

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NOEL BRAUNER

Claimant

v.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY

Respondent

CS-00-0445-280

AP-00-0454-446

and

SAFETY NATIONAL CASUALTY CORP.

Insurance Carrier

ORDER

Respondent and Insurance Carrier request review of the Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample, dated December 2, 2020.

APPEARANCES

John G. O'Connor appeared for Claimant. Frederick J. Greenbaum appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award and considered the record, consisting of the Teleconference Transcript of Regular Hearing held August 12, 2020; the transcript of Remote Discovery Deposition of Noel Brauner taken June 25, 2020; the transcript of Telephonic Evidentiary Direct Examination for Regular Hearing of Noel Brauner taken September 8, 2020, including Exhibit 1, after sustaining the objection made on Page 17; the transcript of Telephonic Evidentiary Deposition of Daniel D. Zimmerman, M.D., taken September 21, 2020, including Exhibits 1-2; the transcript of Evidentiary Deposition of Paul Cowan, M.D., taken October 29, 2020, including Claimant's Exhibit 1 and Respondent's Exhibits 1-3; Respondent's Spreadsheet itemizing its medical payments; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs, and heard oral argument on March 11, 2021. At oral argument, the parties stipulated if this matter is compensable, Claimant's functional impairment is 12% of the right leg under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*, Sixth Edition).

ISSUES

1. Did Claimant sustain personal injury from an accident arising out of and in the course of her employment with Respondent, including whether the alleged accident was the prevailing factor causing her alleged injury, medical condition, need for treatment and resulting disability or impairment?
2. Is Claimant entitled to an award of future medical treatment?
3. Is Claimant entitled to an award of temporary total disability compensation?
4. Is Claimant entitled to an order for Respondent and Insurance Carrier to issue payments directly to the medical providers for past medical treatment?

FINDINGS OF FACT

Claimant worked at Respondent's psychiatric facility as a Floor Nurse and later as a Charge Nurse. As a Floor Nurse, Claimant responded to patient care calls, put patients in restraints and administered medication. As a Charge Nurse, Claimant performed triage activities.

Claimant's medical history is notable for a prior right knee injury while lifting weights. Claimant received treatment from Dr. Munns for the prior right knee injury. Dr. Munns did not testify, but his treatment records are in evidence as Exhibit 3 of Dr. Cowan's deposition transcript. An MRI performed on November 10, 2018, was interpreted by Dr. Munns as showing a complex tear of the anterior horn of the lateral meniscus with a parameniscal cyst, with a second cyst at the medial femoral condyle. Claimant underwent surgery by Dr. Munns on November 28, 2018. During the surgery, Dr. Munns identified more cartilage damage than indicated by the MRI. In addition to a lateral meniscectomy, Dr. Munns performed a microfracture procedure, where holes were driven into Claimant's femur to introduce stem cells into the knee capsule to regenerate the cartilage Dr. Munns removed.

Claimant missed work for ten weeks following the procedure, and returned to work as a Floor Nurse. Claimant initially experienced mild pain and swelling when she returned to work, and she occasionally took ibuprofen as needed. Claimant's pain and swelling resolved the longer she worked. No activity limitations were imposed. Dr. Munns released Claimant from treatment on February 21, 2019. In the Spring of 2019, Claimant had no right knee problems, and had resumed working out with a trainer.

On June 8, 2019, Claimant was assisting a patient in the bathroom shower. As Claimant walked out of the shower, her left leg slipped and she hyperextended her right

knee. Claimant felt an immediate onset of pain in the right knee. Claimant continued working, but limited her work to making chart notes while seated. Claimant applied ice and took pain medication she had from the prior surgery after she went home.

Claimant reported the accident to Respondent on June 11, 2019, and was referred to the Occupational Medicine Department. An MRI scan of the right knee was ordered and Claimant was taken off work. The MRI was performed on June 12, 2019. An orthopedic referral was made, and Claimant was seen by Dr. Cowan. Dr. Cowan told Claimant she did not sustain a work-related injury, and she should see the surgeon who treated her before. Respondent also informed Claimant she could not return to work until she was medically cleared. Claimant sought treatment on her own with Dr. Munns.

Dr. Munns' records indicate Claimant returned on July 25, 2019. Claimant told Dr. Munns she was doing well following her earlier course of treatment and reinjured her right knee on June 8 while working. Claimant reported ongoing right knee pain. Examination was notable for an antalgic gait, tenderness at the medial compartment and an occasional clicking sound during rotation testing. The MRI was interpreted as showing a central flap-type tear. Dr. Munns diagnosed a re-tear of cartilage regenerate at the medial femoral condyle due to a twist and fall. Dr. Munns recommended an osteochondral allograft procedure. Dr. Munns confirmed Claimant's condition was work-related because she was symptom-free before June 8, 2019. Claimant was restricted to sedentary-level work.

Dr. Munns performed surgery on August 26, 2019. Dr. Munns noted a full-thickness tear at the location of the prior procedure. The osteochondral allograft was implanted. Claimant was released to return to work in a full-duty capacity on October 8, 2019. On February 18, 2020, Dr. Munns noted Claimant was pain-free and performing light-level activities without pain. An x-ray of the right knee was interpreted as showing excellent incorporation of the allograft. Full range of motion and normal stability was noted. Progression to full activities was discussed, and Claimant was released from Dr. Munns' care.

Claimant's medical treatment by Dr. Munns was paid by Claimant's personal health insurance, which was provided by Respondent. Claimant did not know if Respondent's health insurance was self-funded. Claimant initially testified she paid some out-of-pocket medical, but later testified her health insurance paid all the charges and she paid nothing. Claimant testified she received some bills her personal insurance did not pay, but those bills are not part of the record. The record includes an itemization of the medical expenses paid by Respondent as workers compensation benefits from June 11 through July 1, 2019. According to an itemization completed by Claimant's counsel, Claimant received medical bills totaling \$92,669.50, but no medical bills were attached to the itemization.

Claimant currently is working as a clinical nurse at the University of Kansas School of Medicine in Wichita. Due to the COVID-19 pandemic, Claimant works remotely, and a

lot of her work is done via Zoom conferences and phone calls. Claimant's right leg does not bend like before. Claimant exercises as a hobby, and she cannot perform lunges or single-leg exercises. Dr. Munns restricted Claimant from performing pylometric exercises. Claimant experiences some right leg pain some days, and her knee cracks and pops when flexed. Claimant cannot squat on the ground.

Dr. Cowan confirmed he examined Claimant at the request of Respondent on July 1, 2019. Dr. Cowan reviewed Dr. Munns' records, and performed an examination. The prior right knee surgery report was reviewed. Claimant reported pain in the medial and anterior aspects of the knee. Meniscus tests were normal, but painful grinding was present at the patella, which Dr. Cowan thought was likely from chondromalacia or degenerative changes. Dr. Cowan testified he normally did not perform microfracture procedures, like the one Dr. Munns performed before the work-related event, because he did not believe the procedure produced a long-lasting repair. According to Dr. Cowan, the microfracture procedure has a 20% failure rate. Instead, Dr. Cowan would have performed an osteochondral allograft procedure, which was the second surgery Dr. Munns performed.

Based on his review of the records and the MRI scans, as well as his examination, Dr. Cowan opined the prevailing factor causing Claimant's medical condition, need for the second surgery and resulting lost time was the original cartilage loss caused by the first surgery. In particular, Dr. Cowan believed the cartilage produced by the microfracture was not robust enough to withstand Claimant's normal activities. Dr. Cowan, however, did not address whether the pathology at the microfracture site could have been caused by the June 8, 2019, event, and he admitted he could not state the cartilage at the site would have failed regardless of whether the June 8, 2019, occurred. Dr. Cowan admitted the event of June 8, 2019, could have contributed to the failure of the cartilage.

Dr. Cowan acknowledged Dr. Munns thought the work-related accident caused a re-tearing necessitating the second surgery. Dr. Munns was one of Dr. Cowan's teaching physicians when he was a second-year resident. Dr. Cowan admitted the slip may have contributed to the failure of the first surgery, and he was unable to state the cartilage in Claimant's right knee was going to fail regardless of the slip in the shower. Dr. Cowan thought Claimant could work full-duty. Dr. Cowan rated Claimant's impairment at 0% based on the *AMA Guides*, Sixth Edition, without explanation.

Dr. Zimmerman evaluated Claimant at her attorney's request on March 24, 2020. Claimant reported pain and discomfort of the right knee following the hyperextension injury of June 8, 2019. Claimant's treatment by Dr. Munns was reviewed. Dr. Zimmerman noted residual complaints of pain preventing Claimant from running, and limiting Claimant to climbing up and down stairs one step at a time. Examination was notable for limited range of motion of the right knee compared to the left, pain to palpation and grinding during passive flexion and extension. Some atrophy of the right thigh was noted.

Dr. Zimmerman thought Claimant sustained a chondral injury to the right knee treated by Dr. Munns on account of the work-related accident. Under the *AMA Guides*, Sixth Edition, Dr. Zimmerman rated Claimant's impairment at 12% of the right knee from the June 8, 2019, accident, and preexisting impairment of 1%. Under the *AMA Guides*, Fourth Edition, Dr. Zimmerman rated Claimant's impairment at 18% of the right knee from the June 8, 2019, accident, and 2% preexisting. Dr. Zimmerman thought Claimant would require future medical treatment consisting of prescription medication, injections and viscosupplementation. Dr. Zimmerman reviewed the itemization of medical charges prepared by Claimant's counsel, and testified they appeared to be reasonable and customary charges. Dr. Zimmerman thought the time Claimant was off work on account of the second surgery was expected.

ALJ Sample issued the Award on December 2, 2020. ALJ Sample found the event of June 8, 2019, was the prevailing factor causing a retearing of cartilage in the right knee. Claimant was awarded temporary total disability compensation from August 23, 2019, through October 11, 2019, and permanent partial disability compensation based on Dr. Zimmerman's impairment rating of 12% of the right knee. Future medical treatment was awarded. With regard to Claimant's request for an order requiring Respondent to pay medical expenses, ALJ Sample declined ordering the medical costs paid directly to Claimant, but ordered Respondent to pay all outstanding medical bills directly to the providers, subject to the Kansas Workers Compensation Medical Fee Schedule, and to assist Claimant in removing any reference to unpaid or late medical bills from Claimant's credit history. This appeal follows.

ANALYSIS AND CONCLUSIONS OF LAW

Respondent and Insurance Carrier argue the Award is erroneous because the event of June 8, 2019, was not the prevailing factor causing Claimant's right knee pathology requiring the second surgery by Dr. Munns. Because Claimant did not prove compensability, Respondent and Insurance Carrier maintain the award of past and future medical, temporary total disability and permanent partial disability compensation is erroneous.

Claimant argues the determination of compensability in the Award was correct, but the Award should be modified to order Respondent and Insurance Carrier to pay the medical providers based on Claimant's itemization of medical expenses, including medical expenses Respondent may have already paid under Claimant's personal health insurance.

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. CLAIMANT PROVED SHE SUSTAINED PERSONAL INJURY TO HER RIGHT KNEE FROM AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT ON JUNE 8, 2019.

The primary issue is whether Claimant sustained a compensable right knee injury arising out of and in the course of her employment with Respondent on June 8, 2019. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁴ The accident must be the prevailing factor in causing the injury, and “prevailing factor” is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁵ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁶ Accidental injuries resulting in a new physical finding, or change in the physical structure of the body, are compensable despite the employee also having sustained an aggravation of a preexisting condition.⁷

In this case, there is no dispute the event of June 8, 2019, occurred, and Claimant’s testimony she experienced a sudden onset of symptoms at the right knee immediately after the event is uncontradicted. The issue is whether the event of June 8, 2019, was the prevailing factor, compared to all other factors, causing the right knee injury necessitating the second round of treatment by Dr. Munns and the corresponding period of temporary total and permanent partial disability.

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-508(d).

⁵ See K.S.A. 44-508(d),(g).

⁶ See K.S.A. 44-508(f)(2).

⁷ See, e.g., *Bennett v. City of Topeka*, No. 118,546, 2018 WL 3486114, at *3 (Kansas Court of Appeals unpublished opinion filed July 20, 2018).

Dr. Munns' treatment records and Claimant's testimony establish Claimant sustained a prior right knee injury. The MRI performed on November 10, 2018, was interpreted by Dr. Munns as showing a complex tear of the anterior horn of the lateral meniscus with a parameniscal cyst, as well as a second cyst at the medial tibial condyle. Dr. Munns performed an arthroscopy of the right knee on November 28, 2018, and had the opportunity to see the knee compartment. The lateral meniscus tear was removed, along with two lesions at the medial femoral condyle. Due to the condition of the cartilage, Dr. Munns performed a microfracture procedure to regenerate the cartilage. Dr. Munns' records indicate Claimant recovered from the procedure well. Ultimately, Claimant's pain and swelling resolved, and no activity limitations were imposed. Claimant was released from Dr. Munns' care on February 21, 2019, and was performing her usual work and personal activities without restriction. Claimant was symptom-free from Spring 2019 until the event of June 8, 2019.

Following the event of June 8, 2019, Claimant underwent another MRI, which revealed an irregularity of the lateral meniscus and thinning of the cartilage at the medial femoral condyle at the area of the prior surgery. This finding indicated a new change in the physical structure of the right knee. Dr. Munns interpreted the MRI as showing a re-tear of the cartilage due to the work-related event of June 8, 2019, and recommended an osteochondral allograft procedure to cure or relieve the new pathology. Dr. Munns provided the treatment he recommended, and released Claimant on February 18, 2020.

Dr. Cowan performed a single evaluation of Claimant at the request of Respondent and Insurance Carrier. Dr. Cowan opined the pathology in Claimant's right knee following the June 8, 2019, event was not caused by a work-related accident, but because the cartilage produced from the microfracture procedure was not robust enough to withstand Claimant's normal activity. Dr. Cowan indicated he did not perform microfracture procedures because they have a 20% failure rate. Dr. Cowan later admitted he could not state the cartilage failure would have happened without the June 8, 2019 event, and later conceded the June 8, 2019 event could have contributed to the cartilage failure.

Dr. Zimmerman, who performed a single evaluation of Claimant at her attorney's request, thought Claimant sustained a chondral injury from the event of June 8, 2019. Dr. Zimmerman, who is not an orthopedic specialist, did not provide much explanation for his causation opinion.

Based on the record as a whole, Claimant met her burden of proving the event of June 8, 2019, was the prevailing factor causing the re-tearing of the right knee necessitating additional treatment from Dr. Munns, including the second surgery. Claimant was performing her usual work and personal activities without problems in the Spring of 2019, until the event of June 8, 2019. Dr. Munns, who was the treating physician, thought the event of June 8, 2019, caused a new injury, namely a re-tearing. The MRI scan of June 12, 2019, confirms a change in the physical structure of the right knee. Dr. Munns had the

opportunity to visualize Claimant's knee capsule for both surgeries, and is entitled to deference as the treating orthopedic specialist. In contrast, Dr. Cowan saw Claimant one time and his opinions on causation were equivocal. Dr. Zimmerman, who is not an orthopedist, saw Claimant one time, as well. The Board finds the opinions of Dr. Munns, as the treating orthopedist, the most credible on the cause of Claimant's recurrent tear and need for medical treatment. Claimant met her burden of proving the accident of June 8, 2019, was the prevailing factor causing her right knee injury and need for medical treatment. Accordingly, the determination of compensability in the Award should be affirmed.

2. BECAUSE CLAIMANT MET HER BURDEN OF PROVING SHE SUSTAINED A COMPENSABLE INJURY TO THE RIGHT KNEE, THE AWARD OF TEMPORARY TOTAL DISABILITY COMPENSATION, PERMANENT PARTIAL DISABILITY COMPENSATION AND FUTURE MEDICAL TREATMENT IS AFFIRMED.

Having affirmed the compensability determination from the Award, the Board considers Respondent's remaining issues on appeal.

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any substantial and gainful employment, and an authorized treating physician's opinion regarding work status shall be determinative.⁸ Where the employee remains employed by the employer and an authorized treating physician imposes restrictions, the employee shall receive temporary total disability compensation if the employer cannot accommodate the restrictions.⁹ In this case, Claimant sustained a compensable right knee injury. Although Dr. Munns was not authorized by Respondent to provide medical treatment under workers compensation, his opinion Claimant was restricted from working full-duty until October 8, 2019, due to the second surgery was uncontradicted. There is no evidence Respondent attempted to accommodate Claimant's restrictions from August 23, 2019, through October 11, 2019. The Board finds Claimant was rendered temporarily and totally disabled from engaging in any substantial and gainful employment on account of the compensable right knee injury from August 23 through October 11, 2019. Accordingly, the award of temporary total disability compensation should be affirmed.

With regard to permanent partial disability compensation, the parties stipulated Claimant's functional impairment was 12% of the right leg under the *AMA Guides*, Sixth Edition, if Claimant sustained a compensable injury. Claimant met her burden of proving she sustained a compensable right knee injury. Accordingly, the award of permanent

⁸ See K.S.A. 44-510c(b)(2)(A).

⁹ See K.S.A. 44-510c(b)(2)(B).

partial disability compensation based on 12% functional impairment of the right knee is affirmed.

Finally, the Board considers the future medical issue. 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.¹⁰ An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹¹ 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.¹² Here, Dr. Munns released Claimant from treatment on an as-needed basis. Dr. Zimmerman testified Claimant would require future physician intervention. It does not appear Dr. Cowan commented on future medical. Dr. Zimmerman's opinion constitutes medical evidence showing it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. Therefore, the award of future medical contained in the Award is affirmed.

3. THE PROVISION FOR PAYMENT OF PAST MEDICAL EXPENSES FOR MEDICAL TREATMENT REASONABLY NECESSARY TO CURE OR TO RELIEVE THE EFFECTS OF THE WORK-RELATED RIGHT KNEE INJURY CONTAINED IN THE AWARD IS AFFIRMED.

Claimant argues the Award should be modified because ALJ Sample did not order Respondent and Insurance Carrier to pay all the medical expenses listed in Claimant's itemization, which may include charges already paid by Respondent under Claimant's personal health insurance claims. Claimant did not directly incur out-of-pocket medical expenses, and Claimant does not seek direct payment of medical expenses to herself. Respondent and Insurance Carrier argue Claimant does not have standing to request payment of the bills to the providers, which were already paid by Respondent.

Claimant does not cite legal authority in support of the claim for payment of medical expenses, and the actual bills at issue are not in evidence. The Appeals Board previously ruled an employer's duty to pay medical expenses for a compensable injury includes a duty

¹⁰ See K.S.A. 44-510h(a).

¹¹ See K.S.A. 44-508(f)(2)(B)(ii).

¹² See K.S.A. 44-510h(e).

to reimburse another entity, such as a health insurer, who paid medical expenses payable under workers compensation.¹³ The right to seek reimbursement for medical expenses belongs to the health insurance carrier and not to the Claimant.¹⁴ Here, Claimant apparently seeks an order compelling Respondent and Insurance Carrier to issue duplicate payments to health care providers for services previously paid by Claimant’s health insurance carrier, and possibly Respondent. This remedy does not exist under *Morse*, and Claimant does not have standing to request it. The provision for payment of past medical expenses contained in the Award comports with K.S.A. 44-510h, and is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award of ALJ Julie A.N. Sample, dated December 2, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

John G. O'Connor
Frederick J. Greenbaum
Hon. Julie A.N. Sample

¹³ See *Morse v. Sunshine Biscuits, Inc.*, No. 228,888, 2000 WL 1929338, at *2 (Kan. WCAB Dec. 22, 2000).

¹⁴ See *id.*