**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **SHARON PESINA** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | AP-00-0458-411 |
| **AEGIS PROCESSING SOLUTIONS** | ) | CS-00-0441-118 |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **OHIO SECURITY INSURANCE** | ) | |
| Insurance Carrier | ) | |

# ORDER

Sharon Pesina requested review of the June 7, 2021, Award issued by Administrative Law Judge (ALJ) David J. Bogdan. The Board heard oral argument on September 23, 2021.

## APPEARANCES

Roger Fincher appeared for Ms. Pesina. Deborah Johnson appeared for respondent and its insurance carrier (respondent). Due to a conflict, Board Member Rebecca Sanders recused herself from this appeal. Mark Kolich was appointed Board Member Pro Tem in this case.

## RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held June 25, 2020, with exhibits attached; the transcript of the Preliminary Hearing held May 29, 2019; the transcript of the Telephonic Evidentiary Deposition of Daniel D. Zimmerman, M.D., taken July 14, 2020, with exhibits attached; the transcript of the Evidentiary Deposition and Continuation of Hearing Testimony/Cross-Examination of Sharon Pesina taken July 8, 2020; the transcript of the Evidentiary Deposition of Robert Bruce, M.D., taken July 21, 2020, with exhibits attached; the transcript of the Evidentiary Deposition of Brian Divelbiss, M.D., taken August 13, 2020, with exhibits attached; and the documents of record filed with the Division.

## ISSUES

The ALJ found Ms. Pesina sustained 2 percent disability of the right upper extremity at the wrist level for tenosynovitis. The ALJ did not award permanent impairment for alleged bilateral carpal tunnel syndrome based upon no finding of prevailing factor related to Ms. Pesina's work activity, and further found Ms. Pesina's alleged bilateral elbow epicondylitis did not arise out of or in the course of her employment with respondent. The ALJ determined Ms. Pesina was not entitled to future medical treatment for any work-related injury.

Ms. Pesina argues she sustained repetitive trauma injuries (carpal tunnel syndrome, lateral epicondylitis, and chronic tendinitis) to her upper extremities arising out of and in the course of her employment and is entitled to future medical treatment. Ms. Pesina contends she has 21 percent impairment of the whole body, consistent with the ratings of Dr. Daniel Zimmerman, under the 4th Edition AMA *Guides* (4th Edition).[1] Alternatively, if Ms. Pesina has a scheduled injury, the use of the 6th Edition AMA *Guides* (6th Edition) is unconstitutional, and the *Johnson v. U.S. Food Service*[2] decision applies to her injury. Should the Board find Ms. Pesina has a whole person injury, Ms. Pesina requests the matter be remanded to the ALJ for a more accurate impairment determination following the *Johnson* decision.

Respondent argues the ALJ's Award should be affirmed except for its award of 2 percent impairment to Ms. Pesina's right upper extremity at the wrist. Respondent maintains Ms. Pesina did not suffer any permanent impairment as a result of her work injury. Further, respondent asks the Board to deny Ms. Pesina's request to find any aspect of the ALJ's decision unconstitutional or be remanded.

The issues before the Board are:

1. Did Ms. Pesina provide proper notice for her claimed injury to her elbows?

2. Did Ms. Pesina suffer an injury to both upper extremities by repetitive trauma arising out of and in the course of her employment?

3. If Ms. Pesina sustained compensable upper extremity injuries, what is the nature and extent of impairment?

4. Is Ms. Pesina entitled to future medical treatment?

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

[2] *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

5. If Ms. Pesina sustained compensable upper extremities, should this matter be remanded to the ALJ?

6. Is the use of the 6th Edition constitutional?

## FINDINGS OF FACT

Ms. Pesina began working for respondent, a warehouse for charities, on July 2, 2018. Prior to working for respondent, Ms. Pesina worked at a law firm as a skip tracer, which did not require repetitive use of her hands. Her job duties at respondent included handling checks, and sometimes opening envelopes, for seven hours of her eight-hour workday. Ms. Pesina also lifted and sorted through boxes weighing approximately 22 pounds, and at times pushed a heavy cart loaded with boxes. Ms. Pesina used scissors to cut stacks of paper, cutting about 5 pages at once, for a total of around 300 pages per day.

Ms. Pesina testified her workload increased in October 2018 due to upcoming holidays, and her hours increased to 10 hours, 6 days per week. The increased workload continued until March 2019. Ms. Pesina began experiencing pain and numbness in her hands and wrists in December 2018. Ms. Pesina stated she had no problems with numbness, tingling, or any other repetitive-type injuries to her upper extremities prior to working for respondent. Ms. Pesina is 52 years of age.

On January 15, 2019, Ms. Pesina went to a Cotton O'Neil Express Clinic with complaints of pain and numbness in her hands, wrists, and fingers. She indicated she was losing the ability to grasp and lift things but continued to perform her job duties. Ms. Pesina notified respondent of her issues the following day, January 16, 2019. Respondent sent Ms. Pesina to Kansas Rehabilitation Hospital for treatment, at which time she was provided cock-up splints for both wrists. Ms. Pesina stated she did not receive any further treatment for her upper extremity complaints.

Ms. Pesina's counsel sent her to Dr. Lanny Harris on February 23, 2019. Dr. Harris did not provide testimony in this case, and his records are not in evidence.

Dr. Robert Bruce, a board-certified orthopedic surgeon, examined Ms. Pesina on February 28, 2019, at respondent's request. Ms. Pesina complained of pain and fatigue into her hands and fingers, bilateral wrist pain, and pain radiating from her wrist to her elbow. She also complained of neck pain, numbness around the thumbs, and tingling and aching in her hands. Dr. Bruce reviewed Ms. Pesina's available medical records, work history, and performed a physical examination. Dr. Bruce performed various tests during his physical examination without utilizing tools in conducting his measurements. He found Ms. Pesina's range of motion measurements in her hands and wrists to be normal. Dr. Bruce found Ms. Pesina sustained tenosynovitis in her right wrist as a result of her work

at respondent. Dr. Bruce testified Ms. Pesina's symptoms were a result of inflammation in her flexor tendons, and he found no objective evidence of carpal tunnel syndrome. Because he determined Ms. Pesina to not have carpal tunnel syndrome, he did not order an EMG.

Dr. Bruce stated the use of cock-up splints is appropriate treatment for Ms. Pesina's work-related condition, as is the use of over-the-counter medications. Dr. Bruce found Ms. Pesina to be at maximum medical improvement (MMI) with zero percent impairment.

On July 2, 2019, board-certified orthopedic surgeon Dr. Brian Divelbiss performed a Court-ordered independent medical evaluation. In her May 29, 2019, Order, the ALJ asked Dr. Divelbiss his opinions on diagnosis and recommendations for treatment. Ms. Pesina's chief complaint was pain in her hands, wrists, and arms. Ms. Pesina did not complain of elbow pain. Dr. Divelbiss obtained a medical and work history from Ms. Pesina, reviewed available medical records, and performed a physical examination. Dr. Divelbiss assessed Ms. Pesina with bilateral hand numbness and tingling with suspicion of bilateral carpal tunnel syndrome. He explained:

> It is certainly possible that this patient has bilateral carpal tunnel syndrome, however, I do not believe that it is likely that her job activities are the prevailing cause for the presentation of this suspected carpal tunnel syndrome. It is far more likely that any potential carpal tunnel syndrome is related to her age (>50), gender (F), and associated hypothyroidism rather than her job activities. She certainly does have some repetitive activity at her work but I would not classify this activity as highly forceful. Therefore, since I do not believe that her job activities are likely to be the prevailing cause for the presentation of her suspected carpal tunnel syndrome, I am not recommending any further evaluation or treatment.[3]

Dr. Divelbiss testified Ms. Pesina's work at respondent was not forceful enough to contribute to carpal tunnel syndrome. He noted his assessment was a "suspicion" of bilateral carpal tunnel syndrome. Dr. Divelbiss stated he did not confirm his suspicion with an EMG because he did not believe Ms. Pesina's work activities were the prevailing factor in causing her condition. Dr. Divelbiss acknowledged an EMG study would objectively confirm the presence of carpal tunnel syndrome.

Ms. Pesina stated she wore her splints until the summer of 2019. Ms. Pesina continued working for respondent until she left in September 2019. Ms. Pesina testified she left because she could no longer perform her job duties with her pain. Ms. Pesina obtained employment at Kansas Neurological Institute (KNI), where she cares for developmentally disabled adults. While Ms. Pesina has had slight improvement with her hands since working at KNI, she continues to have trouble maintaining her grip. Ms.

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[3] Divelbiss IME (July 2, 2019) at 2.

Pesina described weakness in both wrists and loss of sensation in her hands. Ms. Pesina stated she began having pain in both elbows in February or March 2020. She did not inform respondent of her elbow pain because she was no longer working there, but was working for KNI.

Dr. Daniel Zimmerman evaluated Ms. Pesina at her counsel's request on February 19, 2020. Ms. Pesina informed Dr. Zimmerman she had been employed at KNI for approximately six months. Dr. Zimmerman did not review Ms. Pesina's job duties at KNI. She complained of pain and discomfort affecting her hands, wrists, digits, and elbows. Dr. Zimmerman reviewed Ms. Pesina's available medical records, history, and performed a physical examination, using tools to measure her range of motion.

Dr. Zimmerman reviewed Ms. Pesina's prior medical records, including those from Kyle Garrison, M.D., Lanny Harris, M.D., and Ann McConkey, ARNP-C. Dr. Zimmerman noted Ms. Pesina, on January 15, 2019, presented to Dr. Garrison with complaints of bilateral wrist pain with numbness and tingling consistent with peripheral radial nerve involvement. The symptoms started three or four weeks prior to the examination. On January 16, 2019, Ms. Pesina was seen by Nurse McConkey with complaints of bilateral hand and wrist pain. Dr. Zimmerman also notes Ms. Pesina was examined by Dr. Harris on February 23, 2019.

Dr. Zimmerman concluded Ms. Pesina's findings were consistent with right and left lateral epicondylitis, bilateral carpal tunnel syndrome, and chronic tendinitis affecting the bilateral hands, wrists, and digits. Dr. Zimmerman found Ms. Pesina's work activities at respondent were the prevailing factor causing her right elbow lateral epicondylitis, right chronic tendinitis, right carpal tunnel syndrome, left elbow lateral epicondylitis, and chronic tendinitis affecting the left hand, wrist, and digits, with clinical findings consistent with left carpal tunnel syndrome.

Dr. Zimmerman indicated Ms. Pesina was at MMI, but recommended future conservative care with pain management, possible injections and an EMG nerve conduction study, which he believed would be positive, to determine if Ms. Pesina is a candidate for surgical management. He provided restrictions. He stated the use of Ms. Pesina's splints were appropriate at the time they were provided, but he no longer recommended them because her testing was complete.

Dr. Zimmerman provided ratings under both the 4th Edition and 6th Edition of the AMA *Guides*. Utilizing the 6th Edition, Dr. Zimmerman opined Ms. Pesina sustained 2 percent impairment of the right elbow due to right elbow lateral epicondylitis. For chronic tendinitis and right carpal tunnel syndrome, Dr. Zimmerman found Ms. Pesina sustained 2 percent permanent partial impairment of the right wrist. These ratings combined to 4 percent impairment of the right upper extremity, or 2 percent whole person impairment. He provided identical ratings for Ms. Pesina's left elbow and left wrist. Overall, Dr.

Zimmerman opined Ms. Pesina sustained 4 percent impairment to the whole person under the 6th Edition. Dr. Zimmerman assessed 21 percent whole person impairment based upon the 4th Edition.

Dr. Zimmerman stated Ms. Pesina did not use her upper extremities at KNI on an extended and repetitive basis, and the amount of lifting was minimal compared to respondent. Dr. Zimmerman understood Ms. Pesina's upper extremity symptoms, including her elbow complaints, were designated as having started on January 16, 2019. He testified:

> If I saw records that suggested that there was no symptoms affecting the elbows until she began working at the Kansas Neurologic Institute and those records provided convincing medical evidence, I would, possibly, have to revise the ratings in terms of the elbows being related to the work activities [performed at respondent].[4]

Ms. Pesina continues working for KNI. She has not been treated for her upper extremity complaints since receiving splints in January 2019. Ms. Pesina never underwent an EMG study.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2018 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2018 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

[4] Zimmerman Depo. at 15.

**1. Did Ms. Pesina provide proper notice for her claimed injury to her elbows?**

K.S.A. 44-520 provides:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

In her Application for Hearing filed with the Division on February 5, 2019, Ms. Pesina alleges an injury by repetitive trauma from January 16, 2019, through February 5, 2019. Ms. Pesina testified she did not develop elbow pain until February or March of 2020. As such, she could not have provided notice within 20 calendar days from the date of injury by repetitive trauma.

Ms. Pesina failed to meet the burden of proving she provided notice of her alleged elbow injuries as required by K.S.A. 44-520.

**2. Did Ms. Pesina suffer an injury to both upper extremities by repetitive trauma arising out of and in the course of her employment?**

K.S.A. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 44-508(g) states:

“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.

Dr. Zimmerman is the only physician who provided the opinion Ms. Pesina's work activities while employed by respondent were the prevailing factor causing her bilateral upper extremity conditions. In arriving at that opinion, Dr. Zimmerman relied, in part, on his review of Ms. Pesina's medical history, including records from Drs. Garrison and Harris and Nurse McConkey. Dr. Zimmerman is the only medical expert in the record who reviewed these particular medical records.

There is no indication either Dr. Bruce or Dr. Divelbiss reviewed and considered the medical records of Dr. Garrison or Ms. McConkey. Dr. Divelbiss noted in his report it is possible Ms. Pesina has bilateral carpal tunnel syndrome. He did not think it was related to her work activities. Dr. Bruce did not think there was anything wrong with Ms. Pesina's wrists, except possible transient synovitis. Dr. Bruce's opinion related to carpal tunnel syndrome is inconsistent with the findings of Dr. Divelbiss and Dr. Zimmerman.

With regard to Ms. Pesina's bilateral wrists and hands, Dr. Zimmerman reviewed a more comprehensive medical history than the other testifying experts; therefore, the Board gives more weight to his opinions regarding medical causation. Dr. Zimmerman opined Ms. Pesina's work activities were the prevailing factor causing her chronic tendinitis affecting her hands and wrists, and possible bilateral carpal tunnel syndrome. Without an EMG, it is difficult to make a finding of carpal tunnel syndrome. The Board finds Ms. Pesina experiences chronic tendinitis affecting her hands and wrists as the result of her work-related injury by repetitive trauma.

Ms. Pesina also alleges injury to her elbows. The Board finds Ms. Pesina's bilateral epicondylitis is not related to her injury by repetitive trauma. Ms. Pesina alleged injury by repetitive trauma through February 5, 2019. Ms. Pesina did not develop elbow symptoms until February or March of 2020, a year after she stopped working for respondent. The elbow symptoms could not have been caused by Ms. Pesina's work activities for respondent. The late onset of symptoms also suggests the elbow complaints are unrelated to the injury by repetitive trauma to Ms. Pesina's wrists. There is insufficient evidence the elbow condition is related to the original injury. Ms. Pesina failed to meet the burden of proving a bilateral elbow injury.

**3. If Ms. Pesina sustained compensable upper extremity injuries, what is the nature and extent of impairment?**

K.S.A. 44-510e(2)(B) states:

> The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries

> occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Ms. Pesina requested the case be remanded to the ALJ to allow additional evidence in light of *Johnson*.[5] When conducting review of an ALJ's decision, the Board shall have authority to grant or disallow compensation, to increase or decrease an award, or to remand a matter to the ALJ for further proceedings.[6]

In *Warsame v. Tyson Fresh Meats,* the Board denied a claimant's request to remand the case to present evidence in conformation with *Johnson*, stating:

> Claimant's request for a remand for Dr. Carabetta to do an analysis of his rating based on the recent Kansas Supreme Court case of Johnson v. US Food Service is denied. The Johnson case was decided before this case was submitted to the ALJ. There is no record Claimant requested Dr. Carabetta reevaluate his rating under Johnson when this case was before the ALJ.[7]

This case is distinguished from *Warsame*. The evidence in this case was fully submitted to the ALJ on August 28, 2020, prior to the date *Johnson* was published. The parties in this case could not have known to ask the ALJ to admit additional evidence. Although additional evidence of impairment was introduced in *Johnson*, the additional evidence was presented in the context of whether impairment based on the AMA *Guides*, 6th Edition, provided a constitutionally sufficient substitute remedy, and not as evidence of permanent impairment under K.S.A. 44-510e, as subsequently defined by the Supreme Court.

In *Adam v. Ashby House Ltd.*,[8] the Board granted a request for remand stating:

> In part, K.S.A. 44-551(l)(1) states, "On any such review, the board shall have authority 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.[9]

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[5] *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

[6] *See* K.S.A. 44-551(l)(1).

[7] *Warsame v. Tyson Fresh Meats,* No. AP-00-0457-958, 2021 WL 4592945, at *6 (Kan. WCAB Sept. 22, 2021).

[8] *Adam v. Ashby House Ltd.*, No. AP-00-0455-555, 2021 WL 1832461 at 5-6 (Kan. WCAB Apr. 26, 2021).

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

In *Johnson,* the Kansas Supreme Court stated, "K.S.A. 2019 Supp. 44-510e(a)(2)(B) has never dictated that the functional impairment is set by guides."[10] *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 *Guides*, 6th ed., is only a starting point for any medical opinion.[11] *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 untrammeled discretion, with factors, guidelines, and standards falling in between')." *Apodaca v. Willmore*, 306 Kan. 103, 136, 392 P.3d 529 (2017) (Stegall, J., dissenting).[12]

The Supreme Court's ruling in *Johnson* represents a new interpretation of K.S.A. 44-510e(a)(2)(B). Before *Johnson*, K.S.A. 2019 Supp. 44-510e(a)(2)(B) was interpreted as mandating the use of the *Guides*, 6th ed., without deviation, in assessing functional impairment for whole-body injuries. The Board ruled use of the *Guides*, 6th ed., was mandatory.[13] The Board did not consider ratings based on methodology deviating from the *Guides*, 6th ed.[14] The Board rejected the argument a physician's discretion continued to play a role in assessing impairment.[15] In like token, the Court of Appeals interpreted K.S.A. 2019 Supp. 44-510e(a)(2)(B) as mandating use of the *Guides*, 6th ed., in assessing whole-body impairment, and ruled the statute was unconstitutional because it left no room for the knowledge and expertise of the evaluating physician.[16]

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[10] *See Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776, 780 (2021).

[11] *Id.*

[12] *Id.*

[13] *See, e.g., Struckhoff v. DH Pace Co., Inc.*, No. CS-00-0440-513, 2020 WL 2991822, at *4-5 (Kan. WCAB May 29, 2020); *Carpenter v. Healthcare Resort of Topeka*, No. CS-00-0307-857, 2020 WL 2991820 at *3 (Kan. WCAB May 8, 2020).

[14] *See Venditti v. Cessna Aircraft Co.*, No. CS-00-0003-734, 2020 WL 719924, at *4 (Kan. WCAB Jan. 18, 2020); *Cantrell v. Securitas Security Services USA, Inc.*, No. 1,078,294, 2018 WL 3326975, at *4 (Kan. WCAB June 28, 2018).

[15] *See Cantrell*, 2018 WL 3326975, at *4.

[16] *See Johnson v. U.S. Food Service*, 56 Kan. App. 2d 232, 253-54, 427 P.3d 996 (2018), *rev'd*, 312 Kan. 597, 478 P.3d 776 (2021).

> Here, the parties were in no position to predict the outcome in *Johnson*. The parties would not be expected to portend use of the *Guides*, 6th ed., was a mere starting point, permitting medical experts to further explain opinions based on competent medical evidence. Before *Johnson*, such evidence was irrelevant. 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 contemplated in *Johnson*.
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> Recently, in *Pimenta-Stone*,[17] the Board was asked to remand the case to an ALJ for reconsideration and potential additional expert medical testimony to explain the doctor's medical opinion consistent with *Johnson*. However, such request was conditioned upon the Board being unwilling to determine the worker's impairment based on the testimony and arguments presented. The Board declined to remand the case because the evidence was sufficient to determine the worker's impairment.
>
> Unlike *Pimenta-Stone*, the Board concludes the evidence in the present case is insufficient to determine the claimant's impairment. As such, the ALJ's determination of the claimant's functional impairment is vacated and remanded for further proceedings consistent with *Johnson*.

As in *Adam*, the Board finds the parties should be allowed to present additional competent medical evidence relevant to the claimant's impairment of function of Ms. Pesina's bilateral wrists and hands as contemplated in *Johnson*. The evidence of carpal tunnel syndrome is unclear, but is material to the nature and extent issue. Dr. Zimmerman recommended an EMG to confirm carpal tunnel syndrome, which would be helpful to clear up the issue. Dr. Divelbiss did not provide an opinion on a course of treatment because he did not think Ms. Pesina's carpal tunnel syndrome was related to her work. He provided this opinion even though he was not asked for a causation opinion. Dr. Divelbiss, however, acknowledged an EMG study would confirm whether Ms. Pesina had carpal tunnel syndrome.

Ms. Pesina is not entitled to permanent partial disability for her bilateral elbow claim because the elbows are not compensable in this claim.

**4. Is Ms. Pesina entitled to future medical treatment?**

K.S.A. 44-510h(e) states, in part:

> It is presumed that the employer's obligation to provide [medical benefits] shall terminate upon the employee reaching maximum medical improvement. Such

[17] *Pimenta-Stone v. Parker Hannifin Corp.*, No. AP-00-0452-538, 2021 WL 1270396 (Kan. WCAB Mar. 15, 2021).

> presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-525(a) states:

> Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

In light of the matter being remanded to allow additional evidence, on diagnosis and nature and extent of impairment it is premature to rule on whether future medical treatment will be awarded. The ALJ's denial of future medical treatment is vacated. Ms. Pesina's request for future medical treatment should be determined again by the ALJ on remand after consideration of additional evidence on the extent of her injuries.

**5. Is the mandate for the use of the AMA *Guides*, 6th Edition, constitutional?**

The Appeals Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act.[18] The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. The Board does not have jurisdiction and authority to determine a statute is unconstitutional.[19]

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board the Award of Administrative Law Judge David J. Bogdan dated June 7, 2021, is affirmed in part and vacated in part with respect to the compensability of Ms. Pesina's bilateral wrists and

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[18] *See*, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the AMA Guides, 6th Edition, for a scheduled injury was unconstitutional as applied in that case only).

[19] *Jones v. Tyson Fresh Meats, Inc.*, No. 1,030,753, 2008 WL 651673 (Kan. WCAB Feb. 27, 2008).

forearms, permanent impairment of function, and future medical treatment. This matter is remanded to the ALJ with instructions to the parties to present additional evidence concerning the extent of the injuries Ms. Pesina sustained to both wrists and forearms, the extent of Ms. Pesina's impairment consistent with *Johnson*, and future medical treatment. Upon presentation of the additional evidence the ALJ is instructed to issue a new award addressing the compensability of Ms. Pesina's alleged bilateral wrist and forearm injuries, the nature and extent of disability, and future medical treatment.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

**DISSENT**

I respectfully dissent from the Board's decision to remand the case.

*Johnson* was decided on January 8, 2021. In this case, the claimant's deadline, or terminal date, to submit evidence was July 31, 2020. The ALJ's ruling was made on June 7, 2021. K.S.A. 44-523(b) allows parties to request extensions of time to present additional evidence. The time to litigate the case based on *Johnson* would have been in the interim five months between the time *Johnson* was decided and the ALJ's Award was issued. The claimant's solution was to request the ALJ to allow an extension of time to secure additional medical testimony taking *Johnson* into account *before the ALJ decided the case*.

As correctly noted above, the Board in a different case recently stated:

> Claimant's request for a remand for Dr. Carabetta to do an analysis of his rating based on the recent Kansas Supreme Court case of *Johnson v. US Food Service* is denied. The *Johnson* case was decided before this case was submitted to the ALJ. There is no record Claimant requested Dr. Carabetta reevaluate his rating under *Johnson* when this case was before the ALJ. The Board is bound by the record made before the ALJ. The time and place to have Dr. Carabetta reevaluate his rating was when the case was still before the ALJ.[20]

*Warsame* is similar in the sense that the ALJ decided it four months after *Johnson* was decided. Because the claimant could have requested an extension of time, the timing of the submission of the evidence is largely immaterial. Both in *Warsame* and in this case, the claimant had the opportunity to request to present additional medical evidence consistent with *Johnson*. The undersigned sees no reason to treat this case differently than *Warsame*.

The Board asserts *Warsame* is distinguishable because the evidence in the present case was fully presented by August 28, 2020, months before *Johnson* was decided. This wafer-thin distinction makes no difference. Again, in both *Warsame* and the instant case, the parties had the opportunity to present additional evidence, consistent with *Johnson*, before the awards were issued. Simply because evidence has already been presented and a deadline to submit evidence has lapsed does not preclude the parties from asking for additional time to present additional evidence. Again, K.S.A. 44-523(b) allows this procedure. On appeal, arguing the ALJ erred is too late; the parties could have asked the ALJ to address the issue before the Award was entered. The ALJ only has the record before him. The responsibility to make the record rests with the parties. The ALJ should not be tasked with ameliorating an issue not presented to him.

Likewise, the Board's contention the parties could not have known to ask the ALJ to submit additional evidence is simply incorrect. As soon as *Johnson* was issued, the parties knew additional evidence was a possibility. In the five months after *Johnson* was issued and before the ALJ's Award was entered, the parties knew additional evidence was a consideration. However, the parties did not request the record be reopened to present additional evidence in line with *Johnson*. This is not a problem of the ALJ's making.

The Board rationalizes the parties could not have predicted the Kansas Supreme Court's ruling in *Johnson*. A cursory examination of the litigation in *Johnson* at the administrative level undermines this argument. Well before *Johnson* was decided by an ALJ on April 4, 2017, the parties in that particular case argued over the adequacy of the *Guides*, 6th ed. Namely: (1) a medical expert for the injured worker testified there was no scientific support for reduced impairment ratings under the *Guides*, 6th ed., and (2) it was

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[20] *Warsame v. Tyson Fresh Meats*, No. AP-00-0457-958, 2021 WL 4592945 (Kan. WCAB Sept. 22, 2021).

noted impairment ratings under the *Guides*, 6th ed., were 40% to 70% lower than those provided in the *Guides*, 4th ed.[21] The litigation and evidence presented in *Johnson* proves arguments should and may be raised whether competent medical evidence might explain if the *Guides*, 6th ed., fairly accounts for an injured worker's impairment. The medical evidence in *Johnson* was presented in advance of the ALJ deciding that case and *years before* the Kansas Supreme Court decided the appeal. Just as in *Johnson*, the claimant in this case had the opportunity to contest the adequacy of the *Guides*, 6th ed., prior to the ALJ deciding the case.

Additionally, prior Board decisions demonstrate the parties are free to challenge the adequacy of the *Guides*, as had been done with the *Guides*, 4th ed. Parallels may be drawn between analysis of cases decided under the *Guides*, 4th ed., and cases now decided under the *Guides*, 6th ed.:

- In a case involving the *Guides*, 4th ed., the Board adopted the opinion of a physician who used his own judgment to assign impairment which arguably varied from the strict language of the *Guides*.[22] The doctor's opinion was based on low back pain, sacroiliac dysfunction (which was not a condition listed in the *Guides*), the claimant's pain, the claimant's limitations in activities of daily living, and, most importantly, physician discretion. This decision was affirmed by the Kansas Court of Appeals.

- In a case based on the *Guides*, 4th ed., the Board indicated it need not fully reject the entirety of a doctor's opinion based on some deviation from the *Guides*.[23] This decision was also affirmed by the Kansas Court of Appeals.

The conclusions reached in these *Guides*, 4th ed., cases are equally applicable to *Guides*, 6th ed., cases, even prior to *Johnson*. Attorneys have always been able to ask doctors questions about the sufficiency of any edition of the *Guides* in assessing a worker's impairment. Doctors have always been free to explain why any edition of the *Guides* may be inadequate in determining an injured worker's impairment. While adherence to the *Guides* has historically been viewed as a mandate, some deviation from the *Guides* has been allowed. Having a doctor present competent medical evidence to explain why an impairment rating under the *Guides* does not adequately explain a worker's impairment would be equally possible under any edition of the *Guides*. The claimant had the

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[21] *Johnson v. U.S. Food Serv.*, 56 Kan. App. 2d 232, 255, 427 P.3d 996, 1012 (2018), *rev'd*, 312 Kan. 597, 478 P.3d 776 (2021).

[22] *See Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 2009 WL 596551 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010.

[23] *See Pierce v. L7 Corp./Wilcox Painting*, No. 103,143, 2010 WL 3732083, at *4 (Kansas Court of Appeals unpublished opinion filed Sept. 17, 2010).

opportunity to ask Dr. Zimmerman to explain why a rating based on the *Guides*, 6th ed., did not fairly represent the residuals of the claimant's injury. If Dr. Zimmerman wanted to express a medical opinion concerning the claimant's impairment which might deviate from a strict reading of the *Guides*, 6th ed., or based on physician judgment, he had, or should have had, the opportunity to do so.

Put simply: (1) the time to ask for application of *Johnson* could have and should have been done before the ALJ decided this case and (2) any challenge to the adequacy of the *Guides* 6th ed., could have and should have been done before the ALJ decided this case on June 7, 2021.

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BOARD MEMBER

c: (Via OSCAR)

Roger Fincher, Attorney for Ms. Pesina
Deborah Johnson, Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge