

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

LEVETA I. DANIELS)	
Claimant)	
V.)	
)	
RSI HOLDING CORPORATION)	
Respondent)	Docket No. 1,056,799
AND)	
)	
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of Administrative Law Judge Brad E. Avery's September 23, 2013 Award. The Board heard oral argument on January 7, 2014.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the transcript of the November 7, 2011 preliminary hearing and exhibits thereto, the transcript of the February 4, 2013 regular hearing, the transcript of the April 29, 2013 deposition of Edward Prostic, M.D., and exhibits thereto, the transcript of the July 23, 2013 deposition of James Zarr, M.D., and respondent's exhibits A and B only,¹ and adopted all stipulations listed in the Award. However, while an Agreed Order filed September 3, 2013, listed January 20, 2011 as claimant's last day worked, the parties agreed at oral argument that claimant's last day worked, and her legal date of accident, was January 10, 2011. Further, claimant's counsel noted at oral argument that he was not pursuing benefits for his client's right shoulder.

¹ The Award excluded Zarr Depo., Resp. Ex. C (Dr. Devendra K. Jain's May 10, 2011 report) as a medical record lacking supporting physician testimony. At oral argument, claimant renewed objections to medical reports offered into evidence without supporting physician testimony. For reasons more fully explained below, the Board further excludes Resp. Ex. D (Dr. Maxime Coles' June 14, 2011 report) as a medical record lacking supporting physician testimony.

ISSUES

The Award indicated claimant suffered personal injury by accident arising out of and in the course of her employment, resulting in a 30% impairment to her left upper extremity at the level of the shoulder. Respondent requests reversal, arguing claimant failed to prove compensability because her physical symptoms and conditions were related to or part of amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease). Claimant maintains the Award should be affirmed because her work injury was independent of her ALS.

The issues for the Board's review are:

- (1) Is Dr. Coles' June 14, 2011 report properly in evidence?
- (2) Did claimant sustain personal injury by accident arising out of and in the course of her employment or due to ALS?
- (3) What is the nature and extent of claimant's disability?
- (4) Should the Board adjust the award based on claimant's death for unrelated reasons, even though such issue was not raised by the parties?

FINDINGS OF FACT

Claimant worked for respondent as a production worker. Claimant testified she sustained repetitive work injuries from lifting doors, beginning October 2010 through her last day worked, January 10, 2011.² Claimant also testified she was lifting a cabinet door from the paint line in October 2010 when she felt a pop in her neck and left shoulder. She testified she notified her supervisor and was directed to seek medical treatment on her own. Claimant continued to work her regular job, but her condition worsened. On January 10, 2011, claimant was terminated because she could no longer physically perform her job.

Claimant initially sought treatment for her work injury on her own through Nancy Gilmore Cashero, a nurse practitioner, and had trigger point injections, a left shoulder MRI, an EMG and physical therapy. Claimant saw Ms. Cashero, or another nurse practitioner, Aaron Shaw, before, during and after the asserted series of accidental injuries, on the following dates for the following reasons:

- May 28 2010 – her left thumb would not bend or for left hand problems stemming from her index finger not bending correctly;
- August 26, 2010 – she would have a stabbing pain in her back when she moved her arm.

² P.H. Trans. at 6, 10, 16. Claimant's Application for Hearing alleged injuries to her neck, left shoulder, arm and all other parts of the body affected.

- December 30, 2010 – she could not lift up her left arm and could not grip with her left hand;
- January 17, 2011 – one of her left fingers was pointing down constantly; and
- February 17, 2011 – she fell from her porch after being dizzy.

Respondent also sent claimant to Maxime Coles, M.D., an orthopedic surgeon.

On September 27, 2011, Edward J. Prostic, M.D., a board certified orthopedic surgeon, examined claimant at her attorney's request. Dr. Prostic's report states:

Mrs. Daniels reports injury during the course of her employment on the paint line for RSI Home Products beginning October, 2010 through the last date of employment January 10, 2011. The predominant injury occurred lifting a cabinet door from a paint line. The patient had a pop about her neck or left shoulder. She reported her injury and was seen by nurse practitioner Nancy Gilmore Cashero. Trigger point injections were given. She was subsequently referred to nurse practitioner Aaron Shaw, who initially thought the problem was a cervical radiculopathy. An EMG was performed. The patient was also sent for an MRI of her left shoulder that was interpreted as showing hypertrophy of the acromioclavicular joint and a small amount of fluid anterior to the shoulder joint. Adhesive capsulitis was suspected. The patient was given a steroid injection and physical therapy. She was subsequently seen by Dr. Maxime Coles whose impression was of adhesive capsulitis of the left shoulder and cervical myelopathy. The patient continues out of work.³

During his examination of claimant, Dr. Prostic noted claimant showed a “three-quarter inch decrease in circumference of the left upper arm as compared to the dominant right and one-half inch decrease in circumference of the left forearm as compared to the right.”⁴ Dr. Prostic reported claimant's right shoulder range of motion was restricted to 30° flexion, 20° abduction, and 20° internal rotation, and left shoulder range of motion was poor with “maximum excursion” of 60° flexion, 45° abduction, 30° external rotation and 30° internal rotation.⁵ Dr. Prostic noted claimant had significant tenderness and significant weakness of the left upper extremity, but no right upper extremity weakness. Dr. Prostic diagnosed claimant with severe capsulitis of the left shoulder and some rotator cuff difficulties on the right.⁶

³ Prostic Depo., Ex. 1 at 1. Dr. Prostic's mention of Dr. Coles' diagnosis does not make Dr. Coles' diagnosis part of the evidence.

⁴ *Id.*, Ex. 1 at 2.

⁵ *Id.*, Ex. 1 at 2. Dr. Prostic did not provide a figure for left shoulder internal rotation.

⁶ Dr. Prostic acknowledged claimant made no physical complaints relating to her right shoulder. (*Id.* at 20).

Dr. Prostic assigned a 10% permanent partial impairment of the right upper extremity and a 30% permanent partial impairment of the left upper extremity, at the level of the shoulders, pursuant to the *AMA Guides*⁷ (hereafter *Guides*). As noted above, claimant has abandoned pursuit of benefits for the right shoulder.

Dr. Prostic testified the positive findings that he related to claimant's work injury were the mild to moderate loss of motion in her cervical spine, some loss of motion without obvious weakness in her right shoulder, and poor range of motion and fairly severe weakness in her left shoulder. It was Dr. Prostic's opinion that claimant's injuries "were caused or contributed by the work that she did at [respondent] through her last date of employment January 10, 2011."⁸ Dr. Prostic indicated the conditions for which he evaluated claimant were absolutely "no way, no how" due to ALS⁹ and explained:

ALS or amyotrophic lateral sclerosis causes significant damage to the motor neurons which leads to weakness, but not adhesive capsulitis or loss of motion, so I don't find that it is a likely source of the problems that she had. It certainly wouldn't have caused the pop as she was lifting and certainly wouldn't have caused the findings on her MRI.¹⁰

When questioned whether it is difficult to separate out the physical manifestation from claimant's work activity as opposed to ALS, Dr. Prostic stated:

Generally ALS is not painful. Generally ALS doesn't cause adhesions, so what we would expect is if the left upper extremity symptoms were from ALS, that she would have profound weakness, perhaps profound loss of voluntary range of motion, but passive motion should have been normal and without significant symptoms. That's not the way she presented. She had significant loss of motion both actively and passively and she had expressions of her face that these motions were with significant pain.¹¹

On November 2, 2011, claimant was seen at respondent's request by James S. Zarr, M.D., who is board certified in physical medicine and rehabilitation. At the time of the visit, claimant complained of daily neck and bilateral shoulder pain which she rated as a 5 on a scale of 10. Dr. Zarr reported claimant's history as follows:

⁷ 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.

⁸ Prostic Depo. at 12.

⁹ *Id.* at 15, 24; see also p. 12.

¹⁰ *Id.* at 15.

¹¹ *Id.* at 21.

The patient is a 52 year old female whose pertinent history of this problem begins on 01/10/11. At that time, the patient was employed as a paint line worker for RSI-Prestige Cabinets located in Columbus, KS. The patient was doing her assembly line work and was reaching to remove a cabinet off the line. She had to reach over her head to do so and in the process she heard a popping in her left shoulder associated with the sudden onset of pain. The patient relates she was not sent for any medical attention. She remained at work. Her pain persisted. Because the patient was not sent for any medical attention by her employer, she decided to go [to] the Family Clinic on her own. The injury actually occurred back in October of 2010. The first visit at the Family Health Clinic talking about her problems is dated 12/30/10 where she had difficulty with her left arm and could not hold anything. If she tried to hold anything with her left hand she would drop it. The note states that this problem had been going on for at least a month. The patient was diagnosed as having left shoulder pain. She was prescribed Flexeril. The patient was seen again in the Family Health Clinic by the nurse practitioner on 01/17/11. She was still having left shoulder and arm pain. The patient received a trigger point injection around her left shoulder. The patient was taking ibuprofen. The patient was seen again by the nurse practitioner on 02/17/11. Her left shoulder was still hurting. The nurse thinks that the left shoulder pain had been going on for the last six months. MRI scan was ordered. The MRI scan of the left shoulder was performed on 02/22/11 and showed no evidence of a rotator cuff tear. The patient was seen again by the nurse practitioner on 03/17/11. The patient received a steroid injection in the left shoulder. The patient is seen again by the nurse practitioner on 03/17/11. She was still having left shoulder pain. Diagnosis was left shoulder adhesive capsulitis with possible underlying rotator cuff or neurologic etiology. The patient received another steroid injection in the shoulder and was prescribed physical therapy. The patient was next seen by Dr. Devendra Jain. The patient underwent electrodiagnostic studies which revealed a possible brachial plexus lesion or cervical radiculopathy. It was recommended that the patient be referred to a neurologist. The patient is next seen by Dr. Maxine Coles. Dr. Coles felt the patient had a cervical myelopathy on top of degenerative arthritis of the neck. The patient was also diagnosed as having a frozen left shoulder with degenerative joint disease. Dr. Coles did not feel these problems were related to a work incident where she was lifting a cabinet. Dr. Coles recommended an MRI scan of the cervical spine. She felt the patient was only capable of performed [sic] sedentary work.¹²

Dr. Zarr indicated claimant presented with muscle atrophy, slurred speech and trouble swallowing. Dr. Zarr's physical examination of claimant revealed she had bilateral shoulder adhesive capsulitis (or frozen shoulder), with resulting bilateral shoulder range of motion deficits, in addition to severe weakness and severe atrophy, or loss of bulk, in her arms. He testified adhesive capsulitis is a condition that requires lack of movement of a joint for weeks if not months.

¹² Zarr Depo., Resp. Ex. B at 1-2. Dr. Zarr's mention of Dr. Coles' causation opinion does not make Dr. Coles' causation opinion part of the evidence.

Dr. Zarr diagnosed claimant with a motor neuron disease, such as progressive muscular atrophy and bulbar palsy, which are types of ALS.¹³ Dr. Zarr opined claimant had no work-related conditions. In addressing causation, Dr. Zarr stated, "I do not feel this is a work related problem. I do not feel it is due to any work injury."¹⁴ However, Dr. Zarr also testified he did not know if claimant's left shoulder symptoms were due to ALS.¹⁵ He acknowledged that adhesive capsulitis would be a work-related condition if an individual had a shoulder injury, stopped using his or her shoulder and then developed resulting capsulitis.

Dr. Zarr testified he had treated approximately 50 patients with ALS during his career, which started in 1984. While Dr. Zarr acknowledged claimant's medical records were devoid of a diagnosis of ALS and the treatment she received, such as injections, was appropriate for a shoulder injury due to adhesive capsulitis, he opined it was "highly unlikely"¹⁶ claimant did not have ALS earlier because she was in an advanced stage when he examined her. Dr. Zarr stated that other medical professionals, including Dr. Prostic, missed the ALS diagnosis. Dr. Zarr believed claimant was showing signs of the disease in May 2011 and June 2011 based on reports from other physicians, Drs. Jain and Cole. Dr. Zarr opined adhesive capsulitis can be a symptom or indicator of ALS and is the "result of the loss of muscle atrophy" because an individual cannot move his or her joint and it "scars down."¹⁷ Dr. Zarr testified claimant's atrophy was due to a disease process over a considerable period of time.

At the preliminary hearing held November 7, 2011, Judge Avery directed the claimant to answer yes or no questions because of her slurred speech. Claimant attributed her hand and finger problems that occurred earlier in 2010 as being due to her repetitive work.¹⁸ Claimant believed her symptoms were the result of her work accident and repetitive activities, separate from ALS.¹⁹

Due to ALS, claimant died January 20, 2012.

¹³ *Id.* at 9.

¹⁴ *Id.*, Resp. Ex. B at 3.

¹⁵ *Id.* at 17.

¹⁶ *Id.*

¹⁷ *Id.* at 36.

¹⁸ P.H. Trans. at 15-16.

¹⁹ *Id.* at 11-13, 15-16.

The regular hearing was held February 4, 2013. Claimant's husband, Joe Daniels, testified claimant began complaining about her neck and left shoulder in October 2010 and until her death. When questioned regarding these complaints, Mr. Daniels testified:

- Q. And did she come home making complaints of pain regarding her neck and shoulder as a result of her work at [respondent]?
- A. Yes.
- Q. Did she demonstrate to you, through your observations of her day-to-day living, problems with her neck and shoulder?
- A. Yes.
- Q. And did she relate those problems to her neck and shoulder to her work activities at [respondent]?
- A. Yes.²⁰

Mr. Daniels testified claimant developed respiratory problems and speech difficulties around November 2011 and was diagnosed with ALS. While Mr. Daniels acknowledged claimant was abnormally thin, showed signs of atrophy and was experiencing slurred speech during Dr. Coles' June 2011 examination, he believed she did not begin showing signs of ALS until after she saw Dr. Prostic. With regard to claimant's loss of range of motion, Mr. Daniels observed claimant being unable to lift or grasp anything with her left arm. He indicated those symptoms, as well as the neck pain, began while claimant was still working for respondent and was well before she was diagnosed with ALS.

When questioned regarding how claimant's symptoms of the disease compared to her work-related symptoms, Mr. Daniels testified:

- Q. Were those symptoms different than the complaints of pain that she gave to Dr. Prostic and to you regarding her work injury at [respondent]?
- A. Yes.
- Q. How were they different?
- A. Her breathing and down her legs and, you know, her muscles was aching.
- Q. So it started with a respiratory problem?
- A. Yes.
- Q. Then did she start having problems with her speech?

²⁰ R.H. Trans. at 7-8.

A. Yes.

Q. Then did she start having problems with her legs?

A. Yes.

Q. And does Lou Gehrig's disease, to your knowledge, attack the entire body?

A. Yes.

Q. Did it attack her organs?

A. Yes.

Q. And she also then started having problems with her upper extremities?

A. Yeah.

Q. But that was over and above what had already existed from her work injury?

A. Yeah.

Q. Correct?

A. Yeah.²¹

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.²² Claimant bears the burden of proving his or her right to an award based on the whole record under a "more probably true than not true" standard.²³

K.S.A. 2010 Supp. 44-508(d) states that an "accident" is:

. . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

²¹ *Id.* at 10-11.

²² K.S.A. 2010 Supp. 44-501(a).

²³ *Id.* and K.S.A. 2010 Supp. 44-508(g).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²⁴

The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must exist before compensation is allowable and they have separate and distinct meanings:

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.²⁵

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

(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 $\frac{2}{3}$ % 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:

. . .

(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.

²⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

²⁵ *Id.*

K.S.A. 44-510(e)(b) states:

If an employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment of compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such employee shall cease and be abrogated by the employee's death.

K.S.A. 44-519 states:

[N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act . . . shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.S.A. 44-523(a) states:

The director, administrative law judge or board shall not be bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 2010 Supp. 44-551(i)(1) provides in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award for compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2010 Supp. 44-555c(a) provides:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.A.R. 51-3-5a states, in part:

(a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement.

ANALYSIS

(1) Dr. Coles' June 14, 2011 report is not properly in evidence.

The Award excluded Dr. Jain's May 10, 2011 report as non-compliant with the K.S.A. 44-519 requirement for supporting physician testimony, but the judge allowed as evidence Dr. Coles' June 14, 2011 report. Neither physician testified.

K.S.A. 44-519 does not prevent a testifying physician from considering medical evidence generated by other absent physicians, so long as the testifying physician expresses his or her own opinion rather than the opinion of the absent physician:

[K.S.A. 44-519] literally applies only when a party seeks to introduce a report or certificate of a physician or surgeon into evidence. In the present case, no report or certificate prepared by an absent, nontestifying physician or surgeon was introduced into evidence. Neither [doctor] attempted to 'bootleg in' the opinion of an absent, nontestifying doctor by merely reading from the other doctor's report. See, e.g., *Mesecher v. Cropp*, 213 Kan. 695, 701-02, 518 P.2d 504 (1974). Although each doctor relied in part on the reports of the absent doctors in forming his opinion, each doctor, when testifying, expressed his own opinion and not that of the absent, nontestifying doctors."²⁶

Thus, K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. A physician's reliance upon a medical record authored by non-testifying physician does not make the non-testifying physician's opinion admissible.²⁷ "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination, and if this is to be changed, we believe the legislature should do so and not this court."²⁸ While K.S.A. 44-523(a) disfavors "technical rules of evidence," K.S.A. 44-519 is a specific legislative mandate that must be followed.²⁹

²⁶ *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), rev. denied 244 Kan. 736 (1989).

²⁷ *Brady v. State of Kansas*, No. 1,050,052, 2011 WL 2185267 (Kan. WCAB May 6, 2011).

²⁸ *Roberts v. J. C. Penney Co., Inc.*, 263 Kan. 270, 282, 949 P.2d 613 (1997).

²⁹ *Id.* at 278.

Both parties refer to opinions from non-testifying health care providers. Respondent argues in its brief that Dr. Coles opined claimant's symptoms were not work related, while claimant argues Dr. Coles diagnosed claimant as having frozen shoulder and did not diagnose ALS.³⁰ Claimant cites Dr. Prostic's mention of Dr. Coles' diagnosis in Dr. Prostic's own report.³¹ Dr. Zarr's report mentions Dr. Coles' opinion that claimant's condition was not work related. Both parties examined Dr. Zarr regarding Dr. Coles' opinions: claimant for the purpose of showing that Dr. Coles diagnosed claimant as having frozen shoulder syndrome and not ALS, while respondent did so to point out that claimant had potential signs of ALS well before Dr. Zarr's evaluation. Both parties are trying to "bootleg in" opinions from absent, non-testifying physicians. The presence of non-testifying physician opinions being contained in testifying physician reports does not make the non-testifying physician opinions evidence. Based upon K.S.A. 44-519, *Roberts, Enloe* and K.A.R. 51-3-5a, Dr. Coles' opinions are excluded from the evidence.³²

(2) Claimant sustained personal injury arising out of and in the course of her employment.

The Board agrees with the judge's conclusion that claimant was injured as a result of her repetitive work activities. Claimant testified to having a "pop" in her neck or left shoulder and her work activities thereafter worsened her condition. While claimant likely had ALS before her work injury, her ALS and her work injury are separate and distinct. Claimant's development of ALS does not diminish that she also had a work injury involving her left shoulder. Dr. Prostic testified ALS would not have caused the pop when claimant was lifting nor caused her left shoulder MRI findings.

Dr. Prostic and Dr. Zarr expressed opposing opinions regarding whether ALS can result in adhesive capsulitis. While it is a close decision, the Board adopts Dr. Prostic's opinion as controlling for the reasons set forth in the judge's Award. Quite simply, the evidence establishes claimant was injured as alleged. Dr. Prostic was emphatic that there was "no way, no how" that ALS would cause claimant's injury or impairment.

As an aside and differing from the judge's Award, the Board does not find that claimant sustained a specific lifting injury from lifting a cabinet or cabinet door on January 10, 2011. Such date merely represents claimant's last day worked.

³⁰ See Respondent's Brief (filed Nov. 15, 2013) at 3 and Claimant's Brief (filed Dec. 5, 2013) at 2.

³¹ See Claimant's Submission Letter (filed May 23, 2013) at 3.

³² Further, Dr. Coles' opinion, while not part of the evidence, is further undermined based on his incorrect understanding that claimant's injury occurred on a single date, January 10, 2011. Claimant alleged repetitive injury for a number of months prior to her last day worked.

- (3) Claimant sustained a 30% impairment of function involving her left upper extremity at the level of the shoulder and is entitled to permanent partial disability (PPD) benefits based upon such disability.**

No physician opined claimant had a cervical spine impairment. Claimant's counsel conceded no benefits are being sought for the right shoulder. The nature and extent issue is limited to determining claimant's left shoulder impairment. While Dr. Zarr opined claimant had no work-related impairment, such opinion is based on relating the impairment to ALS. As noted above, we reject such opinion and concluded claimant's impairment was due to her work injury. This leaves Dr. Prostic as having the only opinion regarding claimant's permanent functional impairment. The Board agrees with the Award's finding that claimant sustained a 30% impairment of function involving her left upper extremity at the level of the shoulder.

- (4) The Board could, but will not, revise the amount of PPD benefits ordered paid because the parties did not raise the issue of whether claimant's death for reasons unrelated to her injury stopped benefits.**

The judge's Award indicated claimant was entitled to 67.5 weeks of PPD benefits. Given that claimant's date of accident was January 10, 2011, and her date of death was January 20, 2012, claimant would only be entitled to 53.57 weeks of benefits, as based on K.S.A. 44-510e(b). The judge's Award permits payment of PPD benefits after claimant's death. However, the parties did not raise – to Judge Avery or the Board – the issue of how K.S.A. 44-510e(b) might limit PPD benefits.

The Board has de novo authority on appeal from a judge's decision.³³ “[C]hanges to the workers compensation code were designed to shift the de novo review of the district court to the . . . Workers Compensation Board of Appeals.”³⁴ Even though the parties did not raise the issue of whether claimant's death for reasons unrelated to her work injury should terminate PPD benefits, the Board still has authority to address the issue.³⁵ As noted by the Kansas Court of Appeals:

³³ See *Hall v. Roadway Express, Inc.*, 19 Kan. App. 2d 935, 939, 946, 878 P.2d 846 (1994) (“After July 1, 1993, the legislature substituted the Workers Compensation Appeals Board for the district court. The claimant still has the right to a de novo appeal; it is simply before the Board and not before the district court.”). See also *Riedmiller v. Harness*, 29 Kan. App. 2d 941, 34 P.3d 474 (2001); *Helms v. Pendergast*, 21 Kan. App. 2d 303, Syl. ¶ 2, 899 P.2d 501, 506 (1995) (Review by the Board of administrative law judge orders “is de novo on the record.”); *Wynn v. Boeing Co.*, No. 100,071, 203 P.3d 1281 (unpublished Kansas Court of Appeals opinion filed April 3, 2009) (same); *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,564, 169 P.3d 1147 (unpublished Kansas Court of Appeals opinion filed Nov. 9, 2007) (“[C]laims are initially tried before an administrative law judge. They may then be appealed to the Workers Compensation Board, which reviews the matter de novo and makes its own factual findings.”).

³⁴ *Hall*, 19 Kan. App. 2d at 939.

³⁵ See *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 516, 949 P.2d 1149, 1153 (1997) (“K.S.A. 44-551(b)(1) (the predecessor to K.S.A. 2010 Supp. 44-44-551(i)(1)) does not limit the Board's authority to issues raised in the written request for review.”).

K.S.A. 44-555b(a) authorizes the Workers Compensation Board “to review all decisions, findings, orders and awards of compensation of administrative law judges.” The legislature intended the Board to have the authority to review and to substitute its judgment for the decisions of the administrative law judges. Under the facts of the present case, the administrative law judge had jurisdiction to determine which of two insurance carriers before him had coverage of the 1991 accident, and the Board had full jurisdiction to review the award and correct any errors it found therein.³⁶

“The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made.”³⁷ De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.³⁸

The Board has the authority to address whether claimant’s death for reasons unrelated to her work injury ceases payment of PPD. However, the Board has frequently declined to exercise de novo review when an issue was not raised by the parties and limited review to “questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.”³⁹ The Board, citing *Scammahorn*,⁴⁰ has frequently held that under K.S.A. 44-555(c)a, issues not raised before the judge cannot be raised for the first time on appeal.⁴¹

The Board at oral argument, *nostra sponte*, asked the parties if claimant’s PPD benefits should have ended with her death, as based on K.S.A. 44-510e(b). The parties stated the answer was “yes.” Nonetheless, the Board affirms, and does not disturb, the Award of PPD benefits. The issue was raised by the Board on its own initiative and not brought up by the parties or presented to the judge. Moreover, the Kansas Court of Appeals has recently voiced displeasure with the Board for “unilaterally” having “reached out to grab” an issue “without a request . . . or notice to the parties.”⁴² Therefore, the Board will not address the K.S.A. 44-510e(b) issue it raised on its own accord, even though we have the authority to do so.

³⁶ *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, Syl. ¶ 2, 889 P.2d 1151 (1995).

³⁷ *In re Panhandle E. Pipe Line Co.*, 272 Kan. 1211, 39 P.3d 21, 23 (2002).

³⁸ *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

³⁹ See K.S.A. 2010 Supp. 44-555(c)a; *Byers v. Acme Foundry*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013); *Miller v. General Motors Corp.*, Nos. 1,048,350, 1,048,351, 2013 WL 1384378 (Kan. WCAB Mar. 13, 2013).

⁴⁰ *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 415, 416 P.2d 771 (1966).

⁴¹ See *Miller v. General Motors Corp.*, Nos. 1,048,350 & 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013).

⁴² See *Goss v. Century Manufacturing, Inc.*, No. 108,367, 303 P.3d 1278 (unpublished Kansas Court of Appeals decision filed July 26, 2013).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the September 23, 2013 Award should be modified to exclude from evidence the June 14, 2011 report of Dr. Coles. The Award is otherwise affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the September 23, 2013 Award is modified as listed in the "Conclusions" section, but otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

Claimant is only entitled to PPD benefits until her death for other and independent causes. The plain and unambiguous language of K.S.A. 44-510e(b) compels such result.

The Board must follow the mandate of *Bergstrom*:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).⁴³

⁴³ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

The plain and unambiguous language in K.S.A. 44-510e applies to all injuries. Quite simply, claimant's unrelated death ceases payment of PPD benefits.

By affirming the judge's Award and allowing payment of PPD benefits after claimant's death for reasons unrelated to her accidental injury, the majority is permitting an award that is contrary to the law.

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen
wlp@wlphalen.com

Michelle Daum Haskins
mhaskins@constangy.com

Honorable Brad E. Avery