

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DIANA LOPEZ</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0472-902
<b>NATIONAL BEEF PACKING CO.</b>	)	CS-00-0450-236
Respondent	)	
AND	)	
	)	
<b>AMERICAN ZURICH INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Both parties appealed the December 20, 2022, Award issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 11, 2023.

**APPEARANCES**

Jeff K. Cooper, appeared for Claimant. Shirla R. McQueen appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the following and the documents of record filed with the Division:

1. Transcript of Preliminary Hearing, held December 11, 2020;
2. Deposition of Genaro Sanz, held June 26, 2020, with exhibits
3. Vito Carabetta, M.D. IME reports dated June 22, 2021, and November 4, 2021;
4. Deposition of Vito Carabetta, M.D., held January 18, 2022, including exhibits;
5. Deposition of Danny Briggs, Jr., held May 10, 2022, including exhibits;
6. Deposition of Genaro Saenz, held May 10, 2022, including exhibits;
7. Transcript of Regular Hearing, held September 1, 2022;
8. Transcript of Continuation of Regular Hearing, held October 14, 2022, including exhibits

9. Deposition of Steve Benjamin, held September 23, 2022, including exhibits;
10. Deposition of David W. Hufford, M.D. held October 17, 2022, including exhibits;
11. Deposition of Pedro Murati, M.D. held October 19, 2022, including exhibits;
12. Deposition of Vito Carabetta, M.D. held October 31, 2022, including exhibits;
13. Deposition of Karl Ulibarri, held November 14, 2022, including exhibits;
14. Deposition of Karen Terrill, held November 14, 2022, including exhibits; and
15. Deposition of Armando Barboza, held November 21, 2022.

#### ISSUES

1. Was Claimant's work the prevailing factor for her myofascial thoracic/cervical injury diagnosis?
2. Did Claimant's torn right rotator cuff injury arise out of and in the course of employment?
3. What is the nature and extent of Claimant's disability, including work disability?
4. Is Claimant entitled to future medical treatment?
5. Is Claimant entitled to reimbursement of medical bills related to the right shoulder?

#### FINDINGS OF FACT

Claimant's job with Respondent was fabrication supervisor. Claimant's average weekly wage at the time of her accident was \$1,096.16. Her job duties included making the schedule, changing equipment, product specification and supervising employees. From December 20, 2019, to January 2, 2020, Claimant performed one of her employee's job duties, deboning brisket.

Deboning brisket involves the brisket falling onto a conveyor belt in front of the worker which requires the worker to reach with the right arm, while using a hook to grab the meat off the belt and pull it towards the worker. The left arm is used to pull the meat out to cut and debone it with the right arm. After the brisket is deboned, the right arm is used to throw the bone onto an overhead belt. This is a repetitive task. Claimant did this job for two weeks, 8 hours a day. She handled a fourth of 3,150 head of cattle per day or 787.5 briskets per day.

As Claimant performed this job, she started to feel pain in her chest and tenderness extending into her right side under her armpit. Claimant reported these symptoms to her boss, Mr. Saenz. Claimant initially thought there was something wrong with her breast and planned on seeing her primary care physician. However, on January 3, 2020, Claimant went to the emergency room. The diagnosis was reactive lymphadenopathy and rotator cuff problems. Claimant was instructed to rest. Claimant presented Respondent with the emergency room's doctor note and did not return to work until the following Monday.

Claimant went to her primary care doctor on January 6, 2020, where she received a diagnosis of tendinitis and problems with her right shoulder. Claimant reported this diagnosis to the company nurse on January 7, 2020.

On January 10, 2020, through her personal health insurance, Claimant received an MRI of her right shoulder. The MRI showed a torn rotator cuff. On March 11, 2020, Claimant had right shoulder surgery to repair the rotator cuff tear with Dr. Desai, through her personal health insurance.

Claimant reported a work-related injury to the company nurse on January 22, 2020, and requested workers compensation benefits. Claimant reported injury to her right flank, right breast, and rotator cuff tear due to deboning briskets on the line for two weeks. Her claim was denied by Respondent.

Claimant believed her injuries were work-related. She performed eight hours for two weeks a job she was not physically used to. She does not do anything outside of work she considered to put her at risk for a rotator cuff injury. Claimant is five foot four inches tall and weighs 140 pounds.

Claimant was released from care by Dr. Desai July 6, 2020, as Claimant reached maximum medical improvement.

Dr. David W. Hufford first examined Claimant on February 20, 2020, at Respondent's request. Claimant complained of pain in the right shoulder and anterior chest and numbness and tingling throughout the right upper extremity. Dr. Hufford noted no direct vertebral tenderness in the cervical spine; generalized tenderness about the right shoulder; diminished range of motion due to voluntary guarding of the right shoulder; positive provocative rotator cuff signs; tenderness about the posterior and lateral chest wall below the right axilla extending somewhat anteriorly. Claimant had an MRI of the right shoulder, which showed high-grade partial tearing and a possible full-thickness tear of the supraspinatus. Dr. Hufford opined Claimant was involved in repetitious occupational activities and her primary area of pain was more musculoskeletal or myofascial in nature involving the chest wall rather than the shoulder or neck directly. He diagnosed repetitive

occupational activities with the subsequent development of chest wall pain becoming more generalized, including the right upper extremity.

Dr. Hufford dismissed her chest wall and breast pain and found “the sequence of events that have been described are not consistent with nor sufficient to have caused a rotator cuff tear in the very short interval of time she was involved in the occupational activities of deboning brisket”.<sup>1</sup> He found Claimant’s work activities were not consistent nor sufficient to cause any direct injury to the cervical spine nor the evolution of radiculopathy in the right upper extremity. He opined further investigation with a cervical MRI and electrodiagnostic testing of the right upper extremity would be useful to help establish a surgical path to repair the right shoulder rotator cuff tear. Dr. Hufford opined the occupational component of her condition was the myofascial pain possibly including the pectoralis muscle, but it is not responsible for the chest wall and right upper extremity pain, paresthesias, the rotator cuff tear in the right shoulder, or the rash leading her to the emergency room. Dr. Hufford opined the occupational activities were not the prevailing factor for Claimant’s current condition nor need for further treatment.

On September 17, 2020, Dr. Hufford examined Claimant again. He diagnosed post rotator cuff surgery with Dr. Desai. Dr. Hufford noted Claimant had been released at maximum medical improvement, without restrictions and returned to normal duty. Claimant continued to have some right shoulder pain anteriorly. Dr. Hufford assigned 6 percent permanent partial impairment of the right upper extremity for range of motion deficits under the *American Medical Association Guides to the Evaluation of Permanent Impairment 6<sup>th</sup> Edition* (hereinafter referred to as *The Guides*). No restrictions and no further medical treatment was required. Dr. Hufford found Claimant’s current symptoms in the right upper extremity and cervical spine can not be attributed to the occupational activities.

Dr. Pedro A. Murati examined Claimant on May 13, 2020, at her attorney’s request. Claimant’s chief complaints were: right hand shaking; right upper extremity pain when picking up objects; unable to perform job duties; unable to attend to her son; stiffness in the right upper extremity; difficulty driving/turning the wheel; difficulty with housework and yard work due to right upper extremity pain; limited range of motion of the right upper extremity; and soreness in the chest. All of these complaints were post-right shoulder rotator cuff surgery. Claimant denied any significant injuries to the right upper extremity and chest prior to December 19, 2019.

Upon review of Claimant’s prior records and examination of Claimant, Dr. Murati diagnosed: status-post right shoulder arthroscopic debridement with subacromial decompression on 3-11-20; right occipital neuropathy with headaches; and myofascial pain

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<sup>1</sup> Dr. Hufford Depo., Exhibit 2.

syndrome of the right shoulder girdle extending into the cervical and thoracic paraspinals.

Dr. Murati recommended physical therapy for the right shoulder complaints, occipital blocks for the occipital neuropathy and physical therapy with pain release techniques for the myofascial pain syndrome. He also recommended cortisone trigger point injections and anti-inflammatory medication and Zanaflex for muscle spasms.

Dr. Murati ordered temporary restrictions in an eight hour workday of no climbing ladders; no crawling; no heavy grasping more than 40 kg with the right; no above the shoulder work with the right; no lifting, carrying, pushing, or pulling more than 35 pounds, occasionally lift 35 pounds, frequently lift 20 pounds; no work more than 24 inches away from the body on the right; avoid awkward positions of the neck; and avoid trunk twisting.

Dr. Murati opined Claimant sustained multiple repetitive traumas at work which resulted in right upper extremity complaints. He further found under all reasonable medical certainty and probability the prevailing factor in the development of the conditions was the multiple repetitive traumas at work and the employment exposed Claimant to an increased risk she would not have had if she were unemployed. Dr. Murati testified Claimant's type of injuries were consistent with work at meat packing plants. Claimant never reported a pop in her shoulder to Dr. Murati.

Claimant met with Dr. Murati again on January 14, 2021, at the request of her attorney. Claimant had chief complaints of occasional right upper extremity pain when picking up objects; occasional difficulty with housework and yard work due to right upper extremity pain; limited range of motion of the right upper extremity; and difficulty lifting overhead. Claimant reported her symptoms improved since the last visit.

Dr. Murati examined Claimant and diagnosed status post-right shoulder arthroscopic debridement, subacromial decompression on 3-11-20; and myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals. Dr. Murati did not change his prevailing factor opinion.

Dr. Murati rated Claimant's permanent impairment referencing both *The Guides* and the 4<sup>th</sup> Edition of *The Guides*. Under *The Guides*, Dr. Murati found Claimant had a body as whole impairment of 10 percent which included right shoulder status post subacromial decompression, right upper extremity impairment and myofascial pain syndrome. Under *The Guides 4<sup>th</sup> Edition*, Claimant has 20 percent body as a whole impairment. Based on Dr. Murati's training, experience and expertise in evaluating the conditions Claimant has, he opined the 20 percent impairment rating most closely approximates Claimant's true impairment.

Dr. Murati ordered permanent restrictions in an eight-hour day of no climbing

ladders; no crawling; no heavy grasping more than 40 kg with the right; no above shoulder work with the right; no lifting, carrying, pushing, or pulling more than 35 pounds, occasionally lift 35 pounds, frequently lift 20 pounds; no work more than 24 inches away from the body on the right; and avoid awkward positions of the neck.

Dr. Murati opined Claimant will need future medical treatment, which will eventually include right shoulder replacement.

Dr. Murati reviewed the task list of Steve Benjamin and opined Claimant has a lost the ability to perform 3 out of 15 tasks for 20 percent task loss.

Dr. Vito J. Carabetta examined Claimant on June 22, 2021, at the request of the Court. Claimant reported residual anterior and lateral right shoulder pain. She described the pain as sharp and intermittent, with pain for two days and no pain for two days. Claimant also had pain posteriorly at the base of the neck in the right upper back region and described it as constant and variable deep aching pain. These areas of pain can flare up at the same time or separately. Claimant told Dr. Carabetta the pain in her right shoulder was from an incident at work when she was deboning brisket on January 2, 2020, and felt a sudden popping sensation in her right shoulder. He also noted Claimant reported some improvement in her condition.

Dr. Carabetta diagnosed Claimant with status post-right rotator cuff tear repair; and regional fibromyositis in the right upper trapezius muscle area. Dr. Carabetta opined the repetitive activity from December 20, 2019, to January 2, 2020, was not the prevailing factor for Claimant's rotator cuff tear. He opined Claimant suffered the rotator cuff tear in a specific incident on January 2, 2020, at work, where forceful pushing and pulling caused a popping sensation in her right shoulder. He opined the myofascial pain diagnosis was due to repetitive use.

Dr. Carabetta found Claimant to be at maximum medical improvement and assigned permanent impairment of 13 percent body as a whole (2 percent body as a whole for cervical involvement; 2 percent body as a whole for the thoracic involvement; 15 percent right upper extremity (10 percent for resection arthroplasty and 6 percent for rotator cuff tear, which converts to 9 percent body as a whole). This impairment rating was based on competent medical evidence using *The Guides* as a starting point.

As of June 21, 2021, Dr. Carabetta did not feel he could determine any kind of restrictions without a functional capacity evaluation, but felt Claimant should avoid lifting over 5 pounds. On November 4, 2021, after reviewing a functional capacity evaluation he assigned permanent restrictions of no lifting over 35 pounds; limit her lifting activities up to chest level and not above and; no lifting above shoulder level over 5 pounds.

Dr. Carabetta opined Claimant did not require future medical treatment.

Dr. Carabetta was deposed on October 31, 2022. Claimant reported a shoulder injury after an MRI was done to investigate the cause of her chest wall pain and swelling. He opined the cervical and thoracic impairments were due to Claimant's work as the likely cause. Claimant was in her thirties and is in good health. Dr. Carabetta stated other than Claimant's work activities, there was no other plausible cause for Claimant's injuries.

Dr. Carabetta reviewed the task list of Steve Benjamin, and concluded Claimant could no longer perform 3 out of 15 tasks for 20 percent task loss.

Claimant acknowledged she only told Dr. Carabetta about the pop in her shoulder because he was the only doctor who questioned her in such a way to elicit this information. Claimant was uncertain as to any significance of a pop in her shoulder.

Steve Benjamin interviewed Claimant on January 24, 2022, at the request of Claimant's attorney. Mr. Benjamin identified 15 tasks Claimant performed in the five years preceding her accident. Mr. Benjamin found Claimant had a wage loss of 41.6 percent.

Karen Terrill interviewed Claimant on October 23, 2022, at the request of Respondent. Ms. Terrill identified 18 tasks Claimant had performed in the five years preceding her accident. Ms. Terrill opined Claimant did not have a wage loss.

On December 15, 2021, Respondent reassigned Claimant to a warehouse clerical position due to her restrictions and less range of motion in her right shoulder. Claimant is no longer a supervisor and eligible for bonuses. Claimant's current average wage is \$870.17

Respondent had several witnesses testify. There was testimony from Danny Briggs, physician assistant for Respondent, who testified Claimant, after his physical exam and no diagnostic testing, did not have a torn rotator cuff in her right shoulder, despite an MRI to the contrary. Two supervisors testified Claimant, at most, was deboning brisket only four hours per day and the brisket she was deboning weighed between 25 to 30 pounds. Claimant was deboning at waist height instead of chest height and there was no difference between deboning natural beef and usual beef. One supervisor, Armando Barboza, acknowledged a certain amount of force is required to remove a bone from a brisket. All supervisors acknowledged deboning brisket was an unusual task for Claimant. Claimant testified she worked deboning briskets weighing over 30 pounds, natural beef was more difficult to cut than usual beef and gave varied testimony as to deboning a brisket at waist level or chest level.

ALJ Hursh found Claimant suffered a myofascial thoracic/cervical injury, only and awarded a 4 percent functional impairment to the body as a whole. He did not award anything for the right shoulder because the injury was not reported to the supervisor, when she complained of chest wall pain, and it was not proven within a preponderance of the credible evidence the work caused injury to the rotator cuff. As a result, medical bills from Southwest Medical Center and SW Professional Physicians for lymphadenopathy and rotator cuff problems were found not work-related and were denied payment. Future medical was also denied.

### PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Award should be reversed in part and affirmed in part. Respondent contends Claimant failed to prove her work activity was the prevailing factor in her alleged January 2, 2020, injury by repetitive trauma with specific regard to her myofascial thoracic/cervical injury diagnosis, and therefore compensation should be denied. Respondent also contends the denial of future medical should be affirmed and the denial of payment of medical bills for lymphadenopathy and rotator cuff problems should be affirmed.

Claimant's argues the credible evidence establishes she met her burden of proving her work accident is the prevailing factor causing the rotator cuff tear and myofascial injuries. The award should be modified to reflect 13 percent body as whole impairment and Claimant is entitled to future medical benefits.

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

"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. 44-508(f) states:

(2) An injury is compensable only if it arises out of and in the course of employment.

...

...

(B) An injury shall be deemed to arise out of employment only if:

(i) There is a casual connection between the conditions under which the work is required to be performed and the resulting accident; and



(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability and impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant is a five foot four inches tall female who weighs approximately 140 pounds. She was, at the time of the accident, a fabrication supervisor whose primary duties were scheduling, product specification, supervising employees and changing equipment. Beginning on December 20 2019, until January 2, 2020, Claimant filled in for one of her employees who was on vacation deboning briskets four to eight hours a day. This job required repetitive motion of pushing and pulling meat weighing approximately 20 to 25 pounds and cutting the bone away from the meat. It is undisputed Claimant engaged in this activity in service to Respondent.

After performing the deboning brisket job for two weeks, Claimant developed pain in her right upper extremity and into the right side of her chest wall and shoulder area. Claimant was eventually diagnosed by two physicians with myofascial pain syndrome and a torn rotator cuff in her right shoulder. Claimant did not do anything in her personal life or at work besides deboning brisket competent to cause such injuries and her work is the only plausible cause for injuries.

Respondent attempts to dispute Claimant's injuries were caused by her work activity of deboning briskets in several ways. There was testimony about whether Claimant performed the work at waist level or chest level, the number of hours per day she performed the work, whether natural beef or usual beef is the same. None of this evidence is sufficient to overcome the proven facts Claimant was injured as result of deboning briskets for two weeks, a task she did not usually perform, was repetitive and according to two medical experts was competent to cause her injuries.

Claimant's testimony, not artful at times, was an attempt to convince her employer, when confronted with an immediate denial of her injuries, to explain why or how she was injured.

Respondent attempts to discredit Claimant by arguing there was no pop in her shoulder reported until she saw Dr. Carabetta. Claimant explains she was not aware of any significance of a popping sensation in her shoulder in diagnosing an injury until Dr. Carabetta questioned her in such a manner she reported it. The doctors all agreed even if Claimant were deboning briskets 4 hours a day for 2 weeks, it is still competent to cause

some injury. Working at waist level or chest level, according to the medical evidence makes no difference and is still competent to cause myofascial pain syndrome. All the doctors and one of the supervisors who testified, found Claimant to be an honest and truthful.

It is found and concluded Claimant has proven she injured her right shoulder and developed myofascial pain from deboning brisket for Respondent. Work was the prevailing factor for these injuries. Dr. Carabetta, the doctor ordered to examine Claimant by the Court, found the prevailing factor for Claimant's injuries was the work activity of deboning brisket and Claimant has a permanent impairment of 13 percent to the body as a whole. Dr. Carabetta's opinion is the most credible because he is a neutral examiner, ordered by the Court to examine and evaluate Claimant.

Despite Claimant meeting the impairment threshold to claim work disability she is waiving her right to work disability **at this time**, based on statements made by Claimant's attorney at oral argument.

K.S.A. 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.

One of the physicians, Dr. Murati, testified Claimant should receive future medical treatment. Such testimony is sufficient to award Claimant future medical upon proper application.

Any medical bills incurred to treat Claimant's right shoulder are authorized and shall be paid in accordance with the fee schedule.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of ALJ Kenneth J. Hursh dated December 20, 2022, is modified. Claimant is awarded permanent partial disability based on 13 percent body as a whole functional impairment, which included permanent impairment to the thoracic and cervical spine and right shoulder. Respondent and its insurance carrier shall pay Claimant 53.95 weeks of permanent partial disability benefits at the rate of \$666.00 for a 13 percent impairment to the body as a whole, totaling \$35,930.70. As of the date of this Order all weeks of permanent partial disability, a total of \$35,390, less any amounts previously paid, are due and owing and shall be paid in lump sum. Claimant is awarded future medical upon proper application. Medical bills incurred for treatment of the right shoulder are authorized and shall be paid in accordance with fee schedule.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2023.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant  
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier  
Hon. Kenneth J. Hursh, Administrative Law Judge