

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

**ISABELLE EHRlich**  
Claimant

VS.

**DILLON COMPANIES, INC.**  
Self-Insured Respondent

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Docket No. **1,059,129**

**ORDER**

Self-insured respondent requests review of the September 26, 2013, Award by Administrative Law Judge (ALJ) John Clark. The Board heard oral argument on January 22, 2014.

**APPEARANCES**

Shawn Elliott of Wichita, Kansas, appeared for claimant. Matthew Schaefer of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

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

**ISSUES**

Claimant sustained personal injury by accident arising out of and in the course of her employment on October 29, 2010.

The ALJ awarded permanent partial disability (PPD) based on a finding of an 18.5% whole body functional impairment.

Respondent argues the ALJ erred in determining the nature and extent of claimant's disability. Respondent contends claimant sustained a 3% permanent impairment to the right shoulder based upon the opinions of Drs. Stein and Prohaska.

Claimant maintains the Award should be affirmed.

The sole issue presented for Board determination is: what is the nature and extent of claimant's disability?

### FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant, who was age 78 at the time of the April 22, 2013 regular hearing, began working for respondent as a cashier on November 19, 2009. Her job included assisting customers and scanning food items through the checkout line. Claimant described her October 29, 2010, accident as follows:

A. I was going back to the bakery and I slipped on some liquid substance on the floor, falling down and falling on my right shoulder, leg, with excruciating pain, it was really -- and I couldn't -- you know, couldn't get up, it was hurting so bad, and couldn't walk.<sup>1</sup>

Claimant testified she experienced pain in her right shoulder, right leg and hip. Initial medical treatment was provided by Via Christi Immediate Care.

Claimant testified she injured her right shoulder in 2008 when she stumbled at home and lunged forward to keep herself from falling. Claimant testified she received no medical treatment for that incident but a right shoulder MRI scan was conducted, which revealed a long head biceps rupture and a right rotator cuff tear. Surgery was suggested at that time, but claimant declined to undergo the procedure. Claimant testified her right shoulder symptoms thereafter resolved and she experienced no further difficulties until the October 29, 2010 accidental injury.

Claimant testified she had an automobile accident in 2009, resulting in a neck injury.

Following the October 29, 2010 accident, claimant was evaluated by Drs. Hubin, Estivo, Prohaska, Gonzalez, Stein, Manasco and Murati.

On November 22, 2010, claimant underwent a right shoulder MRI scan which revealed a full thickness tear of the right rotator cuff. Claimant underwent a lumbar MRI on June 12, 2011, which revealed severe degeneration at L5-S1, degenerative changes at the thoracolumbar junction, slight slippage at L4-5, disk bulging at L2-3, and moderately severe stenosis at L4-5.

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<sup>1</sup> R.H. Trans. at 8.

Dr. Daniel Prohaska, a board certified orthopedic surgeon, first saw claimant on January 27, 2011, due to right shoulder pain. The doctor reviewed medical records, took a history and performed a physical examination. He reviewed x-rays taken in his office. Dr. Prohaska also reviewed and compared the right shoulder MRI scans taken after the 2010 injury and in 2008. Dr. Prohaska diagnosed a right shoulder rotator cuff tear, acute on chronic, and a chronic long head biceps tendon rupture. The doctor recommended arthroscopic surgery to repair the right rotator cuff.

Dr. Prohaska performed surgery on claimant's right shoulder on February 7, 2011 and provided follow up care. On August 9, 2011, claimant was released at maximum medical improvement.

Based upon the AMA *Guides*,<sup>2</sup> Dr. Prohaska rated claimant's permanent impairment of function at 6% to the right upper extremity at the shoulder due to loss of range of motion and loss of strength. Dr. Prohaska also found 50% of claimant's impairment preexisting the October 29, 2010 accident, leaving a 3% impairment to the right shoulder caused by the current injury.

The following exchange occurred at Dr. Prohaska's deposition:

Q. Talk to me a little bit about the one tendon versus two tendon(s). I know I just see massive tear. It looks like it's a big tear. I don't know what exactly that means. What is one versus two?

A. There's four tendons that make up the rotator cuff complex. The most important two are the supraspinatus and the infraspinatus. Her initial tear [in 2008] was of the supraspinatus. Her follow-up when I treated her, she had a supraspinatus and infraspinatus tear. When a tendon tears, the muscle will atrophy over time and you will lose some strength. It's an inevitable factor that if the tendon is not attached, the muscle won't fire and the muscle becomes weak. Therefore, that's part of the apportionment for the 50 percent pre-existing condition because I know after two years that that muscle is going to have some atrophy and some potential weakness.

Q. Once the surgery is performed, should the muscles regain some strength then?

A. It will regain some but not all. Especially due to the chronicity of the tendon being detached, there are times where it will not return fully. In fact, most times if it's that chronic, studies have shown that it won't return fully.<sup>3</sup>

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

<sup>3</sup> Prohaska Depo. at 20-21.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, evaluated claimant on December 14, 2011, at the request of claimant's attorney. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Murati diagnosed: (1) status post right shoulder arthroscopy, rotator cuff repair and subacromial decompression; (2) myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinal muscles; (3) low back pain with signs and symptoms of radiculopathy; (4) thoracic sprain; and, (5) right sacroiliac (SI) joint dysfunction. The doctor recommended additional conservative treatment.

Dr. Murati performed a second evaluation on November 6, 2012. The doctor reviewed medical records of Drs. Stein, Manasco and Phillips, and performed another physical examination. Dr. Murati found severe glenohumeral crepitus of the right shoulder, trigger points in the right shoulder girdle extending into the cervical and thoracic paraspinals, spasm in the mid-thoracic spine, decreased sensation in the lower extremities along the right SI dermatome, and a mild antalgic gait. Dr. Murati's diagnoses were the same in both of his evaluations.

According to Dr. Murati, he relied on the *AMA Guides* in concluding claimant sustained a 37% whole body functional impairment as follows:

<b>Body Member</b>	<b>Extremity Impairment %</b>	<b>BAW %</b>
loss of sensation of the right axillary distribution	3% RUE	
right shoulder status post subacromial decompression	10% RUE	
severe right shoulder glenohumeral crepitus	18% RUE	
combined right upper extremity impairments	28% RUE	17%
back pain secondary to thoracic strain		5%
myofascial pain syndrome affecting cervical paraspinals		5%
low back pain with signs of radiculopathy		10%
loss of range of motion of right hip	15% RLE	6%
<b>combined whole person impairments</b>		<b>37%</b>

Dr. Murati found no impairment preexisting claimant's accidental injury.

Dr. Paul Stein, board certified in neurological surgery, evaluated claimant on March 20, 2012, pursuant to the ALJ's Order dated January 31, 2012. The doctor reviewed medical records, took a history and performed a physical examination. The doctor evaluated claimant's right hip, right leg and lumbar spine. He found limited range of motion of the lower back and tenderness in the right lower back and right buttock. Dr. Stein recommended a series of L4-5 epidural steroid injections, which claimant thereafter received, and an MRI scan of claimant's right hip. The MRI of the hip conducted on June 1, 2012, was found to be normal.

On May 11, 2012, Dr. Stein provided a causation opinion regarding claimant's current symptomatology in the low back and right hip and her fall on October 29, 2010. The doctor opined as follows:

In regard to the lower back itself, I cannot document injury occurring on 10/29/10 as the medical treatment records do not show any complaint of back pain until 4/27/11. Lumbar MRI scan reflects spinal stenosis at L4-L5 which was more likely than not preexisting work incident.

There are, however, complaints of right hip pain in the only treatment records subsequent to the fall. This may be related to trochanteric bursitis from the fall. I cannot rule out other injury to the hip without further investigation but it would be likely that any such injury documented would be causally related to the incident at work on 10/29/10.<sup>4</sup>

Dr. Stein testified as follows:

Q. And what were your ultimate conclusions regarding the right hip and leg complaints that Ms. Ehrlich gave you? And what I mean by that, were you able to within a reasonable degree of medical probability relate those problems to her fall at Dillons?

A. I couldn't be absolutely certain of that. I couldn't find any pathology in the hip itself based on the studies. That doesn't guarantee that there wasn't something there or that she didn't have a contusion or soft tissue injury of some sort, and so I can't say that her hip pain was not from the accident, but I couldn't document a diagnosis or that any symptoms from the stenosis were from the accident.

Q. So with regard to the hip, there were some subjective complaints by Ms. Ehrlich, but nothing that you were able to document objectively; correct?

A. That's correct, understanding that it's not always possible to make a definitive diagnosis with the hip.

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<sup>4</sup> Stein Depo., Ex. 2 at 7.

Q. And as far as the stenosis is concerned, it was your opinion that that condition pre-existed the accident and was unrelated to the accident.

A. That's correct.<sup>5</sup>

Dr. Stein further testified that claimant's records did not document any complaint of back pain until April 2011. According to Dr. Stein:

A. [T]here is no documentation of back complaints four or five or six months from the time of injury. If there was no such symptomatology until five or six months afterward, one cannot make with medical assurance a causal relationship between the back pain and the work incident. If the individual says, no, I was having back pain right from the very beginning, then you have to decide whether you're more aligned toward having documentation or whether you simply accept the statement of a claimant. I have to go by documentation.<sup>6</sup>

At the time of the regular hearing, claimant had returned to work with restrictions. Respondent has consistently accommodated claimant's restrictions and she continues to work for respondent.

#### **PRINCIPLES OF LAW AND ANALYSIS**

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 by proving 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."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence.<sup>7</sup>

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<sup>5</sup> Stein Depo. at 10-11.

<sup>6</sup> *Id.* at 13-14.

<sup>7</sup> *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

Functional impairment is defined by K.S.A. 2010 Supp. 44-510e(a) as follows:

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.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>8</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>9</sup>

The Board finds no error in the ALJ's determination of the nature and extent of claimant's disability and accordingly affirms the Award. Under the Award, the amount of PPD to which claimant is entitled is based on an average of the ratings of Dr. Murati and the opinions of Dr. Stein, providing equal weight to each opinion. The Board adopts the ALJ's findings and conclusions as though fully set forth in this Order.

Dr. Stein was the court-ordered neutral physician and he evaluated claimant's right hip, right leg and lumbar spine. Although Dr. Stein did not evaluate claimant's thoracic spine, cervical spine or right shoulder and did not specifically rate claimant's functional impairment, it is a reasonable inference that Dr. Stein, insofar as the parts of claimant's body he evaluated, concluded claimant sustained no permanent injury and no permanent impairment caused by the 2010 accident. Dr. Murati evaluated all areas of claimant's body to which injury was alleged. The opinions of Drs. Stein and Murati are entitled to some weight and the Board agrees, under the circumstances of this claim, with the ALJ's provision of equal weight to the opinions of both physicians in determining claimant's permanent functional impairment.

As the trier of fact, the Appeals Board has the right and obligation to weigh the evidence to determine the credibility of the witnesses, including the physicians who testified, in making its decision on the disability of the claimant.<sup>10</sup>

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<sup>8</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>9</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

<sup>10</sup> *Id.*

The Board further finds that Dr. Prohaska’s rating is unpersuasive because he based his opinion on claimant’s impairment on the assumption that part of the impairment preexisted claimant’s accidental injury in 2010. The preponderance of the credible evidence does not support the notion that claimant had preexisting functional impairment as defined in K.S.A. 44-510e(a). Claimant had no prior ratings to any parts of her body injured in this accident. There is no evidence claimant lost any portion of her body’s ability to physically function as the result of her fall at home in 2008. Claimant’s testimony that she recovered from the 2008 injury is undisputed. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.<sup>11</sup>

**CONCLUSIONS OF LAW**

For the reasons set forth above, the Appeals Board finds the ALJ did not commit error in determining the nature and extent of claimant’s accidental injury of September 26, 2013.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the Board's decision that the Award of ALJ John Clark dated September 26, 2013, is hereby affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2014.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>11</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

<sup>12</sup> K.S.A. 2010 Supp. 44-555c(k).

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Honorable John Clark, ALJ