

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DONNA BROWNING)	
Claimant)	
V.)	
)	CS-00-0435-431
STATE OF KANSAS)	AP-00-0449-185
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent requested review of the January 22, 2020, Award by Administrative Law Judge (ALJ) Troy A. Larson. The Board heard oral argument on May 14, 2020.

APPEARANCES

Sally G. Kelsey, of Lawrence, Kansas, appeared for Claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

Respondent appeals arguing the work accident is the prevailing factor for Claimant's left heel injury only and any other complaints Claimant has to other body parts are not caused by the work injury. Claimant should be entitled to no more than a 1 percent impairment to the left lower extremity. Respondent also argues Claimant is not entitled to future medical treatment. Dr. Bishop's testimony is not sufficient to justify an award of future medical treatment.

Claimant argues the award should be modified because Claimant's permanent partial impairment should be based on the ratings of Dr. Bishop and Dr. Halloran. The award of future medical should be affirmed.

The issues on appeal are:

1. Is the work accident the prevailing factor in causing antalgic gait condition and resulting disability?
2. What is the nature and extent of Claimant's disability?
3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

On January 20, 2020, the ALJ ruled the work accident was the prevailing factor causing Claimant's left heel injury and antalgic gait. The ALJ adopted Dr. Bishop's rating of 6 percent permanent partial impairment to the body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition*.¹ The ALJ awarded Claimant future medical treatment.

On January 19, 2016, Claimant responded to a fight between two inmates. As Claimant attempted to stop the fight, she was kicked in her left heel.

Claimant received authorized medical treatment for her injury, which included two surgeries to her left lower extremity from Dr. Joseph P. Halloran. Dr. James P. Halloran, a board certified orthopedic surgeon, first examined Claimant on October 20, 2016, at the request of Respondent. Claimant complained of left foot pain related to a work accident. Dr. Halloran diagnosed Claimant with left Achilles tendinitis. Dr. Halloran opined Claimant's left Achilles tendon injury is work-related and the prevailing factor for her need for treatment. On November 29, 2016, Dr. Halloran performed surgery on Claimant, a left Haglund resection and left Achilles tendon transfer and repair.

After her surgery, Claimant was referred to physical therapy. During physical therapy, Claimant's left heel was reinjured. On July 26, 2017, Dr. Halloran did a second surgery, a left Achilles tendon debridement and repair with FHL tendon transfer.

Dr. Halloran released Claimant at maximum medical improvement with no restrictions. He rated Claimant's permanent partial impairment due to the work accident as 7 percent impairment to the left ankle based on *The Guides*.

Dr. Halloran opined Claimant did not need future medical treatment.

¹ Hereinafter referred to as *The Guides*.

Despite her medical treatment, Claimant continues to have pain in her left foot. Claimant has developed pain in her left knee, left leg, right hip and low back. Claimant believes these symptoms developed because she wore a boot on her left foot for about six months. The boot elevated her left leg from the ground about two to three inches. According to Claimant, wearing the boot for so long caused her altered gait and her right foot to roll. Claimant stopped wearing the boot at the end of October 2017. Claimant also complains of numbness in her outer left thigh. She also developed two to three times per week severe cramping in her left calf and foot to the point she cannot move her leg. Claimant attributes the numbness and cramping to the nerve block she received for her second surgery. Claimant denies having any low back pain before the accident.

Claimant continues to work for Respondent without restrictions, and is physically able to perform her job duties. She does self-limit while she works by walking up and down the stairs less and limiting her walking. Claimant intermittently limps.

Claimant has not had medical treatment for anything other her left heel/ankle area. Depending on her activity, Claimant has back pain at a pain level of 7 out of 10.

Dr. Rodney L. Bishop evaluated Claimant on March 5, 2019, at the request of the Court. Claimant complained about continued pain in her left Achilles tendon along with cramping in her left calf and left foot. Claimant reported she believes the nerve block from surgery caused numbness below her left knee into her lower leg. Claimant reported she developed an altered gait from wearing a boot on her left foot, which changed the way she used her right foot and leg. Claimant reported discomfort, and pins and needles sensation in her left upper buttocks she attributes to her altered gait.

Dr. Bishop noted Claimant's gait was mildly altered while walking on carpet and while barefooted. Dr. Bishop diagnosed left Achilles tendon rupture due to Claimant's work injury. Further diagnoses were: status post operative repair on two occasions; gait alteration as a result of left Achilles tendon injury; altered lower leg and left foot and ankle sensation subsequent to regional nerve block due to surgery, and; right upper buttock discomfort.

Dr. Bishop opined the prevailing factor for the diagnoses, injuries, medical treatment and resulting disability is the January 19, 2016, work accident. He found Claimant reached maximum medical improvement. He assigned a 6 percent permanent partial impairment to the whole body rating based on *The Guides*. Five percent of the impairment was due to Claimant's antalgic gait and one percent for the Achilles tendon injury. In rating the impairment due to antalgic gait, Dr. Bishop referenced page 336, Table 13-12, which is the section of *The Guides* for rating impairments of station gait and movement disorders. Dr. Bishop found it more likely than not Claimant will require additional medical care for her injuries in the future.

Due to continued pain complaints in her left lower extremity, Claimant asked to see Dr. Halloran again on December 2, 2019. Dr. Halloran noted there were no clinical complaints about the left Achilles tendon. He found most of Claimant's complaints centered around the peroneal tendon, which were not related to the Achilles tendon surgery. He found the Achilles tendon was intact. Dr. Halloran could not relate Claimant's nerve and cramping complaints in Claimant's left lower extremity to the nerve blocks, Claimant received for the surgery.

Dr. Halloran opined that any hip or low back complaints were not related to the Achilles tendon injury or surgery. When he saw Claimant in June 2018 she had a normal gait.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2016 Supp. 44-508(h) states:

(h) "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 unless a higher burden of proof is specifically required by this act.

K.S.A. 2016 Supp. 44-510e states in part:

(a) In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

...

(2) (A) 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. Compensation for permanent partial general disability shall also be paid as provided in this section where an injury results in:

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury 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 until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Both doctors who testified agree Claimant's work accident was the prevailing factor for Claimant's left Achilles tendon injury and medical treatment to treat that injury.

The primary dispute is whether the work accident is the prevailing factor for Claimant's antalgic gait resulting in low back complaints. Dr. Halloran, who treated Claimant at the request of Respondent did not attribute her low back complaints to the work accident. Dr. Bishop, who evaluated Claimant at the request of the Court, found the work accident was the prevailing factor for Claimant's antalgic gait. This antalgic gait resulting in low back complaints was due to Claimant having to wear a walking boot on her left foot for approximately six months.

Dr. Bishop's opinion is more credible. He was appointed by the Court and thus his opinion is neutral and more persuasive. Dr. Halloran did not evaluate or acknowledge Claimant's complaints about her low back and wearing a boot on her left foot for a period of time. It is found and concluded that Claimant's permanent impairment is 6 percent to the body as a whole as found by Dr. Bishop.

Respondent criticized Dr. Bishop's opinion because they presented medical records allegedly showing Claimant had prior problems with her left lower extremity and as result her altered gait was due to conditions that preceded the work accident. Claimant denies such problems under oath. This argument is not persuasive or sufficient to refute Dr. Bishop's diagnosis of altered gait. These records were not entered into the record. It is mere speculation, Claimant had complaints preceding the work accident causing altered gait.

Respondent also criticizes Dr. Bishop's rating of altered gait. According to Respondent, it is based on the wrong section of *The Guides*. Dr. Bishop acknowledges *The Guides* are lacking in regard to rating altered gait. He based his rating on the section he believed most resembled Claimant's impairment. Respondent argues if it is not in *The Guides*, specifically, then it is questionable if there is an impairment.

K.S.A. 2016 Supp. 44-510e(a)(2)(B) provides determining the extent of partial general disability is established by competent medical evidence and *The Guides*, **if the impairment is contained therein** (emphasis added). Dr. Bishop used the section in *The Guides*, which in his professional opinion was most akin to Claimant's impairment. He exercised his professional judgement which is allowed by Kansas worker's compensation law.²

² See *Smith v. Sophie's Catering and Deli Inc.*, No. 99,713, 2009 WL596551 (Kansas Court of Appeals unpublished opinion filed March 6, 2009).

K.S.A. 2016 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The ALJ found Claimant is entitled to future medical treatment because Dr. Bishop, the court-ordered neutral physician, opined it is more likely than not Claimant will need future medical treatment. The Board agrees. Respondent's argument future medical treatment should be denied is not persuasive. Claimant is entitled to future medical treatment upon proper request.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Troy A. Larson dated January 22, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Sally G. Kelsey, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Hon. Troy A. Larson, Administrative Law Judge