

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

MARY JANE MENDEZ)	
Claimant)	
VS.)	
)	
SCHWANS FOOD MANUFACTURING)	Docket No. 1,052,881
Respondent)	
AND)	
)	
HARTFORD INS. CO. OF THE MIDWEST)	
Insurance Carrier)	

ORDER

Claimant requested review of Administrative Law Judge Bruce E. Moore's September 21, 2012 Award. Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent). The Board heard oral argument on February 13, 2013.

Judge Moore found the evidence failed to support a finding that claimant suffered an impairment of function to her cervical spine. Judge Moore awarded benefits to the claimant in the amount of \$16,747.29 for a 21% impairment to the left upper extremity at the level of the shoulder, and \$14,354.82 for an 18% impairment to the right upper extremity at the level of the shoulder.

RECORD AND STIPULATIONS

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

ISSUES

Claimant's application for hearing alleges injuries to both hands, arms, shoulders and neck on or about July 2009 and each and every working day thereafter through September 7, 2010.¹ Claimant argues that she is permanently and totally disabled. Respondent contends the Board should affirm Judge Moore's decision that claimant is limited to scheduled benefits for each upper extremity, but that the Board should adopt the ratings assigned by the treating orthopedic surgeon, J. Mark Melhorn, M.D., of 7.7% to each upper extremity.

¹ The parties agreed at the Prehearing Settlement Conference to use September 7, 2010, as the statutory date of accident. (R.H. Trans. at 4)

The issues for the Board's review are:

- (1) Is claimant permanently and totally disabled?
- (2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant began working for respondent as a packer on July 19, 1996. In 2006, claimant changed jobs to a maintenance lubricator in which she used a hand-operated grease gun to lubricate equipment. This task involved claimant holding the grease gun in one hand and pumping grease into the machine with the other. Claimant would change hands intermittently and perform this activity for most of her 8 hour shift. Claimant testified that a year or so after starting the lubricator job, she began experiencing numbness and tingling in her arms with pain into her shoulders and neck. Claimant asked respondent for an electric grease gun as she thought it would be better on her arms since it required less pumping. As the electric gun ran on rechargeable batteries that would "go out" within 10-15 minutes, claimant still had to use the hand-operated gun most of the time. Claimant testified that even on days when she made her best attempt to keep the electric gun charged, it was only operational approximately 30 minutes out of her shift.

Around July 2009, claimant notified respondent she was having problems with pain, numbness and tingling in both hands, left greater than right. Claimant was initially seen by James J. Shafer, M.D., the company doctor, and then referred by respondent to Gary L. Harbin, M.D.

On November 30, 2010, claimant was working when she was informed by her supervisor that the company nurse needed to meet with her. The nurse informed claimant she was scheduled for surgery with Dr. Harbin on December 9, 2010. After the meeting, claimant attempted to return to work, but became very upset about the impending surgery so told a coworker she was leaving and went home.² Claimant confirmed that she did not notify her supervisor or a lead that she was leaving before the end of her shift. Claimant was terminated by respondent for "walking off the job" effective December 2, 2010.

On December 9, 2010, Dr. Harbin performed a left carpal tunnel release. However, the surgery was unsuccessful in improving claimant's symptoms. After claimant's release by Dr. Harbin, the respondent referred her to Dr. Melhorn.

² Prior to being notified of the surgery date by the company nurse, claimant was aware that surgery was being scheduled based upon her discussions with Dr. Harbin. (R.H. Trans. at 29)

Dr. Melhorn, a board certified orthopedic surgeon who specializes in upper extremities, examined claimant on March 28, 2011. Claimant complained to Dr. Melhorn of pain in her upper extremities. X-rays were taken of claimant's wrists, forearms, and elbows. Claimant was diagnosed with bilateral carpal tunnel syndrome (CTS) and bilateral ulnar nerve complaints at the elbow, as well as age-related CMC arthritis. Dr. Melhorn recommended heat massage and injection in the left wrist and elbow. If symptoms continued, Dr. Melhorn recommended recurrent left CTS release and left ulnar nerve elbow decompression with surgery on the right upper extremity depending upon claimant's surgical outcome. Dr. Melhorn noted claimant was not working, but indicated she was capable of performing regular work.

On April 5, 2011, claimant returned to Dr. Melhorn complaining of pain and discomfort in the left elbow area with symptoms in the wrist. Dr. Melhorn proceeded with injections in the left wrist and elbow. Dr. Melhorn noted claimant was capable of performing regular work.

Claimant was seen again by Dr. Melhorn on April 25, 2011, indicating that her left wrist and elbow were worse rather than better. Additionally, Dr. Melhorn noted that claimant had begun having pain that extended up into the left shoulder and left side of the neck. Dr. Melhorn reviewed films and opined claimant probably had some residual CTS and ulnar nerve pattern and that claimant's cervical spine pattern appeared appropriate for her age. As claimant had not worked for several months, it was Dr. Melhorn's opinion that she "does not have any work causation with regard to [her neck] symptoms." Furthermore, Dr. Melhorn's April 25, 2011 report stated:

It is certainly possible that some individuals could have pain with regard to the left relative to symptoms of the carpal tunnel and ulnar nerve that it would be unusual for that pattern to present 5 to 6 months after her last date of employment and therefore at this point I do not have a reasonable explanation for the cause with regard to the left shoulder and neck symptoms.³

Dr. Melhorn indicated that if claimant continued having symptoms regarding the carpal tunnel and ulnar nerve, a repeat surgery would be reasonable. Dr. Melhorn noted claimant was capable of performing regular work.

On May 2, 2011, claimant returned to Dr. Melhorn with continued pain and discomfort in the left arm with symptoms up into the shoulder and neck. Dr. Melhorn noted claimant is "likely to continue to have some symptoms even within that pattern particularly since her symptoms have persisted, and or progressed, despite having been off work." Dr. Melhorn recommended repeat left carpal tunnel surgery as well as left ulnar nerve elbow decompression. No reference was made at this visit as to claimant's work restrictions.

³ Melhorn Depo., Ex. 2 at 13.

Dr. Melhorn performed repeat left carpal tunnel syndrome decompression and left ulnar nerve elbow decompression on May 10, 2011. On May 24, 2011, claimant complained of left arm tenderness. Dr. Melhorn noted claimant could return to modified regular duty as tolerated. Additionally, as claimant was having continued symptoms with the right wrist and elbow, Dr. Melhorn proceed with injections in the right wrist and elbow.

Claimant returned to Dr. Melhorn on May 31, 2011, with improvement on the left, but continued complaints on the right. Dr. Melhorn recommended a right carpal tunnel release and right ulnar nerve elbow decompression. Dr. Melhorn noted claimant could return to modified duty as tolerated.

Dr. Melhorn performed a right carpal tunnel release and right ulnar nerve elbow decompression on June 7, 2011. By June 21, 2011, claimant showed improvement in the right wrist and elbow. Dr. Melhorn indicated claimant had a smile on her face, was upbeat and was doing well. Dr. Melhorn noted claimant could return to regular duty as tolerated.

Claimant returned to Dr. Melhorn on August 2, 2011, with a little tenderness in the right and left palms, but showing "marked improvement." Dr. Melhorn released claimant at maximum medical improvement and provided permanent restrictions of regular job duties. Dr. Melhorn testified his permanent restrictions were based upon a combination of his discussions with the claimant and what he felt reflected her capacity, risk and tolerance.

In Dr. Melhorn's rating report dated August 3, 2011, he opined that claimant had a 7.7% permanent partial impairment to the level of the right arm and a 7.7% permanent partial impairment and the level of the left arm, pursuant to the AMA *Guides*⁴ (hereinafter the *Guides*).

On September 14, 2011, claimant was evaluated by C. Reiff Brown, M.D., at the request of her attorney. Dr. Brown rated the claimant as having a 4% impairment of the right shoulder, a 10% rating to the right arm for cubital tunnel syndrome, and a 10% rating to the right arm for carpal tunnel syndrome, as well as a 5% impairment of the left shoulder, a 10% rating to the left arm for cubital tunnel syndrome, and a 10% rating to the left arm for carpal tunnel syndrome, in addition to a 5% whole body impairment based on the DRE Cervicothoracic Category II for myofascial pain syndrome. These combined ratings totaled a 29% permanent partial impairment of function to the body as a whole pursuant to the *Guides*. Dr. Brown recommended permanent restrictions of avoiding work that involved frequent use of the hands above chest level and all lifting above chest level, avoiding frequent reach-away from the body more than 18 inches, and avoiding work that involved frequent flexion and extension of the elbows and wrists greater than 30°.

⁴ 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.

Dr. Brown's deposition was taken on June 11, 2012. When questioned regarding claimant's neck injury, Dr. Brown testified as follows:

- Q. Doctor, and what were the results of your physical examination of this lady?
- A. She had some discomfort with range of motion of her neck, extended more into the upper trapezius area, the top of the shoulders and downward into the scapular shoulder blade musculature as well. I found some trigger points in particular in the rhomboids, supra and infraspinatus and the trapezius of both shoulders. I felt that that distribution of trigger points and tenderness was typical of myofascial pain syndrome. . . .⁵

Furthermore, Dr. Brown testified on cross examination as follows:

- Q. Concerning the physical examination that you performed, you found no atrophy of the neck; is that correct?
- A. Yes.
- Q. And you found no atrophy of the shoulders, correct?
- A. Yes.
- Q. And you found no atrophy of the shoulder girdles, correct?
- A. Yes.
- Q. You found the range of motion of the cervical spine to be essentially normal but it produced a pulling discomfort in the upper trapezius bilaterally, is that correct?
- A. Yes.⁶

On January 23, 2012, Paul S. Stein, M.D., a board certified neurological surgeon, performed a court ordered independent medical evaluation. At the time of the evaluation, claimant complained of pain in the left wrist extending to the neck, mainly on the left, as well as pain in her right wrist extending to the elbow and into the right shoulder and right side of the neck. Claimant indicated she still experienced intermittent numbness and tingling in the fingers of both hands and dropped objects, predominantly from her left hand, two or three times a month. Claimant was not taking any prescription medication, but did take Ibuprofen three or four days a week.

⁵ Brown Depo. at 7.

⁶ *Id.* at 16.

Dr. Stein gave claimant a 5% right shoulder impairment, a 10% right arm impairment for cubital tunnel syndrome, a 10% right wrist impairment for CTS, an 8% left shoulder impairment, a 10% left arm impairment for cubital tunnel syndrome, and a 10% left wrist impairment for CTS, based on the *Guides*. Dr. Stein noted there was no indication that claimant had a true injury to her neck and gave a 0% impairment based on DRE Cervicothoracic Category I. Dr. Stein gave permanent restrictions of no frequent repetitive activity with either arm, no or minimal use of power tools, no firm and continued grip with either hand, no activities above shoulder, with arm fully outstretched, or with either hand behind the body, and no lifting more than 15 pounds with either hand up to chest level. Regarding claimant's neck, Dr. Stein testified on May 15, 2012 as follows:

Q. [A]re you saying that she does not have any injury to her cervical spine or that her injury is not significant enough to meet the definition of a Category II, which would give her a 5 percent impairment of function?

A. Well, I don't know that I can use the word injury here. Category I is somebody who has complaints of neck pain but no real findings. Category II really doesn't require a whole lot of findings, but it requires a specific injury, which is what is lacking here. So I honestly cannot say one way or the other whether she has a minor injury to her neck or not. I know she has a lot of complaints, but I don't know whether we are talking about the legal definition of injury or the medical definition of injury.

...

Q. So at least we know that she had been complaining of neck pain for quite sometime, but your examination didn't reveal what you would consider a change or lesion of the body in that area. Would that be an accurate statement?

A. That's an accurate statement, but also if you go back to September of 2010, Dr. Brown reflected an essentially normal range of motion. Dr. Fluter in November of 2010 showed a range of motion within functional limits, so I have no understanding of why she should have had so much limitation of movement now so much later. There was no reason for her neck to be getting worse. In fact, it should be getting better, so I just – I just did not feel that I could document with any reasonable objectivity an injury to the neck –

Q. Okay.

A. – or impairment to the neck.⁷

⁷ Stein Depo. at 16-17.

Further, Dr. Stein testified on cross-examination as follows:

- Q. Going on up – we're just about above the head – in the neck, you didn't feel comfortable assigning her an impairment rating to the neck as a result of her work activities, operating the grease gun?
- A. That's correct.⁸

Jerry Hardin, a vocational expert, interviewed claimant on October 31, 2011, at the request of claimant's attorney. He compiled a list of 23 unduplicated tasks claimant performed in the 15-year period before her September 7, 2010 work-related accident.

On February 13, 2012, Mr. Hardin reviewed Dr. Stein's work restrictions and prepared an addendum report. It was Mr. Hardin's opinion that claimant had a 100% loss and was "essentially and realistically unemployable."⁹

Terry Cordray, a vocational expert, interviewed claimant on April 19, 2012, at the request of respondent's counsel. He compiled a list of 19 unduplicated tasks claimant performed in the 15-year period before her September 7, 2010 work-related accident. Additionally, Mr. Cordray performed a Wonderlic Personnel Test (WPT) which indicated claimant is slightly below average in intelligence. However, it was Mr. Cordray's belief that claimant could complete her GED. Mr. Cordray testified that if claimant would acquire her GED, he felt it would improve her employability.

It was Mr. Cordray's opinion that claimant could not return to her previous job. However, she could "perform many retail sales jobs, cashiering positions and other unskilled jobs"¹⁰ based upon Dr. Stein's restrictions. It was Mr. Cordray's belief that claimant is capable of earning approximately \$9.25 in Salina, Kansas, as a retail sales person.

At the time of the regular hearing on May 8, 2012, claimant was 46 years old and had 12 years of formal education, but had not graduated nor obtained a GED. The only type of work claimant had performed since leaving high school was fabrication and labor work. Claimant testified she had no other formal education or training and had applied for Social Security disability benefits. It is claimant's belief she is unable to work based upon the pain, numbness and tingling that she experiences in both hands, both arms, both shoulders and her neck, with the left side being worse than the right.

⁸ *Id.* at 31-32.

⁹ Hardin Depo., Ex. 3 at 6.

¹⁰ Cordray Depo., Ex. 2 at 14.

Using his restrictions, Dr. Stein opined claimant was unable to perform 17 of the 23 unduplicated tasks in Mr. Hardin's task list for a 73.9 percent task loss.¹¹ When questioned regarding claimant's ability to work, Dr. Stein testified on direct examination as follows:

- Q. All right. Doctor, knowing generally what her 15-year history of employment has been and considering the restrictions which you have placed on her upper extremities and her shoulders, in your opinion, is this lady essentially and realistically unemployable?
- A. I need to start out by saying I'm not an expert on availability of employment. I think that if work activity were available or a job were available within my restrictions and if she has whatever training is required for that particular job within the restrictions, that I would say that she could do it. Whether there is any such work available or not would be a question for an employment expert.
- Q. Okay. If she has less than a high school education, her testimony was she had 12 years of formal education didn't get a high school degree, she's had no training or certifications since high school, given your restrictions, would you be able to say at the very least that she's going to have problems finding a job?
- A. Oh, I don't have any problem saying that, yes.
- Q. Other than that, you would defer to a vocational expert regarding the availability of employment and whether or not she is essentially and realistically unemployable?
- A. That's correct.¹²

Dr. Stein stated that based upon his restrictions, it was unlikely claimant would be able to perform her prior duties as a checker/scanner due to the repetitive nature of the job. However, Dr. Stein agreed claimant would be capable of performing the tasks of a receptionist provided she had a headphone and was not required to do much keyboarding.¹³

Using his restrictions, Dr. Brown opined claimant was unable to perform 17 of the 23 unduplicated tasks in Mr. Hardin's task list for a 74 percent task loss. When questioned regarding claimant's ability to work, Dr. Brown testified as follows:

¹¹ Stein Depo. at 19-20.

¹² *Id.* at 18-19, see also pp 32-34.

¹³ *Id.* at 20-21.

Q. Doctor, we went through those jobs individually and there's not one single job that [claimant] has done in the past 15 years that she's capable of performing today without some type of accommodation, is that correct?

A. Yes.

Q. And assuming that she has 12 years of high school but no high school diploma or GED, that she doesn't have any other certifications, do you believe that this lady is capable of engaging in active, gainful employment at this time?

A. No, I believe for practical purposes she's totally permanently disabled.¹⁴

Furthermore, Dr. Brown testified on cross examination as follows:

Q. At the time that you performed your IME and prepared your report you did not feel that this individual was permanently and totally disabled, did you?

A. There are some things that she could do. I would doubt very much that she could find an employer that would hire her with the considerable number of problems that she has. So I just would say for practical purposes she's disabled.

Q. But you didn't note that in your report, true?

A. Well, no, I don't see that statement in my report.

Q. And if the right job came along that fit within the claimant's work restrictions is it your belief that she would be able to perform that job?

A. I believe so.¹⁵

Dr. Melhorn's deposition was taken on June 14, 2012. When questioned regarding his opinion as to claimant's ability to work, Dr. Melhorn testified as follows:

Q. . . . But my question is, based on your treatment and your knowledge of the claimant, do you believe that she is completely and permanently incapable of engaging in any type of substantial and gainful employment?

A. I believe that she is capable of performing gainful employment that probably would be substantial depending on the definition of substantial.

¹⁴ Brown Depo. at 12-13.

¹⁵ *Id.* at 18-19.

- Q. One of the – there is a couple, as you might guess, vocational experts in this case, but one of them has recorded that he believes [claimant] is capable of performing unskilled labor, retail sales type work. From a medical standpoint would you agree that she'd be capable of performing that type of work?
- A. In general, I would agree.¹⁶

PRINCIPLES OF LAW

It is claimant's burden to prove her right to an award of compensation by a preponderance of the credible evidence.¹⁷

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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

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:

...

¹⁶ Melhorn Depo. at 22-23.

¹⁷ K.S.A. 2010 Supp. 44-501(a) and K.S.A. 2010 Supp. 44-508(g).

(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 Board adopts Judge Moore's conclusion that claimant is not permanently and totally disabled. To varying degrees, all of the vocational and medical experts indicated claimant was capable of some sort of employment. The Board also adopts Judge Moore's conclusion that claimant failed to prove neck or cervical spine impairment due to her work injuries. The Board finds the opinion of the court-ordered physician, Dr. Stein, most credible. Dr. Stein indicated that claimant had no true neck injury or any associated impairment.

Based on *Mitchell*¹⁸ and *Redd*,¹⁹ the Board finds that claimant's disability benefits must be calculated based on impairment to her bilateral carpal tunnel, cubital tunnel and shoulder injuries. Claimant's indemnity benefits are as follows:

- right carpal tunnel: 10% impairment to the forearm
200 weeks x 10% = 20 weeks x \$354.44 = \$7,088.80
- right cubital tunnel: 10% impairment to the arm
210 weeks x 10% = 21 weeks x \$354.44 = \$7,443.24
- right shoulder: 5% impairment
225 weeks x 5% = 11.25 weeks x \$354.44 = \$3,987.45
- left carpal tunnel: 10% impairment to the forearm
200 weeks x 10% = 20 weeks x \$354.44 = \$7,088.80
- left cubital tunnel: 10% impairment to the arm
210 weeks x 10% = 21 weeks x \$354.44 = \$7,443.24
- left shoulder: 8% impairment
225 weeks x 8% = 18 weeks x \$354.44 = \$6,379.92

Claimant's total award for her right and left upper extremity impairments is \$39,431.45.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds Judge Moore's Award should be modified to reflect an award of permanent partial disability benefits to each level of the impaired upper extremities, but to otherwise affirm Judge Moore's Award in all other respects.

¹⁸ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 239 P.3d 51 (2010).

¹⁹ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 21, 2012, is modified as noted in the analysis section of the Board's decision.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee
rob@ksworkcomplaw.com
Mickey W. Mosier
mwmosier@cml-law.com
Honorable Bruce E. Moore