

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**LINDA EPPS**  
Claimant

v.

AP-00-0472-965  
CS-00-0455-592

**MACY'S RETAIL HOLDINGS, INC.**  
Respondent

and

**AMERICAN ZURICH INS. CO.**  
Insurance Carrier

**ORDER**

Respondent and Insurance Carrier requested review of the January 6, 2023, Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on May 11, 2023.

**APPEARANCES**

Thomas Stein appeared for Claimant. Ryan D. Weltz appeared for Respondent and Insurance Carrier (Respondent).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Transcript of Regular Hearing, held October 10, 2022, including Exhibits 1-4; the Stipulation signed by counsel, filed on November 17, 2022; the transcript of Remote Evidentiary Deposition of David J. Clymer, M.D., taken November 14, 2022, including Exhibits 1-2; the transcript of Zoom Deposition of Anne Rosenthal, M.D., taken October 25, 2022, including Exhibits 1-2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

**ISSUES**

1. Did Claimant sustain personal injury from an accident arising out of her employment with Respondent?
2. What is the nature and extent of Claimant's disability?
3. Is Claimant eligible to receive an award of future medical treatment?

**FINDINGS OF FACT**

Claimant works for Respondent at the Beauty and Fragrance Counter. Claimant's work involves selling perfumes and cosmetics to customers and stocking products. Claimant's work requires standing and walking. Claimant's department has a tiled floor. Some of the tiles on the floor are uneven, and Claimant often kicked some of the tiles while walking on the floor. Before November 29, 2020, Claimant never fell from kicking a tile. Although Claimant sometimes walked in the area when she shopped on her personal time, she walked in the area more while working.

On November 29, 2020, Claimant walked from the men's fragrance counter to the women's fragrance counter to assist a customer. Claimant denied rushing to the customer. Claimant was wearing flat-soled boots. The floor was not wet. As Claimant was walking to the customer, she kicked a tile on the floor and fell forward to the ground. Claimant denied falling as a result of a personal health condition. Claimant landed on her right side, and felt an immediate onset of pain in the right shoulder and right hip. Claimant's sister transported Claimant to the emergency department of St. Luke's North Hospital. Claimant was diagnosed with a comminuted displaced fracture of the proximal humerus, and was placed in a sling.

Claimant spoke with Respondent's representative about the accident the following day. Respondent did not refer Claimant to a health care provider. One or two weeks later, Claimant received a letter from Respondent advising the workers compensation claim was denied. Claimant received medical treatment on her own after receiving notice of the denial.

Claimant received additional treatment for her right shoulder from Dr. Williamson, who performed a total shoulder replacement procedure. Claimant was taken off work until March 18, 2021, when Claimant was released to return to work with restrictions. In November 2021, Dr. Williamson released Claimant from his care. Dr. Williamson imposed a permanent restriction of no lifting over twenty-five pounds. Claimant was also diagnosed with a minimally displaced right superior pubic ramus fracture, with no evidence of hip fracture, which was treated conservatively. Claimant's medical care was paid by her personal health insurance carrier and Medicare.

Claimant returned to work for Respondent performing her regular job duties. Claimant reported her right shoulder was doing "pretty good."<sup>1</sup> Claimant's shoulder aches occasionally depending on activities. Claimant can move her right arm behind her back, but range of motion is limited compared to the left side. Claimant cannot raise both arms

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<sup>1</sup> R.H. Trans., at 18.

overhead, and she cannot lift heavy boxes or furniture at her home. Claimant also reported some residual aching at the right hip. Claimant occasionally takes Tylenol for pain.

Dr. Rosenthal, an orthopedist specializing in upper extremities, evaluated Claimant on December 14, 2021, at her attorney's request. The mechanics of the accident and course of treatment were reviewed. Claimant reported limited motion, weakness and problems lifting heavy items, and pain in the hip. Physical examination was notable for decreased grip strength on the right side, limited range of motion of the right shoulder, and weakness of the right arm. Using the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (AMA Guides)*, Dr. Rosenthal rated Claimant's impairment at 28% of the body as a whole for the right shoulder and 5% of the body as a whole for the right hip, producing total impairment of 32% of the body as a whole. Dr. Rosenthal did not modify the rating based on competent medical evidence. Future medical treatment, consisting of annual physician visits and possible replacement of the shoulder hardware, was recommended.

Dr. Clymer, an orthopedist, evaluated Claimant on February 28, 2022, at Respondent's request. Dr. Clymer reviewed the medical records of Drs. Williamson and Zybko, St. Luke's Hospital and Physical Therapy, and Dr. Rosenthal's report. Dr. Clymer reviewed the accident and Claimant's course of treatment. Dr. Clymer noted Claimant sustained injuries from an unrelated fall at home in July 2021, which did not affect the work-related injuries. Examination of the right hip indicated no problems, some crepitus, and a normal gait. Examination of the right shoulder indicated self-limited range of motion testing due to complaints of pain and weakness, and Dr. Clymer thought Claimant displayed residual loss of range of motion and weakness. After consulting the *AMA Guides*, and stating the shoulder rating provided in the *AMA Guides* was too low, Dr. Clymer rated Claimant's impairment at 24% of the body as a whole, with 22% impairment of the body as a whole for the right shoulder and 2% of the body as a whole attributable to the pelvis. Dr. Clymer thought Claimant should limit lifting to twenty pounds and avoid overhead activities. Dr. Clymer did not recommend future medical treatment, and did not believe a future shoulder replacement would be necessary. Dr. Clymer, however, thought obtaining periodic X-rays of the shoulder and follow-ups every one to two years would be appropriate. Dr. Clymer also testified Claimant's course of treatment was reasonable.

On January 6, 2023, ALJ Sample issued the Award. ALJ Sample concluded Claimant met her burden of proving she sustained injuries from an accident arising out of and in the course of her employment with Respondent, because the tiles on the floor caused Claimant to fall while she was walking as part of her work duties. ALJ Sample awarded permanent partial disability compensation based on 28% functional impairment of the body as a whole, attributable to the right shoulder and hip, based on an average of the two ratings in evidence. Temporary total disability compensation, unauthorized medical, future medical, and reimbursement for past medical expenses paid by Claimant

and Claimant's personal health insurer were also awarded. These review proceedings follow.

### PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the award of compensation should be reversed because Claimant's injuries were not caused by an accident arising out of Claimant's employment with Respondent. Respondent argues Claimant fell while walking in an area where she also walked while shopping during her personal time, and the accident was the product of a neutral risk with no particular employment or personal character. Respondent also argues Claimant should be awarded permanent partial disability compensation based on the 24% functional impairment of the body as a whole rating issued by Dr. Clymer if this matter is compensable. Respondent also argues the award of future medical should be reversed.

Claimant argues this matter is compensable because walking was inherent in Claimant's work for Respondent, and the accident occurred while Claimant was walking on a tile floor while working. Claimant also argues she should be awarded permanent partial disability compensation based on 32% functional impairment of the body as a whole, which is Dr. Rosenthal's impairment rating. Claimant maintains the award of future medical should be affirmed.

#### **1. Claimant sustained personal injuries from an accident arising out of her employment with Respondent.**

The primary issue is whether Claimant met her burden of proving she sustained personal injuries from an accident arising out of her employment with Respondent. It is undisputed Claimant sustained injuries to her right shoulder and pelvis from a fall occurring on Respondent's premises on November 29, 2020. It is also undisputed the fall occurred in the course of Claimant's employment with Respondent. Respondent contends the fall did not arise out of Claimant's employment because it was the product of a neutral risk with no particular employment character, as Claimant walked in the same area while shopping on her personal time.

An accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.<sup>2</sup> An injury occurring as a result of day-to-day activities, a neutral risk with no particular employment or personal

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<sup>2</sup> See K.S.A. 44-508(f)(2)(B).

character, a risk personal to the worker or occurring either directly or indirectly from idiopathic causes is not considered to arise out of and in the course of employment.<sup>3</sup>

K.S.A. 44-508(f)(3)(A) does not disqualify all neutral risks, but only neutral risks with no particular employment or personal character.<sup>4</sup> The employer has the burden of proving the neutral risk defense applies.<sup>5</sup> To determine whether the accident is compensable, the event as a whole is reviewed to determine if it is connected to, or inherent in, the performance of the employee's job for the employer.<sup>6</sup> If the event is connected to the employee's work, the neutral risk defense does not apply.

After reviewing the event of November 29, 2020, as a whole, the Board concludes the neutral risk defense does not apply. It is undisputed Claimant was at the place of employment during regular working hours performing her usual work duties in service to Respondent when the accident occurred. Claimant was not engaged in shopping during her personal time. Instead, Claimant was walking to assist a customer as part of her usual work duties when the accident occurred. Walking is an essential requirement to Claimant's work, and was clearly connected to Claimant's performance of her job. Claimant's accident was work-connected, and the neutral risk defense from K.S.A. 44-508(f)(3)(A) does not apply. Moreover, the cause of the accident is clear: Claimant tripped on a raised tile in Respondent's floor while walking. The raised tile creates an additional work-connected risk of injury. Claimant met her burden of proving she sustained injuries from an accident arising out of her employment with Respondent.

**2. The award of permanent partial disability compensation based on 28% functional impairment of the body as a whole is affirmed.**

The Board next addresses the nature and extent issue. It is undisputed Claimant's injuries constitute injuries to the body as a whole under K.S.A. 44-510e. It is also undisputed Claimant is eligible to receive permanent partial disability compensation limited to her functional impairment. The extent of functional impairment is determined by

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<sup>3</sup> See K.S.A. 44-508(f)(3)(A).

<sup>4</sup> See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 50, 445 P.3d 1183 (2019), rev. denied 311 Kan. 1046 (2020).

<sup>5</sup> See *id.* at 53, 55.

<sup>6</sup> See *id.* at 52.

competent medical evidence, using the *AMA Guides* as a starting point.<sup>7</sup> Essentially, the parties argue the ratings from their respective rating physicians should control.

Dr. Rosenthal rated Claimant's impairment at 32% of the body as a whole, attributable to the right shoulder and hip. Dr. Clymer rated Claimant's impairment at 24% of the body as a whole, attributable to the right shoulder and hip. No other ratings are in evidence. Both physicians testified to the methodology used to rate Claimant's impairment, and each physician used the *AMA Guides* as a starting point and based their ultimate opinions on competent medical evidence and professional judgment. Claimant testified she continues to experience occasional residual aching in the right shoulder and hip, and less range of motion in the shoulder. Claimant is performing her usual work for Respondent. The Board finds the physicians' ratings equally credible. ALJ Sample's finding Claimant's functional impairment is 28% of the body as a whole, attributable to the right shoulder and hip, is affirmed.

### **3. The award of future medical treatment is affirmed.**

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.<sup>8</sup> It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.<sup>9</sup>

Both Drs. Rosenthal and Clymer testified Claimant would require future doctor visits to monitor the right shoulder. Dr. Clymer also testified Claimant would require X-rays, while Dr. Rosenthal thought Claimant may require a future shoulder replacement. Because both physicians testified Claimant would require the services of a physician in the future, Claimant satisfied K.S.A. 44-510h(e). The award of future medical is affirmed.

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<sup>7</sup> See K.S.A. 44-510e(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

<sup>8</sup> See K.S.A. 44-510h(a).

<sup>9</sup> See K.S.A. 44-510h(e).

**AWARD**

**WHEREFORE** it is the finding, decision and order of the Appeals Board the Award issued by ALJ Sample, dated January 6, 2023, is affirmed.

**IT IS SO ORDERED.**

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

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APPEALS BOARD MEMBER

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APPEALS BOARD MEMBER

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APPEALS BOARD MEMBER

c: (Via OSCAR)

Thomas Stein  
Ryan D. Wertz  
Hon. Julie A.N. Sample