vocational expert, interviewed Ms. Ortega at her counsel's request for a wage and task analysis on January 21, 2020. Mr. Barnett obtained a five-year work history from Ms. Ortega and determined she had two jobs as a licensed physical therapist assistant. Mr. Barnett identified seven unduplicated tasks Ms. Ortega performed during the five-year period. He also conducted a wage analysis, and determined Ms. Ortega could earn minimum wage, or \$290.00 weekly. Mr. Barnett noted Ms. Ortega experienced a wage loss of 100 percent at the time of the interview because she was unemployed. He was unaware whether Ms. Ortega had additional sources of income.

Drs. Murati and Carabetta reviewed the task list generated by Mr. Barnett. Of the 7 unduplicated tasks on the list, both physicians opined Ms. Ortega could no longer perform 5, resulting in 71 percent task loss.

Steve Benjamin, vocational expert, also interviewed Ms. Ortega for a task and wage assessment on November 5, 2020. Mr. Benjamin obtained an educational and work history from Ms. Ortega and generated a list of 15 unduplicated tasks she performed in the five years preceding the work accident. Mr. Benjamin noted Ms. Ortega applied for and received unemployment benefits for a period of time following the work incident. She also received long-term disability benefits in 2018 and 2019. In 2019, Ms. Ortega applied for, and now receives, Social Security retirement benefits. Mr. Benjamin opined Ms. Ortega could enter the work force and make \$440.50 per week, for a wage loss of 64 percent.

Dr. Carabetta reviewed the task list generated by Mr. Benjamin. Of the 15 unduplicated tasks on the list, Dr. Carabetta opined Ms. Ortega could no longer perform 4, for a task loss of 26.7 percent.

The ALJ adopted the opinions held by the Court's examiner and determined Ms. Ortega sustained 7 percent whole person impairment as a result of her work-related injury.

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

Ms. Ortega argues the ALJ erred in his determination of her impairment because he did not consider other competent medical evidence other than the *AMA Guides*, 6th Edition, and should have also considered the medical opinions based on the *AMA Guides*,

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<sup>4</sup> Carabetta Depo., Ex. 2 at 4-5.

4th Edition. Ms. Ortega contends she suffered an impairment to her body greater than 7½ percent and she is entitled to a work disability of 43.35 percent.

Respondent maintains the ALJ's award of 7 percent impairment to the whole body should be upheld, or alternatively, the Board should award less impairment to Ms. Ortega. Respondent argues the Court's examiner deviated from the *AMA Guides*, 6th Edition, using both the *AMA Guides* and his medical expertise in determining the impairment values adopted by the ALJ. Respondent argues Ms. Ortega is not entitled to a work disability because her work injury fails to meet the threshold defined by K.S.A. 44-510e(a)(2)(C), and her post-injury wage loss is not directly attributable to the work injury.

K.S.A. 2019 Supp. 44-510e(a)(2)(B), states:

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.

K.S.A. 44-510e(a)(2)(C) states, in part:

An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(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

The Supreme Court, in *Johnson v. U.S. Food Serv.*, interpreted K.S.A. 2019 Supp. 44-510e(a)(2)(B), writing:

Thus, we hold that the language added in 2013 does not change the essential legal standard for determining functional impairment. K.S.A. 2019 Supp. 44-510e(a)(2)(B) still requires that ratings be "established by competent medical evidence." The 2013 amendments merely reflect an update to the most recent set of guidelines - which serve as a starting point for any medical opinion. K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides.

This has not changed. The key fact - percentage of functional impairment - must always be proved by competent medical evidence.<sup>5</sup>

In her brief to the Board, Ms. Ortega argues “[w]hen the competent medical evidence related to functional impairment provided by Dr. Murati and that provided by Dr. Carabetta are considered, Claimant has proven that she has suffered an impairment to her body greater than 7.5% and is therefore entitled to a work disability Award.”<sup>6</sup> Essentially, Ms. Ortega is arguing evidence of impairment under the *AMA Guides*, 4th Edition is competent medical evidence and should be averaged with the *AMA Guides*, 6th Edition opinion to arrive at the final impairment. If the *AMA Guides*, 6<sup>th</sup> and 4<sup>th</sup> Edition opinions are averaged, the ratings provided by Drs. Murati and Carabetta result in 9.25 percent impairment to the body as a whole.

Dr. Murati did not testify one edition of the *AMA Guides* was more reflective of Ms. Ortega’s actual impairment than the other, or some other assessment of impairment was appropriate. Dr. Carabetta provided an opinion Ms. Ortega’s actual impairment fell outside the *AMA Guides*, 6th Edition, stating:

The iliotibial band syndrome component is not specifically listed in the Sixth Edition. Physician judgment and experience are utilized under the circumstances, and the presentation is compared to other similar conditions.<sup>7</sup>

The facts presented and arguments made are similar to those made in *Zimero v. Tyson Fresh Meats, Inc.*, where the Kansas Court of Appeals interpreted *Johnson*, stating:

The Legislature specifically chose to adopt the Sixth Edition as the new set of guidelines for injuries occurring after January 1, 2015. But as stated in *Johnson*, the impairment rating must still be supported by “competent medical evidence” with the Sixth Edition used as a starting point for the determination. See *Johnson*, 312 Kan. at 602, 478 P.3d 776. Based on *Johnson*, the Fourth Edition is irrelevant after January 1, 2015. We start with the Sixth Edition and then use competent medical evidence to increase or decrease that guideline amount. Parties and courts do not choose between using the Fourth Edition or the Sixth Edition. The Sixth Edition is statutorily required.<sup>8</sup>

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<sup>5</sup> *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

<sup>6</sup> Claimant Brief at 4.

<sup>7</sup> Carabetta Depo., Ex. 2 at 5.

<sup>8</sup> *Zimero v. Tyson Fresh Meats, Inc.*, \_\_\_ Kan. \_\_\_, 499 P.3d 1153, 1157 (Kan. Ct. App. 2021).

Dr. Carabetta opined the *AMA Guides*, 6th Edition did not adequately reflect Ms. Ortega’s impairment and assessed additional impairment for iliotibial band syndrome. The Board gives the opinions of Dr. Carabetta more weight, and finds the ALJ was correct in finding Ms. Ortega sustained a 7 percent whole person impairment as a result of her work-related injury. Mr. Ortega failed to prove a functional impairment of greater than 7½ percent and, pursuant to K.S.A. 44-510e(a)(2)(C), is not entitled to an award of permanent partial general disability compensation.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated August 23, 2021, is affirmed.

**IT IS SO ORDERED.**

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

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

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BOARD MEMBER

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

c: (Via OSCAR)

Mitchell W. Rice, Attorney for Ms. Ortega  
Bruce L. Wendel, Attorney for Respondent and its Insurance Carrier  
Hon. Thomas Klein, Administrative Law Judge