

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

CAROL J. GROTH)	
Claimant)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,044,455
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Respondent and its insurance fund (respondent) request review of the February 14, 2013, Award entered by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on June 4, 2013. The Director of Workers Compensation appointed Jeffrey King of Salina, Kansas, to serve as Board Member Pro Tem in place of Thomas Arnhold, who recused himself from this proceeding.

APPEARANCES

James Biggs of Topeka, Kansas, appeared for claimant. Nathan Burghart of Lawrence, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the entire record and adopted the parties' stipulations listed in the Award.

ISSUES

This is a claim for a December 13, 2005, accident in which claimant claims injuries to her left hip and low back. The ALJ found claimant's low back was aggravated by the accident and claimant sustained an aggregate permanent functional impairment of 24% to the body. Claimant was awarded permanent partial disability (PPD) benefits based on the 24% whole body functional impairment. Future medical treatment was also awarded.

Respondent contends claimant's alleged low back symptoms were not caused or permanently aggravated by her December 13, 2005 accident. Respondent argues that,

at most, the accident caused a temporary aggravation of claimant's preexisting lumbar condition. Accordingly, respondent maintains claimant is not entitled to PPD or future medical treatment for the low back.

Claimant asserts the Award should be affirmed in all respects.

The issues before the Board are:

1. Did claimant permanently injure her low back in the December 13, 2005 accident?
2. If so, what is the nature and extent of claimant's disability?
3. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

For 18 years, claimant was employed by respondent as an administrative assistant for a district court judge. Claimant described her December 13, 2005, accident:

I was taking some papers downstairs. I took about two or three steps outside the Judge's chambers and started to fall on a marble floor. And I thought, oh, my gosh. I put my hands up thinking perhaps I was going to split my head open. And I went down on the floor. A very hard, hard fall. I worked my way over to the water cooler and got myself up. And tried to take a step, and that's all she wrote. I could not do that.¹

Claimant experienced pain on the left side of her body and sought medical treatment from her primary care physician, Dr. L. R. Searight. X-rays taken at Hiawatha Community Hospital revealed claimant sustained a fractured left hip. Claimant was transported by ambulance to Heartland Health in St. Joseph, Missouri. On December 14, 2005, Dr. Brett Miller performed surgery consisting of in situ pinning of an impacted fracture of the left femoral neck. Dr. Miller prescribed home health care and physical therapy. Claimant returned to unrestricted work in February 2006.

Claimant noticed pain in her groin increased over time. She also developed pain in her lower back sometime around February 2006, which also worsened as time progressed. Claimant testified:

Q. After the fall, did you experience pain in your low back?

¹ R.H. Trans. at 8.

A. I had recurring pain. I didn't really associate -- I don't know how to say it -- associate it -- I had lower back pain, yes, and it went into like my leg.

Q. Did you have -- did you have any back problems prior to December 12th of 2005?

A. No, sir.²

Claimant testified she walked differently after the accident. She stated she "wasn't walking level."³ Claimant used boots, crutches, a walker and a cane at various times during her recovery from the accidental injury. Claimant had no history of low back symptoms or injury prior to the accident. There is no evidence claimant had preexisting permanent impairment or permanent restrictions regarding her low back.

X-rays of claimant's low back were taken on February 28, 2006. AP and lateral views revealed mild facet hypertrophy at L4-5 & L5-S1 and disk space narrowing at T11-12.⁴

The first documented reference to claimant's low back pain was on February 28, 2006, when claimant had an office visit with Dr. Searight.⁵

Dr. Bruce Smith, a board certified orthopedic surgeon and an associate of Dr. Miller, performed claimant's second surgery, a total left hip arthroplasty, on September 9, 2006. Before the total hip replacement, claimant was diagnosed with avascular necrosis.

Claimant underwent nerve conduction velocity testing by Dr. V. Nanda Kumar on April 2, 2007, which showed left L4 and L5 radiculopathy.

A lumbar MRI scan performed on April 25, 2007, revealed very mild degenerative disk disease with minimal disk bulges at L4-5, L5-S1, with no significant central canal, neuroforaminal, or lateral recess stenosis.

Due to low back pain, claimant underwent eight weeks of physical therapy and three epidural steroid injections performed by Dr. Alejandro Blachar.

² P.H. Trans. at 10-11.

³ *Id.* at 13.

⁴ *Id.*, Cl. Ex. 4.

⁵ Smith Depo. at 22-23; P.H. Trans., Resp. Ex. B at 1.

On October 21, 2008, claimant was evaluated by Dr. Edward Prostic at the request of claimant's counsel. Dr. Prostic reviewed claimant's medical records, took a history and performed a physical examination. X-rays were taken of claimant's lumbar spine and left hip. The lumbar x-rays revealed: (1) disk space narrowing at L5-S1; (2) posterior facet arthropathy of the lower lumbar levels; and (3) shortened L-5 pedicles. Claimant's hip replacement was in good alignment and position. Dr. Prostic suggested continued follow-up visits for her total hip arthroplasty and possible epidural steroid injections for her back. If conservative treatment did not provide sufficient relief, then a CT myelogram was recommended.

With respect to causation, Dr. Prostic testified:

Q. Okay. And in Ms. Groth's case, do you feel that her degenerative disk disease was caused by her accident in December 2005?

A. More probably than not it preceded the accident December 2005 but was most likely aggravated by it.

Q. Okay. So you feel that her injury of December of 2005 aggravated her disk condition?

A. Either that particular accident or altered mechanics because of that accident aggravated the underlying degenerative disk disease.⁶

Based on the *AMA Guides*,⁷ Dr. Prostic opined claimant sustained a 10% permanent whole body functional impairment due to her lumbar radiculopathy and a 15% whole body functional impairment for her total hip replacement. Dr. Prostic combined the functional impairments, which totaled 24% impairment to the whole person. Dr. Prostic opined claimant "may need additional medicines, epidural steroid injections, and/or surgery."⁸

On April 29, 2009, the ALJ ordered that Dr. Mark Bernhardt, a board certified orthopedic surgeon, was authorized as claimant's treating physician. Dr. Bernhardt examined claimant on February 23, 2010, and provided the ALJ with a narrative report bearing the same date. He diagnosed the following: (1) chronic low back pain; (2) left lumbar radiculitis; (3) left femoral neck fracture; (4) avascular necrosis with total left hip arthroplasty; and, (5) lumbar spondylosis.

⁶ Prostic Depo. at 10-11.

⁷ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁸ Prostic Depo. at 25.

Dr. Bernhardt opined that “[claimant’s] current symptoms of low-back pain and radiculitis in the left leg are not causally-related to her fall of December 13, 2005. It is my opinion that her current symptoms are related to her pre-existing lumbar spondylosis and possibly due to the instability she may be developing at L4-5, which are unrelated to her work injury.”⁹ Dr. Bernhardt also expressed the opinion that claimant’s left hip fracture on December 13, 2005, aggravated her low back.¹⁰

Dr. Bernhardt stated that claimant “may benefit from work-up with a MRI of the lumbar spine and treatment with further lumbar epidural steroid injections if her radiculitis in the left leg increases.”¹¹ Dr. Bernhardt was not deposed.

At the request of respondent, Dr. James Zarr, who is board certified in physical medicine and rehabilitation and in electrodiagnostic medicine, evaluated claimant on September 24, 2012. The doctor reviewed claimant’s medical records, took a history and performed a physical examination. Dr. Zarr diagnosed a left hip fracture and status-post pinning with subsequent left total hip replacement. Dr. Zarr found claimant was at maximum medical improvement.

Based on the *AMA Guides*, Dr. Zarr rated claimant’s left hip at 37% due to a good result from her hip replacement surgery. As requested by respondent, Dr. Zarr did not evaluate claimant’s low back and provided no causation opinion regarding the low back.¹²

Dr. Smith, who performed claimant’s hip replacement, expressed doubt at some point in his testimony that there was any causal relationship between claimant’s fall and her development of low back symptoms.¹³ However, Dr. Smith agreed that lumbar spondylosis can be aggravated by trauma. He testified that if claimant had complaints of lower back pain in February 2006 then the fall aggravated her back condition.

Q. Doctor, within a reasonable degree of medical certainty, if, in fact, there are references to complaints of low back pain on February 28th of 2006, would it be your opinion, within a reasonable degree of medical certainty, that her back condition was aggravated, not caused, but aggravated by the fall that occurred in 2005?

⁹ Bernhardt IME report (Feb. 23, 2010) at 3.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 3.

¹² Zarr Depo. at 10-11.

¹³ *Id.* at 8-9, 21; Ex. 1 at 1-2.

A. I think that would be reasonable, yes.¹⁴

Q. Well, how about two months after the back fall, you have got noted in medical records?

A. That's close, yeah, I think that's close. I think that points to the probability that the fall aggravated it, I give you that for certain, yes. If not the fall, even the rehab after the fall, using a walker, doing things like that, you use your back differently when you suddenly can't put your weight on your hip, which Dr. Miller almost certainly wouldn't have allowed her to do. That could have aggravated it.

Q. Which would have caused her to have additional back pain, correct?

A. Very possibly, yes.¹⁵

Claimant testified she continues to have back pain and pain into the left leg. The magnitude of her symptoms varies, depending on the level of her physical activity. Claimant testified the low back and left leg pain come and go but have never gone away from the date of accident to the present. Claimant continues to work full time at the courthouse.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2005 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 by proving the various conditions on which the claimant's right depends."

K.S.A. 2005 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."

¹⁴ Smith Depo. at 22-23.

¹⁵ *Id.* at 32.

It is well settled that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹⁶ The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition.¹⁷

The Board agrees with the ALJ's Award and affirms it in all respects. The preponderance of the credible evidence supports the finding that claimant's accident caused permanent injury to the low back as well as the left hip.

Claimant's testimony, which is relevant to the issue of the nature and extent of her injuries,¹⁸ is that she developed low back pain in February 2006. That testimony is consistent with the records of claimant's family physician, Dr. Searight. Claimant testified that her low back and left leg symptoms worsened during the period of her recovery following the hip injury. Claimant underwent two hip surgeries, requiring lengthy periods of convalescence in which claimant ambulated using crutches, boots, a cane and a walker. Claimant's testimony is undisputed that her hip injury altered her body mechanics and her normal gait pattern. The evidence is also undisputed that claimant experienced no injuries, symptoms, or any other problems with her low back prior to the accident.

Moreover, the medical evidence supports the finding that claimant's accident caused, contributed to or aggravated claimant's preexisting degeneration in her low back. Dr. Prostic testified that either the accident itself or altered body mechanics caused by the hip fracture probably aggravated claimant's degenerative disk disease. The causation opinions of both Drs. Bernhardt and Smith are internally inconsistent, but both provide support for the finding that there was a permanent aggravation of claimant's low back by either the accident or claimant's post-accident gait pattern resulting from the hip injury. Dr. Zarr, at respondent's request, provided no opinion regarding causation of the low back injury.

Dr. Prostic's testimony, combined with claimant's testimony and the opinions of Drs. Bernhardt and Smith, although the latter opinions are inconsistent, provide more than

¹⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

¹⁸ *Gaff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

sufficient evidence to conclude that claimant sustained her burden to prove her accident caused permanent aggravation of her low back condition.

The other two issues raised by respondent require little discussion.

Only one physician expressed an opinion regarding functional impairment which encompassed both claimant's left hip and low back, and that was Dr. Prostic. The Board perceives no basis on which to alter the ALJ's finding that, as a consequence of the accidental injury, claimant sustained permanent impairment of function of 10% to the whole body for the injury to the lumbar spine and 15% permanent impairment to the body for the left hip injury, for a total of 24% to the whole body. Claimant is entitled to PPD based on 24% impairment of function to the body.

Pursuant to K.S.A. 2005 Supp. 44-510h(a) and K.S.A. 2005 Supp. 44-510k, claimant is entitled to future medical treatment for the left hip and low back injuries upon proper application, as set forth in the Award.

CONCLUSIONS

1. Claimant's lower back was permanently aggravated by her work-related accident on December 13, 2005.
2. As a result of claimant injuries, she is entitled to PPD based on a 24% permanent functional impairment to the body as a whole.
3. Claimant is entitled to future medical treatment for her left hip and low back injuries upon proper application to the ALJ.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board finds that the February 14, 2013, Award entered by ALJ Rebecca A. Sanders is affirmed in all respects.

IT IS SO ORDERED.

¹⁹ K.S.A. 2005 Supp. 44-555c(k).

Dated this ____ day of September, 2013.

BOARD MEMBER

BOARD MEMBER

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Honorable Rebecca A. Sanders, ALJ