

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>MEGAN SHAFFER</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0482-451
<b>THE UNIFIED SCHOOL DISTRICT 368</b>	)	CS-00-0475-001
Respondent	)	
AND	)	
	)	
<b>FIRST DAKOTA INDEMNITY CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (Respondent) requested review of the April 3, 2024, Award by Administrative Law Judge (ALJ) Julie A.N. Sample. This case has been placed on the summary docket for disposition without oral argument.

**APPEARANCES**

Zachary K. Mark appeared for Claimant. Samantha N. Benjamin-House appeared for Respondent.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held January 31, 2024; the transcript of the Evidentiary Deposition of Claimant from February 5, 2024, with attached exhibit; the transcript of the Evidentiary Deposition of Carrie Pohl, M.D., from March 4, 2024, with exhibits attached; the transcript of the Evidentiary Deposition of John Ciccarelli, M.D., from March 4, 2024, with exhibits attached; the documents of record filed with the Division; and the briefs filed by the parties.

**ISSUES**

1. What is the nature and extent of Claimant's disability?
2. Is Claimant entitled to future medical treatment?

### FINDINGS OF FACT

Claimant works for Respondent as a paraprofessional life skill's educator. In January 2023, Claimant worked with children aged five to eleven years, taking them to recess, lunch, and specials. Claimant assisted the children with restroom breaks, dressing them as required, and physically moved the children with wheelchairs. Claimant also assisted with behavior issues.

On January 12, 2023, Claimant was called to help with a student, aged 8, exhibiting extreme behaviors. Claimant used her body to block the student, who was throwing a table and chairs at other students. Claimant and a coworker carried the student to a protective room, but his behavior continued. Claimant stayed with the student until 3:30 p.m., when he left. Claimant stated she was repeatedly hit and kicked by the student throughout the day. Claimant testified she felt immediate pain in her low back and right leg, "like somebody jabbed something into [her] back and it was just like radiating electricity through [her] leg and [her] back."<sup>1</sup>

Claimant reported the incident to Respondent and was referred to Concentra, an occupational treatment facility, where she was treated conservatively. An MRI conducted on February 10, 2023, showed a disc herniation at L5-S1 with some nerve compression on the right at S1. Claimant was then referred to Dr. John Ciccarelli, a board certified orthopedic surgeon specializing in spine injuries, for evaluation and treatment.

Dr. Ciccarelli first examined Claimant on March 2, 2023. Claimant reported low back and right leg pain. The pain diagram showed pain down the entire right leg. Dr. Ciccarelli determined Claimant sustained a work-related disc herniation at L5-S1 and recommended surgical intervention. Dr. Ciccarelli performed a single-level discectomy and decompression at L5-S1 on March 29, 2023. Claimant reported improved symptoms following surgery, and she was ultimately released at maximum medical improvement by Dr. Ciccarelli on July 6, 2023. Dr. Ciccarelli did not impose permanent restrictions or recommend additional medical treatment. Dr. Ciccarelli testified flare-ups are not uncommon following this type of surgery and it is reasonable to return for a follow-up appointment to discuss options should one occur.

Starting with the *AMA Guides*<sup>2</sup> and using his medical expertise, Dr. Ciccarelli determined Claimant sustained 5 percent whole person permanent partial impairment. Dr. Ciccarelli based his rating on Table 17-4 of the *AMA Guides* for Class 1 single-level isolated disc impairment with resolved radicular complaints and no additional radicular

---

<sup>1</sup> Claimant Depo. at 7.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

findings. Additionally, Dr. Ciccarelli considered his assessment of Claimant, the radiographic studies, his findings during surgery, and Claimant's normal postoperative recovery when forming his rating opinion.

Dr. Carrie Pohl examined Claimant on September 13, 2023, at her counsel's request. Dr. Pohl is a primary care physician with the Department of Veterans Affairs, board certified in geriatrics and internal medicine. Additionally, Dr. Pohl is a contract physician with Midwest Medical Group, providing external evaluations for assigning permanent impairment. Dr. Pohl reviewed Claimant's history and available medical records, noting Claimant sustained a mild back sprain in 2012 that resolved within two weeks. Dr. Pohl conducted a physical examination, finding Claimant exhibited a guarded gait, tenderness with lumbar spine range of motion, tenderness to palpation, and a positive straight-leg test on the right.

In the history section of her report, Dr. Pohl notes Claimant had a telemedicine evaluation on January 17, 2023, five days after her accident, by Dr. Joshua Stevens, who recorded complaints of numbness and tingling down her legs, worse on the left. Dr. Pohl recorded the following finding upon examination of Claimant:

The main complaint that she had was low back pain, and it was just on the body map that she filled out as we were talking. It was just kind of diffuse lumbosacral low back pain. At the time, she was not reporting any radicular symptoms or pain in the leg, and a lot of that pain was irritated or exacerbated with bending, lifting or a prolonged position. So she could stand for a little bit but prolonged standing was uncomfortable. She could sit for a little bit, but prolonged sitting was uncomfortable. She could lay down, but again, a prolonged position without repositioning or moving around was uncomfortable.<sup>3</sup>

Dr. Pohl agreed with Dr. Ciccarelli's diagnoses but concluded Claimant will require future medical treatment, as she is at risk for adjacent segment disease and flare-ups. Claimant may require physical therapy, injections, or possible surgical intervention. Dr. Pohl did not provide any permanent work restrictions.

Using the *AMA Guides*, Dr. Pohl found Claimant sustained a 10 to 14 percent impairment for a Class 2 disc herniation with radiculopathy. Dr. Pohl stated this rating was inadequate when considering the impact of the injury on Claimant's ability to perform her job and activities of daily living. Utilizing her experience and medical competence, Dr. Pohl determined Claimant sustained 33 percent whole body permanent partial impairment as a result of the work accident. Dr. Pohl opined the prevailing factor causing Claimant's conditions and need for treatment was the work accident of January 12, 2023.

---

<sup>3</sup> Pohl Depo. at 13-14.

Additional medical records indicate Claimant sought chiropractic treatment with Renewed Life Chiropractic (Renewed Life) from August 2021 through September 2022. At Claimant's first visit, on August 20, 2021, she indicated back pain starting 11 years prior with no radiating symptoms. On March 16, 2022, Claimant reported a flare of sharp, stabbing low back pain, worsened with activity, with no radiation. On March 21, 2022, Claimant indicated a gradual decrease of low back pain, now a constant dull ache with no radiation. On June 16, 2022, Claimant returned for an adjustment related to migraines. Records dated September 14, 2022, state Claimant presented with cervicothoracic complaints. By September 16, 2022, her last visit, Claimant reported decreased pain in her neck. The records included headaches, migraines, and low back pain as Claimant's concerns. Claimant testified her low back pain was completely resolved following chiropractic care.

The physicians were presented with the additional records from Renewed Life. Dr. Pohl reviewed the records from Renewed Life and testified her opinions were unchanged. Dr. Ciccarelli produced a letter dated January 31, 2024, in which he stated his opinions remained unchanged. Dr. Ciccarelli wrote, "[T]he records provided do not specifically identify any specific radicular complaints that were present following her 1/12/23 work injury so my opinion on causation has not changed."<sup>4</sup> Dr. Ciccarelli's rating of 5 percent was based solely on the work accident and does not include preexisting impairments. Dr. Ciccarelli, in a letter dated July 25, 2023, based his rating solely on the *AMA Guides*. In a follow up letter, dated January 31, 2024, Dr. Ciccarelli explained he had based his rating on competent medical evidence to arrive at his conclusion.

Following her release from Dr. Ciccarelli on July 6, 2023, Claimant changed her position to a preschool with younger students. Claimant's job duties remain essentially unchanged, though she now works with 3- and 4-year old children. She must get up and down off the floor and physically pick up students. Claimant also works for an after-school daycare for approximately 1.5 hours per day and is a full-time student at Wichita State University. Claimant testified she has not missed work due to low back pain since her release from Dr. Ciccarelli. Claimant has not sought treatment for her low back since July 6, 2023.

When asked about her current symptoms, Claimant stated she would experience random times where pain still shoots down her legs or her feet go numb or tingle. She said she was experiencing tingling in her leg at the time her testimony was taken.

The ALJ found the opinions of Drs. Ciccarelli and Pohl equally credible and determined Claimant sustained 19 percent whole person permanent partial impairment, reflecting the nature of the injury, scope of treatment, and impact on Claimant's ability to

---

<sup>4</sup> Ciccarelli Depo., Ex. 2 at 1.

perform work duties and other activities. Further, the ALJ found Claimant is entitled to future medical treatment.

### PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant sustained 5 percent whole body permanent partial impairment as a result of the work accident. Respondent notes Dr. Ciccarelli not only specializes in spine injuries but, as Claimant's authorized treating physician, was better positioned to evaluate her condition. Respondent argues Claimant is not entitled to future medical treatment.

Claimant contends the ALJ's Award should be affirmed. Claimant argues the award of 19 percent whole person permanent impairment and entitlement to future medical treatment is supported by competent medical evidence.

#### **1. What is the nature and extent of Claimant's 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>5</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 more probably true than not on the basis of the whole record.<sup>6</sup> The trier of fact considers the whole record in determining if the employee satisfied the burden of proof.<sup>7</sup>

The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the *AMA Guides*.<sup>8</sup> In *Johnson v. U.S. Food Service*,<sup>9</sup> the Kansas Supreme Court held, in rating whole body impairments, the ratings calculations should begin with the *AMA Guides* as a starting point and consider competent medical evidence to modify or confirm the rating.

Dr. Pohl correctly identified Claimant's permanent condition as a Class 2 impairment under the *AMA Guides*. Claimant had a documented history of injury resulting in disc

---

<sup>5</sup> K.S.A. 44-501b(c).

<sup>6</sup> K.S.A. 44-508(h).

<sup>7</sup> See *id.*

<sup>8</sup> K.S.A. 44-510e(a)(2)(B).

<sup>9</sup> *Johnson v. U.S. Food Service*, 312 Kan 597, 478 P.3d 776 (2021).

herniation and, based upon the pain complaints recorded by Dr. Pohl and Claimant's testimony, continued complaints of intermittent radicular complaints. Given Claimant's ongoing complaints of pain and physical limitations, and based on credible medical evidence, Dr. Pohl increased the impairment to 33 percent. The Board finds increasing the impairment rating by more than double based solely upon complaints of random pain is excessive.

The Board finds Dr. Ciccarelli's assessment of 5 percent inadequate for someone who has undergone a laminectomy and continues to have radicular symptoms.

Claimant's impairment is more probably than not somewhere between a number higher than Dr. Ciccarelli's rating and lower than Dr. Pohl's rating. The Board finds 14 percent whole person permanent partial impairment reasonably represents the extent of Claimant's permanent partial impairment resulting from her January 12, 2023, work-related injury by accident.

## **2. 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.

The ALJ left the right to future medical treatment open. In her Award, the ALJ wrote:

Given the surgical procedure she experienced and her testimony about the persisting symptoms in her low back, the Court finds it is more probably true than not that Claimant will need medical treatment to cure and relieve the effects of her injury.<sup>10</sup>

The Board agrees. Claimant had an invasive procedure and continues to have pain and symptoms. The Board finds the testimony of Dr. Pohl credible on the issue of the need for future medical treatment. Dr. Ciccarelli agreed Claimant would have occasional

---

<sup>10</sup> ALJ Award (Apr. 3, 2024) at 6-7.

flare-ups and it would be reasonable for Claimant to return for a follow-up appointment to discuss options, should a flare-up occur.

Claimant has met the burden of proving it is more probably true than not additional medical treatment will be necessary.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of ALJ Julie A.N. Sample dated April 3, 2024, is modified to reflect a 14 percent permanent partial impairment to the body as a whole, and affirmed in all other respects.

Claimant is entitled to temporary total disability compensation for 6.71 weeks, paid at \$330.00 per week, totaling \$2,214.30, followed by permanent partial disability compensation for 58.14 weeks at the rate of \$330.00 per week, for a total award of \$19,186.20. Through August 30, 2024, all amounts are due and owing.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2024.

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

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

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

c: (Via OSCAR)

Zachary K. Mark, Attorney for Claimant  
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier  
Hon. Julie A.N. Sample, Administrative Law Judge