

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KELLY S. BAY)	
Claimant)	
)	
VS.)	
)	
CENTRAL PLAINS BOOK MFG.)	
Respondent)	Docket No. 1,019,892
)	
AND)	
)	
TWIN CITY FIRE INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 19, 2007 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on June 15, 2007.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for the claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The disputed issue before the Administrative Law Judge (ALJ) was the nature and extent of disability. Specifically, whether claimant was entitled to a permanent partial general body disability as a result of injuries to both her shoulders or limited to a scheduled disability to the right shoulder.

The ALJ found the claimant suffered a 10 percent permanent partial functional impairment to the right shoulder. The ALJ rejected claimant's allegations of an additional permanent injury to her left upper extremity and shoulder.

The issue raised on review by the claimant is the nature and extent of disability. The claimant litigated the case based upon the allegation that she suffered bilateral upper extremity and shoulder injuries and accordingly was entitled to a permanent partial general body impairment. Claimant further argued she was entitled to a work disability (a permanent partial general disability greater than the functional impairment rating). However, the claimant conceded in her brief to the Board that in light of the recent *Casco*¹ decision she is not entitled to a work disability but argues that she is entitled to compensation for two separate upper extremity scheduled injuries.

Conversely, respondent requests the Board to affirm the ALJ's Award. Respondent argues the claimant was awarded treatment for both shoulders after a preliminary hearing but the authorized doctor never provided treatment to the left upper extremity and claimant never requested such treatment nor a change of physicians. Consequently, respondent requests the Board affirm the ALJ's finding that claimant's disability is limited to a 10 percent scheduled disability to the right shoulder.

The issues raised on review before the Board are whether claimant suffered injury and permanent impairment to her left upper extremity and if so the nature and extent of her disability. And the nature and extent of claimant's disability to her right shoulder.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant ran a variety of machines used to manufacture books for respondent. In October 2002 she developed bilateral pain in her arms. She was sent to the Dr. Bruce Wells, the company physician, and was prescribed anti-inflammatory medication as well as arm bands to wear just below the elbows on both arms. Claimant continued to wear the arm bands at least three times a week during the remainder of her employment with respondent.

In late June 2004 claimant was running a Smyth sewer which sews the pages of books together. A batch of pages had been printed and cut wrong which required claimant to reach up and pull that section into the proper position. After performing that function during her eight-hour shift claimant developed bilateral shoulder pain significantly worse on the right and continued to have elbow pain.

Claimant was sent back to the company physician, Dr. Wells and provided medication but when her symptoms did not improve, she was referred to Dr. Bernard

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

Hearon for treatment of her right shoulder. Although the doctor apparently requested permission to treat claimant's arms he was only authorized to treat her right arm. After a January 25, 2005 preliminary hearing, the ALJ entered an order for Dr. Hearon to treat claimant's left arm if he deemed it necessary. When claimant told Dr. Hearon the ALJ had authorized him to treat her left arm, she was told that they needed to treat the right first before doing anything to the left.

On January 26, 2005, Dr. Hearon performed an arthroscopic subacromial decompression on claimant's right shoulder. The surgery did not work out well, despite a regimen of physical therapy, claimant developed severely restricted range of motion of the right shoulder. She also continued to experience shoulder pain with movement and was treated conservatively with additional physical therapy, injections and medications. Ultimately, Dr. Hearon performed a second surgery on claimant's shoulder on July 20, 2005. The surgery was described as an arthroscopic capsulotomy including resection of the glenohumeral ligament as well as removal of subacromial adhesions.

The claimant did not think the second surgery improved her condition a great deal and in hindsight would not have had either surgery if she had it to do over again. And for that reason, after what she considered a poor result from her two right shoulder surgeries, claimant did not follow up with treatment for her left shoulder with Dr. Hearon because she did not want her left shoulder to end up like her right shoulder. The claimant testified:

Q. Okay. And so after Dr. Hearon performed the second surgery, were you pleased with the result?

A. No.

Q. And so, in view of the fact that you weren't pleased with the surgeries that Dr. Hearon provided to your right shoulder, did you then ask him to go ahead and follow up with that treatment plan to start evaluating and treating the left shoulder, which he had suggested should be delayed until you'd taken care of the right?

A. No, I did not.

Q. Why did you not?

A. Because I didn't want it to end up being like my right shoulder.

Q. So, did you make a judgment that you'd just as soon not have any more surgeries done, particularly anything done to the left shoulder?

A. Yes, I made that decision. I have pain in it and I have pain in my right one, so - but, I have lack of range of motion in my right one, there's a lot of things I can't do with my right one. I didn't want to end up that way with both arms.²

Claimant complains of constant bilateral shoulder pain as well as aching in her elbows and forearms. And claimant has restricted range of motion in her shoulders, worse on the right.

At the request of claimant's attorney, Dr. C. Reiff Brown, examined claimant on November 18, 2005, for a permanent partial impairment evaluation. Dr. Brown imposed restrictions that claimant avoid frequent use of the hands above shoulder level and frequent reach from the body more than 18 inches. No lifting above shoulder level with the right hand. Dr. Brown diagnosed claimant with bilateral rotator cuff tendonitis involving the shoulders as well as bilateral lateral epicondylitis. Dr. Brown rated the claimant using the *AMA Guides*³ and determined she has a 23 percent permanent partial functional impairment to her right upper extremity and a 6 percent permanent partial functional impairment to her left upper extremity. The rating for the right upper extremity included a 9 percent impairment based upon the loss of range of motion of the shoulder joint; 6 percent based upon crepitus on active movement; 7 percent for weakness of rotator cuff function and 2 percent for lateral humeral epicondylitis. The rating for the left upper extremity included 4 percent for loss of range of motion of the shoulder joint and 2 percent for lateral humeral epicondylitis.

On August 10, 2006, Dr. Paul Stein performed an examination and evaluation of claimant at the request of the respondent's attorney. Based upon his examination, the doctor diagnosed claimant with cumulative trauma syndrome affecting her bilateral upper extremities as a result of her employment with respondent. Dr. Stein opined claimant suffered a 10 percent permanent partial functional impairment to her right upper extremity based upon the *AMA Guides*. The doctor further opined claimant did not have any permanent impairment to her left shoulder or bilateral elbows. Dr. Stein imposed permanent restrictions that claimant avoid repetitive work activity with either hand above shoulder level or more than 24 inches from the body. Claimant should avoid lifting more than 15 pounds with the right hand up to chest level on a very occasional basis and more than 10 pounds occasionally, but not repetitively. Claimant should avoid intensively repetitive work activity with either hand or requiring repetitive elbow motion.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of*

² K. Bay Depo.(Oct. 6, 2006) at 17-18.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Permanent Impairment, if the impairment is contained therein.⁴ The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁵ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.⁶

The claimant complained of bilateral pain in her upper extremities including her shoulders. When she began treatment with the company physician he treated both upper extremities. Although Dr. Hearon limited his treatment to claimant's right upper extremity it was because claimant's right shoulder complaints were worse and it was determined that it should be treated first. After two right shoulder surgeries left claimant with continuing pain and loss of range of motion she simply elected not to pursue treatment for her ongoing left shoulder complaints out of fear such treatment would leave her left shoulder in the same condition as her right shoulder. Both doctors determined claimant suffered injuries to her bilateral upper extremities as a result of her work activities. Both doctors provided claimant with restrictions for her bilateral upper extremities. The Board finds claimant has met her burden of proof that she suffered bilateral upper extremity injuries as a result of her work-related accident. The Board finds Dr. Brown's opinion that claimant suffered permanent impairment to her left upper extremity as well as her right upper extremity more persuasive than Dr. Stein's opinion that claimant's injuries to her left upper extremity had not yet become ratable.

In *Casco*, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

⁴ K.S.A. 44-510e(a).

⁵ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁶ *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.⁷

Previously, bilateral injuries were considered as being outside the statutory schedule of impairments set forth in K.S.A. 44-510d and were treated as a permanent partial general impairment.⁸ Now post-Casco, the analysis changes somewhat. Apparently in any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.⁹ When an employee's injury involves both arms, as here, there is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.¹⁰

Claimant has sustained two separate bilateral upper extremity injuries. Claimant is presumptively permanently and totally disabled. However, that presumption is rebutted by the fact that claimant, at the time of her October 6, 2006, deposition taken after the regular hearing in this case, was engaged in substantial gainful employment working for a dentist. Moreover neither doctor restricted claimant's activities to a degree that substantial gainful employment would be prevented. Consequently, claimant's recovery is limited and she is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) but is entitled to compensation for two scheduled injuries.

⁷ *Id.*, Syl. ¶¶ 7-10.

⁸ *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

⁹ *Casco*, 283 Kan. 508, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

¹⁰ *Id.*, Syl. ¶ 9.

Here, claimant sustained bilateral, parallel simultaneous injuries to her upper extremities. Both of those extremities are listed in K.S.A. 44-510d. And there is no evidence that as a result of her upper extremity injuries she is permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. Accordingly, the ALJ's Award is hereby modified to reflect two separate scheduled injuries rather than a whole body impairment as a result of claimant's work-related accident.

In this instance, Dr. Brown rated claimant with a 23 percent impairment to the right upper extremity and a 6 percent impairment to the left upper extremity. In contrast, Dr. Stein rated claimant with a 10 percent impairment to the right upper extremity and a 0 percent impairment to the left upper extremity. After considering both opinions, the Board finds that an average of the ratings provided by both these doctors is a reasonable approach. Thus, the Award is modified to reflect a 17 percent permanent partial impairment to the right upper extremity at the level of the shoulder and a 3 percent permanent partial impairment to the left upper extremity at the level of the shoulder.

Because claimant only received treatment for her right shoulder from Dr. Hearon, the weeks of temporary total disability compensation will only be applied to the calculation of the benefits for claimant's right shoulder scheduled disability.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does contain a fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated March 19, 2007, is modified to award claimant compensation for two separate scheduled injuries at the shoulder level as follows:

Right Shoulder

The claimant is entitled to 46.24 weeks of temporary total disability compensation at the rate of \$272.23 per week in the amount of \$12,587.92 followed by 30.39 weeks of permanent partial disability compensation, at the rate of \$272.23 per week, in the amount of \$8,273.07 for a 17 percent loss of use of the right shoulder, making a total award of \$20,860.99.

Left Shoulder

The claimant is entitled to 6.75 weeks of permanent partial disability compensation, at the rate of \$272.23 per week, in the amount of \$1,837.55 for a 3 percent loss of use of the left shoulder, making a total award of \$1,837.55.

The combined total of \$22,698.54 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 31st day of July 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge