

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SUZANNE ENDICOTT)	
Claimant)	
V.)	
)	
ENNIS, INC.)	AP-00-0478-815
Respondent)	CS-00-0014-789
AND)	
)	
SENTRY INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent appealed the September 22, 2023 Award by Special Administrative Law Judge (SALJ) Duncan A. Whittier. The Board heard oral argument on February 8, 2024. Patrick C. Smith appeared for Claimant. Joseph C. McMillan appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the SALJ, consisting of the documents of record filed with the Division and the following:

1. Transcript of Discovery Deposition of Suzanne Endicott, taken September 19, 2017;
2. Transcript of Preliminary Hearing, held April 27, 2018;
3. Court-ordered Independent Medical Examination (IME) of Lanny W. Harris, M.D., dated July 10, 2018;
4. Court-ordered Independent Medical Evaluation by Brian J. Divelbiss, M.D., dated October 11, 2022;
5. Regular Hearing, held February 3, 2023;
6. Evidentiary deposition of Suzanne Endicott, taken April 12, 2023;
7. Evidentiary deposition of Daniel D. Zimmerman, M.D., taken May 16, 2023, with exhibits;
8. Joint Stipulation, May 25, 2023; and
9. Evidentiary deposition of Todd J. Twiss, M.D., taken June 14, 2023, with exhibits.

ISSUES

1. What is the nature and extent of Claimant's disability, including whether her disability includes her elbows and shoulders.
2. Is Claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant is a 37-year employee with Respondent and is 58 years of age. She is currently employed with Respondent. Claimant filed a workers compensation claim in 1996 for her bilateral upper extremities which was settled in 2001 with future medical benefits left open. Her treatment included a right carpal tunnel release, but she opted not to pursue additional treatment on the left, despite a diagnosis of carpal tunnel.

In the summer of 2016, Claimant was a storage typist and shipper. The job required a lot of typing, breaking down and making cartons, filling and taping packages and preparing the shipping labels. Claimant's workload increased substantially due to relocation of a Nebraska facility to her location. Claimant described the rapid and repetitive nature of her work as:

A. Basically the whole thing, it was basically timed. I had, before I left, I had to have everything done before I left during that day and I had no one else to do my job. We had -- they had made some changes so I was the only person doing my particular job, which was basically everything that shipped out of our storage building I had to do it all. You know, not that I like to toot my own horn, but I'm pretty good at what I do, but you have to do it fast and it's all repetitive. You're constantly using your hands. And I would go for a period, I mean, for one year I didn't even take off any, not even vacation because they had no one to do my job. So when my next vacation came up I hadn't even took my first three weeks so I got three more, but they let me carry them over, thank God. But whenever you feel like you can't take off because you have just so much work to do, I just never took off. And because not only was I doing all the Car Quest stuff, I had all of our normal storage releases also, which our building is huge and we have a lot of customers. And, you know, one customer in particular would send in sometimes up to 20 releases a day on top of all the other releases that I had. So you had to type all the releases, plus do all the bill of ladings, the packing slips, and I had to make sure everything was in the pouches for them to put on the cartons once they pulled them. And hopefully we had somebody there to pull them because if they wasn't me and one other person would have to -- another, they worked on something else, but we would have to go pull the cartons

even. So it was time essential because your trucks get there around three and everything has to be done before you go out the door.¹

In approximately July 2017, Respondent modified Claimant's job duties, which she continues to perform. Claimant answers the phone, does all the billing for the plant, moves job tickets, pulls samples and is the fixer (corrects errors made by co-workers). In short, Respondent removed the manual labor requirements (packing), leaving Claimant to perform clerical work, which includes filing, typing, stapling and folding. Occasionally, Claimant is required to perform manual labor if the coworker in the shipping department is gone or picking up a heavy and cumbersome job ticket.

Claimant filed an Application for Hearing (E-1) on June 28, 2017, alleging injuries to her hands, wrists, forearms, shoulders and all other affected body parts due to cumulative and repetitive injuries beginning June 1, 2016 and continuing. Following a preliminary hearing on April 28, 2018, the ALJ ordered an IME with Dr. Lanny Harris.

Claimant was evaluated by Dr. Harris for a Court-ordered IME on July 10, 2018. Claimant reported sudden onset of numbness and tingling in both hands. Dr. Harris opined Claimant had probable bilateral carpal tunnel syndrome secondary to the heavy repetitive work she performed for Respondent. Her work activities were the prevailing factor for her medical condition. Dr. Harris recommended bilateral EMGs and x-rays of the hands and wrists. The EMGs were performed on September 19, 2018, and confirmed moderate bilateral carpal tunnel. X-rays performed on the hands and wrists revealed severe degenerative joint disease of the CMC joints of both thumbs. Dr. Harris opined Claimant developed the bilateral CMC osteoarthritis and the carpal tunnel syndromes secondary to her work activities with Respondent.

Respondent referred Claimant to Todd J. Twiss, M.D., a board-certified orthopedic surgeon, for treatment on June 18, 2019. Claimant reported bilateral hand and wrist pain, including weakness, numbness and tingling. Dr. Twiss diagnosed left hand CMC arthritis, carpal tunnel syndrome and triggers in the index and small finger digits. On the right, Dr. Twiss diagnosed CMC arthritis with carpal tunnel syndrome. He recommended surgical intervention, which Claimant chose to pursue.

On July 8, 2019, Dr. Twiss performed a left thumb CMC arthroplasty, left carpal tunnel release, and trigger finger releases of the left index and small fingers. Claimant was given temporary restrictions and referred to physical therapy. On October 8, 2019, Dr. Twiss released Claimant without restrictions and placed her at maximum medical improvement (MMI) for her left upper extremity. He opined Claimant had permanent functional impairment of 30% of the thumb, which converts to 12% of the hand, 11% of the

¹ Claimant's Depo. at 6.

left upper extremity, which equals 7% functional impairment to the whole body pursuant to the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*, 6th Edition. Dr. Twiss did not provide functional impairment ratings for the carpal tunnel syndrome or the trigger finger releases of the left index and small fingers.

On October 11, 2019, Dr. Twiss performed a right thumb CMC arthroplasty and right carpal tunnel release. Claimant was referred to physical therapy. On November 22, 2019, Dr. Twiss released Claimant without restrictions. On February 12, 2020, Dr. Twiss released Claimant at MMI. He opined Claimant had the same rating as the left thumb, which was permanent functional impairment of 30% of the thumb, which converts to 12% of the hand, 11% of the left upper extremity, which equals 7% functional impairment to the whole body pursuant to the *Guides*, 6th edition. Dr. Twiss did not provide a functional impairment rating for the carpal tunnel syndrome.

Dr. Twiss performed four surgical procedures to Claimant's left upper extremity and two on the right. He testified he rated the thumb procedures, left and right, and not the other procedures because "It makes up the primary diagnosis. I felt like that was, the primary reason for any permanent impairment was that diagnosis there."² Dr. Twiss opined Claimant would not need future medical treatment. He testified Claimant did not report symptoms in her elbows or shoulders over the course of the treatment he provided, his records do not contain such complaints and had she made such complaints, he would have entered them into his records. Claimant testified she reported shoulder complaints to Dr. Twiss during her course of treatment.

On June 16, 2020, Claimant was seen by Dr. Twiss for right shoulder and elbow pain. He diagnosed right shoulder pain with impingement syndrome and right elbow pain with mild lateral epicondylitis. Dr. Twiss opined the prevailing factor for these medical conditions was the repetitive work Claimant performed for Respondent. He ordered 6 weeks of physical therapy and recommended modifications to her job duties. The record does not indicate if Claimant received this treatment.

Claimant testified when she initially sought treatment, she was having symptoms in her "hands, wrists and thumbs with the, probably mainly the right elbow and shoulder."³

At her attorney's request, Claimant was evaluated by Daniel D. Zimmerman, M.D., on March 1, 2021. Claimant reported having pain and discomfort affecting her shoulders, elbows, wrists, hands and fingers. Dr. Zimmerman opined the prevailing factor for

² Twiss Depo. at 15.

³ Claimant's Depo. at 11.

Claimant's medical condition and resulting disability or impairment are the repetitive duties she performed for Respondent through June 2016 and each and every day thereafter.

Using a strict interpretation of the *Guides*, 6th edition, Dr. Zimmerman opined Claimant has 20% functional impairment to the right upper extremity, which converts to 12% to the whole body. He opined Claimant has 22% functional impairment to the left upper extremity, which converts to 13% to the whole body. Combining the two ratings, Claimant has 24% functional impairment to the whole body. Based on competent medical evidence, Dr. Zimmerman opined Claimant has 29% functional impairment to the right upper extremity, which converts to 17% to the whole body. He opined Claimant has 32% functional impairment to the left upper extremity, which converts to 19% to the whole body. Combining the two ratings, Claimant has 33% functional impairment to the whole body. Dr. Zimmerman's ratings under both methods included ratings for Claimant's shoulders, elbows, forearms, thumbs and the left 2nd and 5th fingers.

Dr. Zimmerman opined Claimant will more likely than not need future medical treatment and recommended permanent work restrictions. He testified he did not have medical records for treatment Claimant received prior to 2016, and he confirmed the first shoulder complaint found in the medical records was the April 24, 2020 report of Tracy Southern, APRN. This report reflects Claimant presented with right shoulder pain radiating into the elbow and wrist, which she characterized as acute pain. She was given prescription medication and referred to physical therapy for her right shoulder and wrist pain.

Claimant was sent to Brian J. Divelbiss, M.D., for a Court-ordered evaluation on October 11, 2022. According to Dr. Divelbiss' report, Claimant reported:

She reports she has worked for her current employer for the past 36 years and is at this time working full duty. She notes that prior to surgeries that she had in 2019 she was in the storage department where she had more repetitive type work such as cutting down boxes, managing shipping of items, as well as paper work, typing and filing. Following the surgeries that she had in 2019 her job roles changed and she is now doing more clerical type work with answering of phones and managing billing issues, although she occasionally does have to pull some samples. She indicates to me that she mainly does work at chest level or below at this time whereas she previously had to do quite a bit of work above chest level. She specifically denies the presence of pain in her shoulders or elbows at the time she had her surgeries in 2019.

As noted above she had two different surgeries in 2019. On 7/18/2019 she underwent a left thumb CMC arthroplasty, left carpal tunnel release, left index finger trigger finger release, and a left small finger trigger finger release. She reports that her left hand feels much better after surgery. She indicates resolution of her carpal tunnel symptoms of numbness and tingling and resolution of her prior trigger

fingers. She does get some occasional cramping in the hand and does notice some loss of strength in the hand such as being able to remove jar lids or peel potatoes but again notes overall her hands are much better following surgery. The claimant indicates to me that she had surgery on her right hand in October 2019 (I do not have the operative report available for review) which included a right thumb CMC arthroplasty and a revision right carpal tunnel release. She indicates that she has had resolution of her numbness and her thumb pain is much improved. She had previously had a carpal tunnel release done in 1993 and had resolution of her numbness until this more recent episode. She notes that she did not have any trigger finger issues in her right hand.

In regards to her current issues with her elbows she notes only very occasional pain at the medial side of her elbow and she did not voice much concern with her elbow symptoms. In regard to her shoulders she does indicate that these “bothered her” off and on for years although she again specifically denied that she was having any shoulder issues in 2019 at the time of her prior surgeries and really has been more continuously present for the past 12 - 18 months. She denies any specific injury to her shoulders and does note that since changing job roles following her surgeries in 2019 she really does very little overhead work. She reports that 24 hours a day there is some level of bilateral shoulder pain, right greater than left, that does not seem to worsen with activity.⁴

Dr. Divelbiss diagnosed Claimant with:

1. Status post left thumb CMC arthroplasty, left carpal tunnel release, and left index and small finger trigger finger release in 2019.
2. Status post right thumb CMC arthroplasty and revision right carpal tunnel release in 2019.
3. Bilateral shoulder impingement syndrome, right greater than left.
4. Intermittent occasional medial elbow pain with normal physical exam findings today.⁵

Dr. Divelbiss opined Claimant’s work-related injuries were limited to her hands and thumbs. In support of his conclusion, Dr. Divelbiss noted Claimant reported she did not have shoulder pain at the time of her surgeries, she denied specific injury to her shoulders, she was moved to a job requiring less above chest activity and she has minimal, occasional symptoms in her elbows.

⁴ Divelbiss IME at 2.

⁵ *Id.* at 3

Using the *Guides*, 6th edition, Dr. Devilbiss opined Claimant sustained 12% functional impairment to the whole body, which he divided equally as 6% to each upper extremity. His impairment ratings reflect he provided the same 30% functional impairment to each thumb as Dr. Twiss. No explanation was given why his ratings converted to 6% functional impairment to the whole body. Pursuant to the Court order, Dr. Divelbiss provided functional impairment ratings to the shoulders of 5% to the right and 3% to the left based upon his diagnosis of impingement syndrome. He opined Claimant did not have impairment to the elbows. Dr. Divelbiss opined Claimant will not need future medical treatment for her work-related injuries.

Claimant continues to work for Respondent in the front office doing clerical and desk work. Claimant testified she experiences some sort of pain on a daily basis, mainly her thumbs and her right wrist and shoulder. Her right thumb freezes in a position requiring her to lay her hand down flat on the table and press her thumb back where it belongs. "I'm a continual typer so the pain I don't think really ever goes away. It's just there all the time. It's just in different varying severities."⁶ She testified "my right shoulder is really beginning to have some problems."⁷

The SALJ awarded Claimant 33% functional impairment to the whole body, based on the opinions of Dr. Zimmerman and future medical benefits.

Respondent argues Claimant has not met her burden of proof her work-related job duties caused injuries to her elbows and shoulders. Respondent further argues the award of functional impairment, based on Dr. Zimmerman's opinions and future medical, is in error. Respondent questions the credibility of Dr. Zimmerman's opinions because he did not have all of Claimant's relevant medical records (including her prior medical records), he failed to consider Claimant's shoulder complaints did not appear in the medical records until April 2020 and he did not elicit information from Claimant when her shoulder complaints began. Claimant maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant sustained 21% functional impairment to the whole body.

The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation

⁶ Claimant's Depo. at 12.

⁷ *Id.* at 11.

depends.⁸ “Burden of proof” generally means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence the party’s position on an issue is more probably true than not on the basis of the whole record.⁹ The trier of fact considers the whole record in determining if the employee satisfied the burden of proof.¹⁰

The parties agree the prevailing factor for Claimant’s medical condition and resulting disability or impairment to her hands and thumbs is the repetitive work activities. The main issue is whether Claimant’s injuries to her elbows and shoulders are included as a part of this claim.

In *Johnson v. US Food Service*¹¹, the Kansas Supreme Court held in rating whole body impairments the ratings calculations should begin with the *Guides*, 6th edition as a starting point and consider competent medical evidence to modify or confirm the rating. Claimant continues to work for Respondent. The parties agree Claimant’s award is limited to her functional impairment to the whole body. Three physicians provided functional impairment ratings to the whole body. Dr. Twiss (authorized physician) found Claimant has 14% functional impairment to the whole body, Dr. Divelbiss (Court-ordered evaluator) found 12% and Dr. Zimmerman (Claimant’s evaluator) found 33%. All three functional impairment ratings are flawed.

The SALJ found the functional impairment rating of Dr. Zimmerman to be the most credible and awarded Claimant 33%, which included ratings to her thumbs, hands, elbows shoulders and the left 2nd and 5th fingers. These ratings were based upon his education, training, experience and competent medical evidence, as well as consideration of the *Guides*, 6th edition, a *Johnson* analysis. Dr. Zimmerman did not have a complete set of Claimant’s medical records. He provided ratings to Claimant’s left elbow and shoulder despite Claimant not seeking or receiving treatment for either body part. There is nothing in the medical records verifying Claimant experienced symptoms in the left elbow and shoulder.

Dr. Twiss, the authorized physician, limited his rating to Claimant’s thumbs despite performing surgical procedures to both thumbs, wrists and the 2nd and 5th fingers on the left hand. No explanation was provided if a *Johnson* analysis was completed. He examined Claimant’s right shoulder and elbow on June 16, 2020, roughly four months after he placed her at MMI. He diagnosed right shoulder pain with impingement syndrome and right elbow

⁸ See K.S.A. 44-501b(c).

⁹ See K.S.A. 44-508(h).

¹⁰ See *id.*

¹¹ See *Johnson v. US Food Services*, 312 Kan 597, 478 P.3d 776 (2021).

pain with mild lateral epicondylitis. Dr. Twiss opined the prevailing factor for Claimant's medical conditions in her right elbow and shoulder were repetitive work performed for Respondent. He recommended physical therapy and job modifications. No impairment ratings were provided for Claimant's right elbow and shoulder.

Dr. Divelbiss was the Court-ordered evaluator. The purpose of a neutral evaluation is to assist the trier of fact in resolving issues between the parties. Dr. Divelbiss' report raised more issues than it resolved. He opined Claimant's work-related injuries were limited to her hands and thumbs because she did not have shoulder pain at the time when she had her 2019 surgeries by Dr. Twiss, she denied specific injury to her shoulders and she was moved to a new job which did not require repetitive above chest activity. Regarding Claimant's elbows, Dr. Divelbiss opined they were not a part of Claimant's injury because she reported minimal, occasional symptoms at her examination. His opinion Claimant's injuries are limited to her hands and thumbs disregards the medical treatment recommended to Claimant in April and June of 2020 (roughly two months after being placed at MMI) for her right wrist, elbow and shoulder. Dr. Divelbiss did not provide a prevailing factor opinion for the cause of Claimant's bilateral elbow and shoulder conditions. He did not provide an explanation for his 12% rating, which is different from Dr. Twiss' 14% rating even though he gives the same rating to the thumbs. The Board is left to speculate if this is a simple conversion error or if he elected to deviate from the strict 6th Edition rating.

A rating based solely on the *Guides*, 6th Edition can be sufficient to make a medically competent assessment of a worker's functional impairment rating, if the physician opines the rating is also based on competent medical evidence. The physician, however, must make clear they are adopting a specific functional impairment, using the *Guides*, 6th Edition as a starting point. Here, neither Dr. Twiss nor Dr. Divelbiss, made clear their functional impairment ratings were based on competent medical evidence or they used the *Guides*, 6th Edition as a starting point. They simply provided ratings based on the *Guides*, 6th Edition.

Dr. Zimmerman provided a functional impairment rating of 33% to the whole body. This rating included functional impairment for injuries to Claimant's elbows and shoulders. Claimant did not report left elbow and shoulder complaints to any medical provider. She reported to Dr. Divelbiss her elbows caused minimal, occasional symptoms. Claimant did not make specific complaints regarding her elbows to Dr. Zimmerman and he did not make any significant findings in her elbows upon examination. Dr. Zimmerman's ratings to the elbows and left shoulder are not supported by the evidence in the record. Dr. Divelbiss, the Court-ordered evaluator, and Dr. Twiss limited their ratings to Claimant's thumbs, despite Claimant having surgery for bilateral carpal tunnel syndrome and to two fingers on her left hand. They did not provide clarification for the basis of their ratings.

The Board finds Claimant should be awarded functional impairment and compensation for injuries sustained and requiring surgical intervention - thumbs, bilateral carpal tunnel syndrome, her 2nd and 5th fingers on her left hand and for her right shoulder. Although Claimant did not have surgery on her right shoulder, she did seek treatment for it within months of being released at MMI by Dr. Twiss, she testified she was experiencing increasing symptoms in her right shoulder and Dr. Twiss and Dr. Zimmerman found the prevailing factor for her right shoulder pain and impingement syndrome was the repetitive work performed for Respondent.

Claimant is awarded 21% functional impairment to the whole body. The Board arrived at this rating by starting with the thumb ratings provided by Dr. Twiss and Dr. Divelbiss, which was 30%. The 30% ultimately converts to 7% to the whole body. Combining right and left results in a 14% functional impairment to the whole body. After deducting the left shoulder and bilateral elbow ratings from Dr. Zimmerman's ratings, Claimant has 27% right upper extremity functional impairment and 29% to the left. 27% functional impairment to right upper extremity converts to a 16% whole body impairment and a 29% functional impairment to left upper extremity converts to a 17% whole body impairment. Combining the 16% and the 17% whole body functional impairments results in 28% functional impairment to the whole body.

A split between the 14% and 28% ratings results in 21% functional impairment to the whole body. Accordingly, the award of permanent partial disability compensation is 21% permanent functional impairment to the whole body.

2. Claimant is entitled to future medical benefits.

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 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.¹³

Here, the ALJ awarded future medical treatment. The Board notes the treating physician, Dr. Twiss and the Court-ordered physician, Dr. Divelbiss, opined future treatment was not needed, but those opinions were limited to Claimant's hands and thumbs. Dr. Zimmerman opined Claimant would need future medical treatment.

¹² See K.S.A. 44-510h(a).

¹³ See K.S.A. 44-508h(e).

Dr. Divelbiss and Dr. Zimmerman diagnosed Claimant with impingement syndrome in her shoulders. In June 2020, Dr. Twiss evaluated Claimant's right elbow and shoulder. He opined Claimant's repetitive work was the prevailing factor for these medical conditions and recommended treatment, restrictions and job modifications. Dr. Zimmerman opined the prevailing factor for the shoulder medical conditions was Claimant's work activity. Dr. Divelbiss' opinion is unclear. He opines the bilateral shoulder medical conditions are not included in this injury, but does not offer opinions regarding the cause of Claimant's impingement syndrome in her shoulders.

Claimant testified her pain does not go away. It varies in degree of severity from day to day. Her right shoulder pain is increasing and her right thumb freezes requiring her to push it back where it belongs. The Award of future medical treatment by the ALJ is supported by the record. The Award of future medical treatment is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of a majority of the Board the Award of Special Administrative Law Judge Duncan A. Whittier, dated September 22, 2023, is modified in part and affirmed in part.

Claimant is entitled to 87.15 weeks of permanent partial disability at the rate of \$417.47 per week, or \$36,382.51, for a 21% permanent partial functional disability, which is all due and owing and ordered paid in one lump sum less any amounts previously paid. The award of future medical is affirmed.

IT IS SO ORDERED.

Dated this day March, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned cannot join the majority. First, the majority fails to address the compensability issue raised by Respondent, which is essential for resolving the remaining issues. Second, the undersigned disagrees with the majority's determination of the nature and extent of disability. Third, the undersigned would affirm the award of future medical for a different reason than the majority.

- 1. Claimant sustained injuries to her thumbs, left fingers, wrists and right shoulder from repetitive trauma arising out of and in the course of her employment with Respondent.**

Respondent disputed Claimant sustained injuries to the elbows and shoulders from the repetitive trauma which is the subject of this claim. The Award issued by SALJ Whittier addressed this issue. Respondent sought review of the compensability issue by the Board. Both parties briefed and argued the compensability issue. The majority, however, appears to touch on compensability indirectly in its analysis of nature and extent of disability. Respondent, however, does not merely argue Claimant is not entitled to permanent partial disability compensation for injuries to the elbows or shoulders. Respondent argues Claimant should receive no benefits, at all, for injuries to the elbows or shoulders in this claim.

Review by the Appeals Board shall be based on questions of law and fact as presented before the administrative law judge.¹⁴ In this case, the compensability of Claimant's alleged elbow and shoulder injuries was presented to SALJ Whittier, who ruled on the compensability issue. The issue was not abandoned on appeal, and was briefed and argued by the parties. The majority did not address the compensability issue. The right to compensation is premised on the employee sustaining an injury by repetitive trauma arising out of and in the course of employment.¹⁵ Instead of defining the extent of Claimant's compensable injuries, the majority simply awards compensation. The undersigned cannot join in that approach.

An injury by repetitive trauma shall be compensable only if employment exposes the worker to an increased risk of injury, the employment is the prevailing factor in causing the repetitive trauma and the repetitive trauma is the prevailing factor in causing the medical condition.¹⁶ Moreover, the repetitive nature of the injury must be demonstrated by diagnostic or clinical tests.¹⁷ It is undisputed Claimant sustained injuries to her left second through fifth fingers, both thumbs and both wrists from repetitive work she performed for Respondent. At issue is whether Claimant sustained compensable injuries to both elbows and shoulders.

Claimant's work for Respondent is repetitive. Respondent disputes the repetitive work in this claim was the prevailing factor causing bilateral elbow and shoulder injuries. "Prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.¹⁸

Having reviewed the evidence, the undersigned concludes Claimant proved she sustained an injury to her right shoulder from repetitive trauma arising out of and in the course of her employment with Respondent, as well as the compensable injuries to the thumbs, left fingers and wrists. Claimant reported symptoms in both elbows and shoulders from work activities. Dr. Twiss stated Claimant's right shoulder symptoms were caused by work activities, but apparently Claimant did not report left shoulder or elbow symptoms to him. Dr. Divelbiss's report is not clear on the cause of Claimant's elbow or shoulder symptoms. Dr. Zimmerman related Claimant's elbow and shoulder symptoms to work, but he did not have all of Claimant's treatment records. The undersigned finds Dr. Twiss'

¹⁴ See K.S.A. 44-555c(a).

¹⁵ See K.S.A. 44-501b(b).

¹⁶ See K.S.A. 44-508(f)(2).

¹⁷ See K.S.A. 44-508(e).

¹⁸ See K.S.A. 44-508(g).

opinion on causation persuasive because he saw the Claimant multiple times as the treating physician, he had a fuller understanding of Claimant's prior condition than Dr. Zimmerman, and Dr. Divelbiss's causation opinion is unclear. Claimant is entitled to compensation based on injuries to her thumbs, left fingers, wrists and right shoulder caused by work-related repetitive trauma.

2. Nature and Extent

Having determined the extent of Claimant's compensable injuries, the undersigned next considers the nature and extent of Claimant's disability. Claimant's multiple injuries to both upper extremities and right shoulder qualify as a whole-body injury.¹⁹ Claimant's potential award of permanent partial disability compensation is limited to her functional impairment because she did not experience a post-injury wage loss of at least 10%.²⁰ The extent of functional impairment is determined by competent medical evidence, using the *AMA Guides* as a starting point.²¹

The majority finds fault with the ratings of Drs. Twiss, Zimmerman and Divelbiss. The majority then "splits" the ratings, by averaging the ratings of Drs. Twiss and Divelbiss, and averaging the result with Dr. Zimmerman's rating. This exercise gives excessive weight to Dr. Zimmerman's rating, which is based on incomplete information, and is not a true average of the ratings. Moreover, the majority's approach does not consider Claimant's testimony her residual problems are limited to the right upper extremity and shoulder. Instead, the majority focuses on awarding permanent partial disability compensation to the areas of the body necessitating surgery.

All three physicians' opinions on the extent of Claimant's impairment have flaws. The undersigned finds the impairment rating of Dr. Divelbiss the most credible because he was the neutral physician appointed by the Court. While the majority criticizes Dr. Divelbiss's report, neither party sought to depose Dr. Divelbiss and SALJ Whittier did not request clarification from Dr. Divelbiss. The undersigned does not share the majority's assessment of Dr. Divelbiss's report, and would award Claimant permanent partial disability compensation based on Dr. Divelbiss's impairment ratings for the compensable injuries to the thumbs, left fingers, wrists and right shoulder.

¹⁹ See K.S.A. 44-510e(a)(2)(A)(i).

²⁰ See K.S.A. 44-510e(a)(2)(C)(ii).

²¹ See K.S.A. 44-510e(a)(2)(B); *Johnson v. U.S. Food Service*, 312 Kan. 597, 603, 478 P.3d 776 (2021).

3. Future Medical Treatment

Finally, the undersigned addresses future medical treatment for Claimant's compensable injuries to her thumbs, left fingers, wrists and right shoulder. The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.²² 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.²³ 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.²⁴

Review of the record as mandated by K.S.A. 44-510h(e) indicates Claimant met her burden of proving entitlement to future medical treatment. Claimant presented medical evidence, Dr. Zimmerman's testimony, showing it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. The statute does not require Claimant to present other evidence to prevail. In awarding future medical, the majority focuses on medical causation and the severity of Claimant's residual problems. While the undersigned acknowledges Claimant reported residual problems affecting her right upper extremity and shoulder, it is irrelevant to the application of K.S.A. 44-510h(e). The undersigned would award future medical treatment, pursuant to K.S.A. 44-510h(e), for Claimant's compensable injuries to her thumbs, left fingers, wrists and right shoulder, to be provided pursuant to K.S.A. 44-510k.

BOARD MEMBER

²² See K.S.A. 44-501b(b).

²³ See K.S.A. 44-510h(a).

²⁴ See K.S.A. 44-510h(e).

c: (Via OSCAR)

Patrick A. Smith, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier
Hon. Duncan A. Whittier, Special Administrative Law Judge
Hon. Brian Brown, Administrative Law Judge