

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KERSTIN ANDERS</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0479-938
<b>DIVERSICARE OF COUNCIL GROVE, LLC.</b>	)	CS-00-0454-477
Respondent	)	
AND	)	
	)	
<b>PA MANUFACTURERS ASSN. INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appealed the November 7, 2023 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on April 11, 2024. Jeff Cooper appeared for Claimant. Tim Emerson appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

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

1. Deposition of Kerstin Anders, taken March 21, 2021;
  2. Deposition of John Sand M.D., taken March 13, 2023, with exhibits;
  3. Deposition of Chris D. Fevurly M.D., taken March 14, 2023, with exhibits;
  4. Deposition of Kerstin Anders, taken March 26, 2023;
  5. Status Conference Hearing Transcript, held May 15, 2023;
  6. Deposition of Richard L. Thomas M.S., taken June 5, 2023, with exhibits;
  7. Deposition of Becky Johnson, taken June 6, 2023;
  8. Regular Hearing Transcript, held June 12, 2023;
  9. Deposition of Steven L. Benjamin MS CRC, taken June 19, 2023, with exhibits;
  10. Deposition of Howard Aks M.D., taken July 7, 2023, with exhibits;
  11. Deposition of Michael Rippee M.D., taken July 11, 2023, with exhibits;
  12. Deposition of Lora Siegle M.D., taken August 8, 2023, with exhibits;
  13. Deposition of Deborah Benning P.A., taken August 8, 2023, with exhibits;
  14. Deposition of Janelle Tidemann PhD, LCF, taken August 17, 2023, with exhibits;
- and,
15. Stipulation to Social Security Documentation, with attachment.

**ISSUES**

1. Was the accident the prevailing factor causing the alleged injuries, the medical conditions and the resulting disability and/or impairment?
2. What is the nature and extent of Claimant's disability? Specifically, is Claimant entitled to compensation for work disability or permanent total disability?
3. Is Claimant entitled to future medical benefits?

**FINDINGS OF FACT**

Claimant is a 59 year old individual who worked for Respondent as a night shift CNA/CMA (Certified Nurse's Aide & Certified Medical Aide), off and on for the past twenty years. Her job duties included patient care (toileting, dressing and feeding) and passing medications. Prior to Claimant's work injury, she reported physical issues including diabetes, fibromyalgia, arthritis, hypertension, Crohn's disease, asthma and bipolar disorder.

On January 28, 2020, Claimant saw a fall risk patient attempting to get up and out of bed. She rushed into the room and tripped over the pedal of a motorized wheelchair. Claimant fell, striking the right side of her head, above the ear, on the bathroom doorknob and fell to the concrete floor, striking her forehead. Claimant also injured her right knee and wrist.

Claimant was taken to Morris County Hospital, by her friend, Denise Litke. She was examined in the emergency room by Dr. Brett Siegle. Claimant reported pain in her head, right knee and wrist, ringing in her ears, dizziness and nausea. Dr. Siegle ordered x-rays, which revealed no broken bones, instructed Claimant not to work for two days and sent her home without medication.

Claimant's head pain and nausea worsened during the two days following the accident. On January 30, she experienced debilitating headaches, became nauseated and had difficulty walking. She tried to make an appointment with her personal healthcare provider, Deb Benning, but was instructed to see Dr. Lora Siegle, because she was the workers compensation physician. Lora Siegle, M.D., is a board-certified family physician currently employed with Morris County Hospital and Clinic and Council Grove Family Health Center. On January 30, 2020, Dr. Siegle examined Claimant, who presented with bilateral periorbital contusions (black eyes) and reported headaches, dizziness and poor balance. She ordered a CT scan which revealed a large subdural hematoma 10 millimeters

in depth on the right frontal area of the brain. Claimant's care was transferred to Stormont Vail Hospital in Topeka where she stayed until February 3, 2020.

Dr. Siegle resumed care for Claimant, along, on February 11, 2020. Claimant continued to experience headaches, dizziness and poor balance. Claimant's complaints were essentially unchanged at her February 21 appointment. Dr. Siegle asked Claimant to walk in a straight line and backwards, which Claimant was unable to do. On March 25, Dr. Siegle noted Claimant's balance was still poor, but her headaches were decreasing. She made referrals for physical, occupational and speech therapy. Dr. Siegle noted Claimant could return to work on April 2 to sedentary desk work, but she could not walk without a walker and could not lift more than 15 pounds. Dr. Siegle evaluated Claimant for the last time for the work injury, on April 21, 2020. Claimant reported to Dr. Siegle she had fallen a couple of times when she tried walking without her cane. She advised Claimant not to walk without a cane and referred her to physical therapy for balance issues. Dr. Siegle continued Claimant's sedentary work restrictions. She did not provide permanent work restrictions.

Prior to Claimant's work injury, Dr. Siegle would see patients at Respondent's facility. She saw Claimant at work. Dr. Siegle was unaware if Claimant worked with any limitations or restrictions, but stated she was able to perform her job as a CNA, including all the physical requirements necessary to do so.

Respondent referred Claimant to Michael Rippee, M.D., a neurologist who specializes in treating concussions. Dr. Rippee was instructed to evaluate, diagnose and treat any concussion-related issues. Claimant was evaluated by Dr. Rippee on May 20, 2020. Claimant reported headaches, dizziness, movement intolerance, light insensitivity and decreased concentration and memory. She advised Dr. Rippee she had been doing some vestibular therapy which she believed had improved her headaches and balance issues. Dr. Rippee diagnosed Claimant with post concussion syndrome and recommended she continue with the vestibular therapy. He referred Claimant to Dr. Jonathan Reddell, an optometrist, who fitted her with prism lenses to assist with vision and balance issues. Dr. Rippee placed temporary work restrictions on Claimant. Claimant's treatment regimen remained the same throughout the seven months he provided treatment, although on August 27, 2021, cognitive therapy was added. Claimant's visual skills improved significantly based upon Dr. Reddell's treatment, but her other symptoms, while improved, remained the same. He described Claimant as still quite symptomatic.

Dr. Rippee placed Claimant at maximum medical improvement (MMI) on December 2, 2021. He does not provide impairment ratings, but opined Claimant does have impairment as a result of her postconcussion syndrome. Dr. Rippee recommended permanent work restrictions of sedentary or sitting work only and for not more than four hours per day. She should use a cane and should have no patient contact for safety except for when in a seated position. Claimant will need frequent breaks from computer usage,

5-10 minute break for every 30 minutes of computer usage. His restrictions were not based upon Claimant's orthopedic condition or her osteoarthritis. Dr. Rippee did not provide an opinion regarding future medical treatment.

Dr. Rippee opined the January 28, 2020 work accident was the prevailing factor causing Claimant's post-concussion syndrome, the treatment provided and need for restrictions. He stated knowledge of preexisting symptoms or conditions are important to know in determining causation and the course of treatment. Learning of preexisting symptoms or conditions, after the fact, could affect his opinions regarding prevailing factor.

Dr. Rippee opined Claimant was not capable of working as a CNA. He did not see anything in Claimant's presentation to him, over the seven month course of treatment, causing him to question her veracity, sincerity or the effects of her injury. He stated he has an idea when patients are manipulating or making up symptoms.

At her attorney's request, Claimant was evaluated by Howard Aks, M.D., board certified in anesthesiology and pain medicine, on February 25, 2021. He is also certified by the American Board of Independent Medical Evaluators. Claimant reported headaches, balance issues (presented with a cane), visual problems, speech (trouble finding words), short term memory, reading comprehension, anxiety, nervousness, difficulty sleeping, and difficulty concentrating. In short, Claimant always felt like she was in a fog, which affected her activities of daily living. Dr. Aks diagnosed Claimant with traumatic brain injury secondary to fall and subdural bleed, post-concussion syndrome and myofascial pain. He opined the January 28 work injury was the prevailing factor for her chronic intractable postconcussion symptoms and disability.

Dr. Aks opined Claimant has 45% functional impairment to the whole body by using the *AMA Guides to the Evaluation of Permanent Impairment*, 6<sup>th</sup> edition (*Guides*, 6<sup>th</sup> ed.) as a starting point. He considered Claimant's chronic balance issue, the effect of her injury on her ability to perform work activities, daily activities and enjoyment activities in arriving at his rating. In addition, Dr. Aks consulted a number of tables in the *Guides*, 6<sup>th</sup> ed. regarding consciousness and awareness, sleep and arousal disorders, cognitive deficits and dysphasia. He considered Claimant's preexisting issues in providing his functional impairment rating. Dr. Aks described the difficulty in providing a rating for concussions:

Q. Did you break down the 45 percent within those technical categories before coming up with that total, and if so, what are those percentages?

A. That's a very good question. So unlike other impairment ratings, a concussion is a little bit more difficult to rate versus let's say an orthopedic injury where you have a known surgery and you can use the grids for that or you could take range of motion measurements or objective findings and put them into the Guide. For a concussion or traumatic brain injury, it's based more on symptomatology because

it's very hard to have objective findings for a concussion, but everybody is a little different. It's really hard to quantify that. I did not use one table in particular because of the multiple symptoms that she had. I looked at these tables because I thought they were relative to her situation. I don't recall specifically coming to a declaration of a percentage regarding each individual table, but I took all of this into consideration. That's how I came up with my impairment rating.<sup>1</sup>

Again, the problem with trying to evaluate concussions using the 6th Edition is that it's not black and white, and that's why I didn't reference one specific table. I referenced all of them because of the multitude of her symptoms, and I came up with the 45 percent taking into consideration her headaches, her imbalance, her ocular issues, her heightened sensitivity, her concentration problems, her memory issues, her dizziness, how this all affected her activities of daily living, how this will affect gainful employment, and that's how I came up with that number.<sup>2</sup>

Dr. Aks restricted Claimant to sedentary work and limited her workday to four hours. In addition, he recommended Claimant should have frequent breaks from computer use after thirty minutes, use a cane, no walking on uneven surfaces, no walking more than fifty feet without the use of a walker, and no climbing stairs. He opined Claimant will require future medical benefits. Specifically, he recommended acetaminophen for chronic headaches and assistive devices (cane and/or walker) for ambulation due to her balance issues.

At her attorney's request, Claimant saw Dr. Aks a second time, on March 8, 2023. Dr. Aks was provided additional medical records. He noted Claimant's condition was a little worse from when he saw her before. Claimant reported essentially the same symptoms. Review of the additional medical records and talking with Claimant did not change Dr. Aks' prior opinions. He opined the additional records solidified his opinions. Dr. Aks did not see any evidence of symptom magnification or malingering.

Claimant was evaluated at Respondent's request by Chris Fevurly, M.D., on March 2, 2021. Dr. Fevurly is recently retired, but is board-certified in internal and preventive medicine, with specialization in occupational medicine. During the last year and one half of his practice, he limited his practice to independent medical examinations (IME). Dr. Fevurly opined Claimant suffered a mild traumatic brain injury, visual disturbance, disequilibrium, resulting in gait disturbance and unsteadiness on her feet, cognitive and memory issues and headaches as a result of the work event on January 28, 2020. He further opined her complaints should have improved with the passage of time, but reportedly have not. He noted his examination demonstrated inconsistent results and her

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<sup>1</sup> Aks Depo. (July 7, 2023) at 31.

<sup>2</sup> *Id* at 34.

professed disability was more than would be expected based on the results of his examination.

Dr. Fevurly opined Claimant sustained 6% functional impairment to the whole body under the *Guides*, 4<sup>th</sup> Edition, assigning 2% whole body for post-traumatic headaches, 2% to the whole body for residual disequilibrium and 2% to the whole body for residual mental status and emotional/behavioral issues. Using the *Guides*, 6<sup>th</sup> Edition, Dr. Fevurly assigned Claimant 7% functional impairment to the whole body. His ratings were the same except for an increase to 3% functional impairment to the whole body for the residual disequilibrium. Dr. Fevurly deferred any possible functional impairment for residual visual impairment to neuro-optometry.

Dr. Fevurly recommended permanent work restrictions at the light work level with lifting up to 20 pounds occasionally and limiting overhead work to an occasional basis. Claimant could work eight hour shifts and was capable of performing computer or office type duties. Claimant should avoid work at unprotected heights and if unsteady on her feet, use of a cane. Dr. Fevurly opined Claimant would not require future medical treatment.

Based on review of Claimant's prior medical records, Dr. Fevurly opined Claimant experienced gait and balance difficulties prior to her January 28 work injury. Claimant's preexisting conditions were impeding her ability to recover as opposed to the residuals from her traumatic brain injuries. He believed Claimant was incapable of lifting above the light to light medium work level and was very unstable on her feet prior to her work injury. Dr. Fevurly did not find reports of prior headaches in the medical records. Although Dr. Fevurly could not find any restrictions in the prior medical records, he believed restrictions or limitations would have been placed on Claimant following her bilateral knee replacements in 2011 and Respondent would have had to make accommodations to her job duties for Claimant to be able to perform her job as a CNA.

Dr. Fevurly acknowledged he was not a specialist in concussion care. He stated there were neurologists and physical medicine doctors who subspecialize in concussion care, which included Dr. Rippee. Prior to his deposition, Dr. Fevurly reviewed the reports of Dr. Sand and Dr. Tidemann. He opined their findings were consistent with his overall impression of Claimant's neuropsychological status and confirmed his overall impression of her clinical status.

Claimant was evaluated by John Sand, M.D., a board certified neurologist, for a Court-ordered evaluation on June 29, 2021. Dr. Sand opined Claimant suffered a significant head injury (traumatic brain injury) as a result of her work-related injury on January 28, 2020. Claimant's gait difficulty was her most prominent residual, which was primarily the result of her work injury. Dr. Sand stated Claimant's prior orthopedic issues contributed to her gait difficulty, but her problems were primarily neurologic and not orthopedic.

Doctor, would it be fair to say that Ms. Anders has significant physical symptoms as result of the January 28, 2020, injury where she fell and hit her head?

A. Yes.<sup>3</sup>

Dr. Sand does not provide functional impairment ratings, but did provide permanent restrictions, no prolonged standing, stooping or crawling. Claimant should use assistive ambulating devices and should not carry anything. Claimant should not climb or be exposed to unprotected heights. Dr. Sand's restrictions were solely related to her January 28 work injury.

Dr. Sand reviewed the medical reports of Dr. Rippee and opined the treatment provided was reasonable and appropriate. Dr. Sand knows Dr. Rippee, noted he is a concussion specialist and a good physician. Dr. Sand found his findings (still falling, using a cane and dizziness) were consistent with Dr. Rippee's findings on December 3, 2020, the last time Dr. Rippee evaluated Claimant. Dr. Sand agreed with Dr. Rippee's restrictions of no working more than four hours per day, sedentary work only, use of a cane and Claimant should be allowed frequent breaks if engaging in prolonged computer work.

Claimant reported cognitive difficulties to Dr. Sand, which he was unable to corroborate by his examination of her. Dr. Sand recommended formal neuropsychological testing, which was performed by Janelle Tidemann, a psychologist on January 18, 2022. After reviewing Dr. Tidemann's report, Dr. Sand opined Claimant did not have cognitive residuals as a result of her January 28 work injury.

Based on Dr. Sand's recommendation, the Court ordered Claimant to be evaluated by Janelle Tidemann, PhD, LCP, a psychologist, specializing in neuropsychology evaluations, for neuropsychological testing. Dr. Tidemann met with Claimant for approximately six hours on January 18, 2022. Dr. Tidemann administered several tests to Claimant. Most of the testing was limited to cognitive issues.

Symptom and performance validity tests indicated Claimant was over-reporting (creating more complaints) her symptoms, possibly malingering and not performing to the best of her ability. Claimant's general intellectual functioning fell within the average range. Her memory scores did not indicate impairment. Attention testing indicated Claimant attention and response control deficits with noted exaggeration. Claimant's motor skills were assessed at below expected limits. Dr. Tidemann noted Claimant's testing responses "indicate considerable and pervasive emotional distress that is likely to be perceived as a crisis." In summary, Claimant's testing indicated inconsistencies, symptom exaggeration

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<sup>3</sup> Sand Depo (Mar 13, 2023) at 14.

and lack of effort. Dr. Tidemann opined Claimant did not have cognitive residuals from the January 28 work injury.

Dr. Tidemann is not a medical doctor, but was asked to provide a functional impairment rating using the *Guides*, 6<sup>th</sup> ed. She opined Claimant has 3% functional impairment to the whole body for residual mental status and emotional/behavior issues from the work injury (table 13-8, page 311). Dr. Tidemann's rating did not include any physical impairment. Dr. Tidemann did not recommend restrictions.

Deborah Benning, PA is a physician assistant at Morris County Hospital and Medical Clinic. She has been employed with Morris County for the past nine years. Claimant has been Ms. Benning's patient and has monitored her care as a family clinic clinician since 2015. Claimant suffered chronic issues with type 2 diabetes, hypertension, hyperlipidemia, asthma, gastroesophageal reflux, osteoarthritis, Crohn's disease and bipolar disorder. Ms. Benning opined these issues were well controlled and did not limit Claimant's ability to perform her job as a CNA with Respondent prior to her January 28 work accident. Ms. Benning's last appointment with Claimant was on June 27, 2023. Claimant reported continued issues with unstable gait and daily headaches. She takes Tramadol for headaches and uses a walker to safely ambulate. Ms. Benning opined it was reasonable and necessary for Claimant to use a walker as a result of her work injury.

Ms. Benning opined Claimant's unstable gait is due solely to her January 28 work accident because it was not present prior to her work injury. During the eight years Ms. Benning provided treatment to Claimant, she found Claimant credible at all times and she did not give Ms. Benning any reason to disbelieve her. She opined Claimant's inability to return to work as a CNA was directly related to her work injury.

Becky Johnson was the Assistant Director and then the Director of Nursing for Respondent for 28 years. Ms. Johnson left her employment with Respondent on September 20, 2020. She was Claimant's direct supervisor during the last two years of Claimant's employment and had frequent contact with her. She described Claimant's job duties as providing assistance to the elderly—lift, feed, groom and bath. In short, Claimant did whatever the elderly could not do for themselves. Ms. Johnson observed Claimant's physical ability to perform her job duties. She confirmed Claimant did not use an assistive device and was physically capable of performing her job duties with Respondent prior to her January 28 work injury. There is no evidence Respondent accommodated any restrictions prior to Claimant's January 28 work injury.

Two vocational consultants interviewed Claimant, Richard L. Thomas, M.S., at her attorney's request and Steven Benjamin, on behalf of Respondent. The experts were asked to identify jobs and job tasks performed in the five years preceding her work accident and provide their opinions regarding Claimant's ability to engage in substantial gainful employment, and her wage-earning capacity.



Claimant was interviewed by Mr. Thomas on April 8, 2021. He noted Claimant has a high school diploma, CMA and CNA certificates, but no other formal training. Most of her work history was as a CNA/CMA care giver. He identified sixteen non-duplicative tasks for the relevant time frame. Considering the medical restrictions of Drs. Siegle, Fevurly, Aks and Rippee, Mr. Thomas opined Claimant was permanently and totally disabled.

But at the time she was applying for Social Security Disability. She was living in basically a handicap housing. And so she basically had to depend on other people for transportation and cleaning her house. So, based upon her education and the type of work she had been doing in the past, and the restrictions given by these four different doctors, my conclusion was that she was not employable in the open labor market. Council Grove is a small town of about 25 hundred, I think?

Q. Do you have an opinion based on the evidence, whether or not Ms. Anders is permanently and totally disabled?

A. It would be my vocational opinion that she is permanently and totally disabled.

Q. You mentioned that when you had interviewed Ms. Anders she had applied for Social Security Disability. I believes. Anders will testify that she is now receiving Social Security Disability. Assuming that to be correct, would that receipt of Social Security Disability be consistent with your opinion regarding employability?

A. Yes, it would be.<sup>4</sup>

A. You know, actually I do not believe she's capable of competitive employment in any area, but it's limited living in Council Grove. But based on the restrictions the doctors gave her, two doctors said she couldn't work more than four hours a day. All the doctors have given her restrictions that would place her in the very narrow area of sedentary work. Two doctors said sedentary only. So based upon those restrictions, she doesn't have transferable skills, work skills, her age is 58, and she's limited to a very narrow area. She's worked in the same field for over 20 years. So, basically, all that, I do not believe she would be employable in any open labor market.<sup>5</sup>

Claimant was interviewed by Mr. Benjamin on June 15, 2023. He identified thirty-one non-duplicative tasks for the relevant time frame. Considering the initial restrictions of Dr. Sand and Dr. Fevurly, Mr. Benjamin opined Claimant could return to the labor market and earn approximately \$400.06 per week. Considering Dr. Aks' restrictions, Claimant has a 100% wage loss. He noted Claimant lives in Council Grove and does not drive, but

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<sup>4</sup> Thomas Depo. (June 5, 2023) at 9.

<sup>5</sup> *Id* at 23.

identified potential jobs in Emporia and Manhattan. Considering the restrictions of Dr. Rippee, Dr. Aks and Dr. Sand's final restrictions, limiting Claimant to a four-hour work day, Mr. Benjamin opined Claimant was unemployable and unable to engage in substantial gainful employment.

Currently, Claimant experiences frequent headaches, balance issues, dizziness and ringing in her ears—all of which she attributes to her January 28 work injury. Claimant walks exclusively with a walker. She denies any problems with these issues prior to her work injury and performed her job with Respondent as a CNA/CMA, without restrictions or limitations. Currently, Claimant takes Topomax for headaches. Claimant has not returned to work for any employer since her work injury and has been granted Social Security Disability benefits. She does not drive or own an automobile. Prior to her injury, Claimant liked to walk, read and watch television. She is unable to engage in these activities. Claimant now lives in Neosho Plaza, apartments for individuals with disabilities.

The ALJ found Claimant sustained her burden of proving the January 28, 2020 work accident was the prevailing factor causing her injuries, medical condition and resulting impairment or disability; she is permanently and totally disabled, and is entitled to future medical benefits.

Respondent argues Claimant has not sustained her burden of proving she is entitled to an award of permanent total disability compensation and future medical benefits. In support of their argument, Respondent argues Claimant is not credible rendering the physician opinions to be based on mistaken assumptions and incomplete information. Claimant maintains the Award should be affirmed and she should be awarded permanent total disability compensation and future medical benefits.

### **PRINCIPLES OF LAW AND ANALYSIS**

- 1. Claimant's January 28, 2020 work accident was the prevailing factor causing her injuries, medical conditions and resulting impairment or disability.**

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 depends.<sup>6</sup> "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

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<sup>6</sup> See K.S.A. 44-501b(c).

more probably true than not on the basis of the whole record.<sup>7</sup> The trier of fact considers the whole record in determining if the employee satisfied the burden of proof.<sup>8</sup>

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.<sup>9</sup> The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.<sup>10</sup> Establishing prevailing factor is based on all relevant evidence and is not dependent on medical opinions.<sup>11</sup>

Dr. Rippee, the authorized treating physician opined the January 28, 2020 work accident was the prevailing factor causing Claimant's postconcussion syndrome, the treatment provided and need for restrictions. He does not provide impairment ratings, but opined Claimant does have impairment as a result of her postconcussion syndrome. Dr. Sand, the Court-ordered evaluator, opined Claimant suffered a significant head injury as a result of her January 28 work injury and her gait difficulty was primarily the result of her work injury. Dr. Sand opined Claimant's prior orthopedic issues contributed to her gait difficulty, but her work-related problems were primarily neurologic and not orthopedic. Dr. Tidemann, also a court-ordered evaluator, opined Claimant has 3% whole body functional impairment for residual mental status and emotional/behavior issues from the work injury. Ms. Benning, who has monitored Claimant's care since 2015, opined Claimant's unstable gait is due solely to her January 28 work accident because it was not present prior to her work injury.

Dr. Fevurly, Respondent's evaluator, opined Claimant suffered a mild traumatic brain injury, visual disturbance, disequilibrium, resulting in gait disturbance and unsteadiness on her feet, cognitive and memory issues and headaches as a result of the work event on January 28, 2020. Dr. Aks, Claimant's evaluator, opined the January 28 work injury was the prevailing factor for her chronic intractable post-concussion symptoms and disability.

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<sup>7</sup> See K.S.A. 44-508(h).

<sup>8</sup> See *id.*

<sup>9</sup> See K.S.A. 44-508(d).

<sup>10</sup> See K.S.A. 44-508(d),(g).

<sup>11</sup> See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430 (Kan. WCAB Jul. 12, 2018).

The medical evidence, along with the evidence of Claimant's ability to perform the physical requirements of her job as a CNA prior to her injury without restriction or limitation, establishes the January 28, 2020 work accident was the prevailing factor causing Claimant's injuries, medical conditions and resulting impairment or disability.

**2. Claimant has 45% functional impairment to the whole body and is permanently totally disabled.**

The ALJ chose not to find a specific functional impairment rating because he found Claimant to be permanently totally disabled. Three physicians provided whole body functional impairment ratings. At Claimant's request, Dr. Aks opined 45%, Dr. Fevurly at Respondent's request 7% and Dr. Tidemann under Court-order 3%.

Claimant was referred to Dr. Reddell, an optometrist, who fitted her with prism lenses to assist with vision and balance issues. Dr. Fevurly's rating did not include impairment for Claimant's visual issues. He deferred any possible functional impairment for residual visual impairment to neuro-optometry. Dr. Tidemann is not a medical doctor, but assigned Claimant 3% for residual mental status and emotional/behavior. Dr. Tidemann's rating did not include any physical impairment. While it is true the Board has deferred to Court-ordered or treating physician's opinions in the past, it is not required. To blindly follow a Court-ordered or treating physician's opinions would breach the obligation as the trier of fact to "determine which testimony is more accurate and credible."<sup>12</sup> The functional impairment ratings to the whole body provided by Dr. Fevurly and Dr. Tidemann are incomplete because they do not address all of Claimant's impairments. In addition, it is hard to reconcile the low impairment ratings provided by Dr. Fevurly and Dr. Tidemann in light of the significant restrictions placed on Claimant by all the physicians, including Dr. Fevurly. The restrictions of Dr. Rippee, Dr. Sand and Dr. Aks limit Claimant to a four hour work day and preclude her from returning to work as a CNA.

In *Johnson v. U.S. Food Service*<sup>13</sup>, the Kansas Supreme Court held in rating whole body impairments the ratings calculations should begin with the *Guides*, 6<sup>th</sup> edition as a starting point and consider competent medical evidence to modify or confirm the rating.

Respondent argues Dr. Aks rating is not credible because he could not justify the basis of his rating and was unable to break it down into the specific categories (tables) he considered. A *Johnson* analysis does not require breaking down a rating into specific categories. It requires the physician to begin with the *Guides*, 6<sup>th</sup> edition as a starting point,

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<sup>12</sup> See *Burns v. Stafford County Flour Mills Co.*, No. 1,072,562, 2017 WL 4106376 (Kan. WCAB, Aug. 25, 2017).

<sup>13</sup> *Johnson v. U.S. Food Service*, 312 Kan 597, 478 P.3d 776 (2021).

which Dr. Aks did, and to utilize competent medical evidence to arrive at a final rating. Dr. Aks detailed how it was difficult to provide ratings for concussions and the analysis he utilized in arriving at his final rating. In addition, Dr. Aks is the only physician to include all of Claimant's impairments. The Board finds Dr. Aks 45% functional impairment to the whole body, utilizing a *Johnson* analysis, to be the most credible and finds Claimant has 45% functional impairment to the whole body.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.<sup>14</sup> Concluding an employee is permanently and totally disabled because the employee is essentially and realistically unemployable is consistent with legislative intent.<sup>15</sup> In *Wardlow*, the Court of Appeals affirmed a finding of permanent total disability by the trial court based on a totality of the evidence, including consideration of the nature of the injuries, the testifying physicians' opinions on the employees ability to work, the activities the employee can perform, the employee's age, education, vocational history and current symptoms. *Wardlow* continues to be cited by the Court of Appeals.<sup>16</sup>

Respondent argues Claimant is not credible, over-reported her symptoms, engaged in malingering and provided misleading information to the physicians resulting in flawed opinions. Respondent asserts Claimant's actions were motivated by secondary gain and she chose to discontinue working because she does not want to work. The ALJ was not persuaded by Respondent's argument and neither is the Board. The greater weight of the evidence supports the ALJ's conclusion Claimant is permanently and totally disabled.

Dr. Rippee, the authorized treating physician, opined Claimant does have impairment as a result of her post-concussion syndrome. He recommended permanent work restrictions of sedentary or sitting work only and for not more than four hours per day. She should use a cane and should have no patient contact for safety except for when in a seated position. Claimant will need frequent breaks from computer usage, 5-10 minute break for every 30 minutes of computer usage. His restrictions were not based upon Claimant's orthopedic condition or her osteoarthritis. Dr. Rippee did not believe Claimant was manipulating or exaggerating her symptoms.

Dr. Sand, the Court-ordered evaluator, recommended permanent restrictions of no prolonged standing, stooping or crawling. Claimant should use assistive ambulating

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<sup>14</sup> See K.S.A. 44-510c(a)(2).

<sup>15</sup> See *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 113, 872 P.2d 299 (1993).

<sup>16</sup> See *Stark v. Atwood Good Samaritan Center*, No. 113,075, 2016 WL 4076203, at \*7 (Kansas Court of Appeals unpublished opinion July 29, 2016).

devices and should not carry anything. Claimant should not climb or be exposed to unprotected heights. Dr. Sands restrictions were solely related to her January 28 work injury. Dr. Sand reviewed the medical reports of Dr. Rippee and agreed with his restrictions of no working more than four hours per day, sedentary work only, use of a cane and Claimant should be allowed frequent breaks if engaging in prolonged computer work.

Dr. Aks restricted Claimant to sedentary work and limited her workday to four hours. In addition, he recommended Claimant should have frequent breaks from computer use after thirty minutes, use a cane, no walking on uneven surfaces, no walking more than fifty feet without the use of a walker, and no climbing stairs.

Dr. Fevurly recommended permanent work restrictions at the light work level with lifting up to 20 pounds occasionally and limiting overhead work to an occasional basis. Claimant could work eight hour shifts and was capable of performing computer or office type duties. Claimant should avoid work at unprotected heights and if unsteady on her feet, use of a cane. Dr. Fevurly's opinion Claimant can work an 8 hour day stands alone. More importantly, his restrictions were based on faulty assumptions Claimant had permanent restrictions which would have been accommodated by her employer as a result of her prior bilateral knee replacements.

Mr. Thomas opined Claimant was permanently and totally disabled. Considering the initial restrictions of Dr. Sand and Dr. Fevurly, Mr. Benjamin opined Claimant could return to the labor market. Considering the restrictions of Dr. Rippee, Dr. Aks and Dr. Sand's final restrictions, limiting Claimant to a four-hour work day, Mr. Benjamin opined Claimant was unemployable and unable to engage in substantial gainful employment.

Claimant is 58 years of age with a high school education. She has primarily been employed in the physically demanding occupation of a CNA. She was capable of performing the physical requirements of a CNA prior to her work injury. She has not worked since her injury and is receiving social security disability benefits. Claimant suffered a significant traumatic injury resulting in poor balance, ambulation issues, headaches and visual impairment. She can not return to work as CNA, her primary occupation for the past twenty years. Claimant has lost the ability to take walks, watch television and engage in computer activities.

Based upon a totality of the evidence, and consideration of the expert testimony of Dr. Rippee, Dr. Sand, Dr. Aks and the vocational opinions of Mr. Thomas and Mr. Benjamin, Claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, the award of permanent and total disability compensation is affirmed.

### 3. Claimant is entitled to future medical treatment.

The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or relieve the effects of the injury.<sup>17</sup> 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 healthcare provider and not home exercises or over the counter medications."<sup>18</sup>

Dr. Siegle, Dr. Rippee and Dr. Sand did not offer specific future medical opinions. Dr. Rippee and Dr. Sand recommended continued use of assistive devices to help Claimant with her balance and ambulation issues. Dr. Fevurly opined Claimant does not require future medical benefits, but opined if she is unsteady, she should use a cane to prevent falls. Dr. Aks opined Claimant will require future medical benefits. Specifically, he recommended acetaminophen for chronic headaches and assistive devices (cane and/or walker) for ambulation due to her balance issues. Ms. Benning is prescribing Tramadol for Claimant's headaches and also recommended continued use of assistive devices. Dr. Reddell fitted Claimant with prism lenses to assist with vision and balance issues. Currently, Claimant walks exclusively with a walker and takes Topomax for headaches.

Claimant provided sufficient medical evidence showing it is more probably true than not additional medical treatment will be necessary after she was placed at MMI, thereby overcoming the presumption Respondent's obligation to provide medical treatment upon her reaching MMI terminated under K.S.A. 44-510h(e). The Award of future medical treatment is affirmed.

### AWARD

**WHEREFORE**, it is the finding, decision and order of the Board the Award of Administrative Law Judge Bruce E. Moore, dated November 7, 2023, is affirmed regarding prevailing factor, permanent total disability compensation and future medical benefits and modified to reflect Claimant has 45% functional impairment to the whole body.

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<sup>17</sup> See K.S.A. 44-510h(a).

<sup>18</sup> See K.S.A. 44-510h(e).

**IT IS SO ORDERED.**

Dated this day of May 2024.

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Jeff Cooper, Attorney for Claimant  
Tim Emerson, Attorney for Respondent and its Insurance Carrier  
Hon. Bruce E. Moore, Administrative Law Judge