

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

ROSA E. MENDEZ)	
Claimant)	
)	
VS.)	
)	
CARGILL MEAT SOLUTIONS CORP.)	
Respondent)	Docket No. 1,043,011
)	
AND)	
)	
CHARTIS CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the January 23, 2013, Award entered by Administrative Law Judge Pamela J. Fuller (ALJ). The Board heard oral argument on May 7, 2013. Conn Felix Sanchez, of Kansas City, Kansas, appeared for claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found that claimant had a 15 percent permanent partial impairment to the right upper extremity at the level of the shoulder.

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

ISSUES

Claimant argues she should be entitled to an impairment to the body as a whole and a work disability.

Respondent argues the Award should be affirmed.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant filed an Application for Hearing on November 17, 2008, claiming injuries to her right shoulder, hand and neck from repetitive use of a knife or a hook with her right hand on all days worked until March 26, 2008. Claimant reported her injury and was first sent by respondent to Dr. Terry Hunsberger, who gave her prescriptions for pain medication and sent her for x-rays and physical therapy. Claimant was also given a wrist splint for her right hand.

Dr. Alexander Neel, a board certified orthopedic surgeon, was later authorized to treat claimant's right wrist and hand. He first saw claimant on June 23, 2008, and diagnosed her with right wrist and thumb pain and mild carpal tunnel syndrome. Dr. Neel saw claimant next on July 14, 2008, and stated her mild carpal tunnel syndrome did not require specific treatment. Dr. Neel suggested claimant's treatment be returned to Dr. Hunsberger. By the time Dr. Neel next saw claimant, on April 19, 2010, claimant had an MRI that showed evidence of tendonosis. She had undergone an injection in her wrist and physical therapy. Claimant also complained of right shoulder pain and a pulling sensation in her right neck. Dr. Neel gave claimant an injection in her right shoulder.

Dr. Neel saw claimant again on May 17, 2010, and claimant was still complaining of pain in her right shoulder, wrist, elbow and neck. After examining claimant, Dr. Neel said claimant had a full range of motion in the neck, and lateral bending from the affected side did not cause radicular symptoms in her hand or wrist. Dr. Neel concluded claimant did not have a pinched nerve in her neck but instead had pathology in her shoulder, which could explain her neck pain. Dr. Neel said the results of a nerve conduction test showed claimant had mild carpal tunnel syndrome, which explained some of her upper extremity symptoms.

By September 2010, Dr. Neel had ruled out the neck as a source of claimant's upper extremity pain. Based on the *AMA Guides*,¹ Dr. Neel rated claimant as having a 6 percent impairment to her right upper extremity for her impaired range of motion. Further, Dr. Neel rated claimant as having a 3 percent impairment to her right upper extremity for her mild carpal tunnel syndrome.

Dr. Pat Do, a board certified orthopedic surgeon, performed an independent medical examination of claimant on July 23, 2009, at the request of the ALJ. After his examination, Dr. Do determined that claimant was in need of further treatment.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant next saw Dr. Do on February 10, 2011, and recommended a right shoulder arthroscopic surgery and right carpal tunnel release. He performed both procedures on June 6, 2011. Dr. Do provided treatment for claimant's neck in the form of physical therapy. Dr. Do also said he believed claimant's neck pain was referred from her shoulder. He did not believe claimant's neck pain was separate from her shoulder injury, nor did he believe claimant had an anatomic injury to her neck.

On September 27, 2011, Dr. Do found claimant to be at maximum medical improvement. He assigned permanent work restrictions as follows: In regard to claimant's right upper extremity, he restricted her continuous lifting from 0 to 10 pounds, frequent lifting from 11 to 20 pounds, occasional lifting from 21 to 50 pounds, and no lifting greater than 51 pounds. In regard to pushing and pulling, he restricted claimant to continuously 0 to 25 pounds, frequently 26 to 50 pounds, occasionally 51 to 75 pounds, and nothing over 76 pounds. She should limit overhead reaching of the right shoulder to a frequent basis. She should also limit repetitive gripping, grasping, pinching, and squeezing to a frequent basis. Dr. Do did not assign any work restrictions for any other part of claimant's body other than her right upper extremity.

Based on the *AMA Guides*, Dr. Do rated claimant as having an 8 percent impairment to her right upper extremity for her shoulder and a 5 percent impairment to her right upper extremity for her carpal tunnel release, which combined for a total 13 percent right upper extremity impairment.

Dr. C. Reiff Brown, a retired board certified orthopedic surgeon, examined claimant on October 5, 2010, at the request of claimant's attorney. Claimant told Dr. Brown she had injured her right shoulder and both wrists in the course of her work activities. The pain in her right wrist extended up to the elbow, right shoulder and right side of her neck. Dr. Brown diagnosed claimant with bilateral carpal tunnel syndrome, right rotator cuff tendonitis, acromial impingement syndrome on the right, and early myofascial pain syndrome in the right thoracic paraspinals and scapular areas. Dr. Brown said myofascial pain syndrome is an inflammatory condition involving large expanses of muscle tissue. He stated claimant had involvement of the low cervical and upper thoracic paraspinal muscles, the right scapular muscles, and the right posterior shoulder muscles. Dr. Brown believed claimant's myofascial pain was related to her shoulder injury.

Dr. Brown believed claimant's problems were the result of the work she performed at respondent. He opined that claimant needed further treatment and recommended referral to an orthopedist specializing in upper extremity pathology. Dr. Brown further recommended claimant have restrictions that she avoid work involving use of the right hand above chest level; avoid frequent reaching from the body more than 18 inches with the right hand; avoid lifting from waist to chest level with the right hand more than 10 pounds occasionally or 5 pounds frequently; and avoid work that involved frequent flexion and extension of the wrists greater than 30 degrees and frequent grasp-type activities.

Dr. Pedro Murati is board certified in electrodiagnostic medicine and physical medicine and rehabilitation and is a certified independent medical examiner. Dr. Murati first examined claimant on January 20, 2009, at the request of claimant's attorney. Claimant told Dr. Murati her chief complaints were pain in the right shoulder going down into the fingertips of her right hand, popping and grinding of the right shoulder, numbness and tingling in her right arm, pain on the right side of her neck, and swelling of her right wrist. Claimant told Dr. Murati she had been injured during her employment with respondent and gave Dr. Murati a history of her job duties.

Dr. Murati diagnosed claimant with tenosynovitis of the right second digit, right carpal tunnel syndrome, right lateral epicondylitis, right rotator cuff tear, and myofascial pain syndrome affecting the right shoulder girdle extending into the cervical paraspinals. Dr. Murati recommended temporary restrictions and various treatments and tests for claimant's diagnoses.

Dr. Murati examined claimant a second time on November 1, 2011, again at the request of claimant's attorney. Claimant gave Dr. Murati the same chief complaints as in January 2009 but included complaints of right shoulder pain, neck pain radiating down to the right hand, and trouble lifting with her right shoulder. After examining claimant, Dr. Murati diagnosed her with tenosynovitis of the right 3rd digit;² status post right shoulder arthroscopy with limited debridement of the glenohumeral joint, right shoulder arthroscopic subacromial decompression, right shoulder arthroscopic rotator cuff repair, right carpal tunnel release and subacromial pain injection for postoperative pain control; right lateral epicondylitis; and myofascial pain syndrome affecting the right shoulder girdle extending into the cervical and thoracic paraspinals. Dr. Murati opined that all claimant's current diagnoses were a direct result of her work-related injuries that occurred on all days worked until March 26, 2008.

Based on the *AMA Guides*, Dr. Murati rated claimant as having a 20 percent right finger impairment which converts to a 4 percent right upper extremity impairment; for epicondylitis, a 3 percent right upper extremity impairment; for right status post carpal tunnel release, a 10 percent right upper extremity impairment; for the right shoulder status post subacromial decompression, a 10 percent right upper extremity impairment; and for loss of range of motion of the right shoulder, a 5 percent right upper extremity impairment. These combine for a 28 percent right upper extremity impairment, which converts to a 17 percent whole person impairment. For claimant's myofascial pain syndrome affecting the cervical paraspinals, Dr. Murati placed her in Cervicothoracic DRE Category II for a 5 percent whole person impairment. For claimant's myofascial pain syndrome affecting the thoracic paraspinals, Dr. Murati placed her in Thoracolumbar DRE Category II for a 5

² On Dr. Murati's first examination of claimant, he found she had tenosynovitis of the 2nd digit of her right hand.

percent whole person impairment. Claimant's impairments combine for a 25 percent whole person impairment.

Dr. Murati placed permanent restrictions on claimant based on an 8-hour workday. His restrictions included: (1) no climbing ladders, squatting or crawling; (2) no repetitively grasp or grab with the right arm and no heavy grasp greater than 40 kilograms with her right extremity; (3) she should have no above-shoulder work for the right upper extremity; (4) she should not lift, carry, push or pull greater than 20 pounds or 10 pounds frequently; (5) repetitive hand controls should be limited to occasional with the right upper extremity; (6) no work more than 18 inches from her body with the right arm; (7) avoid awkward positions of the neck and trunk twist; and (8) no use of hooks, knives or vibratory tools with the right arm.

Dr. Murati reviewed the task list prepared by Jerry Hardin.³ Of the 33 tasks on the list, Dr. Murati opined claimant was unable to perform 29 for an 88 percent task loss. However, there were only 20 unduplicated tasks on Mr. Hardin's list, of which Dr. Murati said claimant could not perform 19. This would compute to a 95 percent task loss.

Dr. Paul Stein, a board certified neurological surgeon, performed an independent medical examination of claimant on June 5, 2012, at the request of the ALJ. Claimant gave Dr. Stein a summary of her work activity at respondent. She said she had no specific injury. At the time claimant saw Dr. Stein, she continued to have pain affecting the right side of her neck, right shoulder, right upper extremity, and right wrist. Claimant told Dr. Stein her neck pain had been present from the beginning. Claimant also complained of some numbness and tingling intermittently in the right fourth and fifth digits.

Dr. Stein performed a physical examination. His basic findings were restrictions of movement in claimant's right shoulder and a little tenderness in the muscles. Claimant's range of motion in the cervical area was essentially intact. Claimant had 75 degrees of motion, and normal is 80 degrees, which is less than what is stated in the *AMA Guides* as normal but which Dr. Stein considers to be normal. Dr. Stein opined that claimant had sustained a soft tissue injury from cumulative trauma or repetitive work activity, and this had progressed to the point of a mild right carpal tunnel syndrome and a partial rotator cuff tear. He believed claimant had undergone adequate treatment.

Based on the *AMA Guides*, Dr. Stein rated claimant as having an 8 percent impairment to her right upper extremity at the level of the shoulder for loss of range of motion. He rated claimant as having a 10 percent right upper extremity at the level of the forearm for her mild carpal tunnel syndrome. These ratings combine for a 17 percent

³ Jerry Hardin, a human resource consultant, interviewed claimant on February 6, 2012, at the request of claimant's attorney. At the time of the interview, claimant was unemployed and had a 100 percent wage loss. Mr. Hardin compiled a list of 33 tasks that claimant had performed in the 15-year period before her accident. Of those 33 tasks, 20 were unduplicated.

impairment to the right upper extremity. For claimant's cervical spine, he rated claimant as having a 0 percent impairment of function.

Dr. Stein did not find that claimant had loss of lordosis in the neck. He did not make a finding that claimant had myofascial pain, which he said was an excessively-used term. He noted that claimant had soft tissue discomfort. Dr. Stein said a finding of loss of lordosis in the neck would not change his rating. He noted he did not see loss of lordosis, that people have loss of lordosis with no trauma to their necks, and loss of lordosis on an x-ray is frequently a result of positioning. Dr. Stein places more emphasis on range of motion. Further, he said the *AMA Guides* do not refer to the presence or absence of normal lordosis in the neck as part of its criteria for impairment.

Dr. Stein's permanent restrictions for claimant due to her right shoulder injury were that she have no activity with the right hand above shoulder level or more than 18 inches from her body, that she avoid activity with the right hand behind the plane of the body, that she do no lifting with her right hand more than 10 pounds up to chest level or 15 pounds up to chest level on rare occasions. For claimant's carpal tunnel, Dr. Stein recommended she avoid using vibratory or impacting power tools and that she avoid intensive and frequent repetitive activity with her right hand. Dr. Stein said claimant has no limitations as a result of this accident for any other area of her body.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a

presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. 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. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

The only issue in this case is whether claimant suffers an impairment from a scheduled or whole body injury. The ALJ found that claimant's compensable injuries were limited to her right upper extremity. The Board agrees.

Claimant received treatment from Dr. Neel from 2008 to 2011. Dr. Neel treated claimant for right carpal tunnel syndrome and a right shoulder injury. Claimant's first complaint of neck problems came on May 17, 2010, when she complained of right lateral neck pain. Initially, claimant was evaluated to determine if she was having radicular symptoms related to the neck. Dr. Neel stated that he found no pinched nerve in the neck and that there was pathology in the shoulder that could explain the neck pain. When asked about whether claimant had an impairment related to the neck, he responded, "there was nothing there to rate."⁴

Dr. Brown prepared a report that did not indicate any cervical spine involvement as a result of claimant's work-related injury. He did find early myofascial pain syndrome in the right thoracic and shoulder areas. When he testified, Dr. Brown included the lower cervical area in his comprehensive diagnosis of myofascial pain syndrome. His testimony is inconsistent with his written report. Dr. Brown did not provide an impairment rating.

Dr. Do performed an independent medical examination of claimant on July 23, 2009, at the request of the ALJ. Dr. Do recommended a course of medical treatment for the claimant's right upper extremity injury as a result of the 2009 examination. Dr. Do declared claimant to have reached maximum medical improvement on September 27, 2011, and provided a 5 percent impairment for the wrist injury and an 8 percent impairment for the right shoulder. Dr. Do did not provide an impairment rating for claimant's alleged neck injury.

Dr. Do believed that claimant was experiencing neck pain. He explained that the neck pain resulted from shoulder muscles that originate in the neck area. According to Dr. Do, muscles cause pain when the muscles go into spasm to help protect an injured shoulder. Dr. Do testified he did not believe that the neck condition was a separate, ratable condition.

Dr. Stein performed an independent medical examination of claimant on June 5, 2012, at the request of the ALJ. Dr. Stein assessed a 10 percent impairment for the carpal tunnel syndrome and an 8 percent impairment for the right shoulder. Dr. Stein did not find any ratable impairment to the claimant's cervical spine.

⁴ Neel Depo. at 12.

Only Dr. Murati provided a body as a whole rating for myofascial pain syndrome and assessed a 5 percent whole body impairment for claimant's cervical spine and a 5 percent whole body impairment for claimant's thoracic spine. The weight of the medical evidence does not support Dr. Murati's opinion in this regard.

CONCLUSION

Based upon the foregoing, the Board finds that claimant suffered injuries to her right wrist and shoulder. Based upon the opinions of Dr. Stein, the court-ordered evaluator, the Board finds claimant suffers an 8 percent impairment to the right upper extremity at the level of the shoulder and a 10 percent impairment to the right upper extremity at the level of the forearm. Claimant is entitled to an award at each separate level for multiple injuries to the same extremity corresponding to the statutory schedule set out in K.S.A. 44-510d.⁵

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated January 23, 2013, is modified to reflect the Board's findings with regard to the extent of impairment. The Order is affirmed in all other respects.

RIGHT SHOULDER

For the right shoulder, claimant is entitled to 18 weeks of permanent partial disability compensation, at the rate of \$327.63 per week, in the amount of \$5,897.34 for an 8 percent loss of use of the shoulder, making a total award of \$5,897.34.

RIGHT FOREARM

For the right wrist, claimant is entitled to 20 weeks of permanent partial disability compensation, at the rate of \$327.63 per week, in the amount of \$6,552.60 for a 10 percent loss of use of the forearm, making a total award of \$6,552.60.

IT IS SO ORDERED.

⁵ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 166, 239 P.3d 51, 61 (2010).

Dated this _____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge