

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA del CARMEN SANCHEZ
Claimant

v.

CS-00-0371-751
AP-00-0455-698

NATIONAL BEEF PACKING CO.
Respondent

and

ZURICH AMERICAN INSURANCE CO.
Insurance Carrier

ORDER

Claimant requested review of the Review & Modification Decision issued by Administrative Law Judge (ALJ) Pamela J. Fuller on December 22, 2020.

APPEARANCES

Conn Felix Sanchez appeared for Claimant. Shirla R. McQueen appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the record listed in the Review & Modification Decision, consisting of the transcript of Review & Modification Hearing held September 11, 2020; the transcript of Evidentiary Deposition via Telephone Conference Call of Ma Del Carmen Sanchez taken November 2, 2020, including Exhibit 1; the transcript of Evidentiary Deposition via Zoom of Selena Sena taken December 7, 2020, excluding the exhibits; the transcript of Evidentiary Deposition via Zoom of Karl Ulibarri taken December 7, 2020, including Exhibits 3-6, but sustaining the objection to Exhibit 7; the transcript of Evidentiary Deposition of Pedro A. Murati, M.D., taken September 21, 2020, including Exhibits 1-6; the transcript of Evidentiary Deposition via Telephone of Paul S. Hardin taken October 5, 2020, including Exhibits 1-3; the transcript of Evidentiary Deposition of Pat Do, M.D., taken December 9, 2020, including Exhibits 1-2, 4-7, but excluding Exhibit 3 and Claimant's Exhibit 1; the transcript of Evidentiary Deposition of J. Mark Melhorn, M.D., taken November 19, 2020, including Exhibits 1-2; the transcript of

Deposition of Karen Terrill taken November 12, 2020, including Exhibits 1-2; the transcript of the Settlement Hearing held August 2, 2016, including the Form 12 but excluding the medical reports; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs, and heard oral argument on April 15, 2021.

ISSUES

1. Did Claimant sustain additional impairment or disability meriting modification of the prior award of compensation under K.S.A. 44-528?
2. If modification is appropriate under K.S.A. 44-528, what is the nature and extent of Claimant's disability?

FINDINGS OF FACT

Claimant worked for Respondent for five years performing work requiring repetitive use of both upper extremities. Claimant sustained injuries to both upper extremities from repetitive trauma arising out of and in the course of her employment with Respondent, using a date of injury of April 12, 2012. Claimant is fifty years old, and received a high-school education in Mexico. Claimant took some classes in cosmetology and nursing while in Mexico. Claimant's primary language is Spanish.

On September 29, 2014, Claimant underwent a left lateral epicondylectomy with release by Dr. Ansari. Dr. Melhorn performed a right-sided carpal tunnel release on November 18, 2014, and an attempted ganglion removal, deQuervain's release and radial nerve decompression on February 17, 2015. Claimant returned to work for Respondent in an accommodated position. Dr. Melhorn declared Claimant at maximum medical improvement on June 19, 2015. Dr. Melhorn rated Claimant's permanent impairment at 9.45% of the right arm and 5.2% of the left arm based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, (*AMA Guides*, Fourth Edition). Dr. Melhorn released Claimant to perform medium-level work, with no use of a hook, knife or scissors, at Claimant's request and not based on objective findings.

On July 27, 2015, Claimant was terminated by Respondent for poor job performance and for leaving the job site after being told to report to the Human Resources Department. Claimant was working in an accommodated position when she was terminated. Claimant's last date of work for Respondent was July 23, 2015. According to Respondent's workers compensation administrator, Ms. Sena, Respondent would have accommodated Claimant's work restrictions had she not been terminated for cause.

Dr. Murati evaluated Claimant at her attorney's request on September 14, 2015. Dr. Murati diagnosed Claimant with post-left elbow lateral epicondylectomy with release and

reattachment; post-right-sided carpal tunnel release and ulnar nerve decompression at the elbow; post-attempted removal of a mass at the right wrist and forearm, right deQuervain's tendonitis and right radial nerve wrist; left carpal tunnel syndrome; left radial nerve entrapment; and myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals. Dr. Murati rated Claimant's functional impairment at 36% of the body as a whole referable to both wrists and elbows, shoulders, neck and upper back. Dr. Murati also imposed work restrictions of no climbing ladders, no crawling, no repetitive grasping or grabbing on the right side, no heavy grasping bilaterally, no lifting or carrying, no pushing or pulling over twenty pounds, occasional repetitive hand controls on the right side, occasional repetitive grasping and grabbing on the left side, occasional pushing or pulling twenty pounds; frequent repetitive hand controls on the left side; frequent pushing or pulling ten pounds, no working more than twenty-four inches from the body bilaterally, no use of hooks or knives bilaterally, avoid awkward positions of the neck, avoid twisting at the trunk and use wrist splints on the left side while working and at home.

Dr. Do performed a Court-ordered independent medical examination of Claimant on April 6, 2016. Claimant reported symptoms in both elbows and right wrist radiating to the shoulders and neck. Dr. Do did not believe Claimant sustained injuries to the shoulders or neck, but sustained impairment to both elbows and the right wrist. Dr. Do rated Claimant's impairment at 20% of the body as a whole for the elbows and right wrist. Dr. Do imposed permanent work restrictions of lifting and carrying 0-10 pounds continuously, 11-20 pounds frequently, 21-50 pounds occasionally, and no lifting or carrying 51 pounds or heavier; and frequent use of vibratory tools bilaterally.

Claimant settled her claim with all rights left open, which was approved at a settlement hearing held on August 2, 2016. Claimant received a lump-sum payment of \$30,954.02, which represented permanent partial disability compensation based on 20% functional impairment of the body as a whole, based on the *AMA Guides*, Fourth Edition. Attached to the Form 12 were the rating reports issued by Drs. Melhorn, Murati and Do. Claimant was not working when the settlement hearing occurred. Claimant testified she wanted more medical treatment for her hands. Claimant also confirmed she believed the settlement was in her best interests and she wanted the settlement approved. The settlement hearing transcript was filed with the Division on or about August 18, 2016, and was not appealed.

Following the settlement hearing, Claimant requested additional medical treatment. On March 14, 2017, Dr. Murati evaluated Claimant and recommended she see a hand surgeon for additional treatment. On December 13, 2017, Dr. Do re-evaluated Claimant at Respondent's request. Claimant reported the same symptoms to both elbows, right wrist, neck and back as before. Dr. Do did not believe Claimant sustained neck or back pain from the work-related upper extremity injuries, and Claimant's ongoing symptoms despite not working suggested they were caused by arthritis. Claimant underwent a Court-

ordered independent medical examination by Dr. Carabetta. Dr. Carabetta recommended Claimant be evaluated by a hand specialist.

Claimant returned to Dr. Melhorn on February 19, 2019, for additional treatment. Dr. Melhorn noted increased subjective symptoms greater than expected because Claimant denied working since July 2015. Additional treatment was recommended for Claimant's residual left-sided carpal tunnel syndrome and right-sided lateral epicondylitis. Dr. Melhorn did not address symptoms to other body parts. On March 21, 2019, Dr. Melhorn performed a left-sided carpal tunnel release, and on April 4, 2019, Dr. Melhorn performed a lateral epicondylectomy and radial nerve release at the right elbow. Dr. Melhorn declared Claimant at maximum medical improvement and released Claimant from his care on May 24, 2019. Dr. Melhorn imposed no additional work restrictions, apart from an "optional" restriction of rotating tasks. Ms. Sena testified Respondent could have accommodated Dr. Melhorn's restrictions if Claimant had not been terminated for cause.

Dr. Melhorn thought Claimant sustained additional permanent impairment. Dr. Melhorn rated Claimant's additional impairment at 5.2% of the right elbow, and 3.9% of the left wrist, based on the *AMA Guides*, Fourth Edition. Dr. Melhorn combined the prior rating with the newer rating, and assessed a combined impairment of 12.35% of the right upper extremity and 9.1% of the left upper extremity, which produced 12% functional impairment of the body as a whole.

Dr. Murati re-evaluated Claimant on October 31, 2019. Examination was notable for numbness of the left first digit, and right first and second digits, four out of five strength, and mild atrophy of the thenar and hypothenar eminences of both hands. Full range of motion was noted. Complaints of neck pain with limited flexion and upper back pain were also noted. Dr. Murati diagnosed post-left-sided epicondylectomy and nerve release, post-right-sided carpal tunnel release and ulnar nerve transposition, post-right-sided attempted ganglion removal, post-bilateral carpal tunnel releases, post-left-sided cubital tunnel release, myofascial pain syndrome of both shoulders extending into the cervical and thoracic paraspinals, and probable cervical radiculopathy.

Dr. Murati rated Claimant's impairment at 33% of the body as a whole for the surgeries to the right upper extremity and reduced range of motion of the shoulder, 31% of the body as a whole for the surgeries to the left upper extremity and reduced range of motion of the shoulder, 5% of the body as a whole for impairment to the thoracic spine and 15% of the body as a whole for cervical radiculopathy, which produced a global impairment rating of 63% to the body as a whole under the *AMA Guides*, Fourth Edition. Taking into account only the elbows and wrists, Dr. Murati's rating was 50% of the body as a whole. Dr. Murati believed Claimant's impairment worsened between 2015 and 2019, despite her not working, because she did not receive effective medical treatment. Dr. Murati understood the additional treatment Claimant received was directed to the lumbosacral spine.

Dr. Murati imposed an additional work restriction of no above-shoulder work due to the pathology of the shoulders, neck and thoracic spine, and no keyboarding or use of vibratory tools due to the carpal tunnel syndrome and cubital tunnel syndrome. The other restrictions enumerated on October 31, 2019, were imposed on September 14, 2015. Based on his restrictions and review of Mr. Hardin's task list, Dr. Murati believed Claimant sustained a task loss of 61.5%. Dr. Murati also believed Claimant was realistically unemployable based on the condition of her shoulders, hands, neck and upper back.

On July 15, 2020, Dr. Do evaluated Claimant at Respondent's request. Claimant reported symptoms to both upper extremities, thoracic spine, cervical spine, lumbar spine and right knee. Claimant denied undergoing additional surgeries to the upper extremities, but Dr. Do was aware of the additional surgeries from review of Dr. Melhorn's records. Dr. Do noted Claimant's cervical, thoracic, lumbar and right knee pain did not follow an anatomic pattern, and he did not believe those symptoms were due to a work-related injury. Based on his evaluation of the upper extremities, Dr. Do did not believe Claimant sustained additional impairment. Dr. Do did not believe additional restrictions were indicated, and Claimant's prior restrictions produced a task loss of 38% based on review of Ms. Terrill's task list. Dr. Do acknowledged he would defer to Dr. Melhorn, as the treating physician, on whether additional restrictions were necessary. Dr. Do did not believe Claimant was permanently and totally disabled.

Both Ms. Terrill and Mr. Hardin generated task lists. Mr. Hardin was only provided Dr. Murati's October 2019 report, and was not aware of Dr. Murati's prior restrictions. Based on Dr. Murati's report, Claimant's age, education and job history, Mr. Hardin thought Claimant was permanently and totally disabled. Ms. Terrill reviewed records from Dr. Do, Dr. Murati and Mr. Hardin, and thought Claimant could obtain work paying \$290.00 per week based on either physician's restrictions. Because Claimant could earn minimum wage, Ms. Terrill did not believe Claimant was permanently and totally disabled.

Claimant testified her symptoms worsened after the second course of treatment with Dr. Melhorn. Claimant experiences numbness, loss of grip strength, and strong, constant, daily pain. Claimant received no additional education after the settlement. Claimant testified she does nothing during the day causing her symptoms to worsen because she cannot do anything with her hands. Claimant denied doing housework since July 27, 2015. Claimant never returned to work after July 27, 2015.

Claimant filed an Application for Review and Modification on May 4, 2020. On December 22, 2020, ALJ Fuller issued the Review and Modification Decision. ALJ Fuller reviewed the medical and vocational testimony, and compared Claimant's current condition to her condition at the settlement hearing. ALJ Fuller found the opinions of Dr. Do the most credible because he previously served as the Court-appointed neutral physician, and found Claimant did not sustain additional functional impairment. ALJ Fuller also found Claimant was terminated by Respondent for cause prior to the settlement hearing, and Claimant did

not prove an increase in her wage loss following the settlement hearing. Accordingly, permanent partial general disability compensation based on work disability was denied. ALJ Fuller also concluded Claimant was not permanently and totally disabled. Therefore, additional compensation was denied. This appeal follows.

ANALYSIS AND CONCLUSIONS OF LAW

1. Claimant met her burden of proving a change in condition meriting modification of the initial award of compensation under K.S.A. 44-528.

The Workers Compensation Act provides any award may be reviewed by the administrative law judge, except for lump-sum settlements. If the administrative law judge finds the initial award is excessive or inadequate, or the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify the underlying award.¹ Review and modification must be based on new facts showing a change of condition rendering the former award excessive or inadequate.² To determine whether a change in condition is present, the employee's condition at the time of the initial award must be compared to the employee's condition at the time modification is sought.³

In this case, the credible evidence indicates Claimant's functional impairment at the time modification was sought was higher than Claimant's functional impairment at the August 2, 2016, settlement hearing. At the settlement hearing, Claimant had undergone three surgeries to the left elbow, right elbow and right wrist, and received permanent work restrictions. Claimant was terminated for cause by Respondent and was not working. Claimant received an award of permanent partial disability compensation based on 20% functional impairment to the body as a whole. At the time review and modification was sought, Claimant still had not worked since the settlement hearing because of her hands. Claimant had undergone two additional surgeries to the right elbow and left wrist by Dr. Melhorn. Drs. Murati and Melhorn believed Claimant's physical condition had worsened, and she sustained additional functional impairment. Dr. Do did not believe Claimant sustained additional impairment.

The Board finds the opinion of Dr. Melhorn regarding Claimant's change in condition particularly credible because he was the treating physician at the time of settlement and modification, and had the opportunity to see Claimant on multiple occasions. The Board

¹ See K.S.A. 44-528(a).

² See *Coffman v. State of Kansas*, 31 Kan. App. 2d 61, 64, 59 P.3d 1050 (2002).

³ See *id.*

finds Claimant proved she sustained a change in condition to her upper extremities on account of the additional treatment and surgeries provided by Dr. Melhorn after the settlement. Claimant is entitled to modification of the initial award.

- 2. The initial award of compensation should be modified to reflect an increase in functional impairment to 27.3% of the body as a whole, referable to both arms, effective November 4, 2019, with compensation payable through April 2, 2020.**

Having determined Claimant is entitled to modification of the initial award, the Board must consider the nature and extent of Claimant's functional impairment. The Board must also consider whether Claimant is now eligible to receive permanent total disability compensation or work disability benefits. Finally, the Board must determine the effective date of modification and the amount of any additional compensation awarded.

- A. Claimant's functional impairment is now 27.3% of the body as a whole referable to both arms at the elbows and wrists.**

Claimant's prior award was based on 20% of the body as a whole, which corresponds to the rating issued by Dr. Do assessing impairment to Claimant's bilateral arms. Dr. Murati identified bilateral shoulder, neck and thoracic spine involvement in 2015, and thought the injuries to those body parts worsened when he evaluated Claimant in 2019. Dr. Murati did not have an accurate understanding of Claimant's course of medical treatment, and thought Claimant received treatment for the lumbosacral spine. Claimant never received treatment for the shoulders, neck or back. Dr. Melhorn did not address any body parts other than the upper extremities. Dr. Do, who was the Court-ordered examining physician in 2016, did not believe Claimant sustained work-related injuries to the shoulders or neck. Dr. Do re-evaluated Claimant in 2017 and 2020 at the request of Respondent, and reiterated his opinion Claimant's neck, back and right knee pain were not due to the work-related injuries to the upper extremities. Claimant's neck symptoms were consistent with personal health conditions based on Dr. Do's review of the MRI scan. The Board finds the opinions of Drs. Melhorn and Dr. Do more credible because they had a better understanding of Claimant's course of treatment. The Board finds Claimant sustained additional functional impairment to both arms at the elbows and wrists only.

The Board next considers the extent of Claimant's functional impairment to the bilateral upper extremities. The initial award was based on 20% functional impairment of the body as a whole, based on the *AMA Guides*, Fourth Edition. Dr. Melhorn, the treating physician, opined Claimant's global impairment, taking into account both her initial impairment and additional impairment, was 12% of the body as a whole under the *AMA Guides*, Fourth Edition. Dr. Murati, Claimant's rating physician, testified Claimant's global impairment to both upper extremities, was 50% of the body as a whole under the *AMA*

Guides, Fourth Edition. Dr. Do, Respondent's rating physician, testified Claimant's initial impairment was 20% of the body as a whole under the *AMA Guides*, Fourth Edition, and Claimant did not sustain additional impairment after her second course of treatment by Dr. Melhorn.

Claimant continues to report ongoing pain, but she discontinued working and performing housework at the time of the settlement hearing. Claimant testified she was unable to use her hands, but Dr. Do did not find evidence of nerve issues impacting the upper extremities. Based on his restrictions, Dr. Melhorn thought Claimant was capable of performing work with her hands. Even Dr. Murati, Claimant's rating physician, found full range of motion, four out of five strength and mild atrophy of the thenar and hypothenar eminences of both hands, which suggests Claimant retains functional hands. The Board finds an average of the three ratings accurately represents Claimant's functional impairment, based on the objective findings of the physicians, Claimant's multiple surgeries and residual subjective complaints. Claimant's functional impairment at the time of modification is 27.3% of the body as a whole referable to both arms (50% + 12% + 20% divided by 3 = 27.3%).

B. Claimant is not now permanently and totally disabled.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.⁴

Claimant was not working at the time the initial award of compensation was issued, and Claimant remained unemployed when she requested modification. Claimant's education and job skills are unchanged. Dr. Murati imposed two additional work restrictions in 2019, compared to 2017, on account of the worsening of the upper extremities. Dr. Murati thought Claimant was permanently and totally disabled based on the condition of her shoulders, hands, neck and upper back. Mr. Hardin believed Claimant was permanently and totally disabled based on his review of Dr. Murati's 2019 restrictions, but he was not aware of Dr. Murati's prior restrictions. Dr. Do did not believe Claimant was permanently and totally disabled, and did not believe Claimant required additional work restrictions. Dr. Melhorn thought Claimant could perform medium-level work when he initially released Claimant from treatment, and added one optional restriction for task rotation following Claimant's second course of treatment. Ms. Sena testified Dr. Melhorn's restrictions could have been accommodated if Claimant had not been terminated for cause. Ms. Terrill reviewed the medical reports of Drs. Do and Murati, and concluded Claimant was capable of working and earning minimum wage.

⁴ See K.S.A. 44-510c(a)(2).

Having considered the record as a whole, the Board finds Claimant did not prove she is now permanently and totally disabled. Claimant's education, job skills, primary language, employment status and activity level at the time of settlement and at the time modification was sought are unchanged. Claimant is now fifty years old. Dr. Murati's opinion of unemployability takes into account unrelated conditions in the shoulders, neck and back, and Mr. Hardin's opinion does not consider Claimant's work restrictions at the time of settlement. Dr. Do and Dr. Melhorn considered Claimant's condition at the time of settlement and after the second course of treatment, and did not conclude Claimant was incapable of working. Ms. Terrill considered the reports of Drs. Do and Murati, and opined Claimant was not permanently and totally disabled. Ms. Sena's testimony accommodated work would have been available had Claimant not been terminated for cause was uncontradicted. The Board finds the opinions of Drs. Do and Melhorn more credible than the opinions of Dr. Murati because Dr. Murati's opinion includes non-compensable conditions. Ms. Terrill's vocational opinion considers more medical opinions than Mr. Hardin's, and is more credible. Claimant failed to prove the change in condition she sustained to her upper extremities rendered her permanently and totally disabled.

C. Claimant is not eligible to receive work disability compensation.

Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss as defined in K.S.A. 44-510e(a)(2)(E), the employee may receive work disability compensation in excess of the percentage of functional impairment.⁵ Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.⁶

At the time of settlement, Claimant was terminated by Respondent for cause and was not working. Claimant did not receive a settlement based on work disability considerations. Ms. Sena testified accommodated work within Dr. Melhorn's restrictions would have been provided had Claimant not been terminated for cause. Because Claimant was terminated by Respondent for cause, she remains ineligible to receive work disability under K.S.A. 44-510e(a)(2)(E)(I), because she did not prove her wage loss changed.

⁵ See K.S.A. 44-510e(a)(2)(C).

⁶ See K.S.A. 44-510e(a)(2)(E)(i).

D. The effective date of modification is November 4, 2019, and Claimant is eligible to receive additional permanent partial disability compensation through April 2, 2020.

Claimant is entitled to modification of the initial award of permanent partial disability compensation to reflect functional impairment of 27.3% of the body as a whole referable to both arms. The remaining task for the Board is determining the effective date of modification and the value of Claimant's award. The Kansas Workers Compensation Act provides any modification of an award on the basis of an increase in functional impairment shall be effective the date the increase actually occurred, but in no event shall the effective date of modification be more than six months prior to the date the application for review and modification was made.⁷ The employee shall receive compensation during the period of permanent partial disability not exceeding a maximum of 415 weeks for an injury to the body as a whole resulting in permanent partial disability.⁸ Where an injured worker receives an award of permanent partial disability benefits under K.S.A. 44-510e, the worker's right to receive additional permanent partial disability benefits via review and modification proceedings expires 415 weeks from the date of accident or injury, and no further disability compensation is payable after that time.⁹

In this case, Claimant filed the Application for Review and Modification on May 4, 2020. Under K.S.A. 44-528(d), the effective date of modification is six months prior to the date of filing of the Application, or November 4, 2019. The 415-week limitation under *Ponder-Coppage* expires on April 2, 2020. Therefore, Claimant's increase in functional impairment to 27.3% of the body as a whole is effective November 4, 2019. Claimant is entitled to receive permanent partial disability compensation for 21.57 weeks, at \$372.94 per week, starting November 4, 2019 and continuing through April 2, 2020. After April 2, 2020, no permanent partial disability compensation is payable.

AWARD

WHEREFORE, it is the decision of the Board the Review & Modification Decision issued by ALJ Pamela J. Fuller, dated December 22, 2020, is reversed.

An award is issued in favor of Claimant and against Respondent and Insurance Carrier. Claimant is entitled to permanent partial disability compensation for 83 weeks at \$372.94 per week, based on 20% functional impairment to the body as a whole, totaling

⁷ See K.S.A. 44-528(d).

⁸ See K.S.A. 44-510e(a).

⁹ See *Ponder-Coppage v. State of Kansas*, 32 Kan. App. 2d 196, 200, 83 P.3d 1239 (2002).

\$30,954.02, followed by permanent partial disability compensation for 21.57 weeks based on 27.3% functional impairment to the body as a whole, paid at \$372.94 per week, totaling \$8,044.32, making a total award of \$38,998.34, less the compensation previously paid by Respondent and Insurance Carrier.

As of the date of this award, there is due and owing 21.57 weeks of permanent partial disability compensation at \$372.94 per week, totaling \$8,044.32, which is ordered paid in one lump sum.

Pursuant to K.S.A. 44-536(g)(1), Claimant’s counsel is entitled to an attorney’s fee of 25% of the additional compensation awarded and reimbursement for actual expenses incurred, to be paid from the additional compensation awarded herein.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (VIA OSCAR)

Conn Felix Sanchez
Shirla R. McQueen
Hon. Pamela J. Fuller