

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

INOCENCIA SANCHEZ ONTIVEROZ

Claimant

v.

NATIONAL BEEF PACKING CO. LLC

Respondent

AP-00-0478-650

CS-00-0178-545

and

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

AP-00-0478-651

CS-00-0006-318

ORDER

Claimant seeks review of the September 5, 2023, Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on January 18, 2024.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Shirla McQueen 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 following: Transcript of Regular Hearing taken via Videoconference, held February 22, 2023; transcript of Regular Hearing by Deposition via Zoom, taken March 7, 2023; transcript of Evidentiary Deposition via Zoom of Claudia Deleon, taken May 5, 2023; transcript of Evidentiary Deposition via Zoom of Mague Olivas, taken April 17, 2023, including Exhibits E-Q; transcript of Evidentiary Deposition via Zoom of Yesenia Solis, taken April 17, 2023, including Exhibits A-D; transcript of Evidentiary Deposition via Videoconference of Pedro A. Murati, M.D., taken April 11, 2023, including Exhibits 1-7; transcript of Evidentiary Deposition of David W. Hufford, M.D., taken March 29, 2023, including Exhibits 1-7; transcript of Deposition of Terrence Pratt, M.D., taken March 28, 2023, including Exhibits 1-5; transcript of Evidentiary Deposition via Zoom of Karen Terrill, taken June 19, 2023, including Exhibits 1-4; transcript of Evidentiary Deposition via Zoom of Richard Thomas, taken April 20, 2023, including Exhibits 1-2; the narrative report of Dr. Pratt, dated October 7, 2021, concerning his Court-ordered independent medical examination; the parties' Joint Stipulation, dated July 18, 2023, confirming the admissibility of Dr. Pratt's addendum report dated July 6, 2023; the parties' Joint Stipulation, filed May 9, 2023; the parties' emails with ALJ Sample's office dated August 15, 2023, concerning

Claimant's average weekly wage; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. What is the nature and extent of disability for each case, including whether Claimant is entitled to work disability compensation or compensation for permanent total disability?
2. Is Claimant entitled to an award of future medical treatment for each matter?

FINDINGS OF FACT

Claimant worked for Respondent from 2011 through December 12, 2017. Claimant currently resides in Liberal, Kansas. Claimant emigrated from Mexico, and Claimant cannot speak or read English fluently. Claimant testified she can perform arithmetic and can read approximately 70% of a book in English. Claimant has an approximate seventh-grade education. Claimant is fifty-six years of age.

In 2017, Claimant worked as a Scale Weight Operator. Claimant was paid on an hourly basis, and received life and health insurance from Respondent. Claimant wore a hard hat, and scanned items using a hand-held scanning gun. Claimant performed her work while standing. Claimant also typed information into a computer and put labels on boxes. Claimant occasionally pushed a copier to refill the paper, but she did not do this task daily. Claimant testified her work required constant standing, bending to one side, and lifting less than one pound. Claimant denied climbing, squatting, kneeling or working overhead. Claimant took breaks every two-and-one-half to three hours.

On March 28, 2017, Claimant was climbing stairs at work on her way to the cafeteria. Claimant slipped and fell onto her left side. Claimant injured her left shoulder and the left side of her neck. Claimant testified she continued working regular duty for Respondent. Medical treatment was initially provided by Respondent's medical department. Later, Claimant was referred to Dr. Ansari for treatment. Dr. Ansari performed a rotator cuff repair and decompression surgery on October 18, 2018. This matter was assigned Case Number CS-00-0178-545/AP-00-0478-650 by the Division of Workers Compensation.

On June 1, 2017, Claimant was working, and stepped into a hole to avoid being struck by a forklift. Claimant sustained injuries to her left ankle and low back. Claimant

initially treated at Respondent's medical department and continued working. Claimant was later referred to Dr. Ansari for additional treatment. Dr. Ansari performed a surgical reconstruction of the left lateral ligament complex of the left ankle on May 10, 2019. Claimant also saw Drs. Cayme and Nguyen for pain management modalities of the low back, and briefly saw Dr. Wingate for a surgical consult of the low back. This matter was assigned Case Number CS-00-006-318/AP-00-0478-651 by the Division of Workers Compensation.

Under Respondent's attendance policy, unexcused absences accrue one point per occurrence. Tardies accrue a half point per occurrence, but increase to one point per occurrence if an employee has six unexcused absences or tardies. A point is removed from the employee's record one year from the occurrence. An employee can receive a written warning for every three points accrued in a calendar year, and is subject to termination if twelve points are accrued in a calendar year.

Before the March 28, 2017, accident, Claimant had accrued four and one-half points and received a initial written warning. On April 5, 2017, and May 3, 2017, Claimant accrued two additional points for tardies, and received a second written warning on May 8, 2017, for having reached six points. From May 17, 2017, through July 26, 2017, Claimant accrued three additional points, and received a final written warning on August 3, 2017. From October 12, 2017, through December 9, 2017, Claimant accrued additional points for tardiness, and was terminated on December 12, 2017, for accruing twelve and one-half points.

Following each accident, Claimant continued working her regular job. Claimant testified she was prescribed Tramadol by the medical department, which caused headaches, vomiting, dizziness and insomnia. Claimant testified the side effects caused her to be late to work, which resulted in the points she accrued. Claimant also testified she asked a nurse to change her medication in October 2017, but her request was denied by the nurse because Claimant was not Respondent's favorite employee. Claimant also alleged the nurse called her "Mrs. Always Hurting."

Claimant testified she tried working at IHOP four months after her termination by Respondent, but she was unable to stand because her foot became swollen and painful. Claimant began receiving Social Security Disability benefits in 2019. Claimant did not believe she could work because of her shoulder, neck, ankle and low back injuries, and she did not believe she could perform her old job for Respondent. Claimant testified she cannot stand or sit for more than one hour because her foot gets swollen and she cannot move her arms. Claimant did not believe she could lift more than five pounds. Claimant

testified she cannot exercise, walk or perform housework. Claimant takes Tylenol for her pain. Claimant denied having prior problems, although she previously received treatment from Respondent's medical department for arthritis and accrued points for absences and tardies due to her arthritis.

Ms. Deleon, a nurse at Respondent's medical department, testified Claimant was seen regularly at the medical department for personal health issues, as well as the work-related injuries. Ms. Deleon testified Claimant was placed in an accommodated position due to her ankle injury, but was released to work as a Scale Weight Operator in December 2017. According to Ms. Deleon, Claimant was first prescribed Tramadol on November 21, 2017, by Danny Briggs, P.A. Ms. Deleon testified Claimant asked for a change in medication after November 22, 2017, and Ms. Deleon said she could not change a prescription and would call Mr. Briggs about it. Mr. Briggs subsequently changed Claimant's medication to Tylenol on December 5, 2017. Ms. Deleon denied Claimant reported her medication made her late to work. Ms. Deleon also denied insulting Claimant or telling Claimant she was not Respondent's favorite.

Ms. Deleon testified on December 19, 2017, she called Claimant to advise of an appointment with Mr. Briggs. According to Ms. Deleon, Claimant was upset and said she was terminated because of Ms. Deleon. Claimant said the medication she was provided made her sick, and was the reason she was terminated. Claimant told Ms. Deleon not to contact her again.

A union grievance concerning Claimant's termination was made, and was later dismissed or withdrawn. The parties stipulated Claimant's average weekly wage for both accidents was \$654.42. The parties also stipulated Claimant received fringe benefits with a value to Respondent of \$116.55 per week, which were no longer paid to Claimant on December 13, 2017.

Dr. Murati evaluated Claimant at her attorney's request on multiple occasions. Dr. Murati first saw Claimant on June 27, 2018 in association with the March 28, 2017, accident. Claimant reported sharp pain, pinching and functional losses from the left shoulder, with pain extending to the neck. Dr. Murati noted a history of a repetitive trauma injury to the left arm in 2015. Examination was notable for left shoulder pain, positive signs of impingement and rotator cuff injury of the left shoulder, limited range of motion and trigger points. Dr. Murati diagnosed a partial rotator cuff tear with mild subluxation of the biceps tendon, and myofascial pain syndrome of the left shoulder and cervical paraspinal musculature. Additional treatment was recommended.

On May 7, 2019, Dr. Murati reevaluated Claimant in association with the March 28, 2017, accident. Dr. Murati noted Claimant underwent surgery by Dr. Ansari, consisting of rotator cuff repair and decompression procedures. Examination was notable for positive impingement and rotator cuff signs, loss of sensation of the C7 dermatome, glenohumeral crepitus and limited range of motion of the shoulder and neck. Dr. Murati diagnosed post-small rotator cuff repair and decompression, and myofascial pain syndrome of the left shoulder and cervical and thoracic paraspinal muscles. Dr. Murati recommended future medical, imposed permanent work restrictions and provided impairment ratings under the *AMA Guides to the Evaluation of Permanent Impairment (AMA Guides)*, Fourth and Sixth Editions. Using the *AMA Guides*, Sixth Edition, as a starting point, and based on competent medical evidence, Dr. Murati thought additional impairment for crepitus and impingement was appropriate, and rated Claimant's functional impairment at 12% of the body as a whole. Dr. Murati recommended future medical consisting of physical therapy, injections, medications and physician intervention.

Dr. Murati also evaluated Claimant on June 27, 2018, in association with the June 1, 2017 accident. Claimant reported she stepped into a hole, twisted her left ankle, and developed low back pain while walking with a boot provided four months after the accident. Claimant reported pain, stress, depression, high blood pressure, low back pain and left ankle pain. Dr. Murati reviewed Dr. Ansari's records documenting conservative treatment. Examination of both lower extremities was notable for missing hamstring and ankle jerk reflexes and loss of strength of the left great toe extensor. Limited range of motion of the left ankle was noted. Dr. Murati also noted an antalgic gait, tenderness to palpation of the S1 region, positive straight-leg raise on the left, and positive sacroiliac signs on the right. MRI scans were reviewed. Dr. Murati diagnosed a complete tear of the anterior talofibular ligament of the left ankle, neuropathies of the left lower extremity, low back pain with radiculopathy due to an altered gait, right sacroiliac dysfunction, and left trochanteric bursitis due to an altered gait. Dr. Murati recommended additional treatment and imposed temporary restrictions.

Dr. Murati reevaluated Claimant on April 28, 2021, in association with the June 1, 2017, accident. Dr. Murati reviewed additional medical records documenting additional medical treatment and Dr. Hufford's evaluation. Claimant's symptoms were the same as before, but Claimant also reported increased frequency of urination. Examination was notable for a missing reflex of the left ankle, loss of sensation of the left lower extremity, tenderness to palpation at L5, positive straight-leg raise and sacroiliac signs bilaterally, loss of extension of the left ankle and tenderness of the left plantar fascia. Dr. Murati diagnosed a tear of the anterior talofibular ligament and post-surgery of the left ankle, neuropathies of the left lower extremity, post-radiofrequency ablation procedures at L4-S1,

low back pain with radiculopathy due to an antalgic gait, left plantar fasciitis, bilateral sacroiliac joint dysfunction, metatarsalgia of the left first through fifth metatarsal heads, and bilateral trochanteric bursitis due to an antalgic gait. Dr. Murati imposed permanent restrictions of no lifting above the ankle or below knuckle height, limiting lifting, carrying, pushing and pulling to ten pounds occasionally, and occasionally standing or walking.

Dr. Murati reviewed Mr. Thomas's task list, and thought Claimant sustained 100% task loss. Dr. Murati also reviewed Ms. Terrill's task list, and thought Claimant sustained 87.5% task loss. Dr. Murati rated Claimant's impairment, using the *AMA Guides*, Sixth Edition, as a starting point and based on medical judgment, at 18% of the body as a whole attributable to the left lower extremity and 16% of the body as a whole attributable to the low back, or 34% of the body as a whole globally. Claimant's impairment, excluding the right lower extremity, was 30% of the body as a whole. Dr. Murati also recommended future medical treatment, including the need for a surgical consult for the low back.

Dr. Hufford evaluated Claimant at Respondent's request. An evaluation was scheduled for October 29, 2020, but Claimant did not consent to be examined. The evaluation ultimately took place on December 17, 2020, and was limited to the lumbar spine. Dr. Hufford noted Claimant also sustained a left ankle injury and underwent surgery by Dr. Ansari. The course of treatment for the low back was reviewed. Claimant reported low back pain, pain in the legs running to above the knees, and numbness of the left thigh above the patella. Examination was notable for no direct tenderness of the lumbar spine, tenderness of both sacroiliac joints, full strength of both legs, no reflexes at both knees and ankles, and positive straight-leg raise bilaterally. Dr. Hufford thought the most recent lumbar MRI revealed degenerative changes without herniation or foraminal narrowing. Dr. Hufford diagnosed an occupational injury to the low back with residual pain, and rated Claimant's impairment at 5% of the body as a whole referable to the sacroiliac component of Claimant's injuries.

Respondent subsequently asked Dr. Hufford to issue a rating report addressing all of Claimant's work-related injuries from both accidents, and Dr. Hufford reevaluated Claimant on February 11, 2021. Dr. Hufford understood on March 28, 2017, Claimant sustained a right knee injury, which resolved, and a left shoulder injury requiring surgery by Dr. Ansari. Dr. Hufford also understood on June 1, 2017, Claimant sustained injuries to the lumbar spine and left ankle, which required surgery by Dr. Ansari. Dr. Hufford did not have Dr. Ansari's report concerning the left ankle surgery. The lumbar spine was not examined. No tenderness at the cervical vertebrae or paraspinals was noted. Tenderness of the left shoulder musculature was noted, along with full strength and limited range of motion of the left shoulder. A positive rotator cuff sign was also noted. General

tenderness of the left knee was noted, with no swelling, patellar crepitus, full strength and extension to zero degrees. Tenderness at the Achilles tendon was noted, with limited range of motion of the ankle. Tenderness at the metatarsal heads was also noted.

Dr. Hufford confirmed Claimant reached maximum medical improvement with regard to the work-related injuries. Dr. Hufford issued impairment ratings using the methodology from *Johnson v. U.S. Food Service*. With regard to the injuries sustained on March 28, 2017, Dr. Hufford rated Claimant's impairment at 8% of the left shoulder due to range of motion deficits and 1% of the left knee due to a contusion, which converted to 6% impairment of the body as a whole. With regard to the injuries sustained on June 1, 2017, Dr. Hufford rated Claimant's impairment at 5% of the body as a whole referable to the lumbosacral spine and 3% of the body as a whole referable to the left ankle, which converted to 8% impairment of the body as a whole. Dr. Hufford did not believe Claimant sustained impairment referable to the cervical spine due to the lack of clinical findings, and thought Claimant's neck symptoms were referred pain from the left shoulder. Dr. Hufford recommended future palliative care for the lumbosacral spine.

Dr. Hufford did not impose permanent restrictions on account of any of the work-related injuries. Dr. Hufford did not impose restrictions because he did not believe Claimant sustained a structural change continued activities could damage further. Dr. Hufford reviewed a task list generated by Ms. Terrill, and thought Claimant sustained 0% task loss. Dr. Hufford did not believe Claimant was permanently totally disabled.

Dr. Pratt performed a Court-ordered independent medical examination of Claimant on October 7, 2021. Dr. Pratt noted Claimant sustained an injury to the left shoulder on March 28, 2017, and Claimant reported symptoms about the left shoulder and neck. Dr. Pratt also noted Claimant initially sustained an inversion injury to the left ankle, followed by the development of low back pain. Claimant reported cervical pain running to the thoracic region, weakness of the left shoulder causing her to drop objects and left elbow numbness. Claimant also reported stinging left foot pain, foot and ankle weakness causing her to fall, numbness of the left foot and thigh, and a pins-and-needles sensation across the sacroiliac joints. Claimant was taking over-the-counter Tylenol for her symptoms.

Examination of the cervical spine was notable for diffuse tenderness on the left side running to the thoracic region, a positive Spurling's sign, and limited active range of motion. Evaluation of the lumbar spine was notable for diffuse pain, limited active range of motion and reports of low back pain when the abdomen was palpated. Dr. Pratt thought Claimant displayed four out of five Waddell's signs during examination of the lumbar spine. Examination of the left shoulder revealed pain to palpation with a delay in reported

symptoms, positive impingement signs and limited range of motion. Examination of the left ankle revealed tenderness at the Achilles tendon. MRIs were noted to show degeneration of the lumbar spine.

Dr. Pratt diagnosed post-subacromial decompression and repair of a 1 centimeter rotator cuff tear, cervicothoracic syndrome without radiculopathy, post-reconstruction of the lateral ligament complex of the left ankle, and lumbosacral spondylosis. Dr. Pratt thought the March 28, 2017, accident caused Claimant's left shoulder and cervical conditions, and the June 1, 2017, accident caused Claimant's left lower extremity injury and lumbosacral symptoms secondary to an altered gait. Dr. Pratt did not recommend future medical treatment, and thought future liver function testing would have already been appropriate based on Claimant's personal health condition.

Dr. Pratt issued ratings using the *Johnson* methodology, and testified his written ratings required correction. Dr. Pratt testified, with regard to the injuries of March 28, 2017, Claimant sustained 6% whole-body impairment for the left shoulder and 3% whole-body impairment for the cervical spine, which produced a combined rating of 9% of the body as a whole. Dr. Pratt imposed restrictions, on account of the injuries of March 28, 2017, of no lifting over ten pounds, no pushing over twenty pounds and no frequent overhead lifting with the left arm. Dr. Pratt reviewed Ms. Terrill's task list, and thought Claimant's task loss was 12.5% due to the lifting restriction. Dr. Pratt reviewed Mr. Thomas's task list, and thought Claimant's task loss was 55.5%.

With regard to the injuries of June 1, 2017, Dr. Pratt rated Claimant at 4% of the body as a whole attributable to the left lower extremity and 5% of the body as a whole attributable to the lumbar spine, which produced a combined rating of 9% of the body as a whole. Dr. Pratt imposed restrictions, on account of the injuries of June 1, 2017, of avoiding squatting, kneeling, no use of ladders or using stairs frequently. Dr. Pratt confirmed on cross-examination he did not impose standing, walking, lifting or pushing restrictions due to the injuries of June 1, 2017.

On July 6, 2023, Dr. Pratt issued an addendum report stating based on his review of Ms. Terrill's supplemental task list, Claimant sustained 15% task loss on account of the injuries sustained on March 28, 2017, and 0% task loss on account of the injuries sustained on June 1, 2017.

Mr. Thomas performed a vocational assessment of Claimant at her attorney's request on August 3, 2022. The assessment took place via telephone, and an interpreter was used. Mr. Thomas generated a task list, and reviewed the medical restrictions of Drs.

Pratt, Ansari and Murati. Mr. Thomas noted Claimant reported problems sleeping, problems with balance and requiring breaks from driving more than thirty minutes. Mr. Thomas relied on Claimant for information about her job tasks, and he was cross-examined extensively on deficiencies or inaccuracies in the task list he generated. Mr. Thomas believed Claimant had no transferable job skills, could not return to the work she performed previously, and was incapable of obtaining employment in the open labor market. Mr. Thomas conceded his opinion of Claimant's inability to obtain employment was premised on his understanding of Claimant's work history, and his understanding the Scale Weight Operator position was an accommodated position. Mr. Thomas was not aware of Dr. Pratt's testimony regarding the tasks he believed Claimant could perform. Mr. Thomas was not aware Dr. Hufford did not impose work restrictions, and conceded Claimant would not be permanently and totally disabled if no medical restrictions were imposed.

Ms. Terrill performed a vocational assessment of Claimant at Respondent's request on November 22, 2022. The evaluation was conducted via telephone, and an interpreter was used. Ms. Terrill noted Claimant was not working, and was receiving Social Security Disability benefits. Ms. Terrill generated a task list using information received from Claimant, including Claimant's representation the Scale Operator position required constant standing. Ms. Terrill generated a supplemental task list at the request of Respondent after reviewing additional information provided by Respondent, which included three additional tasks Claimant did not mention. Ms. Terrill also provided an opinion of Claimant's wage-earning capacity based on Claimant's age, education, work background, geography and medical restrictions. Based on the restrictions of Drs. Ansari and Pratt, Ms. Terrill believed Claimant was not permanently and totally disabled, could return to work, and sustained no wage loss. Based on Dr. Murati's restrictions, Ms. Terrill thought Claimant could earn minimum wage. Ms. Terrill, however, acknowledged Claimant had a limited vocational profile.

On September 5, 2023, ALJ Sample issued the Award. With regard to the March 28, 2017, accident, ALJ Sample noted Claimant sought permanent partial disability compensation based on functional impairment. ALJ Sample found the rating of Dr. Pratt the most persuasive and concluded Claimant's permanent impairment was 9% of the body as a whole. Future medical was denied based on Dr. Pratt's opinions, and unauthorized medical was left open.

With regard to the June 1, 2017, accident, ALJ Sample addressed whether Claimant was entitled to permanent partial disability compensation based on functional impairment or work disability, and whether Claimant was rendered permanently and totally disabled.

ALJ Sample found the impairment rating of Dr. Pratt the most persuasive and concluded Claimant's functional impairment was 9% of the body as a whole. ALJ Sample found Claimant met the functional impairment threshold for work disability eligibility, and found Claimant's task loss was 0% based on the opinions of Dr. Pratt and Ms. Terrill. ALJ Sample also found, however, Claimant was terminated for cause by Respondent due to attendance issues and her resulting wage loss was related to her termination. Accordingly, ALJ Sample concluded Claimant was not eligible to receive work disability benefits. ALJ Sample also concluded Claimant did not prove she was permanently and totally disabled because Mr. Thomas' opinion was not based on accurate facts and the opinions of Dr. Pratt and Ms. Terrill were more persuasive. Future medical treatment was denied based on the opinion of Dr. Pratt. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

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

1. The determinations of the nature and extent of disability from the Award are affirmed.

Claimant argues the Award is erroneous. Claimant argues she is permanently and totally disabled based on the facts, particularly her testimony concerning what she can no longer do on account of her work-related injuries. In the alternative, Claimant argues she should receive an award of permanent partial general disability compensation based on work disability because she was not terminated for cause and her wage loss was caused by her work injuries. Respondent argues the determinations of nature and extent were correct and should be affirmed.

¹ K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

A. Claimant sustained 9% functional impairment of the body as a whole attributable to the left shoulder and neck on account of the injuries sustained on March 28, 2017, and 9% functional impairment of the body as a whole attributable to the left ankle and low back on account of the injuries sustained on June 1, 2017.

It is appropriate to award permanent partial disability compensation based on an injury to the body as a whole where the employee, on account of the injury, is disabled in a manner partial in character and permanent in quality, and not covered by the schedule in K.S.A. 44-510d.⁴ The extent of functional impairment is determined by competent medical evidence, using the *AMA Guides* as a starting point.⁵

It is undisputed Claimant sustained physical injuries from the work-related accidents occurring on March 28, 2017, and June 1, 2017. Claimant's injuries from both accidents are compensable as unscheduled injuries under K.S.A. 44-510e. Claimant testified she sustained injuries to her left shoulder and neck from the March 28, 2017, accident. Dr. Ansari performed a rotator cuff repair and decompression surgery to address the left shoulder injury. Claimant returned to work following the surgery. Claimant also testified she sustained injuries to her left ankle and low back from the June 1, 2017, accident. Dr. Ansari performed a surgical reconstruction at the left ankle, and Claimant received pain management treatment for the low back. Claimant initially returned to work for Respondent after the June 1, 2017, accident, but was later terminated. Claimant testified she has residual problems with her left shoulder, neck, left foot and ankle, and low back. Claimant is not currently working.

Dr. Murati, Claimant's examining physician, diagnosed post-small rotator cuff repair and decompression, and myofascial pain syndrome of the left shoulder and cervical and thoracic paraspinals, on account of the March 28, 2017, accident. Dr. Murati rated Claimant's functional impairment at 12% of the body as a whole. With regard to the June 1, 2017, accident, Dr. Murati diagnosed post-surgical repair of a ligament tear at the left ankle, neuropathies of the left lower extremity, post-radiofrequency ablations at L4-S1, low back pain with radiculopathy from an antalgic gait, left plantar fasciitis, bilateral joint dysfunction, metatarsalgia of the left first through fifth metatarsal heads, and bilateral

⁴ See K.S.A. 44-510e(a)(2)(A).

⁵ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

trochanteric bursitis. Dr. Murati rated Claimant's functional impairment at 34% of the body as a whole. Permanent work restrictions were imposed.

Dr. Hufford, Respondent's examining physician, diagnosed a left knee contusion and left shoulder injury caused by the March 28, 2017, accident, and thought Claimant's cervical pain was referred pain from the shoulder. Dr. Hufford rated Claimant's impairment at 6% of the body as a whole. With regard to the June 1, 2017, accident, Dr. Hufford diagnosed an occupational low back injury with residual pain and a left ankle injury requiring surgery. Dr. Hufford rated Claimant's impairment at 8% of the body as a whole. No permanent work restrictions were imposed.

Dr. Pratt, the Court-ordered examining physician, diagnosed post-subacromial decompression and rotator cuff repair of the left shoulder and cervicothoracic syndrome without radiculopathy caused by the March 28, 2017, accident. Dr. Pratt rated Claimant's impairment at 9% of the body as a whole. With regard to the June 1, 2017, accident, Dr. Pratt diagnosed post-reconstruction of the lateral ligament complex of the left ankle and lumbosacral spondylosis. Dr. Pratt rated Claimant's impairment at 9% of the body as a whole. Dr. Pratt imposed permanent restrictions for the injuries sustained from both accidents.

Having considered the entire record, the Board finds the opinions of Dr. Pratt the most credible on the extent of Claimant's injuries and resulting impairment. Dr. Murati, Claimant's evaluating physician, thought Claimant sustained neuropathy to the left lower extremity not identified by other physicians, along with low back radiculopathy, plantar fasciitis, right sacroiliac joint dysfunction, metatarsalgia and bilateral trochanteric bursitis. Dr. Murati assessed permanent impairment for these additional injuries. Claimant did not report problems to the right lower extremity or the hips. Dr. Hufford, Respondent's evaluating physician, did not believe Claimant sustained a cervical injury and sustained impairment to the left knee, which were not opinions shared by the other physicians. Dr. Hufford also believed no restrictions were indicated, which was also an outlying opinion.

Dr. Pratt was a neutral physician appointed by the Court, rather than the parties, to evaluate Claimant. Dr. Pratt evaluated Claimant on multiple occasions and he issued multiple reports explaining his evaluation findings and opinions. Dr. Pratt was deposed and subject to cross-examination. Dr. Pratt's opinions Claimant sustained injuries to the left shoulder, cervical spine, left ankle and lumbar spine are consistent with Claimant's residual complaints. Dr. Pratt's functional impairment ratings adequately account for the problems Claimant continues to experience from her work-related injuries. The Board concludes Claimant sustained injuries to the left shoulder and neck from the work-related accident of

March 28, 2017, producing 9% functional impairment to the body as a whole, and injuries to the left ankle and lumbosacral spine from the work-related accident of June 1, 2017, producing 9% functional impairment to the body as a whole.

B. Claimant was terminated for cause, and she is not eligible to receive permanent partial general disability compensation based on work disability considerations.

Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss as defined in K.S.A. 44-510e(a)(2)(E), the employee may receive work disability compensation in excess of the percentage of functional impairment.⁶ In such cases, work disability is determined by averaging the post-injury task loss caused by the injury with the post-injury wage loss caused by the injury.⁷ In determining wage loss, the Court is required to impute an appropriate post-injury wage based on all factors, including but not limited to the employee's age, physical capabilities, education and training, prior experience, and the availability of jobs in the open labor market.⁸ Wage loss caused by termination for cause shall not be construed to caused by a work-related injury.⁹

In both matters, Claimant sustained injuries to the body as a whole resulting in 9% functional impairment of the body as a whole. Claimant met the functional impairment threshold to receive a work-disability award. At issue is whether Claimant was terminated for cause and ineligible to receive work disability compensation because her wage loss was not caused by the work-related injuries.

In the context of eligibility for work disability, a termination is "for cause" if it is reasonable under the circumstances. The reasonableness inquiry includes consideration of whether the employee made a good faith effort to maintain employment, and whether

⁶ See K.S.A. 44-510e(a)(2)(C).

⁷ See *id.*

⁸ See K.S.A. 44-510e(a)(2)(E).

⁹ See K.S.A. 44-510e(a)(2)(E)(i).

the employer's reason for termination is actually a subterfuge to avoid payment of work disability compensation.¹⁰

Having considered the entire record, the Board finds and concludes Claimant's termination was for cause. Claimant was written up after accruing three points for violating Respondent's attendance policy before the work-related accidents. Approximately two weeks before the March 28, 2017, accident, Claimant accrued 1.5 additional points for violating Respondent's attendance policy. Following the work-related accidents, Claimant continued working for Respondent. Respondent's witnesses and records established Claimant's continued violations of the attendance policy. At the time of Claimant's termination, Claimant accrued 12.5 points. Although Claimant testified her attendance problems were caused by the Tramadol prescribed by Respondent's medical department, personnel from the medical department testified Claimant was not prescribed the Tramadol until November 21, 2017. Claimant had already received a final written warning for attendance issues in August 2017, and had accrued at least ten points by October 12, 2017. Claimant later reported problems with the Tramadol on December 5, 2017, and was told to take Tylenol instead. Claimant's contested claim she was insulted by the medical department, her inaccurate reported job history to Mr. Thomas and failure to cooperate with Dr. Hufford's initial evaluation also undermines her credibility. Although a union grievance was made, it was withdrawn after Respondent reviewed the facts of Claimant's termination with the union. Under the circumstances, it is found Claimant did not exercise good faith in keeping her job and Respondent's reason for terminating Claimant was not pretextual. Claimant's wage loss was caused by her termination for cause, and she is not eligible to receive work disability benefits. The denial of work disability is affirmed.

C. Claimant did not prove she was rendered permanently and totally disabled.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment, and expert evidence shall be required to prove permanent total disability.¹¹

¹⁰ See *Oliver v. National Beef Packing Co.*, No. 123,601, 2021 WL 5984170, at *6 (unpublished Kan. App. opinion filed Dec. 17, 2021)(citing *Morales-Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205, at *5 (unpublished Kan. App. opinion filed Aug. 4, 2006), rev. denied 282 Kan. 790 (2006)).

¹¹ See K.S.A. 44-510c(a)(2).

Claimant continued working as a Scale Weight Operator after both work-related accidents. Following her termination, Claimant worked briefly at IHOP, but stopped because standing produced symptoms. Claimant is not currently working and is receiving Social Security Disability compensation. Claimant is fifty-six years of age, has an approximate seventh-grade education, has limited English skills, and resides in Liberal.

Dr. Murati, who rendered additional diagnoses beyond those made by the other examining physicians, imposed permanent work restrictions in excess of the other physicians. Dr. Hufford believed Claimant did not require permanent restrictions, and was not permanently totally disabled. Dr. Pratt thought Claimant required restrictions on account of the injuries sustained from both accidents.

Mr. Thomas thought Claimant was incapable of engaging in substantial and gainful employment. Mr. Thomas, however, based his opinions on an inaccurate understanding of Claimant's job tasks and his belief Claimant's work as a Scale Weight Operator was an accommodated position, rather than an actual job position. Ms. Terrill was provided information concerning Claimant's jobs from Respondent, as well as from Claimant, and had a more accurate understanding of the work Claimant performed for Respondent. Ms. Terrill opined Claimant was capable of earning wages, even under Dr. Murati's restrictions, although Claimant's vocational profile was limited.

Among the testifying physicians, the Board finds the opinions of Dr. Pratt the most credible regarding Claimant's restrictions and medical capacity to work. The Board also finds the vocational opinions of Ms. Terrill more credible than the opinions of Mr. Thomas because Ms. Terrill had a more accurate understanding of Claimant's work for Respondent. Claimant's work as a Scale Weight Operator was not an accommodated position, but a real job. Based on the more credible evidence in the record, the Board concludes Claimant did not prove she was rendered permanently and totally disabled on account of the work-related injuries she sustained. The denial of permanent total disability compensation is affirmed.

2. The denial of future medical treatment is reversed, and Claimant is awarded future medical treatment for both claims.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.¹² It is presumed the employer's obligation to provide medical treatment terminates upon the

¹² See K.S.A. 44-510h(a).

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.¹³ Generally, 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.¹⁴ Moreover, no award shall include the right to future medical treatment unless the employee proves it is more probable than not future medical treatment, as defined in K.S.A. 44-510h, will be required as a result of the work-related injury.¹⁵

As a result of the March 28, 2017, accident, Claimant sustained a rotator cuff tear and impingement syndrome requiring surgery. As a result of the June 1, 2017, accident, Claimant sustained injuries to the left ankle requiring surgical ligament repairs. Claimant continues to have residual symptoms and problems with the left shoulder, neck, left foot and ankle, and low back. Claimant is not seeing a health care provider for treatment and takes over-the-counter Tylenol for pain. Dr. Murati recommended future medical treatment, including a surgical consultation. Dr. Hufford recommended future palliative care for the lumbosacral spine. Dr. Pratt did not recommend future medical treatment.

Having considered the record as a whole, a majority of the Board finds Claimant met her burden of proving by a greater weight of the credible evidence it is more probably true than not additional medical treatment will be required post-maximum medical improvement. Claimant required surgeries to cure or relieve her work-related injuries, and she continues to have residual problems. Two of the three testifying physicians believed future medical treatment would be necessary. Therefore, future medical treatment is awarded, and shall be provided either by agreement or upon hearing before the Division as provided in K.S.A. 44-510k.

¹³ See K.S.A. 44-510h(e).

¹⁴ See K.S.A. 44-501b(c).

¹⁵ See K.S.A. 44-525(a).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award issued by ALJ Julie A.N. Sample, dated September 5, 2023, is affirmed in part and modified in part.

For Case No. CS-00-0178-545/AP-00-0478-650, the award of permanent partial disability compensation based on 9% functional impairment of the body as a whole, attributable to the left shoulder and neck, is affirmed. The denial of future medical is reversed, and Claimant is awarded future medical treatment, to be provided either by agreement or upon application and hearing pursuant to K.S.A. 44-510k. In all other respects, the Award for this matter is affirmed.

For Case No. CS-00-0006-318/AP-00-0478-651, the award of permanent partial disability compensation based on 9% functional impairment of the body as a whole, attributable to the left lower leg and low back, is affirmed. The denial of future medical is reversed, and Claimant is awarded future medical treatment, to be provided either by agreement or upon application and hearing pursuant to K.S.A. 44-510k. In all other respects, the Award for this matter is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with the majority's determinations concerning the nature and extent of disability. The undersigned also agrees future medical should be awarded in both matters. The undersigned disagrees with the majority's analysis concerning future medical.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.¹⁶ 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.¹⁷

When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.¹⁸ According to K.S.A. 44-510h(e), an employee need only present medical evidence stating it is more probably true additional medical treatment will be necessary. The statute does not state the employee must prove entitlement to future medical treatment by a greater weight of the evidence in the whole record, or based on the employee's course of treatment or residual problems. Likewise, K.S.A. 44-525(a) states no award of future medical shall be awarded unless the employee proves it is more probable than not future medical treatment will be required. This is the same language contained in K.S.A. 44-510h(e). The plain language of K.S.A. 44-525(a) does not state the employee must prove this by a greater weight of the credible evidence contained in the whole record. Grafting the general burden of proof from K.S.A. 44-501b(c) to K.S.A. 44-510h(e) and K.S.A. 44-525(a) is impermissible quasi-judicial blacksmithing.

The majority's analysis does not follow the plain language of K.S.A. 44-510h(e). In awarding future medical, the majority initially reviewed the opinions of Drs. Pratt, Hufford and Murati, and noted Drs. Murati and Hufford recommended future physician intervention. The majority also concluded Claimant was entitled to future medical based on her course

¹⁶ See K.S.A. 44-510h(a).

¹⁷ See K.S.A. 44-510h(e).

¹⁸ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

of treatment and residual symptoms. The plain language of K.S.A. 44-510h(e) does not require consideration of an employee's course of treatment or residual problems. Instead, the statute requires an employee to present medical evidence it is more probably true additional medical care will be necessary.

Dr. Murati and Dr. Hufford recommended future medical treatment. Dr. Pratt did not recommend future medical treatment. Under the specific standard for awarding future medical treatment in K.S.A. 44-510h(e), Claimant presented medical evidence stating it was more probable than not future medical treatment will be required. For that reason, future medical treatment should be awarded.

APPEALS BOARD MEMBER

c: (Via OSCAR)

Jeff K. Cooper
Shirla McQueen
Hon. Julie A.N. Sample