

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TYLESHA PRYOR)	
Claimant)	AP-00-0475-708
V.)	CS-00-0442-368
)	
TARGET CORPORATION)	AP-00-0475-709
Self-Insured Respondent)	CS-00-0442-367

ORDER

Self-insured Respondent requested review of the May 18, 2023, Award issued by Administrative Law Judge (ALJ) Steven M. Roth. The Board heard oral argument on September 21, 2023.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Stephen P. Doherty appeared for 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 January 20, 2023; the transcript of the Continuation of Regular Hearing by Deposition of Claimant from February 21, 2023, with exhibits attached; the transcript of the Evidentiary Deposition of Vito Carabetta, M.D., from March 16, 2023, with exhibits attached; the transcript of the Evidentiary Deposition of Howard Aks, M.D., from March 30, 2023, with exhibits attached; the transcript of the Evidentiary Deposition of Richard L. Thomas, M.S., from February 17, 2023, with exhibits attached; the transcript of the Remote Evidentiary Deposition of Steve Benjamin, M.S., C.R.C., with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Did Claimant sustain compensable injuries to the body as a whole or is her injury limited to a traumatic hernia?

2. If Claimant sustained compensable injuries to the body as a whole, what is the nature and extent of her impairment or disability?

FINDINGS OF FACT

Claimant worked for Respondent as a warehouse operator, lifting boxes of various sizes and weights and placing them in a cage cart. On November 29, 2018, Claimant suffered an inguinal hernia related to lifting boxes at work.¹ She immediately reported the incident to her supervisor and was seen by the company nurse the following day.

Claimant ultimately underwent hernia repair surgery by Dr. Brennan Dixon on January 7, 2019. The procedure included the placement of internal mesh. Following surgery, Claimant returned to work full-time but continued to experience discomfort and pain in her abdomen.

On March 19, 2019, Claimant was lifting boxes overhead into a cage cart when several boxes fell, striking her back.² Claimant testified she attempted to guard her abdomen during the event, experiencing instant pain and aggravated symptoms throughout her abdomen.

Claimant was referred to Dr. Howard Aks by her counsel. Dr. Aks, a board certified pain medicine physician, first examined Claimant on June 3, 2019. After reviewing Claimant's medical records and performing a physical examination, Dr. Aks recorded the following impression:

1. Chronic abdominal pain.
2. Probably [*sic*] myofascial pain of the abdominal musculature.
3. Possible neuropathic pain.
4. Possible but doubtful recurrence of ventral hernia.³

Dr. Aks determined the November 2018 work injury was the prevailing factor causing Claimant's umbilical hernia requiring surgical intervention. He further reported the prevailing factor causing Claimant's new episode of abdominal pain, which has "become chronic and intractable," was the March 2019 work injury.⁴ Dr. Aks recommended conservative treatment, including medications and possible injections, in addition to a surgical consult and a possible trial of anticonvulsants. Dr. Aks limited Claimant to no lifting more than five pounds, no pushing or pulling over ten pounds, no overhead lifting, and sedentary work.

¹ CS-00-0442-367.

² CS-00-0442-368.

³ Aks Depo., Ex. 2 at 3.

⁴ *Id.*

Dr. Vito Carabetta, board certified in physical medicine and rehabilitation, examined Claimant at the Court's request on September 2, 2020. Claimant described constant pain involving all four abdominal quadrants, worsened with forceful activities. Dr. Carabetta reviewed Claimant's history, medical records, and performed a physical examination. Dr. Carabetta found Claimant to be status-post umbilical herniorrhaphy with mesh placement, and wrote:

Though she did suffer a work injury as result of the alleged accident that occurred on March 19, 2019, this is primarily an aggravation of the underlying condition from which she had not fully recovered and had the specific injury date of November 29, 2018. The prevailing factor under the circumstances is clearly the original injury. That aggravation is now the factor that hampered what would've been a standard recovery and the need for medical treatment.⁵

Dr. Carabetta opined, "The recovery of the abdominal wall is one that takes many months before it becomes reasonable, and at least a year even in less involved cases."⁶ Dr. Carabetta recommended an evaluation of Claimant by a general surgeon to fully assess her condition. He wrote:

At the very least we are dealing with myofascial pain with straining of the abdominal wall. I question the integrity of the hernia mesh. Mesh placement sometimes shifts where there is an additional injury. I would have to defer to the knowledge and experience of a general surgeon in this matter, especially one who is essentially sub-specialized in hernia repair surgery.⁷

Dr. Carabetta agreed removal of the mesh would cause a change in the physical structure of Claimant's abdominal tissue and musculature, which would heal over time. Dr. Carabetta also agreed the removal of the mesh and the damage to the tissue and muscles would be a separate and distinct injury flowing from and as a result of Claimant's first surgery. Dr. Carabetta recommended Claimant avoid lifting more than five or ten pounds and limit herself to sedentary activity.

An ultrasound of Claimant's abdomen, obtained November 9, 2020, showed a small supraumbilical ventral hernia. Claimant began treating with Dr. Lawrence Drahota, a surgical specialist, who ultimately performed laparoscopic removal of the old mesh and open repair of an umbilical hernia without mesh on January 6, 2021. When Claimant's

⁵ Carabetta Depo., Ex. B at 3.

⁶ *Id.*

⁷ *Id.*

symptoms continued, she underwent a third hernia repair surgery with Dr. Michael Davoren in the summer of 2021.

Dr. Aks again examined Claimant on November 18, 2021. Claimant complained of abdominal pain in all four quadrants with an occasional burning sensation. Claimant described pain radiating into her groin, discomfort in both flanks, and pain in her low and mid back. Dr. Aks reviewed Claimant's updated history and medical records. By this time, Claimant was working for another employer in a sedentary position with little lifting. Dr. Aks performed a physical examination and recorded his impression:

1. Chronic intractable abdominal pain status post multiple abdominal hernia repairs.
2. Myofascial pain involving the abdominal wall.
3. Possible neuropathic pain from the umbilical hernia repairs.
4. Bilateral flank pain, muscular in origin.
5. Lower back pain probably muscular in origin.⁸

Dr. Aks found the work-related accident of November 29, 2018, was the prevailing factor for her chronic intractable abdominal pain. He stated the work-related accident of March 19, 2019, aggravated Claimant's previous abdominal wall issue. Dr. Aks could not relate Claimant's low back pain to the March 2019 incident. Dr. Aks imposed permanent restrictions of no lifting more than 5 pounds, no pushing or pulling more than 10 pounds, and no frequent kneeling, bending, twisting, or squatting.

Using the *AMA Guides*⁹ and deviating as appropriate, Dr. Aks opined Claimant sustained 13 percent permanent partial impairment to the whole person. Dr. Aks did not consider Claimant's back complaints in providing his rating opinion or suggested restrictions. Dr. Aks testified he used Table 16-10 on page 122 of the *AMA Guides* as a baseline, then considered the extent of Claimant's myofascial pain, her neuropathic issues arising from probable neuromas, and the significant effect on her activities of daily living. In his November 18, 2021, report, Dr. Aks noted possible, rather than probable, neuropathic pain from the umbilical hernia repairs. Dr. Aks was asked about whether the neuropathic pain was possible or probable:

Q. And I notice when you refer to the neuropathic pain, you refer to it as possible, not necessarily probable; is that also accurate?

A. That is correct.¹⁰

⁸ Aks Depo., Ex. 3 at 5.

⁹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

¹⁰ Aks Depo. at 30.

Claimant returned to Dr. Carabetta on June 10, 2022, at the Court's request. Dr. Carabetta was instructed to evaluate Claimant's back complaints, which he could not relate to either work-related accident. Dr. Carabetta testified he did not evaluate Claimant's abdomen at this visit, though he was aware it had not improved. Dr. Carabetta noted the restrictions he imposed in 2020 related to Claimant's abdominal complaints should remain in effect. Dr. Carabetta was asked to provide his impairment opinion related to Claimant's abdomen. He testified:

I don't have an opinion. This is one where it's a little bit out of my wheelhouse and that usually that is the general surgeons who deal with those. This is one that's a tough call. I sometimes am involved in the inguinal hernias when they get the inguinal nerve irritated, which then falls into my territory. But in terms of an umbilical hernia that does not do well and continues to create symptomatology, which is substantial and understandable in her case, that's outside my league.¹¹

Claimant testified she was terminated from Respondent when her restrictions could not be accommodated. She has worked less strenuous jobs since leaving Respondent. In addition, Claimant obtained her degree from Washburn Tech Academy of Cosmetology on September 5, 2022, and her state license later that month. She is currently employed as a cosmetologist with Sport Clips. Claimant indicated her current employer accommodates her restrictions.

Two vocational rehabilitation experts interviewed Claimant: Richard Thomas at her counsel's request and Steve Benjamin at Respondent's request. Both experts compiled a list of the job tasks Claimant performed in the five years preceding 2018. Mr. Thomas generated a list of 21 unduplicated tasks, reviewed by Drs. Aks and Carabetta. Dr. Aks opined Claimant could no longer perform 16 of the 21 tasks, for a task loss of 76 percent. Dr. Carabetta opined Claimant could no longer perform 14 of the 21 tasks, for a task loss of 67 percent.

Mr. Benjamin's list included 28 unduplicated tasks performed by Claimant, reviewed by Drs. Aks and Carabetta. Dr. Aks' review of the Mr. Benjamin's task list results in a 61 percent task loss. Dr. Aks testified he considered his restrictions, Dr. Carabetta's restrictions, and the information provided by Mr. Thomas when determining a task loss based upon Mr. Benjamin's task list. Claimant reported to Mr. Thomas she could not sit or stand longer than 30 minutes. Dr. Aks agreed he did not include limited sitting/standing with his restrictions. Dr. Aks explained:

[S]ometimes standing and sitting can increase your abdominal pain. I specifically did not, in my restrictions and again, I think this is on me, comment about that. And, you know, that's my error. Again, you're asking me to give my opinion on these

¹¹ Carabetta Depo. at 13.

tasks as of March 30th of 2023. I have to take into consideration all the additional medical records and reports that I've been given.¹²

Dr. Carabetta opined Claimant sustained a 41 percent task loss using Mr. Benjamin's task list.

Mr. Thomas testified the starting salary for stylists with less than one year of experience in the Topeka/Lawrence area is between \$9.91 and \$10.14 per hour. Pay stubs from Claimant's current employer, Sport Clips, average \$486.62 per week. Claimant's average weekly wage for Respondent was \$923.90. Based on Claimant's current earnings, this constitutes a wage loss of 49 percent.

Mr. Benjamin provided a wage loss opinion in his report based upon the reported median income for hairstylists in the Topeka Metropolitan Statistical Area, or \$547.20 per week, for a wage loss of \$376.40, or 40.8 percent. Mr. Benjamin was later provided a pay stub showing a pay period where Claimant earned \$736.04 per week. The pay period reflects the most earnings Claimant has made at her current job since November 2022. Mr. Benjamin testified this amount is Claimant's actual earning capacity, and produces a wage loss of \$187.56, or 20.3 percent.

The ALJ found Claimant sustained separate and distinct injuries of myofascial pain and nerve damage in her abdomen, resulting in injury to the body as a whole, and not a scheduled injury under K.S.A. 44-510d(b)(22). The ALJ determined Claimant has 13 percent permanent partial impairment to the whole person. Further, averaging all the task loss and wage loss opinions, the ALJ found Claimant suffered a task loss of 61.25 percent and a wage loss of 44.9 percent, resulting in a work disability of 48 percent. The ALJ did not award future medical compensation.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant failed to prove she had any injury in excess of the underlying hernia and hernia repair. Alternatively, Respondent contends any additional permanent partial disability impairment should not be greater than 7.5 percent to the body as a whole. If permanent partial disability impairment is found to be greater than 7.5 percent to the body as a whole, Respondent argues Claimant's work disability is limited to 30.65 percent.

Claimant maintains the ALJ's Award should be affirmed. Claimant argues she sustained a separate and distinct injury flowing from her traumatic hernia and is entitled

¹² Aks Depo. at 38.

to compensation for a whole-body injury. Claimant further argues the record supports the ALJ's finding she is entitled to an award of 48 percent work disability.

K.S.A. 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. 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.

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

An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal 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 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.

K.S.A. 44-510d states, in part:

(b)(22) For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510h and 44-510i, and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during 12 weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for surgical repair of such hernia shall deprive such employee of any benefits under the workers compensation act.

. . . .

(c) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i, and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

The primary issue is whether Claimant sustained only a hernia or a hernia and additional injury. The Court of Appeals held nerve injuries which develop as a natural consequence of a traumatic hernia are not the same injury as the hernia injury, are not governed by K.S.A. 44-510d(a)(22), and are compensable under the Workers Compensation Act as an injury to the body as a whole.¹³

Dr. Aks testified he used Table 16-10 on page 122 of the *AMA Guides* as a baseline, then considered the extent of Claimant's myofascial pain, neuropathic issues arising from probable neuromas, and the significant effect on her activities of daily living. Table 16-10 deals exclusively with impairment related to hernias. Table 16-10 is made irrelevant by K.S.A. 44-510d(b)(22), which limits compensation for a traumatic hernia to medical treatment and 12 weeks of compensation.

In Dr. Aks' impairment report, which is contradictory to his testimony, he wrote of possible neuropathic pain, not probable. He agreed during cross examination possible neuropathic pain was an accurate description. Dr. Aks did not provide an opinion Claimant suffered verified nerve damage, the prevailing factor of which is the work-related accident within a reasonable degree of medical probability.

The plain language of K.S.A. 44-510d(b)(22) limits recovery for traumatic hernias and does not provide for an award of permanent impairment for a traumatic hernia. Dr. Aks utilized a table from the *AMA Guides* that only provides impairment ratings for hernias and is inapplicable in a Kansas workers compensation claim. Dr. Aks did not provide an opinion suggesting Claimant suffered nerve damage as the result of her work-related accident within a reasonable degree of medical probability.

¹³ See *Goudy v. Exide Technologies*, 283 P.3d 840 (2012); *Lozano v. Excel Corp.*, 32 Kan.App.2d 191, 81 P.3d 447 (2003).

Dr. Carabetta, the Court-ordered examining physician, opined Claimant’s symptoms were caused solely by a hernia from which Claimant had not fully recovered because recovery may require a year. Dr. Carabetta excluded irritation of the inguinal nerve. Dr. Carabetta’s opinions were not contradictory and are more credible. Based upon a greater weight of the credible evidence, Claimant sustained a compensable hernia injury from accidents arising out of and in the course of her employment. Under K.S.A. 44-510d(b)(22), Claimant is entitled to an award of medical treatment and temporary total disability compensation. Claimant is not entitled to permanent disability compensation.

Based upon the record, the Board finds Claimant failed to prove she suffers a permanent impairment related to a nerve injury as the result her work-related accidents.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Steven M. Roth dated May 18, 2023, is reversed. Claimant is awarded medical treatment reasonably necessary to cure and relieve the work-related hernia, and 48.58 weeks of temporary total disability compensation, paid at the rate of \$615.97 per week, totaling \$27,923.95, which is due and owing and ordered to be paid by Respondent, less compensation previously paid.

IT IS SO ORDERED.

Dated this _____ day of October, 2023.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

TYLESHA PRYOR

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c: (Via OSCAR)

Jeff K. Cooper, Attorney for Claimant
Stephen P. Doherty, Attorney for Self-Insured Respondent
Hon. Brian Brown, Administrative Law Judge