

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LINDA SHEPARD)	
Claimant)	
)	
V.)	
)	
WALMART, INC.)	CS-00-0370-193
Respondent)	AP-00-0451-424
)	
AND)	
)	
NEW HAMPSHIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Linda Shepard requested review of the June 1, 2020, Award entered by Administrative Law Judge (ALJ) David Bogdan. The Board heard oral argument on September 24, 2020. Mark Kolich was appointed Board Member Pro Tem. Roger Fincher of Topeka, Kansas, appeared for Ms. Shepard. Matthew Bergmann of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found Ms. Shepard sustained a nine percent functional impairment to the body as a whole as a result of her repetitive work activities.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Ms. Shepard argues she is entitled to a 25 percent whole person impairment based on the 4th Edition *AMA Guides* (4th Edition).¹ Ms. Shepard contends the use of the 6th Edition *AMA Guides* (6th Edition) is unconstitutional. Ms. Shepard asks the Board to

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

remand the matter to the ALJ to allow the admission of additional evidence and allow the ALJ to make findings consistent with *Johnson v. U.S. Food Service*.²

Respondent argues the application of the 6th Edition by the ALJ was appropriate.

The sole issue for the Board's review is: what is the nature and extent of Ms. Shepard's disability?

FINDINGS OF FACT

Ms. Shepard has worked for respondent for 10 years. In 2015, Ms. Shepard's position included zoning, or folding clothes and placing them on shelves, and cashiering. Ms. Shepard began complaining of pain and discomfort in her upper extremities. Ms. Shepard underwent an EMG nerve conduction study and was diagnosed with carpal tunnel syndrome, possibly work-related, on April 6, 2015, the date of accident for her repetitive trauma injury. Dr. Lanny Harris eventually performed surgical releases on Ms. Shepard's wrists, and opined Ms. Shepard sustained a 10 percent impairment of each upper extremity secondary to mild carpal tunnel syndrome, based on the 4th Edition.³ Ms. Shepard was then provided accommodated work in the fitting room department.

Dr. Chris Fevurly, a medical doctor, examined Ms. Shepard at respondent's request on December 13, 2018. Dr. Fevurly reviewed Ms. Shepard's available medical records, history, and performed a physical examination, finding Ms. Shepard's work activity in 2014 to 2016 caused a temporary aggravation of her chronic preexisting upper extremity pain, numbness, and tingling. Dr. Fevurly noted Ms. Shepard's pain, numbness, and tingling in her upper extremities has been a constant problem for her over the last 20 years. Ms. Shepard reported to Dr. Fevurly her symptoms had not changed much after undergoing bilateral surgical releases. Dr. Fevurly testified he believes Dr. Harris performed the surgeries due to the long duration of Ms. Shepard's symptoms, but he doubts Ms. Shepard had carpal tunnel syndrome since she had no improvement of her symptoms following surgery. Dr. Fevurly opined Ms. Shepard sustained no permanent impairment as a result of her work activities for respondent.

Dr. Daniel Zimmerman evaluated Ms. Shepard at her counsel's request on September 18, 2019. Ms. Shepard complained of pain and discomfort affecting her hands, wrists, and digits, not improved after surgery. Dr. Zimmerman reviewed Ms. Shepard's history and available medical records, though he initially did not have the report by Dr. Fevurly or various court documents. He performed a physical examination, finding:

² *Johnson v. U.S. Food Serv.*, 478 P.3d 776 (Kan. 2021).

³ See Harris IME Addendum (Feb. 27, 2017) at 1.

She had range of motion restrictions at the left elbow level and findings consistent with medial epicondylitis. She had clinical findings on both sides – on the right side particularly consistent with residuals of the surgically treated carpal tunnel syndrome. On the left side she had sensory symptoms consistent with an ulnar nerve entrapment, perhaps at Guyon's canal, and also clinical findings consistent on examination with residuals of the surgically treated carpal tunnel syndrome.⁴

Dr. Zimmerman found Ms. Shepard sustained bilateral carpal tunnel syndrome and medial epicondylitis on the left, the prevailing factor for both being the repetitive work activities Ms. Shepard performed at respondent through a series of incidents through April 6, 2015. Dr. Zimmerman determined Ms. Shepard had reached maximum medical improvement, though he recommended additional conservative medical treatment.

Dr. Zimmerman provided a rating opinion using both the 4th Edition and the 6th Edition. Under the 4th Edition, Dr. Zimmerman determined Ms. Shepard sustained a combined 25 percent whole person impairment based on her upper extremity conditions. Dr. Zimmerman found Ms. Shepard sustained a combined 9 percent whole person impairment under the 6th Edition.

Dr. Scott Langford, a board certified orthopedic and hand surgeon, examined Ms. Shepard on March 13, 2020, at respondent's request. Ms. Shepard's chief complaint was hand symptoms, worse on the left, including pain, numbness, and tingling. Dr. Langford also reviewed Ms. Shepard's history, medical records, and performed a physical examination. He determined Ms. Shepard sustained bilateral carpal tunnel syndrome, status-post bilateral carpal tunnel releases. Dr. Langford did not believe Ms. Shepard's work activities to be the prevailing factor of her condition. Dr. Langford testified carpal tunnel syndrome, to be occupational, must meet high force and high repetition requirements. Dr. Langford stated Ms. Shepard's duties at respondent did not meet the criteria. Dr. Langford noted Ms. Shepard had multiple non-occupational risk factors which contributed to her condition. Because he did not find Ms. Shepard's work activities to be the prevailing factor, Dr. Langford opined Ms. Shepard had no work-related permanent partial impairment.

Ms. Shepard continues to work for respondent in the fitting room department. For the last two years, Ms. Shepard also has received Social Security payments. She testified, while her symptoms are not as severe as prior to surgery, she continues to suffer problems with her upper extremities, including numbness in her fingertips and throbbing pain from her elbows to her hands.

⁴ Zimmerman Depo. at 8.

PRINCIPLES OF LAW AND ANALYSIS

Ms. Shepard has asked the Board to remand this case to the ALJ to present additional evidence of functional impairment to conform to *Johnson*. In part, K.S.A. 44-551(l)(1) states, "On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings." The Board may remand a matter to an ALJ for the taking of additional evidence.⁵

Johnson states, "K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides."⁶ *Johnson* held K.S.A. 44-510e(a)(2)(B) requires functional impairment ratings must be proved by competent medical evidence and use of the 6th Edition is only a starting point for any medical opinion.⁷ *Johnson* states:

The use of the phrase "based on" indicates the Legislature intended the Sixth Edition to serve as a standard starting point for the more important and decisive "competent medical evidence." That is, "the application of a standard, while setting the legal parameters of any possible final resolution, leaves work to be done. See Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 959-68 (1995) (in depth analysis of the 'continuum from rules to untrammelled discretion, with factors, guidelines, and standards falling in between')." *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting).⁸

The parties were in no position to predict the outcome in *Johnson*. The parties would not be expected to know, in advance, use of the 6th Edition was a mere starting point, leaving more work to be done in terms of permitting medical experts to further explain opinions based on competent medical evidence. The parties should be allowed to present additional medical evidence relevant to the claimant's impairment of function, especially focused on competent medical evidence as explained in *Johnson*.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge David Bogdan dated June 1, 2020, is vacated and the matter remanded to allow the parties to admit additional evidence, if necessary, and to allow the

⁵ See *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 24-25, 81 P.3d 425 (2003).

⁶ *Johnson, supra*, at 780.

⁷ *Id.*

⁸ *Id.*

ALJ to determine the nature of the claimant's impairment of function consistent with *Johnson*.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

For the reasons explained in *Adam v. Ashby House*, CS-00-0443-901, AP-00-0455-555 (April 26, 2021), I respectfully dissent.

Also, the claimant is correct: *Johnson* does not address the full slate of arguments raised in such case as to the constitutionality of the use of the *AMA Guides*, 6th ed. Instead, *Johnson* narrowly focuses on only one of the arguments raised in such case.

BOARD MEMBER

c: Roger Fincher, Attorney for Ms. Shepard
Matthew Bergmann, Attorney for Respondent and its Insurance Carrier
Hon. David Bogdan, Administrative Law Judge