

Claimant contends Judge Barnes erred. Claimant argues that she also injured her neck in the July 1997 accident and, therefore, she is entitled to receive permanent partial general disability benefits as defined by K.S.A. 1997 Supp. 44-510e. Claimant also argues that she was a full-time worker and, therefore, her average weekly wage is \$406.25.

Conversely, respondent and its insurance carrier contend the Award should be affirmed. They argue the greater weight of the evidence supports the Judge's findings that claimant did not suffer permanent injury or permanent impairment to the neck and that claimant was a part-time worker.

The issues before the Board on this appeal are:

1. Was claimant a full-time or part-time worker on the date of accident?
2. What is claimant's average weekly wage?
3. What is the nature and extent of claimant's injuries and disability?
4. Was there an overpayment of temporary total disability benefits because of the ultimate average weekly wage finding?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The Award should be affirmed.
2. Claimant worked for respondent as a home health care nurse. Respondent is a company that provides temporary nurses, medication aides, home health aides, and physical therapists to hospitals, nursing homes, and individuals.
3. On July 22, 1997, claimant injured herself while moving a patient. The accident arose out of and in the course of employment with respondent.
4. The Board affirms the Judge's finding and conclusion that claimant was a part-time worker at the time of the accident. The Workers Compensation Act defines a part-time worker as follows:

The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary

number of hours constituting an ordinary day in the character of the work involved or performed by the employee.¹

The greater weight of the evidence indicates that claimant was given temporary job assignments with no guarantee that she would work a minimum number of hours per day or per week. The record also indicates that claimant regularly worked less than 40 hours per week and that, according to respondent's branch director, Ms. Audrey Robertson, there is not a certain number of hours that someone would work to be considered a full-time home health care nurse.

5. At oral argument to the Board, the parties agreed that claimant's average weekly wage would be \$369.65 in the event she is determined to be a part-time worker. As indicated above, the Board concludes that claimant was a part-time worker on the date of accident. Therefore, the average weekly wage for purposes of calculating her benefits in this claim is \$369.65, which creates an overpayment of temporary total disability benefits as determined by the Judge.

6. The Board affirms the Judge's finding that claimant has sustained a 5.67 percent functional impairment to the left upper extremity as a result of the July 1997 accident.

Orthopedic surgeon Robert Eyster, M.D., who saw claimant approximately 11 times over eight and one-half months from November 1997 through August 1998, diagnosed rotator cuff tendinitis. Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment (AMA Guides)*, Dr. Eyster rated claimant with a six percent functional impairment to the left shoulder. Dr. Eyster did not believe that claimant had any impairment to her neck. Philip R. Mills, M.D., whom the Judge selected to perform an independent medical evaluation, saw claimant in June 1999 and diagnosed a shoulder sprain with undifferentiated somatoform disorder and depression. Using the *AMA Guides*, Dr. Mills rated claimant with a five percent impairment to the left upper extremity.

Only claimant's hired medical expert, Pedro A. Murati, M.D., found that claimant had sustained permanent injury or impairment to her neck and that claimant was also suffering from carpal tunnel syndrome in the left arm. Using the *AMA Guides*, Dr. Murati determined that claimant had a 10 percent functional impairment to the left arm due to the carpal tunnel syndrome, a six percent impairment to the left upper extremity due to the loss of range of motion in the shoulder, and a four percent whole body functional impairment due to the neck injury.

7. The Judge averaged the three doctors' upper extremity ratings for the shoulder impairment and, thus, determined that claimant's left upper extremity impairment was 5.67

¹ K.S.A. 44-511(a)(4) (Furse 1993).

percent. The Board affirms that finding, along with the Judge’s conclusion that Dr. Eyster’s and Dr. Mills’ opinions of claimant’s residual impairment are the most persuasive. The Board also agrees with the Judge that the greater weight of the evidence indicates that claimant’s permanent injury is located in the shoulder rather than the neck and, therefore, claimant has sustained a “scheduled” injury that is compensated pursuant to K.S.A. 1997 Supp. 44-510d rather than an “unscheduled” injury that is compensated pursuant to K.S.A. 1997 Supp. 44-510e.

AWARD

WHEREFORE, the Board affirms the October 5, 2000 Award.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Brian D. Pistotnik, Wichita, KS
- Gary K. Albin, Wichita, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director