

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

ROSA MARIA IBARRA AKA MARY NINO)
Claimant)
VS.)
NATIONAL BEEF PACKING CO.)
Respondent)
AND)
ZURICH AMERICAN INS. CO.)
Insurance Carrier)

Docket Nos. 1,031,427;
1,031,429

ORDER

Claimant requested review of the February 18, 2009 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 9, 2009.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties confirmed that although there are two docketed claims, both claims were consolidated into a single award and stem from the first accident which occurred on July 11, 2006.

ISSUES

The single issue to be determined in this appeal is the nature and extent of claimant's impairment. The ALJ awarded the claimant a 5 percent whole body functional impairment for injuries sustained in an accident on July 11, 2006. In doing so, she concluded the opinions of the independent medical examiner, Dr. Paul S. Stein, were more credible than those offered by Dr. C. Reiff Brown, the physician retained by claimant's counsel.

The claimant appealed the ALJ's finding with respect to the nature and extent of her impairment. Distilled to its essence, claimant argues that the ALJ inappropriately relied solely upon Dr. Stein's opinions in assigning permanent partial impairment in this case. Claimant maintains that the ALJ should have considered Dr. Brown's opinions and awarded the 13 percent whole body impairment assigned by Dr. Brown.

Respondent contends that the Award should be affirmed in all respects.

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 underlying facts of this case are well known to the parties and will not be repeated in any great detail. Suffice it to say, claimant suffered a compensable accident on July 11, 2006 when she fell on some water and fat while working. Claimant sought and was provided with treatment and returned to work. On October 5, 2006, claimant went home from work complaining of pain. She fell at home when she lost her balance. According to claimant, her leg gave way due to back pain. Again, she sought and received medical treatment.

Claimant has many ongoing complaints which she attributes to this accident. On November 8, 2006 claimant was evaluated by Dr. Brown at the request of her attorney. Dr. Brown took a detailed history and conducted an examination despite having no medical records available to him. Once those records were made available to him, Dr. Brown referred her to an orthopaedic surgeon. Then, on February 6, 2008, he again saw claimant, this time for purposes of providing her with an impairment rating.

Dr. Brown assigned a 13 percent permanent partial impairment to the whole body which included 5 percent for the aggravation of claimant's low back degenerative condition, 5 percent for her myofascial pain syndrome and 8 percent to the right lower extremity for the loss of range of motion to her right ankle.

At the ALJ's direction, Dr. Stein was ordered to examine claimant pursuant to K.S.A. 44-510e(a). That examination took place on September 17, 2007. According to Dr. Stein, claimant had a wide variety of complaints which could not be explained given the nature of her accident. His examination reflected symptom magnification and revealed no neurological deficit consistent with radiculopathy. He diagnosed her with a probable low back strain/sprain and rated her low back complaints at 5 percent. He assigned no impairment to the ankle or foot as he observed no impairment of function of that body member.

The ALJ noted both physicians' testimony and concluded "[t]he claimant suffers a 5% permanent partial impairment to the body as a whole based on Dr. Stein's evaluation which this court finds to be the most reliable. His evaluation was independent."¹

Claimant appealed this finding arguing that the ALJ should not blindly accept the IME physician's assessment of a claimant's impairment. She acknowledges that the independent medical examiner's opinion must be considered², but nevertheless argues that by adopting that opinion, the ALJ erred. The Board is not persuaded by this argument.³

The ALJ weighed the two countervailing opinions. She thoroughly discussed the physicians' testimony, their findings and ultimate assessment of impairment. She was persuaded by those expressed by Dr. Stein, the court ordered independent medical examiner, over those offered by Dr. Brown. Based upon the evidence contained within the record, the Board finds her reliance reasonable, justified and therefore affirms that finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated February 18, 2009, is affirmed.

¹ ALJ Award (Feb. 18, 2009) at 3.

² K.S.A. 44-510e(a).

³ It is worth noting that claimant's argument is somewhat incongruous. Her counsel suggests the ALJ erred in relying solely on the opinions of Dr. Stein when in her brief to the Board she asks the Board to rely solely on the opinions of Dr. Brown and modify the Award to grant her 13 percent permanent partial impairment. Without any other distinguishing factors, claimant seems to be arguing that it is improper to rely solely on the IME's opinions but is not improper to rely solely on claimant's choice of physician.

**ROSA MARIA IBARRA AKA
MARY NINO**

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**DOCKET NOS. 1,031,427;
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IT IS SO ORDERED.

Dated this _____ day of July 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge