

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JUDY KEENAN)	
Claimant)	
V.)	AP-00-0462-203
)	CS-00-0447-729
STATE OF KANSAS)	
Respondent)	AP-00-0462-204
and)	CS-00-0267-277
)	
STATE SELF-INSURANCE FUND)	

ORDER

Claimant, through William Phalen, requested review of Administrative Law Judge (ALJ) Steven Roth's Award & Modification Order dated November 9, 2021. Jeffery Brewer appeared for Respondent. The Board heard oral argument on February 24, 2022.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of: (1) the transcript of the Review and Modification Hearing, held July 30, 2021; (2) the transcript of the Regular Hearing, held July 30, 2021; (3) the evidentiary deposition of Claimant, taken August 5, 2021; (4) the evidentiary deposition of Dr. Pedro Murati, with exhibits, taken August 31, 2021; (5) the Court-ordered independent medical examination (COIME) report of Dr. C. Lan Fotopoulos, dated June 29, 2020; and (6) the Award, dated January 12, 2001 and the Board Order, dated June 2001, addressing the 1999 claim.

ISSUES

1999 Claim (Review & Modification)

1. Did Claimant meet with additional injuries which now require modification of her 2001 award?
2. If so, what is the nature and extent of those injuries?

2019 Claim (New Claim)

1. What is the nature and extent of Claimant's functional disability?
2. What portion or credit is Respondent entitled to, if any, for Claimant's prior impairment for the 1999 claim?

FINDINGS OF FACT

Claimant began working for Respondent in February, 1991. Approximately 80% of her work involved word processing or typing.

In 1999, Claimant was diagnosed with bilateral carpal tunnel syndrome. She eventually underwent left carpal tunnel surgery, but declined surgery on the right upper extremity. Claimant testified she achieved full relief on the left carpal tunnel syndrome. On January 12, 2001, the Court issued an award finding Claimant suffered a combined 15% whole body impairment. Upon appeal, the Board affirmed.

Claimant returned to her regular job duties with Respondent. Between 2000 and 2016, she wore no wrist splints nor received any medical treatment for her bilateral carpal tunnel symptoms. Claimant continued to have some pain, numbness and tingling in her right hand:

Q. What were those symptoms that you continued to experience between 2001 and 2016?

A. I had some, some pain, a little bit of pain when I would use my hand but I didn't have the tingling and the numbness so much then.

Q. Not so much, so you experience[d] it, just maybe not quite as often?

A. Correct.

Q. But it never went away, did it?

A. No.

...

Q. My question goes back to between 2001, that first award, and 2016, did you ever, were you ever completely symptom free in the right hand and wrist from that period of time 2001 to 2016?

A. No, not in the right hand.¹

In 2016, Claimant's right upper extremity condition worsened. Claimant was referred to Dr. Pat Do who saw Claimant on May 31, 2016. An EMG performed on July 5, 2016, revealed right carpal tunnel syndrome. Dr. Do provided conservative treatment, which included medication, physical therapy and a steroid injection into her right wrist on September 1, 2016. The treatment provided relief of Claimant's symptoms. Dr. Do released Claimant from treatment on September 5, 2016.

In March 2017, the State of Kansas went to mandatory E-filing, which changed the physical requirements of Claimant's job. Claimant now spent 90% of her day working on the computer. She was constantly typing and using a mouse to prepare, file and email documents.

In August 2019, Claimant developed numbness and tingling in her fingers and right hand, and pain from her forearm to her right elbow. Shortly thereafter, she experienced right shoulder pain. Respondent referred Claimant to Dr. John Moore. She saw Dr. Moore on October 11, 2019. Dr. Moore diagnosed right carpal tunnel syndrome and scheduled surgery. Dr. Moore opined Claimant's symptoms were not work related. Claimant sought legal counsel.

At her attorney's request, Claimant saw Dr. Pedro Murati on January 28, 2020. Dr. Murati diagnosed Claimant with:

- (1) right occipital neuropathy with headaches;
- (2) bilateral carpal tunnel syndrome, recurrent on the left;
- (3) bilateral ulnar cubital tunnel syndrome;
- (4) probable TFCC tear of the left wrist;
- (5) impingement syndrome of the right shoulder; and
- (6) myofascial pain syndrome of the right shoulder girdle extending into the cervical treatment paraspinals.

Dr. Murati recommended additional treatment. He opined multiple repetitive traumas at work were the prevailing factor in the development of Claimant's conditions. He related Claimant's bilateral carpal tunnel syndrome (#2) to the first injury (each and every working day ending 12/6/99). He related Claimant's remaining conditions (#1 and #3 through #6) to the second injury (each and every working day ending 9/19/19).

Following a preliminary hearing, Claimant was referred to Dr. C. Lan Fotopoulos for a court-ordered independent medical evaluation on June 29, 2020. Dr. Fotopoulos stated:

¹ Claimant Depo. (Aug. 5, 2021) at 33, 35.

I believe Judy developed bilateral carpal tunnel syndrome in 1999, based on her history she had the left side carpal tunnel release performed and was unhappy with the results. In 1999 she had decided to hold off on the right-sided repair until the pain was worse. At this point the pain increased enough in intensity in 2016 and she underwent an injection in the carpal tunnel which kept her relatively pain-free until 2019 when the pain has returned. I believe she does have a right-sided carpal tunnel syndrome related back to 1999 and should be evaluated by a surgeon.²

Dr. Fotopoulos opined Claimant's injury in September 2019 "aggravated her current issue from 1999."³ Dr. Fotopoulos recommended a right-sided EMG to confirm the carpal tunnel diagnosis and subsequent referral to a surgeon for evaluation.

On November 9, 2020, Claimant underwent a right carpal tunnel release by Dr. Mark Winston. She was released on January 19, 2021, with no restrictions.

On March 4, 2021, Claimant was re-evaluated by Dr. Murati. Dr. Murati diagnosed Claimant with:

- (1) right occipital neuropathy with headaches;
- (2) bilateral carpal tunnel syndrome, recurrent on the left;
- (3) bilateral ulnar cubital tunnel syndrome;
- (4) probable TFCC tear of the left wrist;
- (5) right rotator cuff strain versus tear with probable labral tear pathology;
- (6) myofascial pain syndrome of the right shoulder girdle extending into the cervical treatment paraspinals; and
- (7) S/p "Right open carpal tunnel release." Dr. Winston 11/9/20.

Again, Dr. Murati related Claimant's bilateral carpal tunnel syndrome (#2) to the first injury (each and every working day ending 12/6/99). He related Claimant's remaining conditions (#1 and #3 through #7) to the second injury (each and every working day ending 9/19/19). Dr. Murati recommended additional treatment for the right shoulder. Dr. Murati opined Claimant's repetitive work activities were the prevailing factor causing her injuries, need for treatment and resulting disability or impairment. The doctor stated Claimant will require future medical treatment.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition (*Guides*, 4th ed.), Dr. Murati assigned Claimant an additional 11% impairment to the body as a whole for the 1999 claim. He testified:

² Fotopoulos Report at 3-4.

³ *Id.* at 4.

A. Okay. Then we would have to use the, okay, fine. Then we would have to use the Fourth Edition and rate her as of her current condition, I would give her 20 percent upper extremity each hand. And that would be 12 percent whole person both sides. So 12 percent combined, the 12 percent goes to 24 percent whole person. Her final impairment as of March 4th, 2021, for just her carpal tunnel conditions.

Q. So based upon the AMA guidelines, Fourth Edition, just for the carpal tunnel syndrome, you believe she now suffers a 24 percent impairment to the body as a whole?

A. Yes. And if you do that and decombine the 15 percent, let's see, let's see if I can do this. That would be an increase of 11 percent whole person. Remember this is combinations and decombinaions, not straight math.

...

Q. In other words, again, out of an abundance of caution, if the Court somehow finds that this increased impairment is the natural flow and progression of the '99 accident, your opinion is, based on the AMA Guidelines, Fourth Edition, her carpal tunnel impairment has increased by 11 percent impairment to the body as a whole?

A. Correct.

Q. And all the opinions you have given here today have been within a reasonable degree of medical certainty and probability?

A. Yes, sir.⁴

Dr. Murati was asked to decombine the 11% to the body as a whole (in the event the court determined it was the natural and probable consequence of the 1999 injury) from the remaining 30% impairment he opined existed for Claimant's injuries.

Q. Now, out of an abundance of caution, should the Court find that if there is an additional impairment it relates back to the 1999 accident, could you tell the Court your opinion what, if we back the nine percent out of each upper extremity for the carpal tunnel?

A. I can do that.

Q. Okay.

⁴ Murati Depo. at 47-48.

- A. So 14 and 8 would combine to 21. And 21 times 6 is 13 percent whole person. On the other side, 14 goes to 8 percent whole person. So we have an 8, a 13, 13 and 8 goes to 20 percent whole person. 20 and 2 goes to 22 and 1 is 23 percent whole person. If you back out all of the impairments for the second injury for the carpal tunnel.
- Q. So can you say it was, what was that again, Doctor?
- A. 23 percent whole person.
- Q. So I want to make sure, that would be your impairment for the injury you have diagnosed as the right occipital neuropathy with headaches, the bilateral ulnar cubital syndrome, the right rotator cuff sprain versus tear and the myofascial pain syndrome of the right shoulder girdle extending in the cervical paraspinals; is that correct?
- A. Yes, sir.
- Q. And again, that 23 percent would be using the AMA Guidelines, Sixth Edition as a starting point?
- A. Yes, sir.
- Q. And the prevailing factor in causing the 23 percent impairment that you have given would be the each and every working day accident of September 19, '19?
- A. That's right.⁵

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*, 6th ed.), as a starting point, Dr. Murati testified Claimant would have an overall 30% whole person impairment for the 2019 claim.⁶ Dr. Murati opined the overall 30% whole person impairment related to the second injury. He testified:

- Q. So here, and this is my mistake. So it's my understanding that you find essentially a new carpal tunnel condition has occurred each and every working day ending September 19 of '19, correct?
- A. Yes, and the only way that can happen is with structural anatomical change. Why is this? The microscopic injuries to the fibers of the median nerve. You don't go from being asymptomatic and able to do your work and symptomatic

⁵ *Id.* at 44-46.

⁶ *Id.* at 26, 32-33, 41-43.

and not able to do your work by chance. Something has to happen and in this case the fibers to the median nerve, the damage to them at the median nerve.⁷

Claimant currently experiences pain, numbness and tingling in her right hand, right shoulder and neck; constant numbness and tingling in her right hand and wrist; tenderness in her forearms; and occasional left hand and wrist pain. She has difficulty with grip strength, causing her to drop things. Claimant's shoulder pain radiates from her neck and across her shoulders, and she can no longer raise her arm over her head. She has constant neck pain and almost daily headaches on her right side for which she takes Tylenol.

The ALJ stated Claimant is entitled to an award of \$24,659.61, as follows:

In the 1999 case:

Claimant's prior 15% impairment is found to have increased an additional 11%, making for a 24% BAW rating. Using 415 weeks, this 24% rating results in 99.6 weeks. Claimant's applicable workers compensation rate is \$306.36. $306.36 \times 99.6 = \$30,513.49$. Giving Respondent \$19,070.91 credit for the past award paid on the original 15% results in an additional modification valued at \$11,4442.69. [sic]

In the 2019 case:

Claimant's overall rating is 30%; using 415 weeks, this 30% rating results in 124.5 weeks. Claimant's applicable workers compensation rate is \$530.80. $530.80 \times 124.5 = \$66,1084.60$. Giving Respondent "current dollar value" requires the newly modified 24% or 99.6 weeks to be multiplied against \$530.80 which equals \$52,867.68; $\$66,1084.60 - \$52,867.68$ makes for a total award of \$13,216.92.⁸

Claimant argues she sustained a 30% impairment to the body as a whole based upon the *Guides*, 6th ed., for the 2019 claim. In the alternative, Claimant argues she has an additional 11% impairment to the body as a whole for the 1999 accident based upon the *Guides*, 4th ed., and a 25% impairment to the body as a whole based upon the *Guides*, 6th ed., for the 2019 accident. Respondent maintains the Award & Modification Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act provides any award may be reviewed by the ALJ, except for lump-sum settlements. If the ALJ finds the initial award is excessive or inadequate, or the functional impairment or work disability of the employee has increased

⁷ *Id.* at 28.

⁸ ALJ Award & Modification Order at pp. 9-10.

or diminished, the ALJ may modify the underlying award.⁹ Review and modification must be based on new facts showing a change of condition rendering the former award excessive or inadequate.¹⁰

Here, there is not an issue regarding whether Claimant's impairment of function has increased. The issue is whether all or some of the increased functional impairment should be awarded under the initial award or all of the increased impairment should be awarded under the new claim. In awarding an increase of functional impairment under the first award, the ALJ found the medical evidence established Claimant had right upper extremity problems in 1999 (declined surgical intervention and received an impairment rating). The ALJ also relied on Dr. Fotopoulos, the court-ordered evaluator's, opinion Claimant's second injury was an aggravation of the first injury and her right carpal tunnel syndrome related back to the first injury. The Board agrees with these findings.

Additional evidence supporting these findings is Claimant's testimony she continued to have symptoms in her right upper extremity from 2001 through 2016, "it never went away." Dr. Murati's reports both opined Claimant's bilateral carpal tunnel syndrome related back to the first injury (each and every working day ending 12/6/99). Dr. Murati, however, changed his causation opinion when he testified Claimant suffered "recurrent bilateral carpal tunnel." Dr. Murati's causation opinion is based on the assumption Claimant was "asymptomatic and able to work." Claimant's testimony shows she was not asymptomatic in her right upper extremity from 2001 through 2016.

Accordingly, Claimant has an additional 11% impairment to the body as a whole, based upon the *Guides*, 4th ed., for the increase in her impairment for her bilateral carpal tunnel condition in the 1999 accident. Claimant's request for review and modification was filed well past the 415 week limitation for compensation for her 1999 injury. The Board is without jurisdiction to modify her first award of compensation.¹¹

The parties stipulated Claimant was eligible for an increase in functional impairment upon her Application for Review and Modification should it be ordered, but was not eligible for work disability benefits as more than 415 weeks had elapsed since the date of her accident.¹² The parties can not confer jurisdiction upon the Board. In *Acosta*,¹³ the

⁹ K.S.A. 44-528(a).

¹⁰ *Coffman v. State of Kansas*, 31 Kan. App. 2d 61, 64, 59 P.3d 1050 (2002).

¹¹ *Stinchcomb v. Raytheon Aircraft Co.*, No. 92,174, 2005 WL 1214246 (Kansas Court of Appeals unpublished opinion filed May 20, 2005).

¹² Stipulation Upon Review & Modification (filed July 30, 2021).

¹³ *Acosta v. National Beef Packing*, 273 Kan. 385, 386, 44 P.3d 330 (2002).

Supreme Court held “Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes; any exercise of authority claimed by the agency must come from within the statutes.”

Claimant is found to have a 23% impairment to the body as a whole based upon the *Guides*, 6th ed., for the 2019 accident for injuries sustained for right occipital neuropathy with headaches, bilateral ulnar cubital tunnel syndrome, right rotator cuff strain versus tear with probable labral tear pathology, and myofascial pain syndrome of the right shoulder girdle extending into the cervical. The ALJ found the credit contained in K.S.A. 44-501(e) applicable and reduced Claimant’s award for the second injury. K.S.A. 44-501(e) states in pertinent part:

(e) An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting.

...

(A) If the preexisting impairment is the result of injury sustained while working for the employer against whom workers compensation benefits are currently being sought, any award of compensation shall be reduced by the current dollar value attributable under the workers compensation act to the percentage of functional impairment determined to be preexisting.

Claimant’s award of compensation in her first claim was limited to bilateral carpal tunnel injuries. The new claim is for new and distinct body parts for which compensation has not been awarded. Therefore, there is no “functional impairment determined to be preexisting” as contemplated by the credit contained under K.S.A. 44-501(e) for the newly injured body parts and the credit does not apply. The Board finds Claimant has a 23% impairment to the body as a whole based upon the *Guides*, 6th ed., for the second injury.

AWARD

WHEREFORE, the Board affirms in part and reverses in part the November 9, 2021, Award & Modification Order.

Claimant is entitled to 95.45 weeks of permanent partial disability compensation at the rate of \$530.80 per week, for a total due and owing of \$50,664.86.

As of March 22, 2022, there is due and owing Claimant 95.45 weeks of permanent partial disability compensation at the rate of \$530.80 per week for a total due and owing of \$50,664.86, which is ordered paid in one lump sum less amounts previously paid.

JUDY KEENAN

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AP-00-0462-204/CS-00-0267-277

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
William Phalen
Jeffery Brewer
ALJ Steven Roth