

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

SHARON K. OVERCASH)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket Nos. 1,042,749 &
)	1,045,297
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Self-insured respondent requested review of the July 20, 2010 Award by Administrative Law Judge Marcia Yates Roberts. The Board heard oral argument on February 2, 2011.

APPEARANCES

Denise E. Tomasic of Kansas City, Kansas, appeared for the claimant. Bryce D. Benedict of Topeka, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

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

ISSUES

It was alleged that claimant suffered an accidental injury when she slipped and fell at work on January 25, 2007 (Docket No. 1,042,749). Claimant further alleged she suffered repetitive injuries each and every day at work after January 25, 2007 (Docket No. 1,045,297). The cases were consolidated for hearing but based upon the evidence compiled during litigation the alleged repetitive injury claim was abandoned. And it was ultimately undisputed that on January 25, 2007, claimant suffered a work-related injury to her back. There was no contention that claimant was entitled to a work disability but the parties were unable to agree on the nature and extent of her functional impairment.

Both parties provided expert medical opinions regarding claimant's functional impairment. The Administrative Law Judge (ALJ) appointed a physician to conduct an independent medical examination of claimant and provide an opinion regarding claimant's functional impairment. After reviewing the medical evidence, the ALJ concluded the court ordered independent medical examiner's opinion was most credible and awarded claimant compensation based upon a 14 percent whole person functional impairment.

The respondent requested review and argues that the *AMA Guides*¹ indicate that the DRE method of evaluation is preferred and that only its medical expert utilized that method in rating claimant's impairment. Respondent further argues that all three medical experts agreed that claimant's medical condition fit DRE Lumbosacral Category III which constitutes a 10 percent functional impairment. Consequently, respondent finally argues it was inappropriate for the claimant's medical expert and the court ordered independent medical examiner to utilize the range of motion model to rate claimant's functional impairment.

The claimant notes that K.S.A. 44-510e provides that functional impairment is the extent of loss of physiological capability as established by competent medical evidence and based upon the *AMA Guides*. Claimant argues that all the physicians utilized the *AMA Guides* and both her medical expert and the court ordered independent medical examiner explained why they utilized the Range of Motion Model to rate claimant's functional impairment. Consequently, claimant requests the Board affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of claimant's functional impairment.

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:

It was undisputed claimant injured her back as a result of a fall at work on January 25, 2007. Claimant's course of treatment included physical therapy and epidural steroid injections. When that failed to provide significant relief for claimant's back symptoms an arthroscopic discectomy at L5-S1 was performed by Dr. William Reed on November 9, 2007. Claimant was provided physical therapy after her surgery and in December 2007 she was released to return to work and was able to perform her job duties within her restrictions.

¹ 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.

Claimant experienced recurrent symptoms in her low back and an additional MRI was performed in April 28, 2008, which showed epidural fibrosis rather than disc protrusion. Epidural fibrosis is scar tissue which can cause nerve irritation. Dr. Reed ordered additional epidural injections and claimant's condition improved. Another MRI was performed on December 19, 2008, which showed post-surgical changes at L5-S1. Claimant was released from Dr. Reed's care in June 2009 and she retired on November 1, 2009.

At the request of claimant's attorney, Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant on May 12, 2009. Dr. Prostic reviewed medical records, took a history from claimant and performed a physical examination. X-rays were taken which revealed lordotic lumbar curve with disc space narrowing at L5-S1 with significant posterior facet arthrosis. The doctor opined claimant's injury was causally related to her work-related accident. Dr. Prostic diagnosed the claimant with a herniation of lumbar disc at L5-S1 and claimant continued to have radiculopathy, significant restriction of motion and mechanical low back pain. The doctor recommended conservative treatment with intermittent heat or ice and massage, therapeutic exercises and medications to relieve any discomfort.

Based upon the *AMA Guides*, Dr. Prostic opined claimant has an 18 percent permanent partial functional impairment to the body as a whole. The doctor used the range of motion model to determine claimant's impairment. Dr. Prostic placed permanent restrictions on claimant to avoid frequent bending or twisting at the waist, forceful pushing and pulling, use of vibrating equipment or captive positioning. Claimant should also avoid lifting greater than 35 pounds occasionally knee to shoulder height and half as much frequently as well as minimal work below knee height and above shoulder height.

On cross-examination Dr. Prostic agreed that claimant fit DRE Lumbosacral Category III, 10 percent impairment. Dr. Prostic testified:

Q. Under the DRE Model would she qualify for a Category III, 10 percent impairment, lumbar problem with radiculopathy?

A. Well, by the Injury Model she does.²

But Dr. Prostic explained that he used the range of motion model to rate claimant because she had a previous injury to her low back and her current injury was not a single injury but instead a series of injuries.

Dr. Vito Carabetta, board certified in physical medicine and rehabilitation, examined and evaluated claimant on September 22, 2009, at the request of respondent's attorney.

² Prostic Depo. at 15.

The doctor reviewed the medical records that were provided as well as obtained a history from the claimant. Upon examination, Dr. Carabetta diagnosed claimant as having right first sacral radiculopathy and status-post lumbar microdiscectomy. The doctor opined that claimant had reached maximum medical improvement at the time of his examination and no permanent restrictions were imposed. Based on the *AMA Guides*, Dr. Carabetta rated claimant's lumbosacral radiculopathy for 10 percent whole person impairment which placed her in the DRE Lumbosacral Category III.

Dr. Terrance Pratt performed a court ordered examination of claimant on December 7, 2009. Dr. Pratt reviewed claimant's medical records, took a history from claimant and performed a physical examination. Dr. Pratt diagnosed claimant with a herniated disk at the L5-S1 level and status post microdiscectomy with epidural fibrosis which is scar tissue that can cause nerve irritation. Positive findings upon straight leg raising is an indication of nerve root irritation. Using the *AMA Guides*, Dr. Pratt opined claimant suffered a 14 percent impairment to her lumbar spine which is causally related to her work injury. Dr. Pratt provided restrictions that claimant not perform any frequent low back bending or twisting and no lifting in excess of 25 to 30 pounds.

On direct examination, Dr. Pratt opined claimant would fall under the DRE Category III for a 10 percent impairment with radiculopathy. On cross examination, the doctor testified:

Q. And do you stand by your 14 percent impairment rating, or would you revise that today in light of some of the questions that were asked?

A. If we strictly utilized the area categories, it would be 10 percent. If we utilized the Range of Motion Model, it was 14 percent. I chose to use the Range of Motion Model, in part, due to the -- her status after the procedure and the epidural fibrosis.

Q. And if you were making a recommendation to the administrative law judge in terms of an impairment rating, I assume that you're more inclined to stand by the 14 percent impairment rating based on what you've just told us.

A. Yes.³

Functional impairment is defined by K.S.A. 44-510e(a), as follows:

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.

³ Pratt Depo. at 12-13.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁴ 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. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁵

Three physicians have offered opinions as to claimant's permanent functional impairment and they include 10 percent (Dr. Carabetta), 18 percent (Dr. Prostic) and 14 percent (Dr. Pratt).⁶ The difference in these opinions is primarily due to the methodology employed by each physician in assigning the permanency. Both Drs. Prostic and Pratt utilized the Range of Motion Model. But both agreed the DRE method was preferred and that if the DRE was used, under the *AMA Guides*, claimant's rating would be limited to 10 percent to the body as a whole.

Both Drs. Pratt and Prostic explained why they chose to rate claimant using the Range of Motion Model. Dr. Prostic relied upon his determination that claimant had suffered a previous back injury in 2002 but he agreed the conditions from the injury had completely resolved. And Dr. Prostic used the range of motion method of assessing claimant an impairment based on his understanding that this was an accident experienced by a series of injuries rather than a one-time incident. As previously noted, although claimant had initially alleged a series of injuries that claim was abandoned.

Dr. Pratt reasoned that it was appropriate to utilize the range of motion model because claimant had epidural fibrosis post-surgery. But when questioned regarding his range of motion findings he agreed that the findings upon repeat examination should be within a certain number of degrees of each other and claimant's were not. In his report Dr. Pratt specifically noted that the trials on extension demonstrated high variations that were not felt to be a true indication of claimant's functional abilities.

The greater weight of the evidence indicates that the DRE method of evaluation is preferred by the authors of the *AMA Guides*, Fourth Edition. Physicians who become involved in workers compensation claims are compelled to use the *AMA Guides*. And while the approach allows for some variability and an allowance for a difference of opinion as it pertains to how to categorize any given injury, it is clear that the intent of the *AMA Guides* (and of the Legislature in adopting that tool) was to achieve some sort of conformity. The Board finds, based on the expert testimony, Dr. Carabetta's 10 percent

⁴ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁵ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁶ According to the physicians each of these ratings were rendered pursuant to the *AMA Guides*, Fourth Edition.

rating is based on the method preferred under the *AMA Guides* and is the most persuasive based upon all the evidence in this case.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated July 20, 2010, is modified to reflect claimant suffered a 10 percent permanent partial functional impairment.

Claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of \$324.58 per week or \$13,470.07 for a 10 percent functional disability, making a total award of \$13,470.07, which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Denise E. Tomasic, Attorney for Claimant
- Bryce D. Benedict, Attorney for Respondent
- Marcia Yates Roberts, Administrative Law Judge