

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

MARIA OFELIA TURCIOS)	
Claimant)	
)	
VS.)	Docket No. 1,049,655
)	
TYSON FRESH MEATS, INC.)	
Self-Insured Respondent)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 18, 2011, Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 22, 2012. Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. Abigail Lea Pierpoint, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) denied claimant's request for an award of compensation for an injury to her right upper extremity on January 22, 2010.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that claimant would be entitled to seek future medical treatment upon application and approval of the Director should claimant's injuries be found to be permanent.

ISSUES

Claimant argues the ALJ's Award is contrary to the evidence and asks the Board to find that she has a 10 percent impairment to her right upper extremity for carpal tunnel syndrome and an 8 percent impairment to her right upper extremity for right shoulder AC crepitus.

Respondent asks the Board to affirm the Award of the ALJ and find that claimant has no permanent impairment as a result of the January 22, 2010, accident.

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

FINDINGS OF FACT

Claimant is employed by respondent and met with an industrial accident on or about January 22, 2010, that involved her right hand, arm and shoulder.¹ Respondent provided her with medical treatment to that area of her body with Dr. Michael Baughman. Claimant testified she has constant pain in her right shoulder and can only lift her arm about 90 degrees. Claimant also has constant pain in her right hand that goes up across the wrist and into the arm. She had none of these problems before going to work for respondent.

Dr. Baughman's November 30, 2010, report was made a part of the record by stipulation. On that date, claimant was seen complaining of right ring finger pain and triggering. Dr. Baughman noted that repeated attempts to elicit demonstrable triggering or stenosis of the tendons were unsuccessful that day and in the past. Neither was Dr. Baughman able to identify other abnormalities that would benefit from surgery. Therefore, he opined claimant would have to live with her hand pain associated with hand-intensive work and treat the symptoms with over-the-counter medication and home exercise. Dr. Baughman released claimant from his care with the same restrictions he gave her in May 2008.

Dr. Pedro Murati examined claimant on January 4, 2011, at the request of claimant's attorney. Claimant's chief complaints were that she was not able to lift both shoulders, she had pain in her neck going down into both wrists with numbness and tingling, and she had pain in her left shoulder.² Claimant told Dr. Murati she had worked for respondent for 9 1/2 years and was currently so employed. Claimant said her injury was due to working with scissors in a repetitive nature, cutting meat and lifting 60-pound boxes.

In his physical examination, Dr. Murati found that claimant had severe AC crepitus of the right shoulder. Carpal compression examination was positive on the right within 10 seconds. He diagnosed claimant with bilateral carpal tunnel syndrome, which he related to her work-related injury.

Using the AMA *Guides*,³ Dr. Murati rated claimant as having a 10 percent permanent partial impairment to the right upper extremity for carpal tunnel syndrome and

¹ Claimant's Form K-WC-E1, Application for Hearing, set out a series of accidents beginning January 22, 2010, and continuing each working day thereafter, but at the Regular Hearing the parties stipulated to a date of accident of January 22, 2010.

² The claim in Docket No. 1,049,655 only concerns claimant's right upper extremity. Her claims of injuries to her neck, back, left shoulder, left arm, left wrist and left hand are the focus of her claim in Docket No. 1,042,029.

³ 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.

an 8 percent permanent partial impairment to the right upper extremity for right shoulder AC crepitus.

Dr. Murati recommended the following restrictions: No climbing ladders or crawling; no repetitive grasping or grabbing using the left upper extremity; no heavy grasping with either the right or left upper extremities; no lifting, carrying, pushing or pulling more than 10 pounds, more than 10 pounds occasionally or more than 5 pounds frequently. Claimant should only occasionally repetitively grasp with her right hand. She should only occasionally repetitively use hand controls with her left hand. She could frequently use hand controls with her right hand. She should work no more than 18 inches from the body, avoid awkward positions of the neck, and use wrist splints while working and at home. She should not use hooks, knives or vibratory tools.

Dr. David Hufford performed a court-ordered independent medical examination of claimant on April 26, 2011, for the specific purposes of providing an impairment rating and providing recommendations concerning restrictions. He previously performed a court-ordered independent medical examination of claimant on April 23, 2009, in Docket No. 1,042,029. That report was not made a part of the record in this claim.

Claimant described her current work at respondent as being repetitive in nature and said it involved lifting boxes weighing 60 pounds, as well as twisting and turning of her trunk. Dr. Hufford noted her symptoms were consistent with those set out in his April 23, 2009, report. Claimant told him her neck pain radiated into both upper extremities and she developed intermittent paresthesias in the thumb, index, and middle finger of both hands, right more than left.

In his examination, Dr. Hufford found claimant had tenderness throughout the paraspinal musculature at all levels, but she had no trigger points or guarding. Claimant had generalized tenderness across the scapular elevators bilaterally in the shoulders, also without trigger points or guarding. There was no significant tenderness of the right shoulder and essentially full range of motion. Claimant had tenderness at all four epicondyles, medial and lateral, bilaterally. There was no evidence of swelling, tenderness or crepitus in the forearms or wrists. Claimant had no evidence of thenar or hypothenar atrophy, no triggering of any finger in either hand, and no evidence of synovitis in any joint. Dr. Hufford diagnosed claimant with generalized myofascial and soft tissue injury from repetitive motion work activity. Dr. Hufford did not provide an impairment rating for claimant's right upper extremity.

In April 2009, Dr. Hufford recommended claimant have restrictions of no lifting greater than 35 pounds with occasional lifting of 15 pounds and frequent lifting of 7 pounds. He recommended claimant avoid awkward positions of her neck and all overhead use of her arms. He recommended claimant have task rotation. In April 2011, Dr. Hufford noted claimant's description of her current work activity of repetitively lifting 60-pound boxes fell outside his previous lifting restriction. In addition to his previous restrictions, Dr.

Hufford added avoidance of repetitive bending at the waist and twisting and turning of the trunk.

PRINCIPLES OF LAW

K.S.A. 2010 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. 2010 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:

.....

(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.

ANALYSIS

The compensability of this claim is not in dispute. Respondent admits claimant met with personal injury by accident on January 22, 2010, that arose out of and in the course of her employment with respondent. Claimant alleges injuries to her right upper extremity only. The only issue concerns the nature and extent of claimant's right upper extremity injuries and, in particular, whether any of those injuries are ratable as a permanent impairment of function under the *AMA Guides*.

The record contains opinions from three physicians. Dr. Baughman did not diagnose carpal tunnel syndrome. Neither did he diagnose any abnormality that would benefit from surgery. He treated and released claimant as having reached maximum medical improvement on November 30, 2010. He did not offer an opinion about permanent impairment but did impose permanent restrictions. He further suggested that claimant would have to live with her symptoms. Dr. Murati diagnosed crepitus in claimant's right shoulder and carpal tunnel syndrome in her right wrist. These are the two conditions for which Dr. Murati provided ratings.⁴ He also recommended permanent restrictions. Dr. Hufford found no crepitus in claimant's right shoulder and found no evidence of carpal tunnel syndrome. He did, however, note symptoms of shoulder myofascial pain and elbow pain at the epicondyles. He did not find either of these conditions to warrant a rating. Dr. Hufford also specifically found no atrophy or evidence of triggering of any finger or synovitis in any joint. Nevertheless, he did impose permanent restrictions, including limitations on lifting and a recommendation for task rotation. Dr. Hufford's examination was the most recent medical examination of claimant in the record.

Like the ALJ, the Board finds the opinions of Dr. Hufford to be the most credible in this instance. Accordingly, the ALJ's denial of any award for permanent partial disability compensation is affirmed. This is not to say, however, that claimant has not suffered permanent injuries. Although her conditions do not give rise to impairment ratings under the *AMA Guides*, she is entitled to seek future medical treatment upon proper application and approval of the Director.

CONCLUSION

Claimant has permanent injuries and restrictions but no percentage of permanent functional impairment.

⁴ There is no evidence that claimant ever had EMG or NCT testing.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 18, 2011, is modified to award future medical treatment upon application but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stanley R. Ausemus, Attorney for Claimant
Abigail Lea Pierpoint, Attorney for the Self-Insured Respondent
Pamela K. Fuller, Administrative Law Judge