

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>ANGELA MATTHEWS</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0459-577
<b>PROVIDENCE MEDICAL CENTER</b>	)	CS-00-0251-600
Respondent	)	
AND	)	
	)	
<b>SAFETY NATIONAL CASUALTY CORP.</b>	)	
Insurance Carrier	)	

**ORDER**

The parties requested review of the August 6, 2021, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on November 18, 2021.

**APPEARANCES**

Daniel Smith appeared for Claimant. Frederick Greenbaum appeared for Respondent and its insurance carrier (Respondent).

**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 May 27, 2021, with exhibits attached; the transcript of the Preliminary Hearing held July 5, 2018; the transcript of the Preliminary Hearing held October 31, 2018, with exhibits attached; the Evidentiary Deposition of Vanessa Molina taken October 1, 2020, with exhibits attached; the Evidentiary Deposition of Angela Matthews taken June 4, 2021; the Evidentiary Deposition of Daniel D. Zimmerman, M.D., taken June 9, 2021, with exhibits attached; the Evidentiary Deposition of Kelly Own, M.D., taken July 22, 2021, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

1. Did Claimant sustain personal injuries to the left shoulder and neck from repetitive trauma arising out of and in the course of her employment with Respondent?
2. What is the nature and extent of Claimant's disability?

3. Is Claimant entitled to future medical treatment?
4. Is Claimant entitled to payment of unpaid medical expenses pursuant to the Kansas Workers Compensation Medical Fee Schedule?
5. Did Claimant timely file her Application for Review with the Board?

#### FINDINGS OF FACT

Claimant began working for Respondent in the dietary division in 2003. Claimant is a hostess, delivering meals to patients. Claimant's duties include pushing and pulling a cart of food trays weighing approximately 200 pounds. Claimant pushes the cart over carpet, which is difficult, while delivering and picking up the meal trays. She moves the cart at least twice per shift. Claimant also washes pots, pans and cookie sheets.

In 2012, Claimant suffered a compensable injury to her right shoulder working for Respondent. Claimant underwent right rotator cuff repair surgery and has no current issues. Claimant testified she began using her left arm more following the right rotator cuff surgery; she began having difficulty with her left arm and shoulder in October 2017. Claimant reported left shoulder pain to her supervisor on February 21, 2018, due to an increase in her pain after washing pots and pans.

Respondent sent Claimant to William T. Raue, M.D., a general practitioner, who provided treatment for Claimant's right shoulder in 2012. On February 27, 2018, Dr. Raue diagnosed Claimant with impingement syndrome, bicipital tendinitis, and arthritis of the left shoulder. He opined these conditions were the result of Claimant's work activities:

The findings on exam and diagnosis are consistent with the injury reported by patient. Prior factors such as injuries / medical conditions / diseases / prior activities or exposures are not contributing to the findings. The findings can not be possibly produced by natural progression of pre-existing conditions or aging. The reported injury / exposure is not causing an aggravation to the above pre-existing condition. In conclusion, the reported injury, more likely than not, is causing the current symptoms and findings.<sup>1</sup>

Dr. Raue provided conservative treatment for two months, which included medication, physical therapy and temporary restrictions. He ordered an MRI of the left shoulder, which was performed on April 24, 2018. The MRI of Claimant's left shoulder revealed:

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<sup>1</sup> Molina Depo., Ex. 1 at 6.

1. Mild-to-moderate degenerative change and chondromalacia the glenohumeral joint. Suspected full-thickness cartilage loss of the posterior glenoid with patchy subchondral edema.
2. Blunted morphology of the posterior labrum, consistent with degenerative labral fraying. No discrete labral tear.
3. Mild rotator cuff tendinopathy with no evidence of full-thickness tear.
4. Mild to moderate biceps tendinosis.
5. Mild AC joint arthropathy.<sup>2</sup>

On April 27, 2018, despite the MRI results confirming his working diagnosis, Dr. Raue released Claimant from his care with no restrictions. Claimant returned to her normal duties with Respondent.

Following a July 5, 2018, preliminary hearing, Bryan G. Vopat, M.D., an orthopedic surgeon, was authorized to provide treatment. Unfortunately, Dr. Vopat did not evaluate Claimant until January 8, 2019. During this time, Claimant returned to her regular work duties, without restriction. She began experiencing pain in the left side of her neck, which Dr. Vopat found upon examination. Dr. Vopat reviewed Claimant's history, medical records, took x-rays, and performed a physical examination. Dr. Vopat determined Claimant sustained left biceps tendinitis and arthritis of the posterior aspect of the glenoid. Dr. Vopat ordered physical therapy, two bicipital sheath injections, a cervical MRI and repeated a left shoulder MRI. The cervical MRI, obtained January 15, 2019, showed degenerative changes on multiple levels. The left shoulder MRI revealed fraying of the supraspinatus tendon of the rotator cuff.

Claimant's counsel referred her to Daniel D. Zimmerman, M.D., for an examination on October 21, 2019. Claimant's chief complaints were pain and discomfort affecting the cervical spine and left shoulder. Dr. Zimmerman reviewed medical records, Claimant's history, and performed a physical examination, finding Claimant sustained left shoulder biceps tendinopathy, labral pathology, and chronic left cervical paraspinous myofascitis as a result of the repetitive work duties Claimant performed for Respondent. Dr. Zimmerman recommended conservative treatment, although he found Claimant reached maximum medical improvement.

Claimant returned to Dr. Zimmerman on March 15, 2021, with updated medical records. Dr. Zimmerman concluded Claimant's work activities were the prevailing factor for her left shoulder impingement syndrome, rotator cuff tendon fraying and arthritic changes. He opined Claimant's shoulder injury caused neck symptoms. Using the Sixth

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<sup>2</sup> P.H. Trans. (Oct. 31, 2018), Cl. Ex. 1 at 1.

Edition *AMA Guides*,<sup>3</sup> Dr. Zimmerman opined Claimant sustained 13 percent impairment of the left upper extremity at the shoulder level, which converts to 8 percent to the whole body. He assigned an 8 percent impairment of the body as a whole based on Claimant's cervical complaints. Combining the shoulder and cervical spine impairments resulted in 15 percent impairment of function to the body as a whole.

Respondent referred Claimant to Kelly Own, M.D., board certified in physical medicine and rehabilitation, for an examination on January 28, 2020. Claimant's chief complaints were pain and discomfort affecting the cervical spine and left shoulder. Dr. Own reviewed medical records, Claimant's history, and performed a physical examination. He opined Claimant's left shoulder MRI showed degenerative changes, some cartilage loss at the glenohumeral joint, and edema along the glenoid. He remarked the cervical MRI showed only degenerative changes. Dr. Own did not find Claimant's work duties caused her left shoulder and cervical conditions, and provided an impairment rating of 0 percent using the *AMA Guides*.

Dr. Own testified Claimant's shoulder condition was caused by a more gradual process according to the MRI, and he knew of no evidence repetitive trauma from pushing and pulling motions caused higher rates of shoulder arthritis. Dr. Own allowed these activities could contribute to stress and wear on the shoulder joint, but not to the extent seen on Claimant's MRI. Dr. Own did not think Claimant sustained biceps tendinitis because that condition should have improved following the injection. Further, Dr. Own opined Claimant's cervical complaints were referred pain from the left shoulder, and not from a separate neck injury.

Claimant continues to work for Respondent with no restrictions. She has not missed work due to her conditions. She has not received any medical treatment since seeing Dr. Vopat.

The ALJ found Claimant sustained personal injury to her left shoulder arising from repetitive duties she performed while working for Respondent. He determined Claimant's left-sided neck complaints were referred pain from the left shoulder and not a separate injury to the cervical spine. He awarded Claimant permanent partial disability benefits based on a 13 percent impairment to the left shoulder and future medical treatment.

Respondent argues Claimant failed to prove she sustained a left shoulder or neck injury as a result of a work accident or repetitive job duties. Respondent maintains Claimant is not entitled to any benefits or future medical treatment. Respondent seeks fees, costs, and any sanctions deemed appropriate because of the frivolous nature of the

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.). All references are based upon the sixth edition of the *Guides* unless otherwise noted.

claim. Finally, Respondent argues Claimant did not timely file her Application for Review with the Board.

Claimant contends the evidence establishes she sustained a repetitive trauma injury to her left shoulder and secondarily to her neck arising out of and in the course of her employment. Claimant argues she is entitled to unpaid medical expenses, future medical treatment, and permanent partial disability benefits representing a 15 percent whole body impairment.

### **PRINCIPLES OF LAW AND ANALYSIS**

#### **1. Claimant sustained personal injuries to the left shoulder and neck from repetitive trauma arising out of and in the course of her employment with Respondent.**

An injury by repetitive trauma shall be compensable only if the employment exposes the worker to an increased risk of injury, the employment is the prevailing factor in causing the repetitive trauma and the repetitive trauma is the prevailing factor in causing the medical condition.<sup>4</sup> “Prevailing factor” is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.<sup>5</sup> An injury occurring as a result of the natural aging process is not considered to arise out of and in the course of employment.<sup>6</sup>

The greater weight of the credible evidence in the record establishes Claimant’s work-related repetitive trauma was the prevailing factor causing injuries to the left shoulder and neck. Claimant testified she reported the left shoulder pain to her supervisor on February 21, 2018, due to an increase in her pain after washing pots and pans. Following her reported injury, Respondent authorized Dr. Raue, who provided treatment for Claimant’s right shoulder in 2012, to provide medical treatment for her left shoulder complaints. Dr. Raue diagnosed Claimant with impingement syndrome, bicipital tendinitis, and arthritis of the left shoulder. He opined these conditions were the result of Claimant’s work activities and not an aggravation of a preexisting condition.

Claimant’s examining physician, Dr. Zimmerman, evaluated Claimant on two separate occasions. He shared Dr. Raue’s opinion regarding prevailing factor. He opined the prevailing factor for Claimant’s injuries to her left shoulder and neck are not an aggravation of a preexisting condition, but due to the work activities she performed.

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<sup>4</sup> K.S.A. 44-508(f)(2)(A).

<sup>5</sup> K.S.A. 44-508(g).

<sup>6</sup> K.S.A. 44-508(f)(3)(A).

Dr. Own, Respondent's examining physician, opined the prevailing factor for Claimant's medical condition and need for treatment for her left shoulder was degenerative joint disease which led to cervical myofascial pain. Dr. Own readily admitted Claimant's work activities were an aggravating factor in her ongoing symptoms and condition, but opined her medical condition and need for treatment was primarily due to her age and passage of time. Dr. Own stands alone in his prevailing factor opinion Claimant's work activities did not cause her medical condition and need for treatment.

The Board finds the opinions of Dr. Own not credible in light of the facts of this claim and the other medical opinions contained in the record, including the prevailing factor opinion of the original authorized treating physician, Dr. Raue. Claimant received treatment for her right shoulder on an earlier case with Dr. Raue. He was familiar with Claimant and her work responsibilities. Under these facts, Dr. Raue was in the best position to evaluate and assess Claimant's medical condition, need for treatment and the causation of her injury to the left shoulder. Dr. Zimmerman's opinions support Dr. Raue's causation opinion for the left shoulder.

Dr. Raue opined Claimant was in need of additional treatment when he released her from his care on April 27, 2018. Unfortunately, Claimant's treatment did not resume until she saw Dr. Vopat on January 8, 2019. During this time, Claimant continued performing her regular job duties with Respondent, without restrictions. Her neck symptoms developed during the time she was waiting for additional treatment. Dr. Vopat's findings to the left shoulder were essentially the same as Dr. Raue's. However, Dr. Vopat found left-sided neck pain in addition to the shoulder findings. He ordered a cervical MRI, physical therapy and injected the biceps tendon.

Dr. Zimmerman saw Claimant on two occasions. He found reduced range of motion on both examinations. He also found tenderness over the paraspinal muscles of her neck. He opined Claimant's left shoulder injury led to the development of the symptoms in her neck. Dr. Own's findings and assessments were essentially the same as Dr. Zimmerman's. Specifically, Claimant's neck symptoms arose in response to her left shoulder injury. Because Dr. Own opined Claimant's left shoulder injury was due to degenerative changes and not her work activities, the neck symptoms were also not work-related.

The facts of this claim are similar to *Valesano v. Stormont Vail Regional Medical Center*.<sup>7</sup> In this claim, like in *Valesano*, Claimant developed neck pain in the course of treatment for the left shoulder. In *Valesano*, the court evaluator opined the claimant had developed myofascial neck pain which was referred to the neck from the left shoulder, and

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<sup>7</sup> *Valesano v. Stormont Vail Regional Medical Center*, No. 1,050,725, 2012 WL 2890465 (Kan. WCAB June 22, 2012).

neck pain resulting from a neck injury is very common. He provided the claimant with a functional impairment rating to the neck.

Drs. Zimmerman and Own were the last two evaluators. Both identified medical conditions in the shoulder and the neck. Both recognized Claimant's neck complaints were present and consistent since they developed during the break in her treatment from Dr. Raue to Dr. Vopat. As stated above, the opinion of Dr. Raue is more persuasive regarding the prevailing factor of the left shoulder medical condition. It follows Dr. Zimmerman's opinion regarding the prevailing factor for the neck condition is also more persuasive. Claimant sustained her burden of proof her accident resulted in injury to her left shoulder and neck. When a primary injury is shown to have arisen out and in the course of the employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural consequence of a primary injury.<sup>8</sup>

**2. Claimant is entitled to permanent partial disability compensation under the AMA Guides.**

There are two ratings regarding impairment of function. Dr. Zimmerman opined Claimant sustained 13 percent impairment of the left upper extremity at the shoulder level, which converts to 8 percent to the whole body. He assigned 8 percent impairment of the body as a whole based on Claimant's cervical complaints. Combining the shoulder and cervical spine impairments results in 15 percent impairment of function to the body as a whole. Dr. Own testified Claimant had 0 percent impairment to her left shoulder and cervical spine as a result of her work activities based upon the *AMA Guides* and competent medical evidence.

Dr. Own's opinion Claimant has 0 percent impairment due to Claimant's work activities is not credible as set forth above. The Board finds Dr. Zimmerman's opinions regarding impairment are credible and adopts the same. Claimant is entitled to an award of compensation of 15 percent impairment of function to the body as a whole.

**3. Claimant is entitled to future medical treatment.**

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or relieve the effects of the injury.<sup>9</sup> 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

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<sup>8</sup> See *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>9</sup> K.S.A. 44-510h(a).

necessary after maximum medical improvement.<sup>10</sup> The Board agrees with the ALJ's granting Claimant the right to future medical treatment. Although Dr. Own did not believe Claimant's injuries were work-related, he opined Claimant would benefit from additional medical treatment, including potential surgery. Dr. Zimmerman also opined Claimant would require future medical treatment, which could include surgery. The Board finds Claimant is entitled to pursue future medical treatment on account of her work-related accidental injuries.

**4. Claimant is entitled to payment of unpaid medical expenses pursuant to the Kansas Workers Compensation Medical Fee Schedule.**

All outstanding, authorized and related medical bills remaining unpaid, are hereby ordered paid pursuant to the Kansas Workers Compensation Medical Fee Schedule.

**5. Claimant timely filed her Application for Review with the Board.**

K.S.A. 44-551(i)(1) requires a written request for review must be on file within ten days from the date of the entry of the award. Saturdays, Sundays and legal holidays are not included in the time computation. The ALJ entered his award on Friday, August 6, 2021. Excluding Saturdays and Sundays reveals ten days is Friday, August 20. Claimant timely filed her Application for Review on August 17, 2021.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 6, 2021, is modified.

Claimant is entitled to 62.25 weeks of permanent partial disability compensation at the rate of \$391.38 per week or \$24,363.41 for a 15 percent functional disability, making a total award of \$24,363.41.

As of the date of this Order, all the compensation awarded is due and owing to the claimant: 62.25 weeks of permanent partial disability compensation, at the rate of \$391.38 per week, in the sum of \$24,363.41, for a total due and owing of \$24,363.41, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

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<sup>10</sup> K.S.A. 44-510h(e).



Dated this \_\_\_\_\_ day of December, 2021.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Daniel Smith, Attorney for Claimant  
Frederick Greenbaum, Attorney for Respondent and its Insurance Carrier  
Hon. Kenneth J. Hursh, Administrative Law Judge