

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TAMMY CHRISTY)	
Claimant)	AP-00-0479-839
V.)	CS-00-0448-972
)	
TEXTRON AVIATION, INC.)	AP-00-0479-840
Self-Insured Respondent)	CS-00-0457-427

ORDER

Claimant requested review of the November 6, 2023, Award by Administrative Law Judge (ALJ) Brian Brown. The Board heard oral argument on March 7, 2024.

APPEARANCES

William L. Phalen appeared for Claimant. Edward D. Heath, Jr., appeared for self-insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing held April 14, 2023; the transcript of the Regular Hearing by Deposition of Tammy Christy from April 18, 2023; the transcript of the Videoconference Evidentiary Deposition of Lowry Jones, Jr., M.D., from April 13, 2021; the transcript of the Evidentiary Deposition of Pedro A. Murati, M.D., from July 12, 2023, with exhibits attached; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Did Claimant sustain a cervical injury on June 27, 2019?
2. What is the nature and extent of Claimant's disability?
3. Is Claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant has worked for Respondent, an airplane manufacturer, since 2004 as a sheet metal worker. In this position, Claimant repetitively used tools requiring a forceful grip throughout her shift. Claimant used a vibrating drill, a rivet gun, pliers, and a Cleco, which is a tool utilized to attach pieces of sheet metal together. Claimant's job required her to use both arms above her head.

On June 27, 2019, Claimant was working inside an airplane using the Cleco tool above her head when she felt "like a rubber band snap" in her right arm and immediate pain in her neck and right shoulder.¹ Claimant reported the incident to her supervisor and was referred to an in-plant physical trainer. The physical trainer provided ice to Claimant, instructed her to continue using ice throughout the weekend, and then to return after the July 4, 2019, holiday. Respondent shuts down for a week during the July 4th holiday.

Claimant returned to Respondent following the holiday break with no improvement. She reported her condition to the trainer, who provided more ice. Claimant was then sent by Respondent to Health Services, an in-house physician, for x-rays. Health Services provided some physical therapy, but no additional treatment.

Claimant testified she informed Respondent she was seeking medical treatment on her own and received no objections. Claimant sought treatment with her personal physician, who referred her to orthopedic surgeon Dr. Robert Stringer. Dr. Stringer recommended Claimant undergo surgery for the work injuries. Claimant testified she advised Respondent of Dr. Stringer's treatment/recommendations and received no objections.

Claimant worked her regular job duties from June 17, 2019, until surgery. Claimant testified she began using her left arm more in her activities, and performed her work using only her left arm. Claimant is right-hand dominant, and she stated it was difficult to perform her job duties.

Dr. Stringer performed surgery on Claimant's right upper extremity on October 28, 2019. Dr. Stringer repaired Claimant's subscapularis and supraspinatus tendons and performed a biceps tenotomy. He also performed a distal clavicle excision and an acromioplasty. Following surgery, Claimant's right arm was immobilized. Claimant underwent several months of physical therapy before returning to work on February 10, 2020.

¹ R.H. Trans. at 8.

Claimant testified she continued to experience pain in her right arm and neck upon returning to work, and she continued to guard them by performing her job with her left arm and hand. Claimant indicated she began feeling pain in her neck and left shoulder while performing her job duties. The pain in Claimant's neck is constant on both sides of her neck, radiating down into her shoulder. Claimant can only lift her arms to shoulder level without pain. Claimant reported her condition to Respondent's Health Services and was provided ice and heat.

Dr. Pedro Murati, a board certified physiatrist, examined Claimant at her counsel's request on May 4, 2020. Claimant complained of occasional neck pain, right shoulder pain and achiness, limited range of motion in the right shoulder, difficulty sleeping secondary to right upper extremity pain, left shoulder pain radiating into the neck, and difficulty lying on the left shoulder secondary to pain. Dr. Murati reviewed Claimant's history and medical records and performed a physical examination. He determined Claimant had left rotator cuff strain vs. tear due to overuse and myofascial pain syndrome of the bilateral shoulder girdle extending into the cervical and thoracic paraspinals, worse on the right. Dr. Murati did not provide restrictions per request, but he did recommend additional treatment for his diagnoses. Dr. Murati found the prevailing factor causing Claimant's conditions was the June 2019 accident and multiple repetitive traumas at work.

On December 28, 2020, board certified orthopedic surgeon Dr. Lowry Jones, Jr., examined Claimant at the Court's request for purposes of an independent medical evaluation (IME). Claimant's chief complaints included her cervical spine and bilateral shoulders. Dr. Jones reviewed Claimant's medical records and performed a physical examination, finding:

It is my opinion, with a reasonable rate of medical certainty that [Claimant] sustained an injury to her right shoulder on or about 6/27/2019. She underwent surgical treatment and repair and has had a reasonable result with the ability to return to work without restrictions. She still is symptomatic with overhead activity.

Her left shoulder was not injured at the time on 6/27/2019 but her increased use over the 3-4 months following her surgery aggravated preexistent disease process of the left shoulder. She has findings consistent with a partial biceps tendon where, chronic impingement and a probable rotator cuff partial or full-thickness tear on the left shoulder. This again was not caused by her injury, but aggravated by her injury and resulting immobilization and limited use following her surgical treatment to the right shoulder.

She has no findings suggesting cervical or thoracic injury and or pain or limitations.²

² Jones IME (Dec. 28, 2020) at 3.

Dr. Jones recommended further evaluation of Claimant's left shoulder. He determined Claimant had reached maximum medical improvement (MMI) relating to her right shoulder and did not recommend additional treatment. Using the *AMA Guides*,³ Dr. Jones opined Claimant sustained 22 percent impairment of the right upper extremity.

Dr. Jones' deposition was taken April 13, 2021, to determine treatment and causation related to Claimant's left upper extremity. Dr. Jones testified:

Q. Doctor, if we added the 17-year work history at [Respondent] into the causation question, would the 17 years of overhead work activity at [Respondent] combined with the natural flow and progression of the June 17th, 2019, accident – would those work incidents be the prevailing factor in causing the injury to the left shoulder and the need for medical treatment and testing?

A. Yes, sir. It would be.⁴

Dr. Jones further testified Claimant had no pain complaints and was not tender during his examination of her cervical and thoracic areas. Dr. Jones opined neither the June 2019 accident nor Claimant's work history caused problems with her cervical and thoracic areas.

Following Dr. Jones' deposition, an Application for Benefits was filed for an alleged repetitive injury to Claimant's left upper extremity, with an accident date of April 13, 2021. Claimant testified Respondent sent her to Dr. Prohaska to provide the treatment recommended by Dr. Jones, but Dr. Prohaska did not provide treatment. Dr. Jones was eventually appointed Claimant's authorized treating physician in an Order dated October 6, 2021.

Dr. Jones initially provided a left shoulder injection to Claimant. On January 7, 2022, Dr. Jones performed a left arthroscopic biceps tendonotomy, biceps stump debridement, superior labrum debridement, subscapularis debridement and repair, decompression acromioplasty, distal clavicle excision, and open biceps tenodesis. Claimant underwent physical therapy following surgery and worked light-duty for a time. Dr. Jones eventually found Claimant to be at MMI in June 2022 and released her from his care with no restrictions.

Claimant returned to Dr. Murati on August 22, 2022. Dr. Murati reviewed Claimant's updated medical records and performed another physical examination. Dr. Murati found Claimant had bilateral shoulder weakness and impingement, limited range of motion, and

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

⁴ Jones Depo. at 8.

trigger points in both shoulder girdles extending to the cervical and thoracic paraspinals, worse on the left. In addition to noting Claimant's previous surgical procedures, Dr. Murati determined Claimant had myofascial pain syndrome of the bilateral shoulder girdle extending into the cervical and thoracic paraspinals, worse on the left. Dr. Murati indicated Claimant would require future medical treatment. Dr. Murati opined:

Please see my previous report dated 05-04-20 for the prevailing factor, as my professional medical opinion has not changed. It is under all reasonable medical certainty and probability that the prevailing factor in the development of the examinee's left shoulder complaints is due to overcompensation from the 06-27-19 work related injury.⁵

Dr. Murati testified Claimant's left shoulder condition was caused by her repetitive work activities, but only after she sustained injury to the right shoulder. He explained:

Cumulative trauma disorders usually start with a dominant upper extremity. In this case you don't have that because the right shoulder is injured in an accident of fashion, okay? There is one event that starts it all, okay? The left shoulder, as far as I know, and maybe there is documentation, if there is, but nobody is saying she had a bad work product because the left upper extremity was injured. I mean, I don't see that. It's after the right injury that the left upper extremity complaints start to happen. That is consistent with an overuse injury, caused by increased cumulative trauma produced because she's not, because she's favoring the right.⁶

Using the *AMA Guides* as a starting point, Dr. Murati opined Claimant sustained a combined 28 percent whole person impairment. This rating consists of 24 percent right upper extremity impairment, or 14 percent whole person impairment; 24 percent left upper extremity impairment, or 14 percent whole person impairment; 2 percent whole person impairment for myofascial pain syndrome affecting the cervical paraspinals; and 2 percent whole person impairment for myofascial pain syndrome affecting the thoracic paraspinals.

Regarding future medical treatment, Dr. Murati wrote:

It is beyond reasonable medical certainty that this examinee will require further medical treatment as a result of this work related injury. I recommend at least yearly follow ups on her bilateral shoulder and neck in case of any complications that may ensue. This may include but is not limited to the appropriate physical therapy, injections, radiological studies, anti-inflammatory and pain medication(s) and need

⁵ Murati Depo., Ex. 3 at 5.

⁶ Murati Depo. at 33.

for surgical intervention as a result of the injury that occurred on 06-27-19 and 04-13-21.⁷

In an Order by ALJ Steven Roth dated November 1, 2022, Dr. Terrence Pratt was designated to provide an IME related to Claimant's left shoulder and/or cervical and thoracic spine. Specifically, ALJ Roth wrote:

1. Please provide a diagnosis and opinion as to the nature and extent of any left shoulder and/or cervical and thoracic spine injuries the Claimant received due work related medical conditions or injuries, if any, have been sustained as a natural and probable consequence of any work injuries.⁸

Dr. Pratt, a board certified physiatrist, examined Claimant on January 12, 2023. Claimant's chief complaint was left shoulder discomfort, radiating from the shoulder to the cervical region, parascapular area, and posterior arm. Dr. Pratt reviewed Claimant's medical records, history, and performed a physical examination. Dr. Pratt determined Claimant was post surgical intervention on the left upper extremity and had cervicothoracic syndrome. Dr. Pratt agreed Claimant may have had involvement in her left shoulder in relationship to increased use, but he opined the prevailing factor causing Claimant's left shoulder involvement was repetitive work activities and not the right shoulder injury. Regarding Claimant's cervicothoracic syndrome, Dr. Pratt wrote:

Cervicothoracic involvement was not noted until May 4, 2020, and not significantly identified on an independent assessment in December 2020. Today she had some variability in range of motion. She reported today that she did not develop neck symptoms until she returned to work after the left shoulder procedure. The shoulder procedure occurred on January 7, 2022. With variability in symptoms and an absence of cervical symptoms at this time of the court ordered assessment in December 2020 or be identified during subsequent evaluations and care, I cannot state to a reasonable degree of medical certainty that she has cervical involvement with her vocationally related activities as the prevailing factor for the involvement. No significant thoracic was identified at the time of current assessment. I cannot state that she has thoracic involvement with the vocationally related activities as the prevailing factor for the involvement.⁹

Dr. Pratt did not anticipate a need for future medical care related to Claimant's left shoulder. Using the *AMA Guides* as a starting point, Dr. Pratt opined Claimant sustained 18 percent permanent partial impairment of the left upper extremity.

⁷ *Id.*, Ex. 3 at 4.

⁸ ALJ Order (Nov. 1, 2022) at 1.

⁹ Pratt IME (Jan. 12, 2023) at 7.

Claimant testified she had no problems with her neck or either shoulder prior to June 27, 2019. Claimant indicated she currently experiences pain in both shoulders, her neck, and her upper back. Claimant can lift her arms to shoulder level but lifting higher causes pain. Claimant indicated she has difficulty sleeping on either side, and her daily activities are limited. Claimant takes medication on a daily basis. Claimant testified she continues to work her regular job at Respondent, but she has difficulty working above her head due to pain in her neck, shoulders, and upper back.

The ALJ found Claimant sustained injury to her right shoulder as a result of the June 27, 2019, incident, resulting in 22 percent impairment of the right upper extremity. The ALJ found Claimant sustained injury to her left shoulder as a result of repetitive work for Respondent between January 1, 2004, through April 13, 2021, resulting in 18 percent impairment of the left upper extremity. The ALJ determined Claimant did not sustain injuries to her cervical and thoracic spine, neither as a result of the June 2019 work accident nor as a result of cumulative trauma working for Respondent. Further, the ALJ concluded Claimant is not entitled to future medical treatment for either upper extremity.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the opinions of Dr. Murati should be considered uncontroverted because he is the only physician to perform a full physical examination of Claimant post-surgery. Claimant notes Dr. Jones did not testify following the procedure performed January 7, 2022. Claimant further asserts the IME provided by Dr. Pratt was incomplete due to the Court asking an ambiguous question not based upon the language of the Kansas Workers Compensation Act. Therefore, Claimant argues she sustained 28 percent impairment of her whole body as a result of the June 2019 work accident. Alternatively, Claimant argues she sustained 16 percent whole person impairment for the June 2019 injury and 24 percent impairment to the left upper extremity as a result of the April 2021 injury. Claimant contends she is entitled to future medical care.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues the preponderance of credible evidence supports the finding Claimant sustained scheduled injuries to each shoulder.

1. Did Claimant sustain a cervical injury on June 27, 2019?

An injury is compensable only if it arises out of and in the course of employment.¹⁰ The two phrases "arising out of" and "in the course of" have two separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and

¹⁰ K.S.A 44-508(f)(2).

circumstances under which the accident occurred, and means the injury happened while the worker was at work in her employer's service. The phrase "arising out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment if it arises out of the nature, conditions, obligations and incidents of the employment.¹¹

To receive workers compensation benefits, a claimant must prove by the preponderance of the evidence the accidental injury occurred while working. The evidence must include specifics as to time the accident occurred and under what circumstances the accidental injury occurred.

Claimant failed to show by the preponderance of the evidence the injury to her cervical and thoracic spine arose out of and in the course of her employment. Dr. Jones agreed the June 27, 2019, accident did not cause injury to Claimant's cervical and thoracic spine. Dr. Jones also agreed the repetitive work for Respondent did not cause Claimant's cervical and thoracic spine problems. Dr. Pratt could not relate Claimant's cervical and thoracic spine condition to either of Claimant's accidents. Only Dr. Murati opined in his May 4, 2020, report the cervical and thoracic spine injuries arose out of both the traumatic injury and injury by repetitive trauma.

The Board finds the weight of the evidence supports only injuries to Claimant's shoulders. Claimant has failed to prove she suffered an injury by accident to her cervical and thoracic spine related to either the June 27, 2019, injury by accident, or her injury by repetitive trauma through April 13, 2021.

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

Dr. Jones assessed 22 percent impairment to Claimant's right shoulder and 22 percent impairment to Claimant's left shoulder. Dr. Pratt assigned 18 percent impairment to Claimant's left shoulder. On April 4, 2020, Dr. Murati assessed 27 percent impairment to Claimant's right shoulder. On August 22, 2022, Dr. Murati assessed 24 percent impairment to Claimant's right shoulder. On April 4, 2020, Dr. Murati assessed 10 percent impairment to Claimant's left shoulder. On August 22, 2022, Dr. Murati assessed 24 percent impairment to Claimant's left shoulder.

The ALJ noted the difference in Dr. Murati's 2020 and 2022 impairment assessments to conclude the court-ordered examiners' opinions are more credible. The ALJ also noted Dr. Pratt was equally as qualified as Dr. Murati and neutral. In Appeal No.

¹¹ See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P.2d. 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, ¶1, 512 P.2d. 497 (1973).

AP-00-0479-839; Claim No. CS-00-0448-972, the Board agrees with the ALJ's finding Claimant suffers 22 percent impairment to her right upper extremity at the level of the shoulder. In Appeal No. AP-00-0479-840; Claim No. CS-00-0457-427, the Board agrees with the ALJ's finding Claimant suffers 18 percent impairment to her left upper extremity at the level of the shoulder.

3. Is Claimant entitled to future medical treatment?

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

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.

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

Dr. Pratt opined Claimant would not need future medical treatment for her left shoulder injury. Dr. Jones also did not believe Claimant would need future medical treatment for her right shoulder.

Dr. Murati opined Claimant would need additional medical treatment, including yearly follow ups on her bilateral shoulders, physical therapy, injections, radiological studies, anti-inflammatory and pain medication(s), and possibly, surgical intervention.

Considering Claimant's bilateral shoulder surgeries, complaints of ongoing pain in the shoulders, and limited ability to lift her arms, Dr. Murati's opinion is given more weight. The Board finds Claimant has met the burden of proving it is more probably true than not she will require future medical care pursuant to K.S.A. 44-510h(e).

¹² See K.S.A. 44-510h(a).

¹³ See K.S.A. 44-508h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of ALJ Brian Brown dated November 6, 2023, is modified. The ALJ’s award of permanent impairment for both shoulders is affirmed. The ALJ’s denial of future medical treatment is reversed. Claimant is awarded future medical treatment upon proper application.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned agrees with affirming the ALJ’s determinations Claimant sustained a compensable right shoulder injury from an accident arising out of and in the course of her employment with Respondent on June 27, 2019, a compensable left shoulder injury from repetitive trauma arising out of and in the course of her employment from January 1, 2004, through April 13, 2021, and did not sustain compensable injuries to the cervical spine. The undersigned also agrees with the determination of the nature and extent of disability. The undersigned, however, disagrees with the majority’s analysis concerning future medical.

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.¹⁴ The employer’s liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the

¹⁴ See K.S.A. 44-501b(b).

effects of the injury.¹⁵ 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.¹⁶

When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.¹⁷ 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, or based on the employee's course of treatment or residual problems.

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, Jones and Murati, and noted Dr. Murati recommended future physician intervention. The majority, however, apparently concluded Claimant was entitled to future medical based on her course of treatment, residual symptoms and limitations, rather than the medical evidence. 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. Pratt and Dr. Jones did not believe Claimant would require future medical care. Dr. Murati, however, thought Claimant would require future medical care notwithstanding Claimant's reaching maximum medical improvement. Dr. Murati's opinion is medical evidence it is more probably true than not additional medical treatment will be required. Claimant satisfied the particular burden of proof in K.S.A. 44-510h(e). Accordingly, Claimant should be awarded future medical, to be provided either by agreement or upon application and hearing as provided in K.S.A. 44-510k.

WILLIAM G. BELDEN
BOARD MEMBER

¹⁵ See K.S.A. 44-510h(a).

¹⁶ See K.S.A. 44-510h(e).

¹⁷ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

TAMMY CHRISTY

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c: (Via OSCAR)

William L. Phalen, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Self-Insured Respondent
Hon. Brian Brown, Administrative Law Judge