

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

MARY E. BECK)	
Claimant)	
VS.)	
)	Docket No. 1,052,065
DOLLAR GENERAL #2554)	
Respondent)	
AND)	
)	
DG RETAIL LLC)	
Insurance Carrier)	

ORDER

Respondent requested review of the September 25, 2012, Award by Administrative Law Judge William G. Belden. The Board heard oral argument on February 20, 2013.

APPEARANCES

James W. Martin, of Overland Park, Kansas, appeared for the claimant. John A. Pazell, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained injuries to her left shoulder, left elbow, neck, left hip and low back from the accident on April 1, 2008, and awarded claimant a 70.5 percent work disability. The ALJ also found that there was an underpayment of temporary total disability at \$7.35 per week for 44 weeks. This underpayment was corrected in the final award.¹

¹ ALJ Award at 6.

The respondent argues the ALJ erred in finding claimant sustained a work disability rather than a scheduled injury to the left shoulder and claimant should be limited to a 10 percent functional impairment to the left shoulder for the injuries sustained on April 1, 2008.

Claimant argues the Award should be sustained in all respects.

FINDINGS OF FACT

Claimant began working for respondent on February 20, 2007, at its Leavenworth, Kansas store, as a third key assistant manager. Claimant later transferred to one of the respondent's Olathe stores. Claimant's job duties for respondent were as cashier and stocker, she completed the work schedule, dealt with vendors, received merchandise from delivery trucks and opened and closed the store.² Claimant testified that she spent 7½ hours of her workday lifting, unloading trucks and putting away merchandise. The rest of the time she completed paperwork. Claimant started out making \$8 an hour. When she left she was making \$10.05 an hour.

Claimant testified that on April 1, 2008, she was working as an assistant manager when she injured her left shoulder, left elbow, neck, left hip and low back, after falling backwards off of a small ladder while putting merchandise on shelves. Claimant reported this accident to her supervisor, Greg Kueck.

On April 3, 2008, claimant went to Cushing Memorial Hospital on her own because respondent failed to approve treatment. Angie Fergen, custodian of records for Cushing Memorial Hospital, was deposed, providing the medical records from Cushing Memorial Hospital. Claimant arrived in to the emergency room on April 3, 2008, with a chief complaint of left hip and left shoulder pain, from falling off of a step ladder two days before on April 1, 2008, at the Dollar General. Claimant was seen by Dr. George Speer. Claimant was diagnosed with a contusion of the left shoulder and left hip. Claimant's complaints at Cushing Memorial Hospital were limited to her shoulder and hip. X-rays were taken, nothing was found and claimant was referred to Olathe Occupational Medicine. Claimant was given a sling and instructed to rest and not work for two days.

At Olathe Occupational Medicine, claimant came under the care of Dr. Lanny Harris, who sent her for physical therapy and provided two injections in the left shoulder. Claimant testified that neither the physical therapy nor the injections provided relief. From 2008 to August 2010, claimant saw no other physician other than Dr. Harris. Dr. Harris provided no treatment for claimant's neck, low back or hip. By November of 2008, Dr. Harris noted that claimant's left shoulder seemed to be improved. Physical therapy was discontinued, but an ongoing home exercise program was recommended. Dr. Harris released claimant in August 2010.

² R.H. Trans., Resp. Ex. A (Claimant's Discovery Depo. (Oct. 28, 2010) at 11).

Claimant testified that when she went to see Dr. Harris she was told that she had a frozen shoulder. Claimant was given restrictions of no lifting greater than 15 pounds and no overhead activity. Claimant testified that Dr. Harris administered the injections in her shoulder because she was afraid to have surgery or anesthesia manipulation. She was afraid there was a chance her shoulder would break. When claimant was last evaluated by Dr. Harris, there was no mention of the neck, low back or left hip.

Claimant's left wrist problems began in March of 2010, when she noticed tingling down her arm and into two fingers. Claimant was sent to Dr. Vito Carabetta for an EMG which indicated moderate left cubital tunnel syndrome. Claimant was told that the cubital tunnel syndrome was not related to her work for respondent.

Claimant last worked for respondent on September 9, 2010. She testified that her employment was terminated three days after she was asked to fill out a job description and identify the tasks she couldn't do after the accident.

Claimant alleges she can no longer take her grandsons to the park because she cannot sit for long. She has to sit down halfway through washing dishes and vacuuming. Claimant is the caretaker for her young grandchildren and it is difficult. Claimant's daughter does most of the housework.

Claimant continues to have pain in her neck that goes down into her left shoulder, into her elbow, and down her back, all the way down to her left leg. Claimant denies any prior problems with her back, left shoulder, left elbow or left leg. She testified that she has to sleep with a pillow between her legs and a pillow under her arm. She cannot lay on her back and wakes up every two hours with pain, from tossing and turning to get comfortable.

Claimant denies any prior injuries, and reports constant pain and a nagging ache. She testified that her shoulder pain is, at a minimum, 5 out of 10 and at most a 7-8 out of 10. The same pain level applies to her neck and the hip, as well as the back, which she indicated did not hurt constantly. She testified that the back pain could be anywhere from a 2 to a 7 out of 10.

Claimant was referred by her attorney to Dr. Edward Prostic for examination on September 24, 2010. Dr. Prostic noted that claimant was not working at the time of this examination because respondent would not accommodate her restrictions.

Claimant's complaints were stiffness and soreness in her neck; sharp pains from the shoulder toward the elbow, with constant numbness and tingling to the ring and little fingers; difficulty reaching above shoulder level and claimant is no longer able to reach behind her to fasten and unfasten her bra. She also complained of shoulder weakness and difficulty with pushing and pain in the hip with prolonged standing.

Dr. Prostic examined claimant and opined that claimant sustained injury to her cervical spine, left shoulder and left hip during the course of her employment. X-rays of the cervical spine indicated significant degeneration from C5 to C7. X-rays of the left hip displayed no abnormality. Dr. Prostic noted that claimant developed cubital tunnel syndrome and thoracic outlet syndrome. He opined that it was likely that the shoulder pain led to disuse, which led to adhesions, which led to postural changes, which led to the thoracic outlet syndrome, which led to the cubital tunnel syndrome. He felt that claimant would likely benefit from arthroscopic subacromial decompression and perhaps biceps tenotomy to the shoulder. Plus, a cubital tunnel release surgery should be offered. No abnormalities in or complaints involving the lumbar spine were noted.

Dr. Prostic met with claimant again on March 2, 2012. Claimant's greatest complaint at this time was low back pain with radiation of pain into the left foot, worsened by activities as simple as standing to do the dishes, continued pain in the left shoulder, worsened by pushing, pulling reaching and lifting, and continued aching in the neck. Dr. Prostic testified that claimant's low back and hip pain had increased since he last saw claimant. No x-rays were taken of the low back at the first visit. Low back x-rays taken on March 2, 2012, indicated severe degenerative changes at L4-5 and L5-S1.

Dr. Prostic examined claimant and continued to believe claimant sustained injury in the course of her employment on April 1, 2008. He noted claimant had improved with the cubital tunnel release surgery. Claimant continued to show evidence of chronic cervical sprain and strain, rotator cuff dysfunction, secondary to suprascapular nerve injury, weakness of grip of the left hand and a new condition of S1 radicular symptoms on the left, likely from an aggravation of pre-existing disease at the lower lumbar spine. He also indicated that a reasonable doctor could say that claimant's low back problems could have been a result of age-related degeneration. Dr. Prostic recommended shoulder surgery and lumbar epidural steroid injections.

Dr. Prostic felt claimant should continue with the restrictions imposed by Dr. Jones, and assigned claimant a 25 percent whole person functional impairment (5 percent whole body impairment for the cervical spine; 20 percent impairment in the left upper extremity for the shoulder; 10 percent left upper extremity impairment for the cubital tunnel syndrome; and 10 percent whole body impairment for the lumbar spine).

Dr. Prostic also reviewed the task list of Michael Dreiling and opined that claimant had a 55 percent task loss, having lost the ability to perform 12 out of 22 tasks.

Claimant was referred by respondent to board certified orthopedic surgeon David J. Clymer, M.D., for an evaluation on May 9, 2012. Claimant's prior medical records were reviewed. It was noted claimant reported that, after she fell off the ladder on April 1, 2008, she had pain in her left shoulder, discomfort in her left arm and pain in her left hip. She first sought medical treatment on April 3, 2008. X-rays of the shoulder, pelvis and hip were normal. Claimant was evaluated by Dr. Smith on April 7, 2008, and was diagnosed with

left shoulder pain or strain with contusion. Dr. Clymer noted there was no mention of significant injury to the neck, low back or hip during this evaluation with Dr. Smith. Dr. Clymer noted claimant presented to him with discomfort in the neck, left shoulder, low back, left buttock, and left thigh. Claimant reported these areas are aggravated by activity.

Dr. Clymer examined claimant and opined that some of claimant's left shoulder injuries are the result of the April 1, 2008, fall. He went on to assign a 10 percent impairment to the left upper extremity for the work related injuries to the shoulder. He noted that claimant's left elbow, forearm and hand pain were not recorded in claimant's medical records until two years after the accident. He could not relate the cubital tunnel syndrome to the work accident on April 1, 2008. He did assign a 10 percent impairment to the left upper extremity for the cubital tunnel syndrome.

As for the cervical and lumbar spine, Dr. Clymer felt the original injury on April 1, 2008, probably involved a simple contusion and these areas may have been involved with the contusion. However, he also felt there was no evidence of significant injury to the neck, low back or left hip. He found no ongoing permanent impairment of the lumbar or cervical spines. He testified that if he were going to assign claimant an impairment for the neck and back it would be a 10 percent general body disability, 5 percent to each. Ultimately he opined there was no relation between the April 1, 2008, accident and the cervical and lumbar spine complaints. Dr. Clymer opined that while claimant is symptomatic in the neck and low back, the objective findings are rather minimal and any ongoing subjective symptoms are probably consistent with the mild degenerative spondylosis in those areas, as was noted on the radiographic studies. Dr. Clymer found no evidence of ongoing impairment to claimant's left hip.

Dr. Clymer recommended, relating to the left shoulder, that claimant should avoid vigorous or heavy lifting and should limit lifting to about 20 to 30 pounds at shoulder height and limit any over shoulder height lifting. He didn't feel claimant needed any restrictions for the neck or low back.

Finally, Dr. Clymer was asked to review a task list created by vocational expert Michael Dreiling. Dr. Clymer found claimant to have suffered a 23 percent task loss having lost the ability to perform 5 out of 22 tasks on the list.

Jason Langford, physical therapist/clinical director and custodian of records for SERC, Lansing Clinic, was deposed on June 21, 2012. Mr. Langford testified that claimant was referred to him for physical therapy for her elbow, after an ulnar release. The evaluation took place on December 20, 2011. Mr. Langford indicated that on the questionnaire claimant was asked to fill out, she reported that she fell off a ladder at work on April 1, 2008. Claimant answered yes to the question of whether the injury was to her back or neck. She also answered yes to whether she noticed a change in her symptoms when coughing or sneezing. This record of back or neck pain did not occur until

December 20, 2011. Claimant reported that her back pain at that time was a 10 out of 10.

Barbara Creason, records custodian for Dickson-Diveley Midwest Orthopedic Clinic, was deposed on June 18, 2012. She provided claimant's medical records from Dr. Constantine L. Fotopoulos, Dr. Lowry Jones and Dr. Brian Divelbiss.

Claimant met with Dr. Fotopoulos for a court ordered IME on February 7, 2011, regarding the left hip, left shoulder, left elbow, and left hand, all allegedly due to an accident on April 1, 2008. Claimant's chief complaints were left shoulder pain, neck pain and low back pain. The focus of claimant's treatment after the accident was to the left shoulder and left arm at the elbow. The low back was mentioned. All of the records are from 2011 and 2012. Treatment for the back was not authorized until December 2011. When claimant met with Dr. Fotopoulos, she was sent for an MRI of her neck and low back and referred to an orthopedic surgeon. Claimant never met with that orthopedic surgeon because respondent would not approve it, even though Dr. Fotopoulos was court-appointed.

In a June 11, 2012, report, Dr. Lowry Jones opined that claimant's lower back pain was initiated at the time of the fall on April 1, 2008. Claimant received two injections from Dr. Jones. At the time claimant met with Dr. Jones, she had severe pain and weakness in her left shoulder. Injections did not help with the pain. Claimant was offered surgery on her back, but she was told by Dr. Jones that it would probably provide no more than temporary relief.

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.³

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.⁴

Claimant alleges injury to her neck, left shoulder, left elbow, left hip and low back, all as the result of a fall on April 1, 2008. Claimant testified that she told every physician who treated her that she had injuries to multiple parts of her body. However, the medical records created contemporaneous with her injuries do not support claimant's position. The initial emergency room notes discuss only claimant's left shoulder and hip. When claimant

³ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

was referred to Dr. Harris, he treated her left shoulder for a period of over two years. During that time, he provided no treatment for the hip, neck or low back.

The Board finds claimant has proven injury to her left shoulder as the result of the fall on April 1, 2008, but to no other part of her body. The failure of the medical records to discuss claimant's low back, neck and hip for such a significant period defeats claimant's argument. Dr. Clymer's opinion that the cubital tunnel syndrome is not connected to the work injury is also supported by the significant delay in the manifestation of symptoms.

K.S.A. 44-510e defines functional impairment as:

. . . 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.⁵

The Board finds the most credible opinion in this record is that of Dr. Clymer regarding claimant's functional impairment to the shoulder. Claimant is awarded a 10 percent functional impairment at the level of the left shoulder.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to limit claimant's award to a 10 percent permanent partial functional impairment to the left shoulder.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge William G. Belden dated September 25, 2012, is modified to award claimant a 10 percent functional impairment to the left shoulder as the result of the work-related accident on April 1, 2008.

Claimant is entitled to 44 weeks of temporary total disability compensation at the weekly rate of \$317.72 totaling \$13,979.68, followed by 18.10 weeks of permanent partial disability compensation at the weekly rate of \$317.72 totaling \$5,750.73 for a total award of \$19,730.41, for a 10 percent permanent partial functional disability to the upper extremity at the level of the left shoulder. As of the date of this award, all of this award is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

⁵ K.S.A. 44-510e(a).

The award of the ALJ is affirmed in all other regards insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
stacia@lojemkc.com

John A. Pazell, Attorney for Respondent and its Insurance Carrier
ecruzan@mulmc.com

William G. Belden, Administrative Law Judge