

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SARAH CINDRIC)
Claimant)
V.)
) AP-00-0478-190
SEDGWICK COUNTY, KANSAS) CS-00-0469-583
Self-Insured Respondent)

ORDER

Respondent appealed the August 11, 2023, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on December 14, 2023.

APPEARANCES

Rob Lee appeared for Claimant. William L. Townsely, III appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Evidentiary Deposition of Sarah Cindric taken February 8, 2023; Transcript of Regular Hearing from March 20, 2023; Evidentiary Deposition of George G. Fluter, M.D., taken April 5, 2023, with exhibits attached; Evidentiary Deposition of Paul Hardin, taken April 6, 2023, with exhibits attached; Evidentiary Deposition of Ines Fricker, taken May 5, 2023, with exhibits attached; Evidentiary Deposition of Angela Hamilton, taken May 5, 2023, with exhibits attached; Evidentiary Deposition of Steve Benjamin, taken June 12, 2023, with exhibits attached; Evidentiary Deposition of John P. Estivo D.O., taken June 13, 2023, with exhibits attached; Evidentiary Deposition of Steve Benjamin, taken July 17, 2023, with exhibits attached. The documents of record filed with the Division and the parties briefs were also considered.

ISSUE

What is the nature and extent of Claimant's disability?

FINDINGS OF FACT

Claimant worked for Sedgwick County EMS as a paramedic for six years. She was a full-time employee beginning in February 2015.

On August 2, 2012, Claimant gave two weeks notice she was resigning from her full-time position as a paramedic effective August 16, 2021. Claimant's intention was to work as a part-time paramedic on an as needed basis for Respondent. According to Angela Hamilton, deputy chief of operations, part-time positions are on an as needed basis. The guidelines for part-time work are the employee is to submit their availability for six 12 hour shifts per month. The employee must work a minimum of four 12 hour shifts and one major holiday per month.

According to Claimant, when there is a response to a call for their services, they are accompanied by firefighters unless it is to a nursing home facility. In those circumstances the nursing home staff is used.

On August 8, 2021, around 7:00 a.m., Claimant and her paramedic partner were on a call at a nursing home and were administering treatment to a patient. In the process of transferring the patient to a cot from the floor for transport to the hospital, the nursing home staff member helping lift the patient stepped away from lifting the patient's legs, leaving the patient's weight unbalanced. To prevent dropping the patient, Claimant lifted the extra weight. In lifting the patient, Claimant felt a pop in her low back and experienced sudden pain.

Claimant reported her back was bothering her to her supervisor and she was going to file a report, but continued to work her shift because they were busy and short staffed. On the next call, they were dispatched to a hotel for an overdose call. After reviving the patient, the patient got unruly, and it took several people to control the patient. With this incident, the pain in Claimant's back got worse and she had difficulty walking back to the ambulance.

After the overdose incident, Claimant reported to her supervisor, Mitch Hansen, the pain was too much for her to keep working and she was sent to the minor emergency center, where she was given an injection and told to follow up at Via Christi Medical Center. At Via Christi, Claimant had x-rays and an MRI and was referred to Dr. Estivo. Dr. Estivo treated Claimant with physical therapy, x-rays, nerve testing, and injections for two months. She was then referred to Dr. Henry, a neurosurgeon. Dr. Henry evaluated Claimant and he found Claimant was not a good candidate for surgery. Dr. Estivo released Claimant on July 19, 2022, with permanent restrictions.

Claimant did not return to work after the August 8, 2021, accident.

Ines Fricker, who is with Respondent's human resources department, called Claimant and told her she could no longer continue to work as a paramedic due to her permanent restrictions.

Since Claimant has been unable to work for Respondent, she has been working as

a photographer in a new business she started. Claimant started with photography by taking pictures for family and others for free and in June or July of 2020 transitioned to hire for pay taking photos. Claimant works in her photography business about 16 hours a week. Claimant testified she contracts with someone to do the makeup and friends help with things needing done she is unable to do.

Currently, Claimant is not completely able to take pictures in certain positions, as it aggravates her back. When she took photos before her accident, there was a lot of bending, stooping, and crawling. Now she can stand and take pictures. She is not able to lift over 50 pounds, so she is careful when moving things around in her studio or she gets assistance. Claimant is trying not to close her photography business, but she may have to since she is not able to do as much and cannot earn as much. She has made some money in her business, but has not earned anything since November of 2022. Claimant has been performing some work for another photographer since January 16, 2023, at \$15 an hour, 20 hours a week.

Claimant has no set wage or salary. She only pays herself if the business makes a profit. She has an accountant to take care of the finances and taxes. Claimant charges \$499 and up \$3,700 for a session but testified most customers spend about \$1,000.

Claimant denies prior low back injuries. She admits to filling out a report for pain to her upper back between her shoulder blades on August 31, 2020, while she was moving supplies and stock blankets inside the ambulance. Claimant did not receive any medical treatment for this incident. On November 7, 2019, Claimant had pain in her back and lumbar area on both sides when she was transferring a patient and lifting the cot into the ambulance. Claimant did not have treatment for this incident.

Claimant used to be very active. Now she has trouble walking long distances, is unable to workout or lift her child and can no longer sleep in the same bed as her husband because back spasms wake him up. Claimant has also gained weight. Her pain is mostly in the lower back and wraps around her right thigh and at times the right calf. She has a burning sensation in the second toe on both feet. The pain is constant at a 4 or 5 on the 1 to 10 pain scale.

Respondent is not able to accommodate Claimant's restrictions to perform paramedic duties but still considers Claimant an employee. Her fringe benefits stopped at the end of August 2021.

Dr. John Estivo first saw Claimant on August 25, 2021, upon referral from Via Christi Occupational Health Clinic. Dr Estivo examined Claimant and diagnosed her with a protruding disc at L4-5 toward the left, a lumbar spine strain, and a right sacroiliitis. He recommended physical therapy for the lumbar spine. He prescribed naproxen, an anti-inflammatory medication, and assigned temporary work restrictions.

Dr. Estivo noted at a followup visit Claimant had a series of injections which provided no relief. He recommended continued treatment for the lumbar spine, with medication and physical therapy. He referred Claimant to Dr. Henry, a neurosurgeon, for evaluation of her right lower extremity and right thigh pain and for a surgery consult. After Dr. Henry's evaluation, Dr. Henry and Dr. Estivo agreed Claimant was not a candidate for surgery.

Dr. Estivo last saw Claimant on July 19, 2022. Claimant continued to have a herniated disc at L4-5, but since surgery was not an option, Claimant was placed at maximum medical improvement. She was given permanent work restrictions of no lifting over 35 pounds; and occasional bending and twisting at the waist, not to exceed more than one-third of the work shift.

Dr. Estivo rated Claimant's permanent impairment at 12 percent body as a whole based on the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition*, (hereinafter referred to as *The Guides*).

Dr. Estivo reviewed the task list prepared by Steve Benjamin and found Claimant had lost the ability to perform 10 out the 24 tasks on the task list, for a 41.7 percent task loss.

Dr. Estivo recommended future medical treatment, such as physical therapy, epidural injections and surgery should the herniated disc become symptomatic.

Dr. George G. Flutter examined Claimant on September 27, 2022, at her attorney's request. Claimant reported feeling a pop in her low back while helping lift a patient. Claimant complained of pain in her low back with radiation into the right hip/thigh/lower leg, dysesthesia in both calves and numbness in the second toes of both feet. She reported her pain as constant. She denied any prior injuries or problems. She had received conservative treatment without relief. Claimant reported trouble sleeping and weight gain. Claimant's inability to be active has led to depression. Dr. Flutter diagnosed Claimant with status post work-related injury, August 8, 2021; low back/lower extremity pain and dysesthesia; lumbosacral strain/sprain; multilevel lumbar discopathy; probable sacroiliac joint dysfunction; probable lower extremity radiculitis; and probable lumbar facet joint dysfunction. He opined with a reasonable degree of medical probability, the August 8, 2021, work injury is the prevailing factor for the injury, the need for medical evaluation/treatment, and the resulting impairment/disability.

Based on *The Guides*, Dr. Flutter found a 9 percent body as a whole permanent partial impairment to the lumbar spine. He found because Claimant is no longer able to return to work as a paramedic, and unable to participate in activities she had been able to prior to the work injury, Dr. Flutter assessed an additional 5 percent body as a whole permanent partial impairment. Claimant's total impairment was 14 percent body as a

whole. Dr. Fluter opined this rating represents Claimant's impairment due to Claimant's ongoing pain, dysesthesia, and dysfunction from the work injury.

Dr. Fluter assigned the following restrictions: no lifting, carrying, pushing, and pulling more than 20 pounds occasionally and 10 pounds frequently, occasionally bend, stoop, crouch, and trunk twisting, and occasionally squat, kneel, crawl, and climb.

Dr. Fluter reviewed Paul Hardin's task list and found Claimant had a 43.5 percent task loss, having lost the ability to perform 10 out of 23 tasks.

Dr. Fluter opined Claimant will benefit from future medical treatment for her musculoskeletal conditions. He recommended continued medication management, varying physical therapies, possibly radio-frequency ablation and a soft abdominal lumbar support brace during activities. He believed treatment for depression would be appropriate.

Ines Fricker, workers compensation adjuster for Sedgwick County, testified she oversees the workers compensation claims. She provided Claimant with FMLA/ADA contact information when she found out Claimant was at maximum medical improvement and had permanent restrictions. She was not aware of Claimant taking advantage of this information.

Paul Hardin, a vocational consultant, met with Claimant on November 21, 2022, via telephone, at her attorney's request. After reviewing the medical reports of Dr. Fluter and Dr. Estivo, Mr. Hardin determined Claimant has 60 percent wage loss using a wage of \$1,563.74 pre injury wage. Mr. Hardin opined Claimant could work in the open labor market earning \$11 - \$12 per hour. Mr. Hardin prepared a task list of 23 non-duplicative tasks Claimant had performed in the five years prior to the Claimant's work accident.

Steve Benjamin, a vocational rehabilitation consultant interviewed Claimant in person on May 10, 2023, at the request of Respondent. Mr. Benjamin identified 24 non-duplicative tasks Claimant had performed in the five years preceding Claimant's work accident.

Mr. Benjamin opined Claimant can re-enter the open labor market on a full-time basis earning \$612.80 per week, for a wage loss of 48.8 percent.

Mr. Benjamin was not aware Claimant was still considered an employee of Sedgwick County, but it did not change his opinion, as she was not earning wages there.

Mr. Benjamin was asked to determine Claimant's employability or potential loss of wages using positions at Sedgwick County she would be qualified to perform. Mr. Benjamin reviewed 16 positions Claimant should be able to perform based on her physical

restrictions. He did not know if Claimant had the typing skills of bookkeeping skills required for some of the 16 positions. Claimant does not have work experience as an office worker.

The ALJ found Claimant had a 13 percent functional impairment to the body as a whole and a 48.5 percent work disability for the August 8, 2021, injury. The ALJ found Claimant is entitled to future medical treatment. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent appeals arguing Claimant is not entitled to work disability as she voluntarily resigned from her employment and failed to provide the necessary credible evidence to satisfy her burden of establishing she is entitled to work disability benefits.

Claimant argues the Award should be affirmed.

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.

The extent of functional impairment is determined by competent medical evidence, using *The Guides* as a starting point.¹

Two physicians testified to the extent of Claimant's permanent impairment. Dr. Estivo opined Claimant has 12 percent body as a whole impairment and Dr. Flutter opined Claimant has 14 percent body as a whole impairment. The ALJ ruled Claimant has 13 percent body as a whole impairment, a split between the two ratings. The Board finds both doctors equally credible. The Board agrees 13 percent body as a whole is a reasonable assessment of Claimant's permanent impairment.

Claimant's functional impairment meets the threshold for Claimant to be eligible for a work disability.² Work disability is defined as:

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

¹ See K.S.A. 44-510e(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603 P.3d 776 (2021).

² See K.S.A. 44-510e(C)(i).

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.³

Respondent contends Claimant is not eligible for a work disability award because she had given notice of her resignation from her full-time job with Respondent to work part-time for Respondent effective August 16, 2021. But before the resignation was effective Claimant was injured. The work injury caused Claimant to have permanent restrictions which rendered Claimant unable to perform the duties as a paramedic. Respondent was unable to accommodate Claimant's restrictions to work as a part-time paramedic.

For a wage loss to be considered in calculating work disability the wage loss must be caused by the injury. Claimant is no longer able to work as paramedic due to permanent restrictions caused by her work injury. The fact Claimant had given notice of resignation did not cause her wage loss, her work injury did. Claimant's wage loss due to her physical inability to continue as a paramedic is considered in determining Claimant's award of work disability.

Respondent argues Claimant quit her job and the fringe benefits should not be used to calculate average weekly wage and wage loss. The parties stipulated Claimant's average weekly wage is \$939.04 with fringe benefits of \$624.70 per week for an average weekly wage of \$1,563.74.

³ K.S.A. 44-510e(a)(2)(C)(ii)(D)(E).

Claimant's wage loss was due to a compensable work injury and calculating wage loss includes the loss of fringe benefits due to her injury.

Respondent cites the Kansas Court of Appeals case of *Rickson v. Kerns Construction*⁴ to support their argument Claimant voluntarily resigned her position and is not entitled to a work disability. Rickson sustained a work injury. After the work injury Rickson returned to work with light duty restrictions. Subsequent to his return to work Rickson gave two weeks notice after his employer confronted him with complaints by other employees about his work. The employer asked Rickson to leave without two weeks notice. The Court of Appeals determined Rickson was not entitled to work disability benefits following his two week notice of resignation because Rickson voluntarily quit his job and Rickson's wage loss was the result of his voluntary resignation and not his work injury. There was no determination Rickson was not physically able to return to work.

This case is distinguishable from *Rickson*. Claimant gave two weeks notice she was resigning to transition from full-time work to part-time work. Before Claimant's resignation was effective, Claimant was injured. Due to her work injury Claimant could not return to work full-time or part-time work as a paramedic due to her permanent restrictions caused by her work injury.

Claimant's resulting wage loss is not due to a voluntary resignation or a termination for cause, but due to her work injury. Claimant's wage loss is included in the calculation of a work disability award.

Respondent further argues Claimant is not entitled to work disability benefits because Respondent offered Claimant employment with equal or comparable wages. When Claimant was told the employer could not accommodate Claimant's permanent restrictions so she could not continue to work as a paramedic. Claimant was given a person to contact about the ADA (Americans with Disability Act) information. It is not clear what information this individual could provide Claimant. Respondent had Steve Benjamin, a vocational consultant hired by Respondent, to review 16 open positions with Respondent. According to Mr. Benjamin, Claimant could physically perform these jobs, but he was uncertain whether Claimant qualified for the job based on her experience and training. There is no evidence any of these jobs were offered to Claimant. These circumstances do not constitute an offer of employment. The Board agrees with the ALJ providing contact information is not an offer of employment. Tools as Respondent terms this information is not an offer of employment.

Two vocational experts testified in this matter. Mr. Benjamin opined Claimant has

⁴ *Kerns v. Rickson Construction*, filed Sept. 4, 2020, No. 122,092, 471 P.3d 33, 2020 WL 5268162 (Unpublished Court of Appeals opinion).

a wage loss 48.8 percent and Mr. Hardin found Claimant has wage loss of 60 percent. In finding wage loss the ALJ averaged the two opinions as to wage loss and found a wage loss of 54.4 percent. The Board finds and concludes this is a reasonable finding for Claimant’s wage loss.

Two physicians testified as to Claimant’s task loss. Dr. Estivo opined Claimant’s task loss is 41.7 percent and Dr. Flutter opined Claimant’s task loss is 43.5. In calculating task loss the ALJ averaged the two doctors’ opinions resulting in task loss finding of 42.6 percent. The Board finds and concludes this is a reasonable finding for task loss.

Claimant’s work disability award is calculated by adding the task loss of 42.6 percent and the wage loss of 54.4 percent and dividing by two. Claimant’s work disability award is 48.5 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Gary K. Jones dated August 11, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Rob Lee, Attorney for Claimant
William L. Townsley, III, Attorney for Self-Insured Respondent
Hon. Gary K. Jones, Administrative Law Judge