

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA MACIAS de HERNANDEZ)	
Claimant)	
v.)	Docket: 1,085,920
)	CS-00-0255-934
TYSON FRESH MEATS, INC.)	AP-00-0454-107
Self-Insured Respondent.)	

ORDER

Claimant requested review of Administrative Law Judge (ALJ) Pamela J. Fuller's Award dated November 10, 2020. Scott J. Mann appeared for Claimant. Gregory D. Worth and Frank Matande appeared for the Self-Insured Respondent. The Board heard oral argument on February 25, 2021.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award. The record consists of: Deposition of Maria Macias de Hernandez dated July 15, 2020; Deposition of David Hufford, M.D., dated July 31, 2020, with exhibits 1-9; Regular Hearing Transcript dated August 4, 2020, with exhibit B1; Deposition of Maria Macias de Hernandez dated August 13, 2020; Evidentiary Deposition of Pedro Murati, M.D., dated August 20, 2020, with exhibits 1-3; Evidentiary Deposition of John P. Estivo, D.O., dated September 22, 2020, with exhibits 1-2; Deposition of Steve Benjamin dated September 28, 2020, with exhibits 1-2; Independent Medical Examination report of David Hufford, M.D., dated February 27, 2020; and the pleadings and orders contained in the administrative file.

ISSUES

1. May the Board determine if the use of the AMA *Guides to the Evaluation to Permanent Impairment* (6th ed.), (*Guides* 6th ed.), fairly accounts for a worker's actual impairment and provides an adequate substitute remedy?
2. Were the repetitive activities the prevailing factor causing Claimant's injury, medical condition and need for treatment to her right shoulder?
3. What is the nature and extent of Claimant's disability, including whether she is entitled to a work disability?

4. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant is 54 years of age and began working for Respondent on Friday, June 8, 2018, as a meat trimmer. Claimant worked in tri tips from June 11 to July 19, 2018. Claimant used a hook to pull the product from a moving conveyor to her work station, trimmed the meat off both sides, and tossed the meat onto a different conveyer belt.¹

On June 14, 2018, during the first week of Claimant's employment, she reported pain in her hands and shoulder soreness. On July 2, 2018, Claimant reported right shoulder pain. On July 7, 2018, Claimant reported an injury to her left thumb when a piece product struck her left thumb, bending it backwards.

Claimant's symptoms worsened in early August 2018 when Respondent moved Claimant to a different job using a wizard knife. Claimant continued in the wizard knife job until August 20, when she was sent home. Claimant returned to work on August 22 and was informed she was terminated for failing to qualify.

Claimant was sent to Siena Medical Clinic on September 6, 2018, where she was seen by Kent R. Wagner, PA. Claimant complained of right elbow, right shoulder and left thumb pain. A right shoulder MRI was performed on October 4, 2018, which revealed a full-thickness rotator cuff tear with no associated differential muscle atrophy.² Dr. Ashfaq performed surgery on Claimant's right shoulder and left trigger thumb on November 28, 2018.

Claimant re-injured her shoulder while attending physical therapy after the surgery. On May 9, 2019, Claimant had a repeat MRI of her right shoulder. Claimant suffered a re-tear of her rotator cuff in her right shoulder. Dr. Ashfaq performed a second shoulder surgery on July 31, 2019, which revealed a large, irreparable rotator cuff tear. Following a course of physical therapy, Dr. Ashfaq released Claimant from treatment on September 30, 2019.

At her attorney's request, Claimant saw Dr. Pedro A. Murati on November 5, 2019. Dr. Murati diagnosed Claimant with status post left thumb and right shoulder surgery, right lateral epicondylitis, and myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals. Dr. Murati opined the prevailing factor for Claimant's diagnoses was the accidental injury by repetitive trauma at work for Respondent.

¹ Claimant Depo. (July 15, 2020) at 16-17.

² Hufford Depo. Ex. 7 at 1.

Dr. Murati testified the type of shoulder injury sustained by Claimant is not uncommon. He disagreed Claimant must have had a partial rotator cuff tear prior to working for Respondent, which was aggravated by her repetitive work. Claimant was asymptomatic prior to her work for Respondent. There are no records documenting Claimant had prior injuries to her right shoulder, elbow and left thumb. He opined assuming Claimant had a right shoulder condition prior to her work with Respondent was “speculative at best and not supported by medical evidence...her accident caused significant anatomical change that produced symptoms and impairment.”³

Dr. Murati also disagreed the 10 millimeter full thickness tear of the supraspinatus tendon revealed in the October 4, 2018, MRI would have been present for longer than one month before she had symptoms. Dr. Murati testified the retraction occurs immediately. “You know how fast it takes for a muscle to retract once its torn from the tendon? Immediately it retracts...But it happens immediately, it doesn’t – you don’t need a month. You need a millisecond, I guess, before the retraction takes place.”⁴

Using the *Guides*, 6th ed., Dr. Murati assigned Claimant 16% right upper extremity impairment for the loss of range of motion of the shoulder; 1% right upper extremity impairment for the right axillary distribution; 1% right upper extremity impairment for lateral epicondylitis at the right elbow; 13% left upper extremity impairment for the thumb. Using the combined values chart, Dr. Murati assigned a 20% whole person impairment. Dr. Murati provided Claimant a 30% whole person impairment under the *AMA Guides to the Evaluation of Permanent Impairment*, 4th ed. (*Guides*, 4th ed.).

Dr. Murati imposed permanent work restrictions of no climbing ladders; no crawling; no reaching more than 24 inches away from the body on the right; no above shoulder level work; no heavy grasp with the right upper extremity; avoid awkward positions of the neck; no use of hooks or knives with both arms; push, pull, carry to thirty-five pounds occasionally, twenty pounds frequently, and ten pounds constantly.

Dr. Murati recommended future medical treatment, including Celebrex, yearly follow-ups, physical therapy, trigger point injections, and a total shoulder replacement. He stated:

- A. Well, it’s never good to have such injuries, especially in her case. And I think this is probably going to end up needing a total shoulder replacement, because a normal arthritic processes that the body has over time are accelerated because of the rotator cuff tear. Now a retracted rotator cuff tear, it’s very difficult to reattach. She had a shoulder debridement. In other words, when they went in

³ Murati Depo. Ex. 2 at 6.

⁴ Murati Depo. at 9-10.

there, all they could do was cut out any soft tissue that was getting in the way. So essentially this lady now does not have a rotator cuff tendon.⁵

Dr. Murati's report and testimony indicated all of his opinions were within a reasonable degree of medical certainty.

At Respondent's request, Claimant saw Dr. John P. Estivo on November 4, 2019. Claimant presented with right shoulder pain and left thumb numbness. Dr. Estivo opined the prevailing factor for Claimant's injuries to her right shoulder and left thumb was the repetitive trauma while working for Respondent. Dr. Estivo imposed permanent restrictions of no over shoulder-height work with the right upper extremity. He indicated Claimant was not in need of future medical treatment.

Using the *Guides*, 6th ed., Dr. Estivo assigned Claimant 10% impairment to the right upper extremity and no impairment for the left thumb. Using the *Guides*, 4th ed., Dr. Estivo assigned 6% impairment to the right upper extremity and no impairment for the left thumb. Upon request, Dr. Estivo combined his shoulder rating (10%) with Dr. Hufford's thumb rating (6%) using the *Guides*, 6th ed., which resulted in 7% whole person impairment. Dr. Estivo's report and testimony indicated all of his opinions were within a reasonable degree of medical certainty.

On February 27, 2020, Claimant saw Dr. David W. Hufford for a Court-ordered independent medical examination. Dr. Hufford opined the prevailing factor for Claimant's injury to her left thumb was the repetitive trauma. He did not believe Claimant's injury to her right shoulder was the result of repetitive trauma. Dr. Hufford opined Claimant likely had a pre-existing partially torn rotator cuff when she began working for Respondent. The repetitive work activities likely caused additional tearing resulting in a completely torn rotator cuff.⁶

Dr. Hufford imposed permanent restrictions of "no lifting greater than ten pounds with the right arm, no overhead use of the right arm, and the avoidance of all repetitive gripping and grasping."⁷ He indicated Claimant was not in need of future medical treatment.

Using the *Guides*, 6th ed., Dr. Hufford assigned Claimant 5% impairment to the right upper extremity and 6% impairment for the left thumb. The two impairments combine for 4% whole person impairment. Using the *Guides*, 4th ed., Dr. Hufford assigned Claimant

⁵ Murati Depo. at 11-12.

⁶ Hufford Depo. at 27-28.

⁷ *id.* at 33

no impairment to the right upper extremity because he believed there is no way to rate right shoulder rotator cuff pathology with invalid range of motion. Dr. Hufford assigned 20% impairment for the left thumb. Dr. Hufford's report and testimony indicated all of his opinions were within a reasonable degree of medical certainty.

At her attorney's request, Steve Benjamin, a vocational rehabilitation consultant, interviewed Claimant by phone on November 11, 2019. Mr. Benjamin prepared a list of 27 tasks Claimant performed in the five years preceding the accident. Mr. Benjamin opined Claimant is capable of earning \$358.07 per week. Out of the 27 tasks listed by Mr. Benjamin, Dr. Murati opined Claimant was unable to perform 15 tasks, for a 55.55% task loss.⁸ Out of the 16 tasks listed by Mr. Benjamin, Dr. Hufford opined Claimant was unable to perform 8 tasks, for a 50% task loss.⁹

Claimant has not returned to work since she last worked for Respondent. She has not looked for work because of her restrictions. Claimant reports pain in her right shoulder. She tries not to use it. Claimant reports she has no feeling in her thumb and she has fingers on both hands that lock. Claimant currently cares for her grandchildren who reside with her and assist her with chores, driving, and shopping.

The ALJ found the prevailing factor for Claimant's right shoulder and left thumb was the repetitive trauma suffered while working for Respondent. The ALJ adopted Dr. Hufford's rating opinions as he was the Court-ordered evaluator and awarded a 4% whole person impairment. The ALJ denied a work disability award and future medical treatment. Finally, the ALJ ruled she did not have jurisdiction to determine constitutional issues.

Claimant requests review of the nature and extent of Claimant's disability, Claimant's entitlement to future medical, and whether the use of the *Guides*, 6th ed., violated the Claimant's constitutional due process rights. Respondent argues the Board should adopt Dr. Hufford's opinions in their entirety as Dr. Hufford was the Court-appointed physician who rendered a neutral opinion as to Claimant's impairment of right shoulder and left thumb.

ANALYSIS AND CONCLUSIONS

1. The Board may not determine if the use of the *Guides*, 6th ed., fairly accounts for a worker's actual impairment and provides an adequate substitute remedy.

⁸ Murati Depo. at 13-16; Ex. 3 at 9.

⁹ Hufford Depo. at 35-36.

K.S.A. 44-510e(a)(2)(B) states impairment ratings for injuries occurring after January 1, 2015, are to be based on use of the *Guides*, 6th ed. Claimant argues the use of the *Guides*, 6th ed., fails to provide an adequate substitute remedy and does not accurately assess a worker's impairment.

Section 18 of the Kansas Constitution Bill of Rights states "All persons, for injuries suffered in person, reputation of property, shall have remedy by due process of law, and justice administered without delay." According to Claimant, the conclusions of the Kansas Court of Appeals in *Johnson*,¹⁰ namely use of the *Guides*, 6th ed., denied due process to injured workers and did not provide an adequate substitute remedy, should still be good law, because the Kansas Supreme Court did not specifically address those issues.

*Johnson*¹¹ held K.S.A. 44-510e(a)(2)(B) requires functional impairment ratings must be proved by competent medical evidence and use of the *Guides*, 6th ed., is the starting point for any medical opinion. *Johnson*¹² states "K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides." The Kansas Supreme Court held a constitutional challenge against K.S.A. 2019 Supp. 44-510e(a)(2)(B) failed.

The Board may not decide the constitutionality of Kansas laws. The Board can not explore whether use of the *Guides*, 6th ed., provides injured workers with due process or an adequate substitute remedy.

2. The repetitive activities are the prevailing factor causing Claimant's injury, medical condition and her need for treatment to her right shoulder.

The purpose of Court-ordered evaluations are to assist the trier of fact in resolving issues between the parties. Unfortunately, in this claim, the Court-ordered evaluator, Dr. Hufford, created an issue. Respondent provided medical care and treatment which included three surgical procedures. Respondent sought and received an independent evaluation from Dr. Estivo regarding the issues: prevailing factor, impairment ratings, permanent restrictions and future medical. At the time Dr. Hufford was ordered to provide an independent evaluation, the issues between the parties were nature and extent of disability and future medical.

Dr. Hufford opined Claimant sustained an aggravation of an asymptomatic preexisting condition from her occupational activities with Respondent in her right shoulder. The parties' evaluators disagreed. Both Dr. Murati and Dr. Estivo opined the repetitive

¹⁰ *Johnson v. U.S. Food Service*, 56 Kan.App. 2d 323, 427 P.3d 996 (2018)

¹¹ *Johnson v. U.S. Food Service*, ___ Kan. ___, 478 P.3d 776 (2021)

¹² *id.* at 780.

activities of Claimant's work with Respondent were the prevailing factor causing Claimant's injury, medical condition and need for medical treatment. It is difficult to accept the premise Claimant began work with Respondent with an asymptomatic partially torn rotator cuff because there is no history of prior injury or medical treatment. In addition, Dr. Hufford testified there were additional structural changes resulting from Claimant's occupational activities.¹³ The ALJ stated,

It is found that the claimant had a change in the structure of her right shoulder as a result of her work for the respondent. Prevailing factor does not mean exclusive of all other factors. Dr. Hufford apparently used this standard in determining whether the claimant's work activities were the prevailing factor in her resulting rotator cuff tear. He testified that he believed she had a preexisting tear even though there is no evidence to support it. Previously he testified that it is possible, that more likely true than not, her work caused additional tearing. K.S.A. 44-508(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. After consideration of all the evidence presented, it is found that the prevailing factor for the claimant's right shoulder condition was her work activities while working for the respondent.¹⁴

The Board agrees. Dr. Hufford's prevailing factor opinion stands alone and is somewhat contradictory in light of his opinion the work activities caused a change in the physical structure. Adopting his opinion, considering Claimant's work history for the five years prior to her employment with Respondent and in the absence of any evidence Claimant began work with a pre-existing condition in her right shoulder (partially torn rotator cuff), requires a leap of faith not supported by the evidence. The Board affirms the ALJ's finding the prevailing factor was the repetitive work activities performed by Claimant for Respondent.

3. The Board modifies the ALJ's finding regarding functional impairment and awards a work disability.

Three physicians offered opinions based on the *Guides*, 6th ed., for Claimant's right shoulder and left thumb. All three of those opinions to the body as a whole are found to be credible regarding the left thumb: Hufford/1%, Murati/2% and Estivo/0%. Averaging impairment ratings in an award of compensation has been routinely approved by the Board. Averaging the three credible ratings in the evidentiary record results in a 1% impairment to the whole person for the left thumb.

¹³ Hufford Depo. at 27-30 & 50-51.

¹⁴ ALJ Award (Nov. 10, 2020) at 11.

Regarding the opinions to the right shoulder, two of the three opinions are found to be credible: Murati/16% and Estivo/10%. Dr. Hufford's 5% impairment to the right shoulder, like his prevailing factor opinion, stands alone and is undermined by his prevailing factor opinion. Averaging the two credible ratings in the evidentiary record results in a 8% impairment to the whole person for the right upper extremity.

Combining the left thumb (1%) and right upper extremity (8%) ratings to the body as a whole results in 9% to the whole person functional impairment.

K.S.A. 44-510e(a)(2)(c), states an injured worker may be entitled to compensation in excess of functional impairment, if the functional impairment exceeds 7.5% to the body as a whole and the injured worker sustains a post-injury wage loss in excess of 10%.

Claimant's 9% functional impairment to the body as a whole meets the functional impairment threshold. The next issue is whether she meets the wage loss threshold for work disability. Claimant is not currently working. The record is absent of any evidence Claimant was terminated for job abandonment or cause. The Board is tasked with imputing an appropriate post-injury wage based on the factors in K.S.A. 44-510e(a)(2)(E).

Mr. Benjamin is the only vocational expert to offer opinions regarding wage earning capacity and task loss. He opined Claimant could expect to earn \$358.07 per week post injury. Claimant's average weekly wage is \$755.25. This results in a wage loss of 53%. Out of the 27 tasks listed by Mr. Benjamin, Dr. Murati opined Claimant was unable to perform 15 tasks, for a 55.55% task loss. For reasons unclear from the record, Dr. Hufford's review of prior tasks listed by Mr. Benjamin was limited to 16 and not 27. The only credible task loss opinion in the record is Dr. Murati's. The Board finds Claimant's task loss due to her work-related injuries is 55.55%. Claimant is entitled to receive work disability benefits based on a 53% wage loss and a 55.55% task loss, which is a 54.28% work disability. Claimant is eligible to receive the statutory maximum award of \$130,000, less a credit to Self-Insured Respondent for the compensation previously paid. The Award dated November 10, 2020, should be modified accordingly.

Claimant was paid temporary total disability compensation for 58.57 weeks at the rate of \$519.29 totaling \$30,414.69. Claimant should have been paid at the rate of \$503.53 for 58.57 weeks totaling \$29,491.75. Pursuant to K.S.A. 44-525(c), Respondent is entitled for a credit for the overpayment of temporary total disability compensation in the amount of \$922.94.

4. Claimant is entitled to future medical treatment.

K.S.A. 44-510h presumes an employers obligation to provide medical benefits terminates when the employee reaches maximum medical improvement (MMI). The presumption may be overcome with medical evidence it is more probably true than not

additional medical treatment will be necessary after such time as the employee reaches MMI.

The ALJ denied Claimant's request for future medical treatment finding, "The only physician that believed the claimant would require future medical treatment was Dr. Murati. Dr. Hufford, Dr. Estivo and the treating physician all found that no future medical treatment was necessary."¹⁵

The treating physician, Dr. Ahsfaq, did not testify. The Board can only speculate as to whether his opinion is from a surgical standpoint or all-encompassing. Dr. Estivo and Dr. Hufford's opinion regarding future medical are not credible. Claimant's had two failed surgical procedures to her right shoulder. She has a full thickness rotator cuff tear in her right shoulder. To suggest Claimant will not require additional treatment to cure or relieve her from the effects of her injury is not credible. Dr. Murati's opinion Claimant will require future medical is the most credible. Therefore, Claimant is entitled to an award of future medical treatment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed in part and modified in part. The Board affirms the ALJ's findings the Court is without jurisdiction to address constitutional issues and the work activities are the prevailing factor for the injury sustained by Claimant to the right shoulder. The Board reverses the ALJ's denial of work disability benefits and finds Claimant has an 9% functional impairment and a 54.28% work disability. The Board also reverses the ALJ's denial of future medical. Claimant met her burden of proving entitlement to an award of future medical treatment under K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Pamela J. Fuller, dated November 10, 2020, is affirmed in part and modified in part.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF Claimant Maria Macias de Hernandez and against Self-Insured Respondent, Tyson Fresh Meats Inc. Claimant is entitled to 58.57 weeks of temporary total disability compensation paid at \$503.53 per week totaling \$29,491.75; followed by 199.61 weeks of permanent partial disability compensation based on 54.28% work disability paid at \$505.53 per week, totaling \$100,508.25; for a total award of \$130,000.00.

¹⁵ ALJ Award (Nov. 10, 2020) at 12

As of March 29, 2021, there is currently due and owing 58.57 weeks of temporary total disability compensation paid at \$503.53 per week totaling \$29,491.75; followed by 89.29 weeks of permanent partial disability compensation paid at \$505.53 per week totaling \$41,435.48; for a total due and owing of \$70,927.23, which is ordered paid by Self-Insured Respondent in one lump sum less any compensation previously paid. Thereafter, Self-Insured Respondent shall pay Claimant permanent partial disability compensation at the rate of \$505.53 per week for 115.49 weeks, totaling \$58,149.83, which represents the remaining permanent partial disability compensation awarded less a credit of \$922.94 to Self-Insured Respondent for a prior overpayment of temporary total disability compensation pursuant to K.S.A. 44-525(c), until paid in full or unless later modified.

FURTHER AWARD IS MADE that all valid, authorized and related medical expenses reasonably necessary to cure or to relieve the effects of the work-related injuries shall be paid by Self-Insured Respondent, subject to the Kansas Workers Compensation Medical Fee Schedule. The unauthorized medical allowance of \$500 is awarded to Claimant and left open, subject to future payment either by agreement of the parties or upon application and hearing before the Director. Future medical treatment to cure or to relieve the effects of the work-related injuries is also awarded pursuant to K.S.A. 44-510h(e).

IT IS SO ORDERED.

Dated this 29th day of March, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Scott Mann, Attorney for Claimant
Gregory Worth, Attorney for Respondent and its Insurance Carrier
Hon. Pamela J. Fuller, Administrative Law Judge