

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

<b>GAIL K. WATERS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>WATERS TRUE VALUE HARDWARE</b>	)	
Respondent	)	Docket No. <b>1,041,172</b>
	)	
AND	)	
	)	
<b>TWIN CITY FIRE INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the April 28, 2010 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on August 3, 2010.

**APPEARANCES**

Gary Peterson of Topeka, Kansas, appeared for the claimant. Katie Black of Kansas City, 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**

It was undisputed claimant suffered an injury to her right knee while working for respondent on October 4, 2007. Treatment included an arthroscopic partial anterior horn medial meniscectomy followed by hyalagen and cortisone injections in her right knee. Claimant returned to work for respondent. The parties were unable to agree upon the nature and extent of disability claimant suffered as a result of her injuries and that was the sole issue litigated before the Administrative Law Judge (ALJ).

Claimant argued that as a natural and probable consequence of her accidental injury, due to an altered gait, she also suffered a permanent impairment to her left knee, hip and back. Accordingly, claimant further argued her permanent partial disability should be for a K.S.A. 44-510e whole person functional impairment. In contrast, respondent argued that claimant should be limited to a K.S.A. 44-510d scheduled disability to the right leg. The ALJ adopted the opinion of Dr. Mark Rasmussen, the court ordered independent medical examiner, and awarded claimant compensation based upon a 7 percent permanent partial scheduled disability to her right lower extremity.

Claimant requests review of the nature and extent of her disability. Claimant argues that Dr. Rasmussen's rating was not based upon the Fourth Edition of the *AMA Guides*<sup>1</sup> as required by K.S.A. 44-510e(a) and should be disregarded. Claimant further argues that Dr. Fejfar's rating is not persuasive because he did not have all of claimant's medical records and was unaware of the nature of surgery performed on her knee. Finally, claimant argues that as a result of her right knee injury she developed an antalgic gait that led to a permanent impairment in her left knee, hip and back. Consequently, claimant requests the Board to modify the ALJ's Award and find that she is entitled to a 12 percent whole person functional impairment based upon Dr. P. Brent Koprivica's rating which included permanent partial disability ratings for her left knee, hip and back.

Respondent notes that at the regular hearing the parties agreed that Dr. Rasmussen's rating report was part of the evidentiary record without the necessity of his deposition testimony. Consequently, respondent argues that the parties stipulated that Dr. Rasmussen's report was admissible evidence regarding the nature and extent of claimant's disability. Respondent further argues that claimant's arguments regarding Dr. Rasmussen's report should be disregarded because of references to documents not contained within the evidentiary record. Respondent argues that claimant failed to establish that she suffered an altered gait and never requested nor received treatment for her left knee, hips or back. Consequently she should be limited to compensation for a scheduled disability to her right knee. Respondent further argues that the Board should adopt the opinion of her treating physician, Dr. Fejfar and conclude that she has a 0 percent impairment. In the alternative, if the Board finds Dr. Rasmussen's report defective, respondent argues that the case should be remanded to the ALJ to direct the doctor to rate pursuant to the *AMA Guides*.

The issues for Board determination include the nature and extent of claimant's disability. Specifically, whether she should be compensated for a scheduled disability pursuant to K.S.A. 44-510d or a non-scheduled whole person functional impairment pursuant to K.S.A. 44-510e. Because claimant returned to work for wages equal to or more than her average gross weekly wage at the time of her injury, she is neither entitled

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<sup>1</sup> 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.

to a permanent total disability award nor a work disability award (a permanent partial general disability greater than the functional impairment rating).<sup>2</sup> Additionally, the Board must determine whether Dr. Rasmussen's rating opinion can be considered.

#### **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:

Gail Waters has worked as an assistant manager approximately 16 years for respondent. Her job duties included supervising a department, waiting on customers, loading and unloading trucks, mixing paint, sweeping floors and stocking shelves.

Claimant described her right knee injury of October 4, 2007:

I was waiting on a customer in the paint department, and it was truck day. Of course there was boxes on the floor. And so we were talking about paint, and then we turned to leave and I caught my right foot on it. And as I – as it left – as it went to the outside, it popped. And it made me nauseous and she heard it, too, and she – but I didn't have to, like, take off to the doctor. It just hurt.<sup>3</sup>

On November 9, 2007, Dr. Allan Holiday performed a partial medial meniscetomy on claimant's right knee. Dr. Holiday continued to treat claimant post-operatively until he retired at which time claimant's ongoing medical treatment was taken over by Dr. Shane Fejfar. Claimant continued to complain of right knee pain and when she first saw Dr. Fejfar on January 17, 2008, he provided her with the first of a series of Hyalgen injections in her knee. Dr. Fejfar testified the injections were to recreate joint fluid dynamics and try to relieve claimant's right knee pain. Dr. Fejfar testified that he provided five such injections before he noted claimant had reached maximum medical improvement as of March 19, 2008. Without seeing claimant after that date, Dr. Fejfar opined, based on the AMA *Guides*, that claimant had a 0 percent functional impairment to her right knee. And when claimant continued to complain of knee pain, Dr. Fejfar's office note dated May 21, 2008 reflects that he suggested she seek a second opinion.<sup>4</sup>

Claimant continued to have right knee pain and also testified that she developed pain and problems with her left knee, hip and back. Claimant attributes her left knee, hip

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<sup>2</sup> K.S.A. 44-510e(a); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *rehearing denied* (May 8, 2007).

<sup>3</sup> R.H. Trans. at 8.

<sup>4</sup> Fejfar Depo. Ex. 1.

and back pain to over compensating for her right knee injury. Claimant testified that she has limped since the day of her injury. And that she did not have any problems with her left knee, hip and back before her accidental injury on October 4, 2007.

Claimant scheduled a preliminary hearing seeking additional medical treatment. As a result of that scheduled hearing the ALJ issued a January 5, 2009 Preliminary Hearing Order which directed claimant to undergo an independent medical examination by Dr. T.J. Rasmussen to offer opinions including whether claimant's current complaints or presenting condition is causally related to her October 2007 accidental injury or her work duties for respondent.<sup>5</sup>

Dr. Mark Rasmussen reviewed claimant's medical records and performed a physical examination. Dr. Rasmussen noted in his examination that claimant walked without a marked limp and was able to toe and heel walk. He further noted that claimant had pain free range of motion in her hips. The doctor did note claimant had some left knee pain which he noted can be secondary to favoring her right knee. But the doctor further noted the left knee pain was also secondary to de-conditioning and would likely improve if claimant would work on her strengthening program. Because he could not rule out a re-tear of claimant's medial meniscus Dr. Rasmussen ordered another MRI of claimant's right knee.

Dr. Rasmussen re-examined claimant on April 22, 2009 after the MRI was performed on claimant's right knee. Dr. Rasmussen indicated that the MRI revealed some changes in the medial meniscus which could have been postoperative in nature since claimant has had two arthroscopies on her right knee. Dr. Rasmussen also gave the claimant a cortisone injection in her right knee. Finally, Dr. Rasmussen opined claimant had reached maximum medical improvement due to her injury and provided a rating of 7 percent for her lower extremity.

Claimant testified she got relief from the cortisone for approximately six months. She further testified her knee is not as painful but it still catches.

Dr. P. Brent Koprivica, board certified in emergency medicine, examined and evaluated claimant on August 26, 2009, at her attorney's request. The doctor reviewed claimant's medical records and took her history regarding education and vocational training. Dr. Koprivica performed a physical examination and found that Waddell's testing was appropriate in all five categories. The doctor opined claimant's true lumbar extension was 2 degrees; normal is 25 degrees which is a 92 percent relative deficit. He further opined there was no evidence of exaggeration.

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<sup>5</sup> The independent medical examination report was authored by Mark Rasmussen but no objection was lodged regarding this change in examining physician.

Based on the *AMA Guides*, Dr. Koprivica assigned a 12 percent impairment to the right knee due to progression of chondromalacia, clinical findings and further loss of medial meniscus as well as aggravation, acceleration of the degenerative changes in the medial compartment. This lower extremity impairment converts to a 5 percent whole person impairment. The doctor also assigned a 5 percent to the left lower extremity and another 5 percent for claimant's bilateral hip and back. The doctor opined that these impairments are a natural and direct consequence of claimant's injury on October 4, 2007. Using the Combined Values Chart, the right knee, left knee, hip and back impairments result in a 12 percent whole person impairment.

Dr. Koprivica testified:

Q. Can you explain for the judge how you feel the back – or the basis for your opinion that the back and hip complaints are causally related to the October 4, 2007 injury?

A. She has – basically it's relying on truthful history. It's clinically seen as very common that when individuals have lower extremity alterations of weight bearing capabilities, altered gait, that those altered mechanics will produce abnormal stresses on the low back. And so it's very common that a person will develop low back and/or hip pain which is, I felt, the mechanism as to why she developed that low back pain complaint.<sup>6</sup>

Dr. Koprivica agreed that claimant never received any medical treatment nor diagnostic studies for her left knee, low back or hips. In essence, the doctor relied upon claimant's history and further agreed that his medical examination notes did not indicate that claimant had walked with an altered gait although it was his customary practice to note such a condition observed during his examination. And Dr. Koprivica agreed that even though an individual may have symptoms that does not necessarily establish a permanent impairment.

The initial issue is whether claimant should be compensated for a scheduled disability pursuant to K.S.A. 44-510d or a non-scheduled whole person functional impairment pursuant to K.S.A. 44-510e. The ALJ analyzed the issue in the following manner:

The primary issue is whether in addition to having a permanent impairment to her right knee, does Claimant have a permanent impairment to her left knee, hips and low back as a natural and probable consequence of her right knee injury. The Court appointed Dr. Rasmussen to do an independent medical evaluation. Dr. Rasmussen noted Claimant's complaints to her left knee, hips and low back. However, he did not assign a permanent impairment as a result of those

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<sup>6</sup> Koprivica Depo. at 17.

complaints. Dr. Rasmussen assigned a seven percent impairment to the right lower extremity. The Court agrees. Dr. Koprivica said symptoms do not in and of themselves become rateable impairments. None of these complaints have been verified by diagnostic testing such as an MRI or X-rays. While the Court is not doubting that Claimant has these complaints, it has not been verified by medical evidence that these complaints are in fact permanent impairments. The Court finds and concludes that the Claimant has a seven percent impairment to the right lower extremity.<sup>7</sup>

The Board agrees and affirms. Moreover, the Board notes that although claimant testified that she limped from the day of the accident, Dr. Rasmussen specifically noted that claimant walked without a marked limp and Dr. Koprivica did not make specific mention of an altered gait in his examination report. And Dr. Rasmussen noted in taking claimant's history that claimant had complained of back pain to another doctor but never indicated in his report that she made such complaints to him at his examination. Finally, Dr. Rasmussen noted upon examination claimant had pain free hip range of motion.

The claimant next argues that Dr. Rasmussen's rating was not based upon the Fourth Edition of the *AMA Guides* as required by K.S.A. 44-510e(a) and should be disregarded.

The claimant's disability, if any, is limited to her permanent functional impairment.<sup>8</sup> K.S.A. 44-510e(a) states in part:

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.

The Preliminary Hearing Order referring claimant for an independent medical examination specifically noted that if claimant was determined to be at maximum medical improvement the doctor was to offer an opinion on claimant's permanent functional impairment as determined by reference to the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. Dr. Rasmussen's report contained the 7 percent rating but did not specifically reference the Fourth Edition of the *AMA Guides*.

At the regular hearing the following colloquy occurred:

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<sup>7</sup> ALJ Award (Apr. 28, 2010) at 7.

<sup>8</sup> As previously noted, because claimant returned to work for wages equal to or more than her average gross weekly wage at the time of her injury, she is neither entitled to a permanent total disability award nor a work disability award (a permanent partial general disability greater than the functional impairment rating).

JUDGE SANDERS: Okay. Any other issues or matters we need to take up before we take testimony?

MR. COOPER: Not that I'm aware of, Your Honor.

MR. STUBBS: No. The only matter I wanted to confirm for the record, Your Honor, was that Dr. Rasmussen's **rating report** will come into evidence without further deposition testimony as it was - - or as he was a neutral order of the Court.

JUDGE SANDERS: All right.

MR. COOPER: That's my understanding as well, Your Honor.<sup>9</sup> (Emphasis Added)

Under some factual situations the Board has refused to consider a court ordered independent medical examiner's rating opinion if it is unclear whether the doctor utilized the Fourth Edition of the *AMA Guides*. Claimant argues there is such evidence but goes outside the evidentiary record to support her argument.

K.S.A. 44-516 compels the ALJ to consider the independent medical examiner's report in making her final determination. Consequently, there was no question that the report was part of the evidentiary record. Instead, the question posed at the regular hearing was whether the **rating** report was to be considered. Although the rules of evidence are not strictly applied in workers compensation cases, the Board finds that the longstanding "contemporaneous objection rule" applies to a workers compensation case. Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making clear the grounds of the objection.<sup>10</sup> Under the unique factual situation presented in this case the Board concludes that the failure to make a timely objection to the **rating** report coming in to evidence precludes claimant's request to exclude the portion of the report containing the rating opinion of Dr. Rasmussen regarding claimant's percentage of functional impairment.

### AWARD

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 28, 2010, is affirmed.

**IT IS SO ORDERED.**

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<sup>9</sup> R.H. Trans. at 5.

<sup>10</sup> See *Anderson v. Scheffler*, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991) and *State v. Carter*, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

Dated this \_\_\_\_\_ day of September 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary Peterson, Attorney for Claimant  
Katie Black, Attorney for Respondent and its Insurance Carrier  
Rebecca A. Sanders, Administrative Law Judge