

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DONNA MULDER

Claimant

v.

MENARD, INC.

Respondent

AP-00-0458-678

CS-00-0243-798

and

XL INSURANCE AMERICA INC.

Insurance Carrier

ORDER

Respondent requested review of the June 17, 2021, Award issued by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Charles W. Hess and Jan L. Fisher appeared for Claimant. William L. Townsley, III, appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing, held December 8, 2020; the transcript of Continuation of Regular Hearing by Evidentiary Deposition via Video Conference, held January 8, 2021, including Exhibits 1-2; Evidentiary Deposition of David W. Hufford, M.D., taken February 26, 2021, with Exhibits 1-3; Evidentiary Deposition of David W. Hufford, M.D., taken June 3, 2021, with Exhibit I; the narrative reports of Dr. Hufford concerning his Court-ordered independent medical examination of Claimant, dated November 1, 2018 and January 17, 2020; and the pleadings and orders contained in the administrative file. The Appeals Board also reviewed the parties' briefs, and heard oral argument on October 7, 2021.

ISSUES

1. What is Claimant's average weekly wage and compensation rate?
2. What is the nature and extent of Claimant's disability, including any preexisting impairment?
3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as a part-time employee starting in April 2018. Claimant's medical history is notable for prior non-work-related low back problems. Claimant underwent a laminectomy/discectomy at L5-S1 performed by Dr. Mellion in August 2017. Claimant last saw Dr. Mellion in January 2018, and reported increasing low back pain. No additional medical treatment was recommended. Claimant's impairment, if any, attributable to her prior low back condition or surgery was not rated.

On May 10, 2018, Claimant was unloading pallets at work, which required lifting, twisting and moving boxes. Claimant experienced pain and tightening in the low back, with her right leg seizing up. Claimant later experienced symptoms in her left leg. Claimant reported the incident to Respondent.

Claimant received medical treatment at Via Christi Occupational Medicine, and was referred to Dr. Henry. Claimant received conservative treatment, and an MRI of the lumbar spine was performed. Dr. Hufford performed a Court-ordered independent medical examination of Claimant on November 1, 2018, and noted the MRI indicated degenerative disc disease with reduced disc height and right-sided foraminal narrowing at L5-S1. Dr. Hufford diagnosed an occupational injury to the low back with right-sided radicular leg pain and right-sided sacroiliitis. Dr. Hufford opined the work-related lifting injury was the prevailing factor causing Claimant's medical condition. Additional medical treatment was recommended.

Dr. Henry performed a laminectomy and instrumented posterolateral fusion at L5-S1 on February 15, 2019. Claimant underwent some post-surgical physical therapy. In August 2019, Dr. Henry released Claimant from his care, and prescribed pain medication for Claimant's residual symptoms. There is no record Dr. Henry imposed permanent restrictions.

Claimant returned to work for Respondent. According to Claimant, she was required to bend, lift, twist repetitively and stand in violation of her personal limitations. Claimant worked for approximately one month. Claimant voluntarily resigned her position on

September 10, 2019, and sent Respondent an email advising she was resigning because her work was too strenuous, and the lifting and bending caused a great deal of pain.

Claimant currently works full-time at the Sedgwick County Juvenile Detention Facility and attends Wichita State University. Claimant experiences occasional pain in her buttocks and thighs, daily low back pain where the hardware was implanted, and additional low back pain if she stands for too long. Claimant is not under active medical care for her low back, and is not taking pain medication because she cannot afford to pay for it.

Claimant's wage records indicate from the work week of April 7, 2018, through May 5, 2018, Claimant's earnings totaled \$1,607.15. Claimant testified she did not work a full week during the work week of April 7, 2018. Claimant's total earnings from the work week of April 14, 2018, through May 5, 2018, were \$1,483.04. The work week of May 12, 2018, includes the date of accident.

Dr. Hufford performed a second Court-ordered independent medical examination of Claimant on January 17, 2020. Claimant's course of medical treatment was reviewed. Dr. Hufford diagnosed an occupational lifting injury with recurrent L5-S1 disc herniation and instrumented lumbar fusion. Dr. Hufford thought Claimant reached maximum medical improvement. With regard to future medical treatment, Dr. Hufford stated Claimant was at risk for developing adjacent segment disorder, but this could not be predicted within the bounds of certainty using a more-probable-than-not analysis. Under the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition (*AMA Guides*, 6th Edition), Dr. Hufford rated Claimant's impairment at 11% of the body as a whole. Under the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition (*AMA Guides*, 4th Edition), Dr. Hufford rated Claimant's impairment at 20% of the body as a whole. Dr. Hufford was unable to apportion Claimant's impairment between the work-related injury and her preexisting condition. Dr. Hufford's opinions on impairment were offered within a reasonable degree of medical probability.

Dr. Hufford testified in two depositions. On February 26, 2021, Dr. Hufford testified the opinions in his narrative reports were given within a reasonable degree of medical probability. Dr. Hufford's reports were admitted into evidence as exhibits without objection. Dr. Hufford confirmed Claimant presented with residual symptoms limiting her activities of daily living. If Claimant were symptomatic, functionally limited, and found the pain medication prescribed by Dr. Henry useful, Dr. Hufford thought Claimant would require future medication and physician monitoring. Dr. Hufford also thought Claimant was at risk of hardware failure in the future, which would require surgery.

Dr. Hufford thought Claimant's permanent impairment was 11% of the body as a whole under the *AMA Guides*, 6th Edition. Based on his experience, however, Dr. Hufford did not believe the *AMA Guides*, 6th Edition, produced impairment ratings reflecting one's

actual impairment, and indicated a rating based on a split between the rating under the *AMA Guides*, 6th Edition, and the rating under the *AMA Guides*, 4th Edition, was appropriate. On cross-examination, Dr. Hufford was asked whether Claimant had preexisting impairment based on the prior surgery, and Dr. Hufford indicated Claimant's preexisting impairment would depend on the extent of Claimant's prior symptoms. Dr. Hufford indicated Claimant's preexisting impairment could be in the range of 5-9%, but also testified rating Claimant's impairment under the *AMA Guides*, 6th Edition, would be speculative.

Dr. Hufford also testified on June 3, 2021. Dr. Hufford testified using the *AMA Guides*, 6th Edition, as a starting point, and taking into account Claimant's residual symptoms and functional status, Claimant's permanent impairment was 15% of the body as a whole. Dr. Hufford based his opinion, in part, on a conversation he had with one of the authors of the *AMA Guides*, 6th Edition. Dr. Hufford testified his opinion on Claimant's impairment differed from his prior deposition testimony because he was not prepared to comment on permanent impairment beyond the *AMA Guides*, 6th Edition, at the earlier deposition. Dr. Hufford testified he was now prepared, and believed 15% functional impairment of the body as a whole was a more accurate representation of Claimant's impairment from the lumbar spine injury. Dr. Hufford believed Claimant had no preexisting permanent impairment, based on his review of Dr. Mellion's records, because Claimant's radicular symptoms resolved following the first surgery and Claimant's low back pain returned to the baseline level of pain she had since the age of fifteen.

On June 17, 2021, ALJ Jones issued the Award. ALJ Jones found Claimant's average weekly wage was \$369.40, after excluding the work week of April 4, 2018 because it was a partial week and including the work week of May 12, 2018. ALJ Jones found Claimant's functional impairment was 15% of the body as a whole, based on initial review of the *AMA Guides*, 6th Edition, followed by competent medical evidence. ALJ Jones also found Respondent did not prove Claimant had preexisting permanent impairment. ALJ Jones awarded future medical treatment. This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Award is erroneous because Claimant's average weekly wage should include the initial partial week worked, as well as the week when the accident occurred. Respondent also argues the determination of Claimant's functional impairment is erroneous because it should be based solely on the *AMA Guides*, 6th Edition, and Dr. Hufford's contradictory opinions are not competent medical evidence. Respondent also argues Claimant has preexisting impairment and is not entitled to future medical. Claimant argues the Award was decided correctly.

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 Respondent and Insurance Carrier, however, have the burden of proving the amount of preexisting impairment.⁴

1. Claimant's average weekly wage is \$321.43 and the resulting compensation rate is \$214.30.

Unless otherwise provided, the employee's average weekly wage shall be the wages the employee earned during the calendar weeks employed by the employer, up to twenty-six weeks immediately preceding the date of injury, divided by the number of calendar weeks the employee actually worked, or by twenty-six as the case may be.⁵ The Appeals Board previously ruled partial weeks worked are not included in average weekly wage calculations.⁶ The Court of Appeals, however, recently ruled the plain language of K.S.A. 44-511(b)(1), requires any week actually worked be included, without excluding partial weeks.⁷ The Appeals Board is obligated to follow decisions of the Kansas appellate courts.

Under K.S.A. 44-511(b)(1) and *Morris*, the work week of April 7, 2018, must be included in Claimant's average weekly wage calculation because Claimant actually worked during that week. The work week of May 12, 2018, is not included in Claimant's average weekly wage calculation because the accident occurred during that week. Claimant's gross earnings for the five-week period of work week April 7, 2018, through work week May

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See *Ward v. Allen County Hosp.*, 50 Kan. App. 2d 280, 288, 324 P.3d 1122 (2014).

⁵ See K.S.A. 44-511(b)(1).

⁶ See, e.g., *Cook v. The Capper Foundation*, CS-00-0150-609, 2019 WL 9607731, at *3 (Kan. WCAB Jul. 2, 2019); *Martin v. Royal Valley Public Schools U.S.D.* 337, No. 1,060,837, 2013 WL 4051827, at *5 (Kan. WCAB Jul. 1, 2013); *Evans v. A-1 Staffing*, Nos. 1,010,708 & 1,010,709, 2007 WL 1390694, at *6 (Kan. WCAB Apr. 5, 2007).

⁷ See *Morris v. Shilling Constr. Co. Inc.*, No. 123,297, 2021 WL 5751704, at *16 (Kansas Court of Appeals unpublished opinion filed Dec. 3, 2021).

5, 2018, are \$1,607.15, and dividing the total by five weeks produces an average weekly wage of \$321.43. The resulting compensation rate is \$214.30.

2. ALJ Jones correctly determined Claimant's functional impairment on account of the compensable lumbar spine injury was 15% of the body as a whole based on competent medical evidence and Respondent failed to prove Claimant had preexisting functional impairment.

Respondent argues Claimant's functional impairment of 15% of the body as a whole is not supported by competent medical evidence, and Claimant has preexisting functional impairment. The Board addresses Respondent's arguments in turn.

A. ALJ Jones' determination Claimant's functional impairment is 15% of the body as a whole is supported by competent medical evidence.

It is undisputed Claimant sustained a compensable lumbar injury, which is compensated as an injury to the body as a whole under K.S.A. 44-510e. The extent of permanent partial 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 *AMA Guides*, 6th Edition, if the impairment is contained therein.⁸ The Kansas Supreme Court ruled impairment in K.S.A. 44-510e is determined by using the *AMA Guides*, 6th Edition, as a starting guideline, but the ultimate impairment determination must be based on competent medical evidence.⁹

"Competent medical evidence" is not defined in the Kansas Workers Compensation Act. In the context of K.S.A. 44-510k, "competent medical evidence" was defined as an opinion asserted by a health care provider expressed in terms of "reasonable degree of medical probability" or similar language, but that definition was created by the parties.¹⁰ Looking to Black's Law Dictionary, the Kansas Supreme Court defined "competent evidence" as, "that which the very nature of the thing to be proven requires."¹¹ In *Roberts*, the Supreme Court held vocational experts could not provide competent evidence on medical opinions because they lacked the training and experience to have medical

⁸ See K.S.A. 44-510e(a)(2)(B).

⁹ See *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

¹⁰ See *Clayton v. University of Kansas Hosp. Authority*, 53 Kan. App. 2d 376, 382, 388 P.3d 187 (2017).

¹¹ See *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 280, 949 P.2d 613 (1997).

expertise.¹² Thus, “competent medical evidence” is the opinion of a physician given within a “reasonable degree of medical probability.”

Here, it is undisputed Dr. Hufford is a physician licensed to practice medicine in Kansas. Dr. Hufford’s reports and testimony reference his examinations of Claimant and the medical records he reviewed. Dr. Hufford testified his opinions were given within a reasonable degree of medical probability. Dr. Hufford’s reports were admitted into evidence as exhibits at his first deposition without objection, and his deposition testimony was given without foundational objection. Respondent argues Dr. Hufford’s opinions are contradictory, but contradictory opinions may be competent medical evidence if they are presented by a physician within a reasonable degree of medical probability. Contradictory testimony impacts credibility, not competency. The Appeals Board concludes Dr. Hufford’s opinions constitute competent medical evidence.

The Board next considers the weight of Dr. Hufford’s opinions. Dr. Hufford’s second narrative report contains impairment ratings based on the *AMA Guides*, 6th Edition, and *AMA Guides*, 4th Edition. In his first deposition, Dr. Hufford opined Claimant’s impairment was 11% of the body as a whole based on strict compliance with the *AMA Guides*, 6th Edition, without deviation. Dr. Hufford was not aware he could exercise his professional discretion in assessing Claimant’s impairment. In his second deposition, Dr. Hufford testified it was his professional opinion, based on a reasonable degree of medical probability after using the *AMA Guides*, 6th Edition, as a starting point, Claimant’s impairment was actually 15% of the body as a whole. Dr. Hufford testified he was not prepared to provide an opinion based on the methodology articulated in *Johnson* at his first deposition, but was prepared at the second deposition. The Appeals Board finds this explanation plausible. Moreover, the record is devoid of other competent medical evidence of impairment. Accordingly, the Appeals Board finds Claimant’s functional impairment is 15% of the body as a whole based on the competent medical evidence in the record.

¹² See *id.*

B. Respondent failed to prove Claimant has preexisting impairment.

An award of compensation for permanent partial impairment shall be reduced by the amount of functional impairment determined to be preexisting.¹³ If the preexisting impairment was not the basis for a prior Kansas workers compensation award, the amount of preexisting functional impairment shall be established by competent evidence.¹⁴

Dr. Hufford initially stated in his second narrative report he could not apportion Claimant's functional impairment between the preexisting condition and the work-related injury. In his first deposition, Dr. Hufford testified he was unable to assess preexisting impairment because he did not know how symptomatic Claimant was at the time of her work-related accident. Dr. Hufford also testified it was possible Claimant could have preexisting impairment based on the *AMA Guides*, 6th Edition, for the prior disc herniation, but that opinion would be speculative. A speculative opinion is not competent evidence. In his second deposition, Dr. Hufford testified Claimant did not have preexisting impairment because her radiculopathy resolved and her mild residual low back pain did not limit her ability to function. Dr. Hufford consistently testified he was unable to assess preexisting impairment. There is no other evidence of preexisting impairment in the record. Therefore, the Board concludes Respondent failed to prove Claimant has preexisting impairment.

3. Claimant is entitled to an award of future medical treatment.

It is the employer's duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of a compensable injury.¹⁵ 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.¹⁶

As a result of her compensable lumbar injury, Claimant underwent a discectomy and fusion with the implantation of hardware at L5-S1. Claimant was prescribed pain medication by Dr. Henry on account of her residual symptoms. Dr. Hufford indicated it was

¹³ See K.S.A. 44-501(e).

¹⁴ See K.S.A. 44-501(e)(1).

¹⁵ See K.S.A. 44-510h(a).

¹⁶ See K.S.A. 44-510h(e).

speculative to state it was more probably true than not Claimant would require additional medical treatment for adjacent segment disorder caused by the fusion. Dr. Hufford, however, testified Claimant was at risk of hardware failure at the fusion site, which would require surgical intervention. Dr. Hufford also testified Claimant may require future prescription medication for her residual symptoms. The Appeals Board concludes Claimant met her burden of producing medical evidence it is more probably true than not additional medical treatment will be necessary. Accordingly, the award of future medical treatment in the Award should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award issued by ALJ Gary K. Jones, dated June 17, 2021, is modified.

Claimant is awarded 63.86 weeks of temporary total disability compensation, at \$214.30 per week, totaling \$13,685.20; followed by 54.92 weeks of permanent partial disability compensation based on 15% functional impairment of the body as a whole attributable to the lumbar spine, at \$214.30 per week, totaling \$11,769.36, for a total award of \$25,454.56.

As of the date of this Award, the entire award of \$25,454.56 is due and owing, and shall be paid in one lump sum by Respondent and Insurance Carrier, less any compensation previously paid.

In all other respects, the Award issued by ALJ Jones, dated June 17, 2021, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of December, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

DONNA MULDER

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Charles W. Hess
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William L. Townsley, III
Hon. Gary K. Jones