BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CARL JOHNSON Claimant V. **TEXTRON AVIATION, INC.** Respondent AND **TEXTRON AVIATION, INC.** Insurance Carrier	))))))))))	AP-00-0460-708 CS-00-0342-475

ORDER

Claimant appealed the August 16, 2021, Award issued by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on December 9, 2021.

APPEARANCES

Phillip Slape appeared for Claimant. Vince Burnett appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing held April 2, 2020; Continuation of Regular Hearing by Deposition of Carl Johnson taken April 20, 2020; Evidentiary Deposition of Stephanie Heberly taken May 4, 2020, with exhibits attached; Evidentiary Deposition of Pat Do, M.D. taken May 6, 2020, with exhibits attached; Court-ordered IME report of Pat Do, M.D., dated December 19, 2018; Evidentiary Deposition of Pedro Murati, M.D. taken May 20, 2020, with exhibits attached; Evidentiary Deposition of Emily Coleman taken June 16, 2020, with exhibits attached; Evidentiary Depositions of Alexander Bollinger, M.D. taken June 9, 2020, with exhibits attached; Evidentiary Deposition of Chris D. Fevurly, M.D. taken June 22, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Did Claimant's bilateral carpal tunnel injuries arise out of and in the course of his employment, specifically was Claimant's work the prevailing factor in his need for treatment and resulting impairment?

2. What is the nature and extent of Claimant's permanent impairment?

3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

For the last 21 years, Claimant has been a final assembly mechanic for Respondent. In this job, Claimant performs maintenance and rebuilds parts for airplanes. Tools used for this work are rivet guns, ratchets, wrenches, and drills. Out of an 8 hour shift, Claimant uses his hands with tools 7 hours out of 8. The other hour is spent performing computer work. Two and a half years ago, Claimant was made a crew chief and supervises 15 employees. Other than supervising employees, there was no change to Claimant's job duties, except less repetitive work with his hands.

In 2013, Claimant began experiencing numbness and tingling in his hands. These symptoms were more acute when Claimant was doing engine installs and had to take little clips and screw them on to the engines. Claimant had to pinch down on the clips using 10 to 15 pounds of pressure, causing tingling in his hands, which Claimant believed was not normal. Claimant reported these symptoms to Respondent in 2013 and was instructed to wear a band around his hand. He found no relief from wearing the band and, after a week, stopped wearing the band.

Claimant continued to perform the same job duties. In 2017, Claimant went to his primary care physician about the numbness and tingling in his hands. Claimant was sent for a nerve conduction test. The nerve conduction test performed on September 12, 2017, showed "1. axonal sensorimotor peripheral neuropathy; 2. superimposed bilateral median neuropathies across the carpal tunnel. This electrophysiologically severe."[1] Claimant was diagnosed with carpal tunnel syndrome.

Claimant received medical treatment paid for by his personal health insurance. Claimant testified he had carpal tunnel surgery on the left performed by Dr. Hearon, but there are no medical records confirming this surgery. Claimant had right carpal tunnel surgery on April 12, 2019, by Dr. Andrew Bollinger.

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[1] Murati Depo., Ex. 4.

Claimant is a type-2 insulin-dependent diabetic. Claimant has taken insulin for seven years. Claimant takes insulin three times a day. Claimant has neuropathy in his feet with numbness and tingling in his toes. He has numbness and tingling in his fingers and pain in his wrists. Claimant was prescribed Gabapentin about five years ago for the neuropathy. Claimant acknowledges he has, at times, had difficulty controlling his diabetes.

Claimant continues to have pain in his left hand, intermittent right hand pain and pain in both elbows. He began having left shoulder pain in 2018. He, occasionally, has problems with his left shoulder giving out when he does overhead work. Claimant believes his pain is getting worse with his left hand, with an 8 out of 10 pain level and the right hand has a 9 out of 10 pain level. Claimant is right-handed and therefore uses the right more than the left. In 2019, Claimant began having right elbow pain. Claimant has not had treatment for his shoulder complaints.

Dr. Pedro Murati examined Claimant on July 31, 2018, at the request of Claimant's attorney. Claimant's complaints were muscle pain in the bilateral arms, numbness and tingling in the fingertips bilaterally and cramps in his hands, more on the right. Claimant reported working in the aircraft industry as an operator using power tools and other hand tools repetitively. Claimant reported a gradual onset of pain, numbness and tingling in his hands and wrists.

Dr. Murati diagnosed bilateral carpal tunnel syndrome. He opined Claimant sustained multiple repetitive traumas at work, which resulted in bilateral wrist/hand complaints. There were significant clinical findings providing diagnosis consistent with the multiple repetitive traumas at work. These repetitive traumas, according to Dr. Murati, were the prevailing factor for Claimant's bilateral carpal tunnel syndrome and need for medical treatment. He recommended Claimant get a surgical evaluation, along with trial of Lyrica and Gabapentin

Dr. Murati examined Claimant again on August 7, 2019. Claimant's complaints were muscle pain and bilateral numbness and tingling in the fingertips, left greater than on the right, stiffness in the elbows, and occasional bilateral shoulder pain.

Dr. Murati performed a carpal tunnel exam, which revealed full range of motion of the wrists and elbows, no crepitus of the wrists or elbows, no instability of the wrists and tenderness of the medial epicondyle on the left. There was negative O'Brien's of the shoulders, there was no instability and there was impingement in both shoulders and mild glenohumeral creptius on the right and severe on the left. There was negative cross arm and speeds bilaterally.

Dr. Murati diagnosed status-post right carpal tunnel release; left carpal tunnel syndrome; left medial epicondylitis; bilateral rotator cuff tear v. sprain. Dr. Murati

recommended further medical treatment such as yearly follow-ups, physical therapy, injections, radiological studies, anti-inflammatory and pain medication, and possibly surgery.

Dr. Murati assigned a combined impairment rating of 17 percent to the body as whole using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition*.[2] The rating consisted of 8 percent for post-right carpal tunnel release; 6 percent for loss of range of motion of the right shoulder; 8 percent for left carpal tunnel syndrome; 1 percent for left medial epicondylitis; 9 percent for loss of range of motion of the left shoulder.

Dr. Murati also rated Claimant's impairment using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*. Dr. Murati's rating was 18 percent to the body as whole, including 3 percent impairment to the left upper extremity for medial epicondylitis.

Dr. Murati opined Claimant's bilateral carpal tunnel syndrome was not caused by Claimant's diabetes. He observed peripheral neuropathy due to diabetes manifests itself initially with peripheral neuropathy in the lower extremities. He opined if Claimant's peripheral neuropathy was so severe to affect the upper extremities, the peripheral neuropathy in the lower extremities would be so severe Claimant would be unable to walk without assistance. Dr. Murati observed Claimant does not have an abnormal gait.

Dr. Murati further observed peripheral diabetic neuropathy affects all nerves the same. That is not the case with Claimant. Only Claimant's median nerve showed damage but the ulnar nerve did not.

Dr. Murati also believed the Claimant's EMG studies were incomplete and should have included a study of one of Claimant's lower extremities.

Dr. Murati affirmed his opinion Claimant's work duties with Respondent were the prevailing factor for Claimant's bilateral carpal tunnel syndrome, left medial epicondylitis and bilateral rotator cuff versus sprain.

Dr. Chris Fevurly examined Claimant at Respondent's request on March 21, 2018, for evaluation of numbness and loss of dexterity in his hands, specifically the cause of Claimant's reported carpal tunnel syndrome. Claimant's complaints at the time were progressive numbness and tingling in the fingertips and diminished dexterity with occasional dropping of items. There were no complaints by Claimant about his elbows or

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[2] Hereinafter referred to as *The Guides*.

wrists. Claimant reported the symptoms with his hands starting in 2011, with the symptoms coming and going over the past 7 years.

Dr. Fevurly testified when a diabetic develops peripheral neuropathy, it usually develops first in the feet and then can involve the hands.

Upon examination, Dr. Fevurly found Claimant had a good walking pace and normal gait despite prior knee surgeries. He did not wear a brace at the visit. He sat up straight for 30 minutes. He was able to toe walk, heel walk and half squat, but reported pain with attempted squat. He had trouble with repetitive toe raises on the right. There was no shoulder atrophy, range of motion of the cervical spine revealed . . . there was no pain in the neck at the extreme ranges of cervical motion. There was no tenderness over the cervical paraspinal musculature and no tenderness over the cervical spine processes. Spurling's test was negative for a radicular component. There was no tenderness over the bilateral shoulder girdle musculature. No spasms or localized tender/trigger points were found. Claimant had full range of motion of the shoulders. There were no abnormailities in examination of elbows or shoulders.

Dr. Fevurly further found Claimant to be a 10 year diabetic with insulin dependency for the last 5 years. He diagnosed peripheral neuropathy symptomatic in the bilateral feet for 5 years in 2013; bilateral hand axonal sensorimotor peripheral neuropathy; bilateral severe median nerve entrapment, carpal tunnel syndrome. Dr. Fevurly recommended bilateral carpal tunnel releases.

Dr. Fevurly did not relate the carpal tunnel syndrome to Claimant's work and opined Claimant was likely to develop carpal tunnel syndrome due to the 10 year history of diabetes and his body mass index. Claimant's work was not the prevailing factor, but contributed to the prevailing factor, which was the diabetes, resulting in advanced peripheral neuropathy. He noted there was no atrophy in the thenar or hypothenar muscles, which was important since Claimant has peripheral neuropathy and carpal tunnel syndrome. If the carpal tunnel syndrome had gone untreated, atrophy would have developed in the fatty area below the thumbs.

It is possible Claimant's work duties caused his carpal tunnel syndrome, but not probable, according to Dr. Fevurly because of Claimant's personal health risks. He testified one can tell by electrodiagnostic testing whether there is dual cause for symptoms, such as diabetes and concurrent presence of nerve compression from carpal tunnel syndrome, but one cannot tell the cause of the carpal tunnel or nerve compression. Dr. Fevurly also opined there are non-occupational factors for developing carpal tunnel syndrome, such as age, body mass index, gender, biophysical factors, smoking, genetics, wrist size and non-occupational activities.

Dr. Alexander Bollinger first saw Claimant on March 28, 2019. Claimant complained of numbness and tingling in both hands. Upon examination, he diagnosed Claimant with bilateral carpal tunnel syndrome. Claimant underwent right carpal tunnel release surgery with a good result. Dr. Bollinger opined the carpal tunnel syndrome was not work-related. Claimant had a post-surgery visit with Dr. Bollinger on April 23, 2019.

Dr. Bollinger did not see Claimant again until May 7, 2019, when he came in for evaluation of left elbow pain at Respondent's request. Claimant reported at the time of his injury on September 18, 2017, his elbow pain was an 8 out 10 on the pain scale with gripping and grasping. He reported nearly constant symptoms for over a year with improvement over the several months prior to his visit to the point of near resolution of the symptoms in the elbow. Dr. Bollinger noted there had been no treatment for Claimant's elbow.

Dr. Bollinger examined Claimant and found the complaints consistent with lateral epicondylitis, which was due to Claimant's work with Respondent, and his work duties were the prevailing factor in causing the condition. Due to Claimant's improvement over several months and current near zero pain, Dr. Bollinger felt Claimant's condition was self-limited and no further work-up was recommended.

On June 10, 2019, Dr. Bollinger found Claimant had left lateral epicondylitis and noted Claimant had conservative treatment due to mild and occasional pain. He found no further treatment was warranted. He assigned an impairment rating of 1 percent permanent partial impairment to the left upper extremity under *The Guides* for mild persistent pain at the area of the lateral epicondyle with activity.

When asked to rate Claimant's carpal tunnel syndrome, Dr. Bollinger opined Claimant would have a 2 percent impairment to each upper extremity.

Claimant reported having diabetes, but did not report any neuropathy complaints to Dr. Bollinger, and Claimant did not report any problems with any other body parts. There were no complaints about both Claimant's shoulders.

Dr. Pat Do examined Claimant on December 19, 2018, at the request of the Court. Claimant complained of bilateral hand numbness and tingling in all 10 fingers and left elbow pain and intermittent left shoulder pain. Claimant also reported bilateral numbness, tingling and aching in his feet and noted he had peripheral neuropathy in his feet and took Gabapentin for this condition. Dr. Do noted Claimant was an insulin dependent diabetic.

Dr. Do diagnosed Claimant with left elbow lateral epidondylitis, bilateral carpal tunnel syndrome, and severe peripheral neuropathy (sometimes referred to as carpal tunnel syndrome) from diabetes in the upper extremities. He found Claimant's work to be the

prevailing factor for the current need for treatment of the left elbow and any resulting impairment.

Dr. Do opined with a reasonable degree of medical probability the work activities with Respondent were not the causative factor in the current need for treatment for the bilateral carpal tunnel syndrome and any impairment. He observed Claimant's diabetes was so bad, the effects of that outweigh Claimant's work activities causing the carpal tunnel syndrome.

His reasoning behind not relating the carpal tunnel syndrome to Claimant's work is:

> . . . taking everything into account such that he has been a crew chief for the last two years and decreasing the amount of work he has to do with tools such as drills, clamping, wrenches, and installing, his numbness and tingling in all 10 fingers is actually getting worse. That, along with his nerve testing showing axonal sensory motor peripheral neuropathy and him having neuropathy in the lower extremities for which he has been on gabapentin for approximately 5 years, tells me that issues unrelated to his work outweigh contributing factors due to his work. So, with that rationale, it is my believe [sic], within a reasonable degree of medical probability, that non-work related issues in his current need for treatment for the bilateral carpal tunnel syndrome.[3]

Dr. Do recommended for the left elbow anti-inflammatories, physical therapy, bracing, injection and, worse case scenario, left lateral epicondyle release with debridement.

Dr. Do noted the first mention of carpal tunnel syndrome problems was in 2013, when Claimant reported left wrist pain. He considered the length of time Claimant suffered from this wrist pain as a contributing factor in the prevailing factor opinion. He also considered the length of time Claimant had diabetes in determining the carpal tunnel syndrome was not related to Claimant's work:

> Q. So the nerve medication gabapentin is directed to the peripheral neuropathy in the upper extremities as well as the peripheral neuropathy in the lower extremities?
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> A. Yes.
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> Q. The fact that he not only has peripheral neuropathy in this upper extremities but also has peripheral neuropathy in his lower extremities, is that significant in the conclusion that you reached as to causation being his diabetes versus his work activities?

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[3] Dr. Do IME Report at 3.

A. Yes.[4]

Dr. Do testified because the numbness and tingling reported was in all of Claimant's fingers, it related more to peripheral neuropathy from diabetes than carpal tunnel syndrome. Carpal tunnel syndrome numbness is usually in the index finger and a portion of the ring finger. Despite the change in Claimant's work duties, his symptoms continue to get worse.

The ALJ found Claimant's work injury was limited to the left elbow and assigned two percent impairment to the left upper extremity, an average of Dr. Bollinger and Dr. Murati's ratings of the left upper extremity. The ALJ found Claimant entitled to future medical treatment for the left elbow. The ALJ did not consider Claimant's bilateral carpal tunnel syndrome to be compensable and Claimant failed to meet his burden of proving he suffered shoulder injuries.

Stipulations were taken at the April 2, 2020, regular hearing Claimant mentioned a request for temporary partial benefits from November 30, 2017, through May 7, 2019. Nothing in the record suggests the request was resolved, but it was not argued further or mentioned in the Award.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ erred in relying on Dr. Do's opinion the carpal tunnel syndrome was not work-related. Claimant requests the Board overturn the ALJ's findings regarding the carpal tunnel syndrome and find Claimant's repetitive work duties were the prevailing factor in the need for treatment of bilateral carpal tunnel and left epicondylitis. Claimant requests the opinions of Dr. Murati be adopted in terms of permanent impairment and need for future medical treatment.

Respondent argues Claimant is entitled to no more than 1 percent to the left upper extremity, as he failed to meet his burden of proving his carpal tunnel syndrome was related to his employment with Respondent. Respondent also argues Claimant failed to meet his burden of proving he was entitled to future medical treatment.

K.S.A. 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."

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[4] Do Depo. at 24-25.

K.S.A. 44-508(f)(2) states:

> An injury is compensable only if it arises out of and in the course of employment.
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> (B) An injury shall be deemed to arise out of employment only if:
>
> (i) There is a casual connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability and 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.

K.S.A. 44-510d(b) states

> If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
>
> . . .
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> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks . . .

The primary issue in this case is whether Claimant’s bilateral carpal tunnel arose out of and in the course of Claimant’s employment, specifically whether Claimant’s work duties were the prevailing factor for Claimant’s bilateral carpal tunnel syndrome.

Dr. Fevurly, Dr. Do and Dr. Bollinger all opined the prevailing factor for Claimant’s carpal tunnel is Claimant’s diabetes. Dr. Murati expressed a strong opinion contrary to these three doctors.

Dr. Do’s opinion is the most persuasive. First, he provided a neutral opinion at the request of the Court. Second, Dr. Do’s analysis of all factors in this case is persuasive. Dr. Do points to Claimant’s diabetes is severe, Claimant treats with 3 doses of insulin per day. Claimant has already developed diabetic peripheral neuropathy in his lower extremities and has been prescribed Gabapentin for five years. Claimant has numbness

and tingling in all of his fingers. Those symptoms are more indicative of peripheral neuropathy from diabetes than carpal tunnel syndrome. Claimant's symptoms in his upper extremities worsened after he became a crew leader, when there was less repetitive use of his hands. For these reasons, it is found and concluded the prevailing factor for Claimant's bilateral carpal tunnel syndrome is his diabetes and not his work duties for Respondent. Claimant's carpal tunnel syndrome did not arise out of and in the course of Claimant's employment.

Claimant's lateral epicondylitis is a compensable injury. The only rating in the record for the left lateral epicondylitis is 1 percent to left upper extremity in accordance with *The Guides*. Both Dr. Murati and Dr. Bollinger adopted the same rating. The ALJ averaged Dr. Bollinger's rating of 1 percent and Dr. Murati's rating of 3 percent. However Dr. Murati's rating of 3 percent was in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*. In the recent case of *Zimero v. Tyson Fresh Meats,*[5] the Kansas Court of Appeals interpreted *Johnson v. U.S. Food Service*[6], stating "the Fourth Edition is irrelevant after January 1, 2015."

Due to the holding in *Zimero*, the 3 percent rating is disregarded. The only rating in evidence using *The Guides* is 1 percent. Claimant's permanent partial impairment is 1 percent to the left arm at the 210 level, attributable to the elbow.

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

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such 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. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

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[5] *Zimero v. Tyson Fresh Meats*, Inc. __ Kan. App. 2d__, 499 P.3d 1153, 2021 WL 4501808 (Oct. 1, 2021).

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

Dr. Do recommended physical therapy, anti-inflammatory medication, injections and possible surgery to treat Claimant's left elbow. Based on these recommendations, the Board awards future medical upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Thomas Klein, dated August 16, 2021, is modified.

Claimant is entitled 2.1 weeks of permanent partial disability at the rate of $631.00 per week, in the amount of $1,325.10, for a 1 percent impairment of the left arm at the 210 level attributable to the elbow, making a total award of $1,325.10, as of the date of this award is due and owing, less any amounts previously paid.

Future medical will be considered upon proper application.

In all other respects the Award issued by ALJ Klein is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Phillip Slape, Attorney for Claimant
Vince Burnett, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge