

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEANNE ACELAS-SALOMON

Claimant

v.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

AP-00-0475-200

CS-00-0442-908

ORDER

Claimant appeals the April 21, 2023, Award issued by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on August 24, 2023.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. Thomas G. Munsell appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing, held October 25, 2022; the Stipulation of Reports into Evidence, including the narrative reports of Dr. Fluter and Dr. Hufford; the narrative report of Dr. Carabetta concerning his Court-ordered independent medical examination of Claimant; the transcript of Evidentiary Deposition of Vito Carabetta, M.D., including Exhibits 1-2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

On May 17, 2018, Claimant sustained injuries from a work-related slip and fall while working for Respondent. After a course of conservative treatment provided by several health care providers, Claimant was diagnosed with a rotator cuff tear of the right shoulder. In March 2019, Claimant underwent an arthroscopic rotator cuff repair procedure by Dr. Hatzidikis. Following the surgery, Claimant underwent physical therapy and received

prescription pain medication. Most of Claimant's medical treatment was devoted to the right shoulder. Ultimately, Claimant was released to return to work with restrictions.

Claimant returned to work for Respondent in a different position picking up small pieces of meat. Claimant continues to work in that position. Claimant testified she had constant pain at the top to the end of the shoulder. Claimant also reported neck pain with a clicking sensation, running from the right side to the shoulder. Claimant reported her shoulder and neck pain were six out of ten in severity. Continuous upper back pain, particularly behind the right shoulder, was also reported. Prior shoulder, neck or back pain was denied.

Claimant testified picking things up caused shoulder pain. The pain also prevents Claimant from lifting items. Claimant thought she may be able to lift up to ten pounds, but she never tried. Claimant also reported having problems sleeping. Claimant cannot do housework or yardwork. Although the record is silent to whether hardware was implanted during the arthroscopy, Claimant believed she had an iron rod in her shoulder and was told she could be paralyzed if the rod was removed.

On December 12, 2019, Dr. Hufford evaluated Claimant at Respondent's request. An interpreter was present. Claimant reported ongoing right shoulder pain with difficulty reaching overhead, and ongoing neck and low back pain. Dr. Hufford noted Claimant was working light duty for Respondent. Examination was notable for tenderness of the paraspinal muscles without trigger points or guarding, and tenderness of the scapular elevators. General tenderness of the right shoulder, with positive rotator cuff signs, four out of five strength and reduced range of motion was noted. Dr. Hufford also noted general tenderness of the lumbar paraspinal muscles, with full strength and a non-antalgic gait.

Dr. Hufford diagnosed a rotator cuff tear of the right shoulder, resolved right wrist and knee pain, and neck pain partially referred on account of the work-related accident. Dr. Hufford also identified low back pain, which he did not attribute to the work-related accident. Dr. Hufford rated Claimant's impairment at 7% of the right upper extremity under the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition (*AMA Guides*, Fourth Edition). Dr. Hufford also rated Claimant's impairment at 8% of the right upper extremity under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*, Sixth Edition), on account of range of motion deficits. Dr. Hufford did not believe Claimant could tolerate returning to her prior job for Respondent. Dr. Hufford did not recommend future medical treatment.

On July 8, 2020, Dr. Flutter evaluated Claimant at her attorney's request. Claimant's son was present during the evaluation, and Dr. Flutter noted he reviewed incomplete medical records. Claimant reported ongoing right shoulder and right-sided neck pain, and rare low back pain. Claimant rated the pain at seven out of ten, and described her

symptoms as burning, dull and aching, pressure and tingling. Claimant confirmed she was working light duty for Respondent. Examination was notable for a non-antalgic gait, normal strength and intact sensation in the extremities. Dr. Flutter noted positive impingement signs at the right shoulder, tenderness to palpation of the shoulder and upper back, and reduced active range of motion of the right shoulder compared to the left.

Dr. Flutter diagnosed right shoulder pain, impingement, tendinitis and bursitis. Dr. Flutter also diagnosed pain of the upper back, neck, upper shoulder and scapular stabilizers, as well as a cervicothoracic strain/sprain. Dr. Flutter rated Claimant's impairment at 18% of the body as a whole under the *AMA Guides*, Fourth Edition, and 12% of the body as a whole under the *AMA Guides*, Sixth Edition. Dr. Flutter imposed permanent restrictions, and recommended future medical treatment. In particular, Dr. Flutter recommended future physician visits, further diagnostic studies and future prescription medication.

Dr. Carabetta performed a Court-ordered independent medical examination of Claimant on November 28, 2022, with the assistance of an interpreter. Claimant reported pain of the right shoulder girdle area following a slip and fall injury at work. Claimant also reported trauma to the cervical and thoracic areas. Claimant was taking an over-the-counter medication she obtained outside the United States, which was a combination of over-the-counter naproxen and ibuprofen, for her residual symptoms. Dr. Carabetta noted Claimant sustained a full-thickness rotator cuff tear, which was the focus of Claimant's medical treatment. Examination of the cervical spine was characterized as good, without specific complaints. Dr. Carabetta noted limited range of motion of the right shoulder, which he thought was consistent with a rotator cuff tear, and signs of residual impingement. Dr. Carabetta also identified diffuse muscle spasm of the right upper trapezius muscle affecting the lower cervical and upper thoracic areas. Giveway weakness consistent with self-limiting behavior was also noted.

Dr. Carabetta diagnosed a rotator cuff tear, post-repair, and regional fibromyositis affecting the right upper back and neck. Dr. Carabetta testified he issued an impairment rating based on his familiarity with *Johnson v. U.S. Foods*, and he corrected an error in the calculation of the rating within his narrative report. Dr. Carabetta assessed 11% impairment of the body as a whole attributable to the right shoulder, 2% of the body as a whole attributable to the cervical spine and 2% of the body as a whole attributable to the thoracic spine, totaling 15% functional impairment of the body as a whole. Dr. Carabetta did not recommend future medical treatment, apart from continued use of over-the-counter medication. Dr. Carabetta imposed permanent work restrictions.

On April 21, 2023, ALJ Marchant issued the Award addressing nature and extent and future medical treatment. ALJ Marchant reviewed Claimant's accident, injuries, course of treatment and the parties' ratings. Dr. Carabetta's Court-ordered independent medical examination was also reviewed. ALJ Marchant adopted the findings and conclusions of

Dr. Carabetta, as the Court-ordered physician, and concluded Claimant's functional impairment was 15% of the body as a whole attributable to the right shoulder, neck and thoracic spine. Claimant's request for future medical treatment was denied because Dr. Carabetta and Dr. Hufford did not believe Claimant would require future medical treatment. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the award of permanent partial disability compensation based on 15% functional impairment of the body as a whole is erroneous. Claimant argues she should be awarded \$150,000.00 for permanent partial disability compensation, or in the alternative permanent partial disability compensation based on Dr. Fluter's rating of 18% of the body as a whole. Claimant also argues the denial of future medical is erroneous because Dr. Fluter recommended future medical treatment and Claimant's current work is repetitive. Respondent argues the Award should be affirmed.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

1. The award of permanent partial disability compensation based on 15% functional impairment of the body as a whole is affirmed.

Claimant described residual symptoms affecting her right shoulder, neck and back. Dr. Fluter diagnosed injuries to the right shoulder and cervicothoracic spine. On the other hand, Dr. Hufford diagnosed an injury to the right shoulder, thought Claimant's neck pain was referred pain from the shoulder, and thought Claimant's low back pain was unrelated. Dr. Fluter believed Claimant sustained whole-body injuries, while Dr. Hufford believed Claimant sustained permanent injury to the right shoulder only.

Dr. Carabetta was appointed to perform a Court-ordered independent medical examination. Dr. Carabetta diagnosed a rotator cuff tear of the right shoulder, post repair. Dr. Carabetta also identified a muscle spasm by palpation of the right upper trapezius

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

affecting the lower cervical and upper thoracic areas, and diagnosed regional fibromyositis affecting the right upper back and neck. Dr. Carabetta's examination findings were undisputed. The Board finds Dr. Carabetta's findings and opinions the most credible of the medical evidence concerning the extent of Claimant's injuries, because Dr. Carabetta was the Court-appointed neutral physician, and his findings and conclusions were subject to examination by counsel in Dr. Carabetta's deposition. The Board concludes Claimant sustained injuries to the right shoulder, upper back and neck on account of the work-related accident. Claimant's injuries are compensable as injuries to the body as a whole.

It is appropriate to award permanent partial general disability compensation based on an injury to the body as a whole where the employee, on account of the injury, is disabled in a manner partial in character and permanent in quality, and not covered by the schedule in K.S.A. 44-510d.⁴ The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as determined by competent medical evidence, using the *AMA Guides*, Sixth Edition, as a starting point.⁵ An employee may be eligible to receive work disability compensation in excess of the functional impairment if the percentage of functional impairment exceeds 7.5% of the body as a whole, and the employee sustains a post-injury wage loss of at least 10%.⁶ In cases where permanent partial disability compensation based on functional impairment only is awarded, the maximum permanent partial disability compensation payable is \$75,000.00.⁷

Claimant sustained compensable injuries to the body as a whole. Claimant returned to work for Respondent, and has not sustained a post-injury wage loss at present. Claimant is eligible to receive permanent partial disability compensation based on her functional impairment only. Dr. Fluter rated Claimant's impairment at 18% of the body as a whole under the *AMA Guides*, Fourth Edition, and 12% of the body as a whole under the *AMA Guides*, Sixth Edition. Dr. Hufford rated Claimant's impairment at 7% of the right upper extremity under the *AMA Guides*, Fourth Edition, and 8% of the right upper extremity under the *AMA Guides*, Sixth Edition. Dr. Carabetta rated Claimant's impairment at 15% of the body as a whole under the *AMA Guides*, Sixth Edition, and was familiar with *Johnson* when he rendered his rating.

⁴ See K.S.A. 44-510e(a)(2)(A).

⁵ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

⁶ See K.S.A. 44-510e(a)(2)(C).

⁷ See K.S.A. 44-510f(a)(4).

Dr. Hufford's rating does not consider the compensable neck or upper back injuries. Dr. Fluter's rating was partly based on incomplete records. Neither physician testified. The ratings based solely on the *AMA Guides*, Fourth Edition, do not comport with K.S.A. 44-510e or with *Johnson*, and are not proper evidence of impairment. The Board finds the rating of Dr. Carabetta the most credible because he served as the neutral physician, and was subject to examination by counsel in his deposition. Accordingly, the Board concludes Claimant sustained 15% functional impairment of the body as a whole, attributable to the right shoulder, neck and upper back, on account of the work-related injuries sustained on May 17, 2018.

Claimant requests additional permanent partial disability compensation due to her residual symptoms and problems. The request for \$150,000.00, however, is not supported by the plain language of the Workers Compensation Act. Dr. Fluter's rating issued solely under the *AMA Guides*, Fourth Edition, without consideration of competent medical evidence after using the *AMA Guides*, Sixth Edition, as a starting point, is not proper evidence of impairment. The award of permanent partial disability compensation contained in the Award is affirmed.

2. Claimant proved she is entitled to an award of future medical treatment.

With regard to future medical treatment, 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.⁸ The plain language of K.S.A. 44-510h(e) does not state entitlement to future medical treatment is proven by a greater weight of the evidence in the record.⁹

Dr. Hufford and Dr. Carabetta did not recommend future medical treatment. Dr. Fluter, however, recommended further physician intervention and testing in the future to cure or relieve the effects of Claimant's work-related injuries. Dr. Fluter's report is medical evidence. Under the plain language of K.S.A. 44-510h(e), Claimant presented medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. Therefore, future medical treatment is awarded to Claimant, and may be provided either by agreement or upon application and hearing under K.S.A. 44-510k.

⁸ See K.S.A. 44-510h(e).

⁹ See *id.*

DECISION

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Ali N. Marchant, dated April 21, 2023, is affirmed in part and modified in part. The award of permanent partial disability compensation based on 15% functional impairment of the body as a whole, attributable to the right shoulder, neck and upper back, is affirmed. The denial of future medical treatment contained in the Award is reversed, and Claimant is awarded future medical treatment, to be provided either by agreement or upon application and hearing, as provided in K.S.A. 44-510k. In all other respects, the Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2023.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

c: Via OSCAR

Stanley R. Ausemus
Thomas G. Munsell
Hon. Ali N. Marchant
Hon. Larry Gurney