

functional disability beginning June 21, 2007 at the rate of \$265.61¹, a 50 percent permanent partial general (work) disability beginning March 18, 2009 until January 31, 2011, at rate of \$325.98 and an additional 10 percent permanent partial whole person functional disability from February 1, 2011 and continuing for 41.5 weeks at the adjusted rate of \$60.37 per week. The ALJ also found claimant was entitled to reimbursement of prescription costs of \$315.56 and medical mileage costs of \$434.52.

Respondent appeals arguing that (1) the ALJ erroneously found that claimant had a 10 percent whole person permanent partial functional disability, contrary to the overwhelming weight of the evidence. Respondent contends that the medical opinions of the court-appointed independent medical examiner, Dr. Peter Bieri justify no more than a 5 percent whole person functional disability; (2) that the ALJ erroneously referred to the 41.5 weeks of benefits due and owing as temporary total disability as same should have been reflected as permanent partial disability. Respondent further contends that claimant's permanent partial functional whole person disability should be no more than a 5 percent permanent partial disability to the body as a whole resulting in 20.75 weeks of disability; (3) that the ALJ erroneously found that claimant had a non-scheduled injury and awarded permanent partial disability to the body as a whole, whereas the evidence demonstrates that the claimant's recovery should have been limited to a scheduled injury to her left ankle and to her right hip, pursuant to K.S.A. 44-510d; (4) that the ALJ erroneously awarded additional compensation to the claimant after February 1, 2011, despite the fact that she was then earning a comparable wage and had received her entire functional impairment of 10 percent; and (5) that the ALJ erroneously refused to consider unemployment benefits awarded to claimant during the time period of March 18, 2008 through January 31, 2011, as wages in calculating her wage loss. Respondent contends that in the event the Board determines that claimant has a body as whole injury and is entitled to a work disability award, then claimant's unemployment benefits should be considered when calculating her post-injury wages.

Respondent argues that the Award should be modified to reflect that claimant is entitled to only a functional impairment for two scheduled injuries to her lower extremities (5% left ankle and 7% to the right hip), and that any additional compensation is erroneous. In the event claimant is found to have a whole body functional impairment it should be no more than 5 percent for the injuries to the ankle and hip. Respondent also argues that claimant's unemployment benefits should be treated as earnings for determining wage loss under K.S.A. 44-510e, if claimant is found to have a whole body impairment.

Claimant relies on the submission brief presented to the ALJ, in which she argues she is entitled to a 50 percent work disability, and future medical care including, but not limited to a possible future total knee arthroplasty.

¹ The award paragraph mistakenly labels this as temporary total disability benefits.

The issues for the Board's consideration include:

1. What is the nature and extent of claimant's injuries and disability? This includes whether claimant suffered more than scheduled injuries to her left ankle and right hip, whether the hip injury is limited to a scheduled disability or is a whole body disability, whether claimant permanently injured her low back, the percentage of functional impairment suffered by claimant and to which parts of her body, and the extent, if any, of a work disability.
2. Did the ALJ err in his calculation of the award when he allowed claimant additional weekly benefits for claimant's functional impairment after she returned to work at a comparable wage?

FINDINGS OF FACT

Claimant began working for respondent in March 2004 as an adult specialist working with the mentally ill. Claimant's job was to teach the client life skills and sometimes she led the psychosocial group.

On June 21, 2007, claimant took a client to Walmart to do some grocery shopping, and, upon returning, they were walking across the front yard of the group home with the groceries, when claimant stepped in a hole, twisting her left ankle and fell, landing on the sidewalk onto her right hip and jamming her elbow.² Claimant testified that the sidewalk was made up of landscape timbers, round stepping stones and gravel. Claimant denies any prior problems with her left ankle, right hip or right shoulder. She admits to prior low back problems before the accident and to having an injection prior to the accident.

Claimant sought medical care at various facilities as a result of this fall. Initially receiving treatment from Robert A. Gollier, II, M.D., and her family physician, Dr. Thomas Fulbright. She received a 3-D walking boot for her left ankle from the Miami County Medical Center emergency room, which she wore for six to eight weeks. During that time she favored her left leg.³

Claimant testified that she ended up seeing board certified orthopedic surgeon Daniel D. Schaper M.D., on her own after she had waited to see an orthopaedic physician on a referral from the emergency room at Miami County Medical Center. She received treatment for her left foot and right hip (injections and physical therapy).

² R.H. Trans. at 7-8.

³ R.H. Trans. at 9.

Claimant testified that she has constant pain in her right hip, with increased pain with walking or climbing stairs or standing for any length of time and sometimes the joint will lock and pop. Claimant also testified that she walks with a slight limp. She has trouble sleeping because of the pain and has trouble driving due the pressure it takes to push on the accelerator. Dr. Schaper assigned a restriction of sitting 50 percent of the time. Claimant was also advised against performing any weight-bearing exercises like walking or using the treadmill for weight loss.

After two injections, Dr. Schaper told claimant that there was nothing more he could do for her hip and that eventually she would need a hip replacement. Claimant's elbow and shoulder complaints had resolved by the time of the regular hearing.

Claimant's employment was terminated on March 18, 2009, after an incident with a client, which respondent deemed was inappropriate and not handled to their satisfaction.⁴ During her time off work, claimant was paid unemployment compensation. Claimant obtained another job, returning to work on January 31, 2011.⁵ Claimant is earning at least 90 percent of what she was earning with respondent on the date of the accident.

Claimant first met with Dr. Daniel D. Schaper, an orthopaedic surgeon⁶, on July 11, 2007, with complaints of pain in her left foot and ankle, her right shoulder and her low back. Dr. Schaper testified that claimant reported prior chronic problems with her low back. His records do not reflect any prior history of problems with the left ankle, right shoulder or right hip. Claimant's examination revealed a swollen and mildly bruised left ankle, normal range of motion and function with the exception of mild tenderness anteriorly in the right shoulder, diffuse soreness in the low back and good range of motion without significant pain in the right hip and a little tenderness in the hip laterally. X-rays of the left ankle showed a chip fracture off of the medial malleolus and some irregularity and bone chips adjacent to the dorsal navicular which have an old appearance.⁷

Dr. Schaper diagnosed claimant with left ankle sprain, right hip pain, right shoulder contusion and chronic back pain syndrome. Claimant was instructed to continue with the cast or boot she was wearing and was allowed to perform work in a seated position three times a week.

Claimant was seen again on July 30, 2007. She continued to have pain in her ankle but was progressing satisfactorily. Dr. Schaper recommended that claimant wear herself

⁴ R.H. Trans. at 15.

⁵ R.H. Trans. at 4.

⁶ He does not deal with spines.

⁷ Schaper Depo., Ex. 2 at 1 (Dr. Schaper's July 11, 2007 office note).

out of her cast, get into a Cooper brace, get into a physical therapy program and continue with the previous work restrictions.⁸ The medical notes do not mention any back, elbow or shoulder complaints.

Dr. Schaper's September 24, 2007, medical notes indicate that claimant's ankle pain was largely resolved. She continued to complain of pain in her right hip with walking and activity. Dr. Schaper found claimant to have reduced range of motion in the hip especially with internal rotation. She also had reduced range of motion of the lumbar spine. He found claimant to have a resolved left ankle sprain and mild right hip osteoarthritis. Claimant was instructed to continue with her work restrictions with intermittent walking allowed.⁹

An MRI of claimant's hip was taken on October 8, 2007, revealing fluid on the hip and a cartilage abnormality on the left side. Claimant received an injection in her right hip joint on October 19, 2007. Her ankle and back complaints were reduced. The recorded diagnosis on October 19, 2007, was of right hip pain only.

Claimant's hip pain continued and on November 5, 2007, Dr. Schaper recommended another cortisone injection. The injection was a temporary fix, and claimant was referred for physical therapy. Dr. Schaper indicated he was unsure of the cause of claimant's persistent right hip pain.¹⁰

On February 20, 2008, Dr. Schaper found claimant to be at maximum medical improvement for the right hip. Claimant was instructed to perform activity as tolerated with walking 50 percent of the time and sitting 50 percent of the time.¹¹

On March 12, 2008, Dr. Schaper found that claimant had a permanent impairment to the right hip and left ankle and assigned a 7 percent impairment to the lower extremity for the right hip and 5 percent for the left ankle. Dr. Schaper opined that these lower extremity impairments combine for a 5 percent whole person impairment (3% for the hip and 2% for the ankle).¹² Claimant last reported significant low back complaints to Dr. Schaper on September 24, 2007. He acknowledged that if a patient reported only minor complaints to a body part, that part may not be included in his notes. However, if the complaints were significant, then they would be included in his notes.

⁸ Schaper Depo., Ex. 2 at 4 (Dr. Schaper's July 30, 2007 office note).

⁹ Schaper Depo., Ex. 2 at 6 (Dr. Schaper's Sept. 24, 2007 office note).

¹⁰ Schaper Depo., Ex. 2 at 12 (Dr. Schaper's Nov. 26, 2007 office note).

¹¹ Schaper Depo., Ex. 2 at 16 (Dr. Schaper's Feb. 20, 2008 office note).

¹² Schaper Depo., Ex. 3 (Dr. Schaper's Mar. 12, 2008 letter).

Claimant was referred by her attorney to board certified orthopedic surgeon, Edward J. Prostic, M.D., for an examination on February 9, 2009. The history of the accident was consistent with claimant's testimony. Dr. Prostic noted claimant had a history of chronic low back pain with radiculopathy to the left leg before this accident. Claimant complained of pain in her right hip with an inability to sleep much on her right side and difficulty sleeping on her left side. She also complained of pain in her left ankle, low back and aching in the right shoulder.

Dr. Prostic examined claimant and determined that she had mild rotator cuff tendinitis of the right shoulder, progressive osteoarthritis of the hip, which in the future will require hip replacement, an altered gait, a painful hip aggravating her low back, and chronic symptoms from an ankle sprain.

He opined that any treatment recommended for the low back would not be effective until claimant gets a good result from hip surgery. Dr. Prostic assigned a 5 percent impairment to the right upper extremity, 5 percent to the body as a whole for the aggravation of the low back and trochanteric bursitis, 10 percent to the body as a whole for the right hip and 5 percent to the left lower extremity, for a combined impairment of 19 percent to the body as a whole on a functional basis.¹³

Claimant met with board certified disability evaluating physician Peter V. Bieri, M.D., at the request of the ALJ, for an independent medical evaluation on August 22, 2011. Claimant expressed persistent complaints of pain in the right hip and left ankle, made worse with weight-bearing and ambulation, increased low back pain, occasional discomfort of the right shoulder at shoulder level with overhead use, pain at night requiring postural adjustment, pain when climbing or descending stairs and difficulty with any squatting, kneeling, crouching or crawling.

Dr. Bieri opined that claimant incurred injury during the course of her employment on June 21, 2007. He diagnosed left ankle sprain, soft tissue contusion on the right hip consistent with trochanteric bursitis, soft tissue injury to the right shoulder, and possible increase in pre-existing lumbar spine disease with left lower extremity radiculopathy.¹⁴

Dr. Bieri found claimant to be at maximum medical improvement and assigned a 7 percent impairment to the right lower extremity for residuals of trochanteric bursitis (3% whole person), and a 5 percent impairment to the left lower extremity for instability of the left ankle (2% whole person).¹⁵ No impairment was given for the right shoulder. Dr. Bieri opined that any increase in low back pain would be considered an exacerbation only and

¹³ Prostic Depo., Ex. 2 at 3-4 (Dr. Prostic's February 9, 2009 report).

¹⁴ Bieri Depo., Ex. 2 at 4 (Dr. Bieri's Aug. 22, 2011 report).

¹⁵ Bieri Depo., Ex. 2 at 5 (Dr. Bieri's Aug. 22, 2011 report).

failed to meet the criteria for a true additional permanent impairment attributable to low back injury. At the time of the examination, he recorded claimant's past history of chronic back pain with a disc herniation at L4-5 and left lower extremity radiculopathy along with multi-level degenerative joint disease diagnosed in 2003. Claimant was also seen for an orthopaedic consultation by Dr. Kindred on February 9, 2007, who diagnosed of significant spinal stenosis secondary to a disc herniation, with left lower extremity radiculopathy.

Dr. Bieri agreed with the restriction of Dr. Schaper, limiting claimant's sitting and standing equally at 50 percent of the 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.¹⁶

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.¹⁷

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.¹⁸

The Board will first determine respondent's contention that claimant's hip injury is limited to a scheduled injury.

K.A.R. 51-7-8 (c)(3) states "An injury involving the hip joint shall be computed on the basis of disability to the body as a whole".

The administrative regulation cited above makes it clear that a hip joint injury is to be computed on the basis of a body as a whole disability. Respondent's contention that claimant has suffered a scheduled injury to the right hip fails.

K.S.A. 2000 Furse 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

¹⁶ K.S.A. 44-501 and K.S.A. 44-508(g).

¹⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁸ K.S.A. 44-501(a).

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.¹⁹

Both Dr. Schaper, claimant's treating physician, and Dr. Bieri, the court appointed neutral evaluating physician, found claimant to have suffered a 5 percent whole person functional impairment from the injuries to her left ankle and right hip. Neither Dr. Schaper nor Dr. Bieri found that claimant suffered a permanent impairment to her low back. Only Dr. Prostic, claimant's hired expert disputed their assessments. In this instance, the Board finds the opinions of Dr. Schaper and Dr. Bieri to be more persuasive than Dr. Prostic. The Award of the ALJ is modified to find claimant suffered a 5 percent whole person functional impairment for the injuries suffered on June 21, 2007. The inclusion of an impairment for the low back is reversed.

K.S.A. 2000 Furse 44-510e(a), in defining permanent partial general disability, states that it 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.²⁰

As claimant's injuries have been determined to be to the whole person, and as claimant was laid off after March 18, 2009, claimant would be entitled to a permanent partial general (work) disability under K.S.A. 2000 Furse 44-510e. Here no physician's task loss opinion was placed in the record. Therefore, the only basis for a work disability would be what, if any, wage loss claimant has suffered. Claimant was laid off from her job with respondent on March 18, 2009 and remained off work until returning to work at a comparable wage on January 31, 2011, a period of 97.71 weeks. The reason for claimant's layoff is irrelevant. As noted in *Bergstrom*²¹, the "good faith" requirement for work disability no longer applies in Kansas workers compensation litigation, where a work disability is claimed. The plain language of the statute considers only the fact that a claimant has no income. Here, from March 18, 2009 until January 31, 2011, claimant had no income. Therefore, her wage loss during that time period is 100 percent. K.S.A. 2000

¹⁹ K.S.A. 2000 Furse 44-510e(a).

²⁰ K.S.A. 44-510e.

²¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

Furse 44-510e requires an average of the 100 percent and 0 percent task loss percentages. Therefore, claimant is entitled to a work disability of 50 percent. This determination by the ALJ is affirmed. Claimant's entitlement to benefits for a work disability ceased when claimant returned to work at a comparable wage on January 31, 2011. The Award of the ALJ finding claimant to have a 50 percent work disability is affirmed. However, the Award grants claimant 97.86 weeks of benefits. The period from March 18, 2009 to and including January 30, 2011, is 97.71 weeks. The Award will be modified accordingly.

K.S.A 2006 Supp. 44-511(a)(2) 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.

The ALJ also granted claimant additional payments of \$60.37 per week for the period of claimant's 10 percent functional impairment. This calculation was partially based upon the parties' agreement that claimant's average weekly wage increased to \$488.95 as of her lay-off on March 18, 2009, with the inclusion of claimant's fringe benefits. However, claimant's functional impairment would have fully paid out prior to claimant's lay-off. The basis for the weekly benefit would be the wage claimant was earning at the time of the payment of the benefits. Neither party was able to explain the ALJ's award of the increased weekly benefit, which he made effective when claimant returned to work at a comparable wage in February of 2011. The weekly benefits are awarded based upon the wage as of the date the benefits are due and payable. In this instance, claimant's average weekly wage up to her lay-off was \$398.40, resulting in a weekly compensation benefit of

\$265.61, the rate at which claimant's weekly benefits for her functional impairment were paid. The award of the additional weekly benefits by the ALJ is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed with regard to the award of additional benefits during the period of claimant's functional impairment, modified to reduce claimant's functional impairment from 10 percent to the whole person to 5 percent to the whole person, and affirmed with regard to the finding that claimant has a 50 percent work disability, but modified to reduce the period of the work disability award from 97.86 weeks to 97.71 weeks.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated March 27, 2012, is reversed with regard to the award of additional permanent partial disability benefits beginning February 1, 2011, modified to reduce claimant's functional impairment from 10 percent to the whole person to 5 percent to the whole person, and affirmed with regard to the finding that claimant has a 50 percent work disability, but modified to reduce the period of the work disability award from 97.86 weeks to 97.71 weeks.

Pursuant to the stipulation of the parties, claimant is entitled to temporary total disability benefits for 3.86 weeks at the rate of \$265.61 and 1.5 weeks of temporary partial disability benefits totaling \$353.33 for a total of \$1,378.58.

Thereafter, claimant is entitled to 20.75 weeks of permanent partial functional disability at the weekly rate of \$265.61 totaling \$5,511.41, for a 5 percent whole person functional impairment.

Thereafter, claimant is entitled to 97.71 weeks permanent partial general disability compensation at the weekly rate of \$325.98, totaling \$31,851.51, for a total award of \$38,741.50. As of the date of this Order, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

In all other regards the Award of the ALJ is affirmed in so far as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

BOARD MEMBER

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