BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ASUNCION TURPIN	)	
Claimant	)	
V.	)	
	)	AP-00-0479-025
DLH HOLDINGS CORP.	)	CS-00-0441-452
Respondent	)	
AND	)	
	)	
PA MANUFACTURERS ASSN INC.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (Respondent) requested review of the September 25, 2023, Award by Administrative Law Judge (ALJ) Troy A. Larson. The Board heard oral argument on February 8, 2024.

APPEARANCES

Steffanie L. Stracke appeared for Claimant. Timothy A. Emerson appeared for Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Regular Hearing held January 3, 2023; the transcript of the Preliminary Hearing held October 8, 2019; the transcript of the Evidentiary Deposition of Tara Hall from July 9, 2019, with exhibits attached; the transcript of the Evidentiary Deposition of Clinton J. Rieber from July 9, 2019;[1] the transcript of the Discovery Deposition of Asuncion Turpin from April 30, 2019; the transcript of the Videoconference Deposition of Asuncion Turpin from September 8, 2022, with exhibits attached; the transcript of the Videoconference Deposition of Anne R. Rosenthal, M.D., from November 3, 2022, with exhibits attached; the transcript of the Evidentiary Deposition via Zoom of Erich Lingenfelter, M.D., from February 16, 2023, with exhibits attached; the transcript of the Evidentiary Deposition via Zoom of Douglas C. Burton, M.D., from March

[1] The depositions of Tara Hall and Clinton Rieber are not listed in the ALJ's Award record but appear to be exhibits of the October 8, 2019, preliminary hearing transcript, and their testimony is discussed in the Award.

6, 2023, with exhibits attached; the transcript of the Evidentiary Deposition via Zoom of Brett Maly from February 23, 2023, with exhibits attached; the transcript of the Videoconference Deposition of Terry L. Cordray from October 17, 2022, with exhibits attached; the transcript of the Evidentiary Deposition via Videoconference of Steve Benjamin from February 27, 2023, with exhibits attached; Report of Court-Ordered Independent Medical Examination of Terrence Pratt, M.D., dated March 24, 2022; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Did Claimant sustain personal injury by accident arising out of and in the course of her employment on February 6, 2019?

2. Did Claimant provide proper notice of her injury?

3. What is the prevailing factor causing Claimant's injury, medical condition, and resulting disability or impairment?

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

5. Is Claimant entitled to an award based on permanent total disability?

6. Is Claimant entitled to future medical treatment?

7. Is Respondent entitled to a credit for an overpayment of temporary total disability benefits (TTD) in the amount of $2,586.02?

FINDINGS OF FACT

Respondent packages and ships medications for veterans through the U.S. Department of Veterans Affairs system. Claimant began working for Respondent as a packer/shipper in 2012. In this position, Claimant placed medication into a tote with the paperwork assigned to the medication, sealed the tote, and placed the tote on a conveyor belt to be shipped. Claimant indicated her job was repetitive in nature.

Claimant previously sustained injuries to her upper extremities in 2017, which she attributed to the repetitive nature of her work with Respondent. Ultimately, Claimant underwent six surgeries on her hands for carpal tunnel syndrome and trigger fingers. Claimant returned to work following her surgeries.

On February 6, 2019, Claimant was working for Respondent when a tote became jammed on the line. Claimant testified she felt sharp pain running from her left thumb to her left shoulder while trying to pull the jammed tote. Claimant indicated she felt pain in both shoulders during this event, and pain radiated throughout her shoulders and neck area. Claimant stated she did not report the incident immediately because she did not know what had happened, and she thought the pain would lessen. Claimant testified she told her supervisor, Mary Brown, she was in pain and leaving early.

Claimant's typical shift with Respondent was 12:30 p.m. through 7:00 p.m. Respondent is required to meet certain production goals each day. If the production goals are met, employees can request to leave early or may be asked to leave early by Respondent. Employees may request to be added to a Go-Home-Early List kept by the supervisor. An employee can request to be added to the list at any time during a shift. Claimant's name is on the Go-Home-Early List from February 6, 2019.

Mary Brown, Claimant's supervisor, testified she created a schedule each week indicating where each packer will be stationed. Notations are made on this schedule regarding each employee. The schedule relating to February 6, 2019, has a notation by Claimant's name. Ms. Brown testified the notation, in her handwriting, indicated Claimant had an early exit (EE) at 5:00 p.m. that day due to low numbers. Ms. Brown stated she would use a different notation if Claimant left early due to illness or injury. Ms. Brown testified Claimant did not request to leave early on February 6, 2019, due to pain, based upon her notations and the paperwork. Ms. Brown does not have an independent recollection of Claimant reporting pain to her on February 6, 2019.

The following day, February 7, 2019, Claimant submitted a Paid-Time-Off (PTO) request for the dates of March 27, 2019, through April 12, 2019. Claimant stated she requested PTO because she was in pain and wanted a break from working. Claimant's request was denied February 11, 2019. Clint Rieber, Respondent's onsite facility manager, testified he denied Claimant's PTO request due to insufficient PTO accrual. Mr. Rieber explained Claimant requested approximately 6.14 days over her available PTO.

Tara Hall is Mr. Rieber's administrative assistant at Respondent. Ms. Hall testified an employee may indicate on the PTO request form why the PTO is requested, but it is not mandatory. Claimant did not indicate on the form her reason for requesting PTO, and Ms. Hall does not know why Claimant requested PTO. Ms. Hall was aware Claimant's PTO request was denied. Ms. Hall gave Claimant the denial paperwork on February 11, 2019.

Ms. Hall indicated Claimant was unhappy about the PTO denial. Ms. Hall testified:

> Well, I handed her the paper and she said, This just isn't fair. And I just knew that she was going to say something, so I started to walk away and she said, Tara, this just isn't fair. And I said, Well, what's the problem? He always denies me, and then

> she said, There's a legal system for this, and I said, Excuse me? And she said, There's a legal system for this, this isn't fair, what he's doing. And I said, You can't have the days off because you don't have enough PTO.[2]

Mr. Rieber said Ms. Hall spoke with him after delivering the PTO denial to Claimant. Mr. Rieber testified:

> Q. What is your understanding of what occurred?
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> A. [Ms. Hall] gave [Claimant] the form and said that it's been disapproved and [Claimant] did not like that and made a comment to [Ms. Hall] and that was it.
>
> Q. What's your understanding of the comment?
>
> A. That it won't matter because I'll be on workers' comp anyway.[3]

Claimant visited her primary care physician's office on her own on February 12, 2019. The primary purpose of this visit was to address an unrelated personal condition, but she mentioned her left thumb and shoulder pain. Claimant stated she was told to see an orthopedic physician for her right shoulder complaints, and her left thumb complaints could be a trigger finger. Because she indicated her pain was due to a work injury, Claimant understood her personal physician would not see her.

On February 13, 2019, Claimant completed an accident report at Respondent indicating an event occurring February 6, 2019. The report indicates Claimant sustained injury to her left thumb and shoulder. It does not specify which shoulder. Claimant indicated she did not report the injury when it happened because she "didn't know that it's a trigger finger."[4]

Mr. Rieber completed a Supervisor's Page attached to the accident report. He indicated the incident was unreported. He further indicated he questioned the claim because Claimant was "previously released for claimed injury by work comp doctors."[5] When directed to list any other pertinent information, Mr. Rieber wrote, "Current claims, lawsuits, and settlements in progress."[6] Mr. Rieber marked out the majority of the Injury

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[2] Hall Depo. at 34.

[3] Rieber Depo. at 24.

[4] Hall Depo., Ex. 3 at 1.

[5] *Id.* at 2.

[6] *Id.*

Report and Accident Investigation Checklist, writing "N/A - OLD Injury" on the bottom of the page.[7] Mr. Rieber testified he questioned Claimant's claim due to the timing of when she reported the accident versus when the injury occurred. Mr. Rieber stated he believed Claimant's injured thumb was related to her 2017 claim and not a new injury. Mr. Rieber admitted he was not aware of the status of Claimant's claims, nor was he aware of Kansas workers compensation law.

Respondent directed Claimant to Concentra for medical treatment. Claimant was also directed to Dr. Clinton Walker, the physician who had treated her bilateral upper extremities related to the 2017 claim. Claimant testified Dr. Walker ordered a cervical MRI based on her presentation at a visit in May 2019. Dr. Walker's records are not in evidence.

Following a preliminary hearing on October 8, 2019, the ALJ found Claimant's claim compensable and ordered Respondent to provide medical treatment. Claimant underwent an anterior cervical discectomy and fusion at C5-6 with Dr. Adrian Jackson before coming under the care of Dr. Douglas Burton.

Dr. Burton, a board-certified orthopedic surgeon, began authorized treatment of Claimant on July 24, 2020. Claimant complained of pain in her left arm and neck. She provided a history of aggravating her neck and left arm while pulling on a jammed tote. Claimant did not have relief from the surgery with Dr. Jackson and came to Dr. Burton for a second opinion. Dr. Burton performed a physical examination and ordered a CT myelogram. He eventually performed an anterior discectomy and fusion at C6-7 on September 23, 2020. Dr. Burton testified he believed Dr. Jackson did not operate on Claimant's spine at C6-7 because it was a challenge due to Claimant's body habitus. Dr. Burton indicated the surgery he performed was difficult. Dr. Burton opined the prevailing factor causing Claimant's cervical spine condition and need for treatment was the incident occurring February 6, 2019.

Records indicate Claimant was off work beginning July 30, 2020, through September 22, 2020, on the orders of Dr. Burton. Dr. Burton explained he generally does not alter a patient's work status when they initially visit him. Claimant was working light duty in July 2020. Notes from July 30, 2020, indicate Claimant called and spoke to a nurse requesting to be taken off work due to pain. Notes from September 16, 2020, indicate Claimant had been taken off work in error, and she should have remained at light duty until the surgery. Dr. Burton explained:

> My guess is that what happened was my nurse took her off before I told him it was okay to take her off. And then when I reassessed the situation I said, you know,

[7] Hall Depo., Ex. 3 at 4.

> she needs to stay doing what she's been doing until surgery. That would be my guess of my thought process at that time.[8]

Dr. Burton further stated, "I think if we told [Claimant] to be off work then my expectation is that she would do what we asked her to do."[9] Dr. Burton continued treating Claimant until he released her a maximum medical improvement (MMI) on November 23, 2021, following a functional capacity evaluation (FCE). Dr. Burton permanently restricted Claimant to a light/medium work category, with no lifting over 38 pounds. Dr. Burton based his restrictions on the FCE, which was considered invalid. Dr. Burton opined he did not believe the FCE underestimated Claimant's capabilities. Further, Dr. Burton stated he was not concerned with secondary gain or exaggerated symptoms related to Claimant. He testified:

> I don't think she made anything up. I think that she's somebody who's got a lot of – who tends toward emotional distress with any kind of symptomatology, and in my experience I've found some people can tolerate it and they seem to be fine; and other people can become a bit unwound by it. And I think she's the latter. And so with someone like her, it's just going to be longer, slower, harder at every step. And it was. So, but I don't think that she ever was purposefully making anything up. I just think this is what you get with her.[10]

In a letter dated December 29, 2021, Dr. Burton opined Claimant did not require future medical treatment for her cervical spine. Using the AMA *Guides*[11] and his expertise, Dr. Burton found Claimant to have 11 percent whole person impairment.

Dr. Erich Lingenfelter, a board-certified orthopedic surgeon, performed a court-ordered independent medical evaluation (IME) of Claimant on December 8, 2020. Dr. Lingenfelter was asked to examine Claimant's right shoulder. Claimant provided a history of pulling on a jammed tote and experiencing right shoulder pain. Dr. Lingenfelter reviewed Claimant's medical records, including a right shoulder MRI conducted in May 2019, and performed a physical examination. Dr. Lingenfelter determined Claimant sustained a right shoulder rotator cuff tear and impingement. He reported the mechanism of the injury made sense, and based on Claimant's description and MRI results, the prevailing factor causing Claimant's right shoulder condition was the incident from February 6, 2019. Dr.

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[8] Burton Depo. at 13-14.

[9] *Id.* at 35.

[10] *Id.* at 16-17.

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

Lingenfelter noted no prior medical records suggested a preexisting condition involving Claimant's right shoulder.

Dr. Lingenfelter became the authorized treating physician for Claimant's right shoulder. He eventually performed a right shoulder arthroscopy with repair of a full-thickness rotator cuff tear and a subacromial decompression and debridement of another partial-thickness tear on April 29, 2021. Claimant continued postoperative treatment with Dr. Lingenfelter. An FCE was conducted on September 29, 2021, after Claimant voiced concerns she felt it was unsafe to return to work. The results of the FCE were invalid due to dramatic presentation. Dr. Lingenfelter agreed Claimant's presentation in his office was "much more dramatic than the average presentation."[12]

Dr. Lingenfelter imposed temporary restrictions on October 13, 2021, of no lifting above shoulder level and no lifting over 40 pounds below chest level. Dr. Lingenfelter determined Claimant had reached MMI as of November 24, 2021. In his final report dated December 23, 2021, Dr. Lingenfelter opined Claimant would not require additional treatment related to her right shoulder. Dr. Lingenfelter released Claimant to work with no permanent restrictions. Dr. Lingenfelter testified he could not recall why he did not impose permanent restrictions on Claimant. Using the AMA *Guides* and competent medical evidence, Dr. Lingenfelter determined Claimant sustained seven percent impairment of the right shoulder.

Dr. Anne Rosenthal, an orthopedic surgeon, examined Claimant on December 8, 2021, at Claimant's counsel's request. Claimant complained of constant pain in her neck, left shoulder, arm, and thumb, with limited motion and weakness in her right shoulder. Dr. Rosenthal reviewed Claimant's available medical records and performed a physical examination. Dr. Rosenthal determined the prevailing factor causing Claimant's cervical and right shoulder conditions was the work-related injury occurring February 6, 2019. Dr. Rosenthal opined Claimant would require ongoing and indefinite palliative care. Dr. Rosenthal adopted the restrictions imposed by Drs. Burton and Lingenfelter with the addition of no overhead work, to avoid activities requiring repetitive head and neck motions, and to avoid sustained awkward positions of the head and neck. Dr. Rosenthal noted Claimant will not tolerate frequent or constant use of either upper extremity.

Using the AMA *Guides* and competent medical evidence, Dr. Rosenthal opined Claimant sustained 46 percent impairment to the whole body as a result of the work injury. Dr. Rosenthal testified she attributed 18 percent permanent partial impairment to the right upper extremity, 15 percent impairment to the left upper extremity, and 28 percent whole person impairment to the cervical spine. Dr. Rosenthal noted these combined to 42 percent whole person impairment. Dr. Rosenthal testified the right shoulder impairment

[12] Lingenfelter Depo. at 16.

provided by the AMA *Guides* did not accurately reflect Claimant's loss of function, and she gave an additional 15 percent to the right upper extremity, resulting in a combined 46 percent whole person impairment.

Dr. Terrence Pratt conducted a court-ordered IME on March 24, 2022. Claimant complained of continuous throbbing, tingling, numbness, and burning in her cervical spine. She complained of continuous right shoulder symptoms with tightness and diminished range of motion and weakness. After conducting a review of Claimant's history, medical records, and performing a physical examination, Dr. Pratt diagnosed a C5-C6 herniated nucleus pulposus, with left upper extremity radiculopathy.

Dr. Pratt concluded Claimant would not require future medical treatment related to her right shoulder involvement. He suggested Claimant may need a reassessment with the surgical specialist should her cervical involvement worsen. Dr. Pratt recommended permanent restrictions of no overhead activities with the right upper extremity, no lifting greater than 25 pounds, and no pushing/pulling greater than 40 pounds. Utilizing the AMA *Guides* as a starting point, Dr. Pratt opined Claimant sustained 26 percent permanent partial impairment of the whole person resulting from injuries to her right shoulder and cervical spine.

Terry Cordray performed a vocational assessment of Claimant at her counsel's request and issued a report dated April 19, 2022. Mr. Cordray obtained Claimant's educational and vocational history. Claimant graduated with a bachelor's degree in medical technology from Manila Central University in the Philippines in 1984. She worked as a medical technologist from 1984 until 1987, when she moved to the United States. Claimant worked as a medical technologist from 1987 to 1995, and then again from 1995 through 2011. Claimant has not worked as a medical technologist or recertified her qualifications in this field since 2011. Claimant does not own a computer or know office programs. English is Claimant's second language. Mr. Cordray indicated Claimant tested at a sixth grade level during the interview. Mr. Cordray explained Claimant's English usage is not necessarily a barrier to employment, but it is a significant barrier for academic training. Mr. Cordray noted Claimant's age and lack of transferable skills, in addition to her education, language skills, and physical restrictions, made her unemployable. Mr. Cordray determined Claimant sustained 100 percent wage loss.

Claimant did not return to work with Respondent after she was sent to a physician by Respondent on February 13, 2019. Claimant currently suffers constant pain in her neck and burning pain from her thumb up her arm. Claimant has difficulty turning her head and testified she cannot bend and lift without pain.

Mr. Cordray generated a list of four unduplicated tasks Claimant performed in the five years preceding the work accident. Dr. Rosenthal reviewed Mr. Cordray's task list and

opined Claimant had 100 percent task loss. Dr. Rosenthal opined Claimant was not capable of employment in the open labor market.

Steve Benjamin conducted a vocational assessment of Claimant at Respondent's request and generated a report dated September 26, 2022. Mr. Benjamin also reviewed Claimant's education and work history, producing a list of five unduplicated tasks Claimant performed in the five years preceding the work accident. Mr. Benjamin identified four jobs Claimant could perform within her restrictions, including call center representative, cashier, front desk clerk, and hotel clerk. Mr. Benjamin opined Claimant could re-enter the labor market and earn approximately $440.80 per week, resulting in a 10.5 percent wage loss.

Dr. Lingenfelter reviewed the task list generated by Mr. Benjamin. With no permanent restrictions, Claimant could perform all tasks on the list. With the restrictions Dr. Lingenfelter imposed in October 2021, Claimant could no longer perform one task, for a task loss of 20 percent. Dr. Burton reviewed Mr. Benjamin's task list and concluded Claimant sustained 20 percent task loss. Both Drs. Lingenfelter and Burton opined Claimant could work in the open labor market.

Brett Maly is a private investigator and regional manager with Frasco, a surveillance company retained by Respondent to conduct surveillance of Claimant. Eleven separate videos of surveillance footage and twelve written reports were generated by Frasco. Surveillance was conducted from June 2019 through September 2022. On June 15, 2020, Claimant replaced a lightbulb on her front porch. On June 25, 2020, Claimant watered plants, trimmed plants with garden shears, and moved soil. Claimant watered plants with a small drinking glass, used a hand-held garden shovel, and carried bags of trash with her left hand on August 5, 2020. She was seen putting a bag in a dumpster and bending at the waist on July 20, 2021. Claimant was observed pushing a shopping cart and stretching her arms and neck to obtain fruit at a grocery store on August 18, 2021. On September 10, 2022, Claimant was cleaning windows in her apartment. She wiped the windows with her left arm, not her right. She tried to reach outside the window with her right arm, but gave up quickly.

The ALJ found Claimant sustained personal injury by accident arising out of and in the course of her employment, stating Respondent provided no concrete evidence Claimant fabricated a work injury. The ALJ determined Claimant provided timely notice of her injury, and the work accident was the prevailing factor causing her injury. Further, the ALJ found Claimant sustained 26 percent permanent partial disability to the whole person and was rendered permanently totally disabled and entitled to future medical treatment.

The ALJ noted Dr. Burton's decision to take Claimant off work on July 30, 2020, must stand pursuant to K.S.A. 44-510c(b)(2)(A). However, because Dr. Burton returned Claimant to light work duty on September 11, 2020, the ALJ determined there is an overpayment of TTD for the period of September 12-22, 2020, in the amount of $516.55.

Finally, the ALJ awarded reimbursement to Claimant of $500 in unauthorized medical expenses and $48 reimbursement for medical mileage.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the ALJ failed to consider the entirety of the evidence before awarding benefits to Claimant. Respondent disputes the occurrence of the accident described by Claimant. Respondent maintains Claimant failed to meet her burden of proving a compensable injury, and the ALJ's Award should be reversed. Alternatively, at oral argument, Respondent argued Claimant may be entitled to work disability benefits, but not a permanent total disability award or future medical treatment. Respondent further argues it is entitled to a credit of $2,586.02 for an overpayment of 7.86 weeks of TTD.

Claimant contends the ALJ's Award should be affirmed. Claimant argues she proved the accident and compensable injury, as well as timely notice. Claimant argues she is permanently and totally disabled as a result of the work-related injuries sustained on February 6, 2019.

1. Did Claimant sustain a personal injury arising out of and in the course of her employment on February 6, 2019?

Under K.S.A. 44-501b: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the trier of fact considers the whole record; and (3) the burden of proof is on the worker. An employer must prove any affirmative defenses.[13]

K.S.A. 44-508(d) states:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur

[13] See *Johnson v. Stormont Vail Healthcare, Inc.,* 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), *rev. denied* 311 Kan. 1046 (2020).

> only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Claimant testified she felt sharp pain running from her left thumb to her shoulder while trying to pull a tote on February 6, 2019. Claimant testified she only told Mary Brown about the incident. Mary Brown testified she had no independent recollection of what Claimant said on February 6, 2019. Claimant's description of the injury by accident is uncontradicted. The ALJ specifically noted in his Award he found Claimant believable. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.[14] Also, Dr. Burton testified he believed Claimant and did not think she was exaggerating her symptoms.

[14] See *Garner v. Kitselman Construction, LLC,* No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

Uncontraverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[15] The Board finds no evidence in the record suggesting Claimant's description of the accident to be improbable or untrustworthy. The Board finds Claimant suffered injury by accident arising out of and in the course of employment.

2. Did Claimant provide proper notice of her injury?

K.S.A. 44-520 provides:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

[15] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
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> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Clint Rieber recalled Claimant came to him personally and said she had a thumb injury, so they filled out the report on February 13, 2019. The report made with Mr. Rieber occurred within the 10 days of Claimant's last day of actual work for Respondent as required by K.S.A. 44-520(a)(1)(A). Moreover, according to Mr. Rieber, Claimant indicated she was seeking workers compensation benefits on February 11, 2019. The Board finds Claimant satisfied the notice requirements of K.S.A. 44-520.

3. What is the prevailing factor causing Claimant's injury, medical condition, and resulting disability or impairment?

K.S.A. 44-508(f) states, in part:

> (2)(B) An injury by accident shall be deemed to arise out of employment only if:
>
> (I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Dr. Rosenthal opined the accident on February 6, 2019, was the prevailing factor causing Claimant's injuries to her neck and right shoulder, and the medical treatment Claimant received for these injuries was necessary. Dr. Lingenfelter said the prevailing factor causing Claimant's shoulder condition was the February 6, 2019, work-related accident. Dr. Burton opined the prevailing factor causing Claimant's cervical spine condition and need for treatment was the incident occurring February 6, 2019. Dr. Burton

added he was not concerned with secondary gain or exaggerated symptoms on Claimant's part.

Based upon the weight of the evidence, considering the medical evidence and Claimant's testimony, the Board finds Claimant proved the prevailing factor causing her cervical and upper extremity conditions was the February 6, 2019, injury.

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

Permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury established by competent medical evidence and using the 6th Edition of the AMA *Guides* as a starting point.[16]

The ALJ adopted Dr. Pratt's impairment opinion and found Claimant suffered 26 percent whole body impairment resulting from her injuries. Dr. Pratt started with the AMA *Guides* and the 4th Edition AMA *Guides* to arrive at his impairment opinion based upon a reasonable degree of medical certainty. Dr. Rosenthal assigned 46 percent whole body impairment resulting from Claimant's work-related injury, using the AMA *Guides* as a starting point. Dr. Burton opined Claimant suffered 11 percent impairment, based upon the 6th Edition of the AMA *Guides*. Dr. Lingenfelter assessed 7 percent impairment to Claimant's right shoulder, but did not rate the cervical spine..

The Board finds Dr. Pratt's assessment of 26 percent permanent partial impairment to the cervical spine and right upper extremity to be reasonable. Dr. Pratt provided an impairment opinion consistent with *Johnson v. U.S. Foods*.

5. Is Claimant entitled to an award based on permanent total disability?

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 gainful employment. Expert evidence shall be required to prove permanent total disability.[17] An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[18]

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[16] See K.S.A. 44-510e(a)(2)(B); *see also Johnson v. U.S. Foods,* 312 Kan. 597, 478 P.3d 776 (2021).

[17] See *Castillo v. Coonrod & Assoc.*, No. AP-00-0471-335, 2023 WL 2823571 (Kan. WCAB Mar. 31, 2023).

[18] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

In awarding permanent total disability, the ALJ wrote:

> In weighing these opinions, the Court finds the opinion of Mr. Cordray to be more persuasive than that of Mr. Benjamin. Claimant sustained a serious work injury requiring two cervical spine surgeries and a shoulder surgery. The work restrictions from the Court-ordered neutral IME physician, Dr. Pratt, are significant. The Court acknowledges that Claimant's pain complaints are subjective, but the Court believes Claimant feels limited by them.
>
> Furthermore, the Court finds the greatest factors for this issue to be Claimant's age and limited job history. Claimant has essentially held two types of jobs over the last 30 years, and neither of those jobs have provided Claimant with any experience to become a cashier. While it is true that a cashier is an entry-level position requiring limited experience, Claimant's age is also a potential hindrance to her obtaining such a job. The Court finds it unlikely that an employer would be willing to hire Claimant as a cashier or for any other entry-level position primarily due to her limited job history and age, along with her documented work restrictions and pain complaints.
>
> The Court finds that, for the reasons described above, Claimant is entitled to permanent and total disability benefits following her last receipt of payment of temporary total disability benefits on January 17, 2022.[19]

The ALJ's analysis of whether Claimant is permanently and totally disabled is consistent with the analysis found in *Wardlow v. ANR Freight Systems*.[20] In *Wardlow*, the Court of Appeals considered the claimant's age, his physical condition, current work restrictions, prior work experience, and training in determining whether an employee is permanently and totally disabled. Claimant is 63 years old, continues to suffer severe pain, has limited ability to speak English, and no transferable skills.

Respondent placed surveillance videos into the record in support of the premise Claimant is not credible. The Board finds the content of the videos unpersuasive. While the videos show Claimant in no apparent distress, they do not show Claimant performing any activity in violation of her known restrictions. Most of the lifting captured in the video was done with the uninjured left upper extremity.

The Board agrees with the assessment provided by the ALJ. Considering all the evidence, the Board finds Claimant is permanently and totally disabled.

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[19] ALJ Award (Sept. 25, 2023) at 16.

[20] *Wardlow v. ANR Freight Systems*,19 Kan. App. 2d 110, 872 P. 2d 299 (1993).

6. Is Claimant entitled to future medical treatment?

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

> It is presumed that the employer's obligation to provide [medical benefits] shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-510h(e) effectively imposes a rebuttable presumption against future medical treatment after an injured worker reaches maximum medical improvement. K.S.A. 44-501b(c) places the burden of proof on the claimant to establish the claimant's right to an award of compensation. The statutes states, "In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." Mandatory consideration of the "whole record" necessarily requires consideration of all medical opinions, not just medical evidence favorable to the claimant. Moreover, K.S.A. 44-508(h), which defines burden of proof, is based on a more probably true than not true standard on the basis of the whole record. All evidence must be considered.

The intent of the language of K.S.A. 44-510h(e) is reinforced by K.S.A. 44-525(a), which states, in part, "No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury."

Additionally, K.S.A. 44-523(a) states the parties are to be afforded a reasonable opportunity to be heard and present evidence. K.S.A. 44-510h(e) should not be interpreted as only requiring the claimant to present evidence, without regard to the respondent's evidence or the evidence from a court-ordered physician, such as Dr. Pratt, which is mandatory under K.S.A. 44-516.

Dr. Rosenthal opined Claimant would need future medical treatment, including prescription medications. Dr. Lingenfelter anticipated Claimant needed no future medical treatment for her shoulder injury. The Board concludes the court-ordered opinion of Dr. Pratt credible. Dr. Pratt opined if Claimant had a progression of her symptoms in relation to her cervical region, she would need reassessment by a surgical specialist. Dr. Pratt was not hired by a party. He was the neutral physician assigned to examine the claimant on behalf of the court.

Based upon the weight of the medical evidence, the Board finds Claimant is entitled to future medical treatment.

7. Is Respondent entitled to a credit for an overpayment of TTD in the amount of $2,586.02?

The ALJ found Respondent made an overpayment of TTD in the amount of $516.55, writing:

> In this claim, it is uncontradicted that Dr. Burton took Claimant off work on July 30, 2020. Based on the language of K.S.A. 44-510c(b)(2)(A), this Court must presume Dr. Burton's opinion was determinative of Claimant's status. As such, Dr. Burton's decision to take Claimant off work starting July 30, 2020, must stand.
>
> However, Dr. Burton testified that he "reassessed the situation" in September of 2020 and returned Claimant to light work duty. Dr. Burton further testified that his office communicated Dr. Burton's decision to return Claimant to light work duty to her on September 11, 2020.
>
> As a result, the Court finds an overpayment of 11 days of TTD, for the period of September 12, 2020, through September 22, 2020, representing 1.57 weeks. At a rate of $329.01 per week, the TTD overpayment amounts to $516.55.[21]

The Board agrees with and adopts the ALJ's analysis on this issue. Respondent is entitled to a credit for an overpayment of TTD in the amount of $516.55.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of ALJ Troy A. Larson dated September 25, 2023, is affirmed.

[21] ALJ Award (Sept. 25, 2023) at 17.

IT IS SO ORDERED.

Dated this _____ day of April, 2024.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with the ultimate results determined by the majority, but writes separately. The majority offers little analysis of most of the issues on review. In addition, the majority affirmed the award of future medical apparently based upon the weight of the medical evidence, which is contrary to the plain language of the Kansas Workers Compensation Act.

First, Claimant met her burden of proving an accident occurred. Claimant's description of the accident, both in her testimony and in the history she provided the health care providers, was consistent. None of Respondent's witnesses were present with Claimant when the accident occurred, and did not directly contradict Claimant's description. The surveillance video does not undermine Claimant's credibility. Based on the greater weight of the credible evidence, Claimant proved the accident occurred.

Claimant also proved the accident was the prevailing factor causing her injuries, medical condition and resulting disability or impairment. Claimant described a sudden onset of upper extremity and shoulder symptoms consistent with an injury immediately after the accident. Dr. Rosenthal thought Claimant's neck and shoulder injuries were caused by the February 6, 2019, accident. Dr. Lingenfelter related Claimant's shoulder injury to the accident. Dr. Burton related Claimant's cervical injury to the accident. Dr. Pratt apparently did not provide a causation opinion. Based on the greater weight of the

evidence contained in the record, Claimant proved she sustained injuries to her neck and shoulder from an accident arising out of and in the course of her employment.

Second, Claimant proved she gave proper notice to Respondent. Under K.S.A. 44-520, Claimant must prove she gave notice to Respondent she either sustained a work-related injury or was claiming workers compensation benefits by twenty days from the date of accident, twenty days from the date medical treatment is sought or ten days from the last day worked if the employee is no longer working for the employer. Twenty days from the accident is February 26, 2019, and twenty days from the first day Claimant sought treatment is March 4, 2019. The majority's findings are not clear, but it appears Claimant's last day worked was February 13, 2019, and ten days from the date is February 23, 2019. It appears Claimant must give notice to Respondent by February 23, 2019. Claimant's testimony she gave notice to Ms. Brown on February 6 was not directly contradicted. Claimant also completed an accident report on February 13 stating she sustained a work-related injury. Based on the evidence, Claimant proved she gave notice to Respondent.

Third, Claimant proved she was rendered permanently and totally disabled on account of her compensable injuries. Dr. Pratt's opinion Claimant's functional impairment is 26% of the body as a whole is the most credible because he served as the neutral examining physician, and because he evaluated all of Claimant's injuries. Dr. Pratt's work restrictions are significant. While the majority considers whether Claimant is permanently and totally disabled under the *Wardlow* analysis, it does not consider the expert opinions, which are required to establish permanent total disability.[22] Like the ALJ, the undersigned finds the opinions of Mr. Cordray more credible than the opinions of Mr. Benjamin. Claimant proved she was rendered permanently and totally disabled on account of the injuries she sustained on February 6, 2019.

Finally, the undersigned addresses the majority's future medical determination. 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.[23] 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.[24] An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.[25] It is presumed the employer's obligation to provide medical treatment terminates upon the

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[22] *See* K.S.A. 44-510c(a)(2).

[23] *See* K.S.A. 44-501b(b).

[24] *See* K.S.A. 44-510h(a).

[25] *See* K.S.A. 44-508(f)(2)(B)(ii).

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.[26]

The majority's analysis does not follow the plain language of K.S.A. 44-510h(e). When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.[27] According to the statute, 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 medical evidence.

Based on the analysis from K.S.A. 44-510h(e), Claimant proved she is entitled to an award of future medical. Dr. Burton and Dr. Lingenfelter did not believe Claimant required future medical. Dr. Rosenthal, however, believed Claimant would require future medical treatment for her work-related injuries, notwithstanding Claimant's achieving maximum medical improvement. Dr. Pratt believed Claimant may require reassessment by a surgical specialist if her cervical condition worsened, although this opinion may not constitute an opinion rendered within a reasonable degree of medical probability. Dr. Rosenthal's opinion is medical evidence it is more probably true than not additional medical treatment will be necessary after maximum medical improvement. Therefore, the award of future medical should be affirmed.

_____
WILLIAM G. BELDEN
BOARD MEMBER

_____
REBECCA SANDERS
BOARD MEMBER

c: (Via OSCAR)

Steffanie L. Stracke, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Hon. Troy A. Larson, Administrative Law Judge

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[26] *See* K.S.A. 44-510h(e).

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