

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

BARBARA A. MCWILLIAMS)	
Claimant)	
VS.)	
)	Docket No. 1,032,948
SOR, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE)	
COMPANY, ONEBEACON AMERICAN)	
INSURANCE COMPANY and ACCIDENT)	
FUND INSURANCE COMPANY OF AMERICA)	
Insurance Carriers)	

ORDER

Respondent and its insurance carriers Accident Fund Insurance Company of America (Accident Fund) and Continental Western Insurance Company (Continental Western) appeal the October 26, 2010, Award of Administrative Law Judge Marcia Yates Roberts (ALJ). Claimant was found to be permanently and totally disabled as the result of injuries suffered while working for respondent, with an injury date of April 2005¹ and an average weekly wage of \$870.63.

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier Continental Western appeared by their attorney, Shelly E. Naughtin of Kansas City, Missouri. Respondent and its insurance carrier OneBeacon American Insurance Company (OneBeacon) appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas. Respondent and its insurance carrier Accident Fund appeared by their attorney, Ryan D. Weltz of Overland Park, Kansas.

¹ The ALJ found the date of accident to be April 2005, with no actual starting date. Additionally, in the Award portion of the decision, the ALJ failed to identify the date from which payments would begin. A specific start date is required for the calculation of the award. The Board will do so in the final award in this matter.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on February 2, 2011.

ISSUES

1. Did claimant suffer personal injury by accident on the date or dates alleged? Continental Western argues that claimant did not allege or complain of an accident or injury during the period of its coverage from October 1, 2003, through October 1, 2004. OneBeacon argues that claimant's dates of injury occurred prior to its coverage period, which began on October 1, 2006. OneBeacon acknowledges that claimant's date of accident for the carpal tunnel syndrome (CTS) was May 2005, and denies that it is responsible for that condition and resulting medical treatment. It goes on to argue that the basilar joint arthritis date of accident should also be May 2005 as claimant was provided treatment and restrictions by the authorized treating physician at the same time as claimant was receiving treatment for the CTS. Accident Fund acknowledges liability for the CTS condition and resulting treatment, but argues that, pursuant to K.S.A. 44-508(d), claimant's date of accident for the arthritis condition should be October 10, 2006, the date claimant was taken off work by the authorized treating physician and scheduled for surgery for the basilar joint arthritis. The ALJ found the date of accident for all of claimant's injuries to be April 2005.
2. Was there an overpayment of temporary total disability (TTD) compensation? Accident Fund lists this issue in its Application For Review, but provides no argument in support of its position.
3. What was claimant's average weekly wage? The parties stipulate that claimant's base wage on the date of accident was \$824.26. However, a dispute remains regarding whether a \$1,000.00 bonus, paid yearly, should also be included in the wage. If the Board finds that the inclusion of the bonus is proper, the parties stipulate that the amount added to the average weekly wage should be \$46.37 per week.
4. Is claimant entitled to future medical care and treatment and/or an unauthorized medical allowance? Accident Fund lists these issues in its Application For Review, but provides no explanation or argument in support of its position.
5. What is the nature and extent of claimant's injuries and disability? Claimant argues that the award by the ALJ of permanent total disability (PTD) is appropriate and should be affirmed. Respondent and its insurance companies argue that claimant is entitled to a scheduled injury award for the CTS and also scheduled injury awards for each upper extremity for the basilar joint arthritis.

FINDINGS OF FACT

Claimant began working for respondent on January 20, 1997, as an assembler. Her job required that she work with both hands on a regular basis, building switches weighing between a few ounces to 50 pounds. In April 2005, claimant began experiencing problems with her right hand. Shortly thereafter, claimant began experiencing bilateral hand problems. Claimant reported the problems to her floor manager, Scott Walloberg, and was referred for treatment. Claimant came under the care of board certified plastic and hand surgeon Bradley W. Storm, M.D., as the authorized treating physician. Dr. Storm first examined claimant on April 28, 2005. He diagnosed claimant with CTS on the right side and basilar joint arthritis bilaterally. He determined that claimant's work duties with respondent contributed to her diagnoses. Claimant's job activities were the prevailing cause of the CTS and her job activities were a factor that made her arthritis worse than it would have been had she not performed that job. Dr. Storm recommended surgery for the CTS and steroid injections for the bilateral arthritis conditions. The carpal tunnel surgery was performed on May 18, 2005. The injections provided temporary relief only. The positive result from the injections confirmed that claimant suffered osteoarthritis of the basilar joint.² This also indicated that injections were only going to provide temporary relief, with surgery almost certain in the future. Dr. Storm testified that when basilar joint arthritis reaches a point where surgery is necessary, there is nothing a patient can do to reverse the process. Even halting the aggravating activity would not allow an avoidance of the surgery. Dr. Storm acknowledged that claimant had reached a "point of no return".³ Following the April 28, 2005, examination, claimant was allowed to return to her regular duties. After the May 18, 2005, surgery, claimant was returned to light duty for a time and then released to go back to her full duty job sometime in July 2005. Claimant reached maximum medical improvement (MMI) with respect to her CTS on March 23, 2006. On April 6, 2006, claimant was again injected with steroids to treat the arthritis condition bilaterally. Again, the results were temporary, confirming, in Dr. Storm's mind, that surgery was the likely result.

Claimant continued working until October 10, 2006, when she was taken off work to undergo surgery for the basilar joint arthritis. Surgery on claimant's left side was performed on October 11, 2006. Surgery on the right side was performed on May 23, 2007. Dr. Storm acknowledged that basilar joint arthritis is a common disease, particularly in women, and the activities of daily living would have contributed to the development of the arthritis. However, claimant's previous work activities would have been part of the process causing the development of the arthritis.

² Storm Depo. at 11.

³ Ibid. at 14.

Claimant was released to return to work for respondent in January 2007 with restrictions. Respondent's human resources representative, Janet Smith, told claimant that respondent had nothing for claimant with those restrictions. Later, claimant received a telephone call from Mr. Walloberg, advising that she was being let go. Accommodated or light-duty work was not offered. Claimant was rated at 2 percent to the right wrist by Dr. Storm for the CTS, pursuant to the fourth edition of the *AMA Guides*.^{4 5} Dr. Storm testified that there was no connection between the development of the CTS and the basilar joint arthritis.

Claimant was referred by respondent to board certified orthopedic and hand surgeon Anne R. Rosenthal, M.D., on May 2, 2006. Claimant displayed decreased feeling in both hands, tenderness at both thumb carpometacarpal (CMC) joints and a positive CMC grind to both thumbs. X-rays showed degenerative changes at the interphalangeal (IP) joint, the metacarpophalangeal (MP) joint and the CMC joint. The CMC joint is where the thumb attaches to the hand. It is also called the basilar joint. Dr. Rosenthal opined that repetitive work activities with constant use of the hands can aggravate arthritis. Dr. Rosenthal agreed with Dr. Storm's rating of 2 percent for the right upper extremity CTS. Dr. Rosenthal opined that claimant's arthritis condition bilaterally was not caused by claimant's work. She disagreed with Dr. Storm's opinion that the arthritis was aggravated by claimant's work. However, on cross-examination, Dr. Rosenthal did admit that it was possible that the arthritis was aggravated by claimant working with her hands.⁶

Claimant was referred by respondent to board certified orthopedic surgeon Lanny W. Harris, M.D., on April 12, 2008. Dr. Harris focuses his practice mostly on the upper extremities. Dr. Harris noted that claimant had undergone injections in her CMC joints bilaterally and had both CMC joints fused. Claimant had also undergone carpal tunnel surgery on the right side. Claimant was diagnosed with bilateral osteoarthritis at the trapezium of both thumbs. X-rays of the thumbs displayed plates and screws from the surgeries. The fusion on each side appeared successful. However, the two proximal screws on each side protruded from the bone near the scaphotrapezial joint, and claimant had degenerative joint disease in the trapezium and scaphoid joints on each thumb. Surgery to remove the hardware was performed on the right side on July 9, 2008, and on the left side on December 26, 2008. While removing the hardware, Dr. Harris also performed a suspension arthroplasty on each side.

Dr. Harris recommended that claimant undergo a functional capacity evaluation (FCE) which was performed on July 8, 2009. Based upon the FCE, Dr. Harris released

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁵ Pazell Depo. at 33.

⁶ Rosenthal Depo. at 23.

claimant with restrictions of no hard grasping, gripping or lifting and occasional lifting up to 20 pounds. These restrictions were the result of the arthritis condition. Claimant was rated at 13 percent to each upper extremity pursuant to the fourth edition of the *AMA Guides*.⁷ Claimant was not restricted in her ability to drive or write.

Dr. Harris opined that claimant can work within his restrictions. However, on cross-examination, he acknowledged that if claimant has diminished pinch strength, then activities, such as using a pen or pencil, may be impacted. Also, difficulty turning a doorknob would be consistent with the problems Dr. Harris treated claimant for. Difficulty buttoning or closing snaps would suggest diminished grip strength. Claimant is able to do computer work but she would have to be trained. Plus, Dr. Harris noted that if claimant was unable to use her hands two days in a row, that would definitely affect her employability. Even if claimant were having problems driving due to her hands falling off the steering wheel, based on the FCE and his restrictions, Dr. Harris would not suggest that she stop driving. The .4 kilogram grip strength finding of Dr. Pazell would be defined as fairly weak. Dr. Harris agreed that claimant should work within her tolerance. If she was having increased pain with activity, she should avoid those types of activities.

Claimant was referred by her attorney to board certified orthopedic surgeon John A. Pazell, M.D., on January 7, 2008. Claimant displayed bilateral range of motion loss in the wrists, with ulnar and radial deviation in the right wrist. Finkelstein's test was positive bilaterally. This test involves testing the tendons that run across the end of the radius up into the thumb. If these areas become inflamed or stressed, the little pulleys where these tendons run through become inflamed and de Quervain's tendinitis develops. Claimant had undergone bilateral fusions of her CMC joints, a surgery performed when arthritic changes are present in the joint. Dr. Pazell attributed the condition to claimant's work. Claimant was not rated at that time as Dr. Pazell felt that claimant needed additional treatment.

Claimant was again evaluated by Dr. Pazell at her attorney's request on September 9, 2009. Claimant's grip strength was found to be weaker than at the last evaluation. Additionally, claimant's pinch strength displayed significant weakness bilaterally. The limited pinch strength would impact activities such as holding a pen, counting change and handling cups and dishes. Claimant was rated at 14 percent permanent partial functional impairment to the right upper extremity for loss of range of motion of the thumb and wrist. This rating was for the arthritis condition and not the CTS. Claimant was rated at 10 percent permanent partial impairment to the left upper extremity for loss of range of motion in the thumb and wrist and 10 percent functional impairment to the left upper extremity for loss of grip strength. This combined for a total of 19 percent permanent partial functional impairment to the left upper extremity at the level of the wrist,

⁷ *AMA Guides* (4th ed.).

with all ratings being pursuant to the fourth edition of the *AMA Guides*.⁸ When Dr. Pazell was asked about claimant's employability in the open labor market, he responded that he was unable to think of anything claimant could do in the open labor market, given her education and the condition of her hands.

Dr. Pazell testified that claimant would be unable to function as a sales clerk, front desk clerk, unarmed security guard or customer service representative due to the weakness in her upper extremities. Claimant would also not be able to do computer work as she cannot type and would not last two hours even if she could. The fact that claimant was having trouble with buttons and zippers did not surprise him. Plus, if she attempted to drive her vehicle and her hands fell off the wheel, he would not clear claimant to operate a motor vehicle.

Dr. Pazell opined that while arthritis is a naturally occurring disease process, it could be caused or aggravated by work as well as the activities of daily living. He agreed that there was no relationship between the development of the CTS and the arthritis conditions. He noted Dr. Storm's 2 percent rating to the right upper extremity for the CTS. Dr. Pazell adopted the same restrictions as were given by Dr. Harris, opining that Dr. Harris was one of the best hand surgeons around. Dr. Pazell also agreed that once the condition in claimant's wrists occurred, the work activity would not hasten the need for surgery. The surgery itself was an inevitability.

Claimant was evaluated by vocational expert Mary Titterington at the request of respondent on December 15, 2009. Ms. Titterington was provided the medical reports of Drs. Harris, Storm, Rosenthal and Pazell, and the vocational report of Michael Dreiling. In her report of December 19, 2009, Ms. Titterington found claimant able to perform sedentary to light work. She reported that claimant could perform jobs such as light sales clerk, front desk clerk, unarmed security guard, customer service representative and gate tender. Her opinion was based partly upon the medical reports of Dr. Harris and the FCE. She agreed that Dr. Pazell's restrictions would allow claimant to return to work, but noted that he concluded that claimant would be unable to return to work given her age and overall limited functioning level. Ms. Titterington agreed that age does impact unskilled work more than semi-skilled or skilled work.

Claimant was later evaluated by vocational expert Michelle Sprecker at the request of respondent. Ms. Sprecker did not meet with claimant but did review the medical reports of Drs. Harris and Pazell and the FCE from July 15, 2009. She also reviewed the reports of Ms. Titterington and vocational expert Michael J. Dreiling. Ms. Sprecker found claimant able to work in the light and sedentary work levels with limitations to the upper extremities. If claimant were to reenter the labor market, she may be limited to entry level, unskilled

⁸ *AMA Guides* (4th ed.).

jobs. She listed jobs including security guard, telemarketer, hostess, retail sales clerk and information clerk as job possibilities. The majority of jobs identified by Ms. Sprecker were in the Kansas City or Independence, Missouri, areas, which would require claimant to drive up to 80 miles, one way. The telemarketer job could be done from claimant's home.

Claimant was referred by her attorney to vocational expert Michael J. Dreiling on October 6, 2009. Mr. Dreiling was provided the reports of Dr. Pazell and Dr. Harris for his review. Claimant's job history included years of highly repetitive hand-intensive work. Claimant's job with respondent included 10-hour days, 5 days per week, with a half day on Saturday. Her education was limited to a GED with no additional training. Claimant has no personal-computer skills and is medically restricted from performing manual labor. Claimant described significant problems using her hands in any repetitive manner. Given claimant's vocational profile, Mr. Dreiling opined that claimant is essentially and realistically unemployable.

Claimant testified that, during the 10 years she worked for respondent, approximately \$1,000.00 was paid as a bonus every year in December. This bonus was based upon how many weeks of vacation she had accrued. Charisse Konrady, respondent's senior vice-president of finance and administration, testified that the \$1,000.00 was a Christmas bonus and was considered a gift from respondent's owners. It was not part of the vacation pay, but was attached in some way to an employee's vacation time.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁰

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹¹

⁹ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

¹⁰ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹¹ K.S.A. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”¹²

Continental Western disputes whether claimant suffered accidental injuries during its period of coverage through October 1, 2004, and whether notice of any injury was timely provided. Continental Western contends that this record supports a finding that claimant suffered neither accidents nor injuries before April 2005.

Beginning in April 2005, claimant began to experience significant upper extremity problems, including CTS in her right wrist and basilar joint arthritis bilaterally. The medical evidence in this matter supports a finding that, while claimant’s job may not have caused these conditions, her job tasks certainly aggravated these conditions.

It is well established under the Workers Compensation Act in Kansas that when a worker’s job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹³

Dr. Storm testified that the work activities, at the very least, aggravated the arthritic conditions in claimant’s hands. Dr. Pazell attributed claimant’s conditions to the repetitive work claimant was doing for respondent. Dr. Rosenthal was not willing to accept the work activities as the cause, but did agree that it was “possible” that the repetitive work activities and constant use of claimant’s hands aggravated the arthritis.¹⁴ The Board finds that claimant suffered a series of accidental injuries to her right wrist resulting in CTS which arose out of and in the course of her employment with respondent. Additionally, claimant suffered a series of traumatic injuries to her bilateral upper extremities from her job with respondent which aggravated the arthritis in her hands bilaterally. These accidents and the resulting injuries arose out of and in the course of her employment with respondent.

¹² *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹³ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹⁴ Rosenthal Depo. at 9.

The appropriate legal date or dates of accident as a matter of law will next be determined. The CTS developed, was treated and rated as at MMI all during the period from April 2005 through May 18, 2005, when claimant underwent surgery with Dr. Storm. Prior to July 1, 2005, Kansas appellate courts established a bright-line rule for identifying the date of injury in a repetitive, microtrauma situation like CTS. The date of injury was found to be the last day worked.¹⁵

In *Lott-Edwards* and *Berry*, the claimants were all forced to terminate their employment due to the injuries sustained by the microtrauma. However, in *Treaster*,¹⁶ the claimant did not terminate her employment but accepted an accommodated position that was significantly different from the position that caused the injury. The Court, nevertheless, applied the bright-line rule of *Berry*, determining that the last day worked was the claimant's last day on the job that caused the injuries. Here, claimant's CTS in her right upper extremity led to surgery on May 18, 2005. Thereafter, claimant's CTS condition improved and claimant suffered no added insult from her labors for respondent. The ALJ found the date of accident to be April 2005 (no specific date in April), when claimant first reported her injuries to respondent. However, under the *Berry-Kimbrough* line of cases, the date would be May 17, 2005, the last day worked before May 18, 2005, when claimant left work to undergo surgery for the CTS condition.

The date of accident for claimant's basilar joint arthritis is not so easily determined. Had claimant sought medical treatment prior to July 1, 2005, with no aggravation after that date, *Berry* and *Kimbrough* would control. However, on July 1, 2005, the Kansas legislature significantly modified date-of-accident determinations in Kansas.

Effective July 1, 2005, the following language was added to K.S.A. 44-508(d):

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident

¹⁵ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

¹⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.¹⁷

Claimant's arthritic condition was aggravated and worsened by her continued employment with respondent through her last day on October 10, 2006. Therefore, the bright-line test of *Berry* and *Kimbrough* would not apply. Now the Board must consider under K.S.A. 44-508(g) whether the employee was taken off work due to the condition or restricted from performing the work which was causing the condition. Claimant was taken off work in May 2005 for treatment of the CTS. However, at that same time, claimant was treated for the basilar joint arthritis by Dr. Storm when he administered injections into claimant's hand/thumb bilaterally. Claimant appeared to have been taken off work for both conditions on May 17, 2005, and then returned to light duty for a period of time. This would establish the date of accident for both conditions as May 17, 2005, the last day worked before May 18, 2005. However, claimant returned to work for respondent performing her regular duties through October 10, 2006. Additionally, to make the matter even more confusing, the Kansas Supreme Court, in its decision in *Mitchell*, recently appeared to resurrect the bright-line rule of *Kimbrough*.¹⁸ The Court, citing both *Kimbrough* and K.S.A. 2009 Supp. 44-508(d), discussed the bright-line rule for deciding dates of accident. The Court in *Mitchell* affirmed the Board's finding of the last day worked as the date of accident. But, the Court did not explain whether its decision was intended to limit the effect of the statute or whether *Mitchell* was an unexplained anomaly. Were the Court intending to limit the effect of K.S.A. 2009 Supp. 44-508(d), a more specific finding and detailed analysis would have been anticipated.

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.¹⁹

Here, the statute defines date of accident with specific criteria to be considered and followed.

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to

¹⁷ K.S.A. 2005 Supp. 44-508(d).

¹⁸ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

¹⁹ *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.²⁰

The legislative language of K.S.A. 2005 Supp. 44-508(d) is clear. Claimant's date of accident was decided when the authorized treating physician, Dr. Storm, removed claimant from her job and provided treatment, although temporary, for both the CTS and the bilateral basilar joint arthritis. Additionally, Dr. Storm opined that, once the basilar joint arthritis developed, claimant's return to work would have no effect. Work restrictions would not change the disease process. Therefore, claimant's return to work through October 10, 2006, did not constitute an additional series of accidents in this situation. The date of accident for claimant's basilar joint arthritis is found to be May 17, 2005, the last day worked before May 18, 2005, when claimant was taken off work by the authorized treating physician. The strange effect of this finding is to cause the date of accident for the CTS and the basilar joint arthritis, under both *Kimbrough* and K.S.A. 2005 Supp. 44-508(d), to be the same date.

K.S.A. 2004 Supp. 44-511(a)(2)(3) states:

(2) The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) 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 unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. 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. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the

²⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494, *reh'g denied* (2007).

employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

The parties have stipulated to the base wage of \$824.26 for the purposes of calculating claimant's average weekly wage. The only dispute lies with the bonus paid to claimant each December. Claimant describes the \$1,000.00 as a bonus. Respondent describes the payment as a gift, given out of the goodness of the owner's heart and not for services rendered. The statute discusses a bonus paid by the employer. The reason behind the payment of the money does not appear to matter. The money is paid yearly to the employee, based, in part, on the amount of vacation time accumulated and, in part, on the good heartedness of the owner. The legislative mandate is clear. Additional compensation, when discontinued, is included in the average weekly wage. Here, the parties stipulated that the appropriate figure to be used, if the bonus is included, is \$46.37 per week. The Board finds that the bonus here paid satisfies the definition contained in K.S.A. 2004 Supp. 44-511(a)(2). Claimant's average weekly wage in this matter is \$870.63.

Functional impairment means 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 fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.²¹

The Board must next consider the nature and extent of claimant's injuries and disability. With regard to the CTS, the record contains only one impairment rating. Dr. Storm found claimant suffered a 2 percent permanent partial functional impairment to the right wrist pursuant to the fourth edition of the *AMA Guides*.²² That rating was found to be appropriate by Dr. Rosenthal. The Board awards claimant a 2 percent permanent partial functional impairment to the right upper extremity at the level of the wrist (forearm) for the CTS.

Dr. Pazell rated claimant's right upper extremity at 14 percent and the left upper extremity at 19 percent. Dr. Harris rated claimant at 13 percent to each upper extremity. Both opinions were provided pursuant to the fourth edition of the *AMA Guides*.²³ The Board, in giving equal weight to both opinions, finds that claimant suffered a 13.5 percent functional impairment to the right upper extremity and a 16 percent functional impairment to the left upper extremity, both at the level of the forearm.

²¹ K.S.A. 44-510e(a).

²² *AMA Guides* (4th ed.).

²³ *AMA Guides* (4th ed.).

(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.²⁴

If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability.²⁵

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.²⁶

At the time of the February 9, 2010, regular hearing, claimant was a 62-year-old worker with a GED. Her employment history involved only physical manual labor jobs which required hand-intensive repetitive activities. Both Michael Dreiling and Dr. Pazell found claimant to be permanently and totally disabled. Dr. Pazell was unable to think of anything claimant could do in the open labor market given her education and the condition of her upper extremities. Claimant told Ms. Titterington that she had significant difficulties buttoning buttons, using zippers, driving vehicles, doing easy household jobs and performing daily activities including light household tasks. Nevertheless, Ms. Titterington believed that there were several entry level jobs that claimant could perform within her restrictions. Ms. Sprecker testified to several jobs claimant would be able to perform with her restrictions. However, when Dr. Pazell was questioned regarding those proposed jobs, he determined that claimant would have significant difficulty performing any of those jobs with her physical limitations and lack of education and training.

²⁴ K.S.A. 510c(a)(2).

²⁵ *Casco*, *supra*, at 528.

²⁶ *Id.* at Syl. ¶ 8.

The Kansas Court of Appeals considered a worker's ability to engage in substantial and gainful employment in *Wardlow*.²⁷ The Court found:

Under the facts of this case, where the evidence of the examining physicians concerning a workman's condition was that he was essentially unemployable, and the evidence of the vocational rehabilitation experts was that it would be difficult for him to obtain any type of employment due to his age and physical restrictions, there was a substantial basis of fact from which the trial court could reasonably find the workman was completely and permanently incapable of engaging in any type of substantial and gainful employment under K.S.A.1992 Supp. 44-510c(a)(2).²⁸

The determination of whether a workers compensation claimant has been rendered totally and permanently disabled is a factual finding. A totality of the circumstances approach is utilized in making the permanent total disability determination.²⁹

K.S.A. 44-510c(a)(2) provides that permanent total disability exists when the employee's injuries have rendered him or her completely and permanently incapable of engaging in any type of substantial and gainful employment. A finding by the Workers Compensation Board that the claimant is essentially and realistically unemployable is compatible with legislative intent and comports with a totality of the circumstances approach to factually determining permanent total disability.³⁰

This claimant has been severely limited in her ability to engage in any type of substantial and gainful employment from this series of traumas. These injuries, coupled with claimant's lack of training and education, effectively render her essentially and realistically unemployable. The Board finds that the Award of the ALJ which finds that claimant is permanently and totally disabled should be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the finding that claimant is permanently and totally disabled, but modified with regard to the accident date. Here, pursuant to the statute, the proper date of accident is May 17, 2005, when claimant was

²⁷ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

²⁸ *Id.* at Syl. ¶ 5.

²⁹ *Lyons v. IPB, Inc.*, 33 Kan. App. 2d 369, Syl. ¶ 1, 102 P.3d 1169 (2004).

³⁰ *Id.* at Syl. ¶ 2.

taken off work by the authorized treating physician and provided medical treatment for both the right upper extremity CTS and the bilateral basilar joint arthritis.

In *Redd*,³¹ the Kansas Supreme Court held: “K.S.A. 44-510d requires compensation for each scheduled injury when multiple injuries occur within a single extremity.”

With regard to the issues dealing with the overpayment of TTD, claimant’s entitlement to future medical treatment and her entitlement to unauthorized medical expense, the Award sets out findings of fact and conclusions of law and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own. The decision by the ALJ on these issues is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Marcia Yates Roberts dated October 26, 2010, should be, and is hereby, modified to find a date of accident for both the right carpal tunnel syndrome and the bilateral basilar joint arthritis on May 17, 2005.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Barbara A. McWilliams, and against the respondent, SOR, Inc., and its insurance carrier, Accident Fund Insurance Company of America, for a series of accidental injuries through May 17, 2005, and based upon an average weekly wage of \$870.63.

Right Forearm

Claimant is entitled to 31.0 weeks of permanent partial disability compensation at the rate of \$449.00 per week totaling \$13,919.00 for a 15.5 percent permanent partial impairment to the right upper extremity at the level of the forearm.³²

³¹ *Redd v. Kansas Truck Center*, 291 Kan. 176, Syl. ¶ 5, 239 P.3d 66 (2010).

³² The 2 percent permanent partial functional impairment to the right upper extremity at the level of the forearm for the CTS and the 13.5 percent permanent partial functional impairment to the right upper extremity at the level of the forearm for the arthritis condition combine for a 15.5 percent impairment to the right upper extremity at the level of the forearm.

Left Forearm

Claimant is entitled to 32.0 weeks of permanent partial disability compensation at the rate of \$449.00 per week totaling \$14,368.00 for a 16 percent permanent partial impairment to the left upper extremity at the level of the forearm.

Permanent Total Disability

After October 10, 2006, claimant is entitled to 91.14 weeks temporary total disability compensation³³ at the rate of \$449.00 per week totaling \$40,921.86.

Commencing October 11, 2006, claimant is entitled to permanent total disability compensation at the rate of \$449.00 per week not to exceed \$125,000.00 for a permanent total general body disability, which as of the date of this award is all due and owing and ordered paid in one lump sum minus amounts previously paid.

The total amount of permanent partial disability compensation and temporary total disability compensation due and owing as of the date of this award is \$69,208.86. Therefore, the amount of permanent total disability compensation remaining to be paid, and all due and owing, is \$55,791.14, for a total award of \$125,000.00.

Claimant's date of accident has been determined to be May 17, 2005. However, claimant continued to work for respondent through October 10, 2006, earning at least 90 percent of her average weekly wage from the date of accident. Therefore, the payment of the award for the permanent total disability will begin October 11, 2006.

The record does not contain a filed fee agreement between claimant and claimant's 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 for approval.³⁴

IT IS SO ORDERED.

³³ Claimant testified that after the carpal tunnel syndrome surgery, she took one week of vacation and then returned to work light duty. Thus, the TTD paid in this matter was after claimant's last day worked on October 10, 2006, and will be applied to the PTD award.

³⁴ K.S.A. 44-536(b).

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Horner, Attorney for Claimant
Shelly E. Naughtin, Attorney for Respondent and its Insurance Carrier (Continental Western)
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier (OneBeacon)
Ryan D. Wertz, Attorney for Respondent and its Insurance Carrier (Accident Fund)
Marcia Yates Roberts, Administrative Law Judge