

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHARITA LARKINS
Claimant

v.

FEDEX GROUND PACKAGE SYSTEM, INC.
Self-Insured Respondent

AP-00-0482-667
CS-00-0472-914

ORDER

Claimant appealed the April 19, 2024, Award issued by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on August 29, 2024.

APPEARANCES

Mitchell W. Rice appeared for Claimant. Jodi J. Fox and Frank Matande 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 Proceedings, held January 4, 2024; the transcript of Evidentiary Deposition via Videoconference of Charita Larkins, taken February 15, 2024; the transcript of Evidentiary Deposition via Videoconference of Pedro A. Murati, M.D., taken February 1, 2024, including Exhibits 1 and 2; the narrative report of Dr. James Zarr, M.D., dated January 16, 2024, which was admitted by stipulation of the parties; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. What is the nature and extent of disability?
2. Did the award of permanent partial disability compensation based partly on an impairment rating issued solely under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*), violate Claimant's constitutional rights?
3. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent loading trucks from June 2021 through July 2023. On October 22, 2022, Claimant was loading a truck. As Claimant walked out of the truck, her foot fell between a gap and she hit her left knee on a pole. Claimant experienced pain and swelling. Claimant testified she had a knot on her leg, and she walked with a limp. Claimant was unable to walk initially, and a manager helped Claimant get up. At regular hearing, Claimant confirmed she only injured her left knee.

Claimant received conservative treatment at Concentra from October 24, 2022, through December 27, 2022. Claimant's treatment records are not part of the record. According to the treatment history recorded by Dr. Murati, Claimant reported left knee pain making it difficult to bear weight. No instability or locking was noted, and Claimant denied suffering hip or back pain. An x-ray was negative for a fracture, and an MRI performed on November 16, 2022, was interpreted as showing mild patellar tendinopathy but was otherwise unremarkable. According to the treatment history recorded by Dr. Zarr, physical therapy was ordered, but Claimant stopped attending physical therapy. Claimant was released from treatment on December 27, 2022, without restriction.

According to Dr. Zarr's report, Claimant worked light duty while receiving medical treatment at Concentra. Claimant's employment with Respondent subsequently ended. Claimant currently works as a full-time sales associate at Hibbett Sports.

In May 2023, Claimant was involved in a motor vehicle accident, and her car was struck on the passenger side. Claimant reportedly experienced symptoms involving the left thigh, chest and low back. Claimant reported to Dr. Murati her low back symptoms returned to pre-motor vehicle accident status. Treatment records concerning any injuries sustained from the motor vehicle accident are not in evidence.

Dr. Murati evaluated Claimant at her attorney's request on September 15, 2023. Claimant reported left knee pain, which varied in intensity based on activity. Claimant also reported weakness and the knee giving out. Claimant stated she had left knee soreness from bending too long, and she was unable to stand too long. Claimant walked with a limp. Claimant also reported occasional low back pain with activity, which worsened with bending and lifting. Claimant said she was unable to run. Dr. Murati reviewed some treatment records from Concentra, but he did not review Claimant's physical therapy records.

Examination was notable for lack of sensation of the right L5 dermatome, but full strength was noted. Tenderness to palpation of the L5 spinous process was noted, with increased tone, guarding and withdrawal on the right side. Sacroiliac testing was positive on the right side, and pelvic compression testing was positive on the left side. Left-sided medial and lateral patellar apprehension was noted, with tenderness of the MCL and pes anserine bursa. Left thigh atrophy, a five degree contracture of the left knee, and full flexion were noted. Dr. Murati thought an antalgic gait was present.

Dr. Murati diagnosed left patellofemoral syndrome, left MCL sprain, per anserine bursitis, left knee contracture, low back sprain from an antalgic gait, right-sided sacroiliac dysfunction, left trochanteric bursitis and IT band strain. Dr. Murati thought all of Claimant's conditions were caused by the work-related accident. Dr. Murati rated Claimant's impairment at 16% of the body as a whole, with 12% of the body as a whole attributable to the left lower extremity.

Dr. Murati's rating was based on the *AMA Guides* as a starting point and competent medical evidence. In particular, Dr. Murati deviated from the *AMA Guides* by assessing impairment for all of Claimant's diagnoses, rather than the most serious injury. Dr. Murati also recommended future medical treatment, including yearly examinations by a physician, as well as physical therapy, injections, radiologic studies, prescription medication and surgery if there were complications. Dr. Murati imposed permanent restrictions of no climbing ladders, squatting, driving a car with a manual transmission, kneeling, using left-sided foot controls, lifting over twenty pounds occasionally, lifting ten pounds frequently, lifting five pounds constantly, or lifting below knuckle height. Dr. Murati thought Claimant could occasionally stand, walk, bend, crouch or stoop. Dr. Murati suggested alternating sitting, standing and walking. Dr. Murati also thought Claimant could frequently sit and drive a car with an automatic transmission.

On cross-examination, Dr. Murati confirmed the MRI scan only revealed mild patellar tendinopathy. Dr. Murati did not know if Claimant attended physical therapy. Dr. Murati was not aware Claimant denied reporting hip or back pain to Concentra at the initial appointment. Dr. Murati reviewed the symptoms Claimant reported from the motor vehicle accident, but he did not know if Claimant received medical treatment. Dr. Murati understood from Claimant she returned to her pre-motor vehicle accident status.

On January 16, 2024, Dr. Zarr evaluated Claimant at the request of Respondent. Dr. Zarr's narrative report was admitted by stipulation, and Dr. Zarr did not testify. Dr. Zarr noted Claimant reported left knee pain of 5/10 in intensity. Dr. Zarr reviewed Claimant's treatment records from Concentra, and noted Claimant received conservative treatment for an MCL sprain. Dr. Zarr also noted Claimant stopped attending physical therapy. Dr. Murati's report was also reviewed. Dr. Zarr did not mention the subsequent motor vehicle accident.

Examination was notable for symmetric reflexes, normal range of motion of the left lower extremity, extension to 0 degrees, flexion to 140 degrees, normal sensation, normal strength, and tenderness at the medial joint line. Dr. Zarr noted a mildly antalgic gait.

Dr. Zarr diagnosed persistent left knee pain secondary to a fall. Dr. Zarr confirmed Claimant reached maximum medical improvement, could work full-time without restrictions and only required over-the-counter medication in the future. Based on the *AMA Guides*, Dr. Zarr rated Claimant's impairment at 1% of the left knee for a soft-tissue injury, category

1. The report does not indicate whether Dr. Zarr independently considered competent medical evidence in assessing Claimant's impairment.

Claimant testified she could not stand for a long period of time, and she had a difficult time getting up if she bended too low. Claimant testified her knee pops and is painful when the weather is cold. Claimant also testified standing for hours was painful.

On April 19, 2024, ALJ Hursh issued the Award. ALJ Hursh concluded Claimant sustained a personal injury from an accident arising out of and in the course of her employment with Respondent. ALJ Hursh reviewed the medical evidence, as well as Claimant's testimony, and concluded Claimant's injuries were limited to a left knee strain treated conservatively. ALJ Hursh found the rating of Dr. Zarr more credible than Dr. Murati's rating, which ALJ Hursh found excessive and included unrelated parts of the body. ALJ Hursh awarded permanent partial disability compensation based on 1% functional impairment of the left knee. Future medical was denied, after ALJ Hursh found the opinion of Dr. Zarr more credible than Dr. Murati's opinion. Finally, ALJ Hursh ruled on the issue of average weekly wage and compensation rate. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the determinations of nature and extent of disability and future medical contained in the Award are erroneous. Claimant argues the rating report of Dr. Zarr should not be considered because it does not follow the rating methodology of *Johnson v. U.S. Foods*¹ or *Weaver v. Unified Gov't of Wyandotte County*.² Claimant argues Dr. Murati's rating is the only rating following *Johnson* and *Weaver*, and should be adopted by the Board as uncontested evidence. Claimant also argues consideration of Dr. Zarr's rating violates Claimant's constitutional rights. Finally, Claimant argues Dr. Murati's opinion on future medical satisfies the burden of proof from K.S.A. 44-510h and future medical should be awarded. Respondent argues the determinations of nature and extent and future medical should be affirmed. Compensability and average weekly wage are not at issue.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.³ The provisions of the Workers Compensation Act shall be applied impartially

¹ 312 Kan. 597, 478 P.3d 776 (2021).

² 63 Kan. App. 2d 773, 539 P.3d 617 (2023).

³ See K.S.A. 44-501b(a).

to all parties.⁴ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.⁵

1. THE BOARD DOES NOT POSSESS AUTHORITY TO REVIEW AN ALLEGED CONSTITUTIONAL VIOLATION AND THE ISSUE IS PRESERVED FOR THE APPELLATE COURTS.

Claimant argues the award of permanent partial disability compensation violates Claimant's constitutional rights because it is based partly on the rating issued by Dr. Zarr, which Claimant argues does not comport with the methodology from *Johnson* or *Weaver*. The Appeals Board does not possess the authority to review independently the constitutionality of the Kansas Workers Compensation Act or its application.⁶ In this case, Claimant's argument concerns whether the Act was applied in an unconstitutional manner. The Board does not possess authority to consider this argument, and it is reserved for determination by the appellate courts.

2. THE AWARD OF PERMANENT PARTIAL DISABILITY COMPENSATION IS AFFIRMED.

Claimant argues the award of permanent partial disability compensation contained in the Award is erroneous. Claimant maintains Dr. Zarr's rating cannot be considered by the Board because Dr. Zarr failed to consider competent medical evidence. Claimant concludes the only rating correctly following the methodology from *Johnson* or *Weaver* was the rating issued by Dr. Murati. As a result, the award of permanent partial disability compensation should be modified to reflect 19% functional impairment of the body as a whole, attributable to the left knee, hips and the low back.

A. THE AWARD'S CONSIDERATION OF DR. ZARR'S RATING WAS NOT ERRONEOUS BECAUSE IT WAS BASED ON COMPETENT MEDICAL EVIDENCE, AS WELL AS THE *AMA GUIDES*.

The Board first addresses whether Dr. Zarr's rating can be considered. Regardless of whether Claimant sustained a scheduled left knee injury only, or sustained multiple injuries compensated as an injury to the body as a whole, an award of permanent partial disability compensation based on functional impairment must be based on an impairment

⁴ See *id.*

⁵ See K.S.A. 44-501b(c).

⁶ See, e.g., *Pardo v. United Parcel Service*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018) (holding use of the *AMA Guides*, 6th Edition, for a scheduled injury was unconstitutional as applied in that case only).

rating issued by a physician, who initially consults the *AMA Guides*, but ultimately bases the rating on competent medical evidence.⁷ In *Weaver*, the Court of Appeals indicated a physician bases a rating on competent medical evidence if the physician incorporates exams, patient reports, tests or research the physician's training and experience directs the physician to use to formulate a fair and comprehensive result.⁸

In support of her argument, Claimant cites *Endicott v. Ennis, Inc.*⁹ In *Endicott*, a majority of the Board reviewed three impairment ratings issued by Drs. Twiss, Divelbiss and Zimmerman. The Board noted Dr. Zimmerman issued an impairment rating using the *Johnson* methodology, although it contained other deficiencies.¹⁰ Drs. Twiss and Divelbiss issued impairment ratings using the *AMA Guides* without explanation of whether the *Johnson* methodology was followed. The Board, however, reviewed Dr. Twiss' evaluations as the treating physician and Dr. Divelbiss' examination findings as the Court-ordered evaluating physician. The Board also noted deficiencies of the ratings of Drs. Twiss and Divelbiss.¹¹

The Board majority stated an impairment rating based solely on the *AMA Guides* could be sufficient to produce a medically competent rating if the physician opined the rating was also based on competent medical evidence. The physician, however, must make clear the rating was made using the *AMA Guides* as a starting point.¹² The Board, however, issued an award of permanent partial disability compensation based on all three ratings.¹³ The ratings of Drs. Twiss and Divelbiss were not excluded from consideration. *Endicott* ultimately does not support Claimant's argument.

Dr. Murati issued a narrative report explaining how he determined his opinion of Claimant's functional impairment. Dr. Murati also testified in detail about his rating process. Dr. Murati's rating, however, also includes impairment for parts of the body Claimant did not testify produced ongoing problems. Dr. Zarr did not testify because the parties

⁷ See K.S.A. 44-510d(b)(23); K.S.A. 44-510e(a)(2)(B); *Weaver*, 63 Kan. App. 2d at 627; *Johnson*, 312 Kan. at 603.

⁸ See *Weaver*, 63 Kan. App. 2d at 627-28 (citing *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 531-32, 506 P.3d 283 (2022)).

⁹ AP-00-0478-815, CS-00-0014-789, 2024 WL 1472278 (Kan. WCAB Mar. 1, 2024).

¹⁰ See *id.* at *7.

¹¹ See *id.* at *6-7.

¹² See *id.* at *7.

¹³ See *id.* at *7-8.

stipulated to the admission of his report without foundational deposition testimony. Dr. Zarr reviewed in detail the medical records he reviewed, the clinical tests he administered and notable clinical findings. Dr. Zarr adequately explained the basis for his rating under the *AMA Guides*, and competent medical evidence as described in *Weaver*.

As in *Endicott*, both ratings have shortcomings. Both physicians rendered opinions within a reasonable degree of medical certainty, after reviewing the records of Claimant's tests and treatment and after performing clinical examinations of Claimant. Neither *Johnson*, nor *Weaver*, requires a physician to explicitly state a rating was determined by using the *AMA Guides* as a starting point followed by consideration of competent medical evidence. In this particular case, the Board finds and concludes both ratings were based on competent medical evidence, as well as the *AMA Guides*. The Award did not erroneously consider Dr. Zarr's rating.

B. THE AWARD OF PERMANENT PARTIAL DISABILITY COMPENSATION BASED ON 1% FUNCTIONAL IMPAIRMENT OF THE LEFT KNEE IS AFFIRMED.

The Board next considers the nature and extent of Claimant's functional impairment. Claimant testified she injured her left knee. Claimant testified she initially walked with a limp, but Claimant did not testify she developed back or hip problems from limping. Claimant's two-month course of conservative treatment focused on her left knee. Claimant testified she has residual left knee problems affecting her ability to stand or bend. Claimant is currently working in retail sales, which requires standing walking, bending and lifting. Claimant is not receiving medical treatment.

Dr. Murati testified Claimant sustained left patellofemoral syndrome, a five-degree contracture of the left knee, an MCL sprain, per anserine bursitis, left trochanteric bursitis and IT band strain, low back sprain and right sacroiliac dysfunction on account of the work-related accident. Dr. Murati rated Claimant's impairment at 16% of the body as a whole. Dr. Murati's rating is excessive because Claimant did not testify to ongoing hip or back problems, and did not seek treatment for the low back or hips. Dr. Murati's multiple left knee diagnoses are not supported by an MRI, which displayed signal changes consistent with mild patellar tendinopathy. Dr. Murati did not know if Claimant attended physical therapy, and he did not review physical therapy records.

After reviewing Claimant's course of treatment and conducting an examination notable for normal reflexes, strength, sensation, and range of motion, but a mild antalgic gait and medial joint line tenderness, Dr. Zarr diagnosed persistent left knee pain secondary to a fall. Dr. Zarr did not testify. While it does not appear Dr. Zarr evaluated the back or hips, it also does not appear Claimant reported back or hip pain. Based on a soft-tissue injury, Dr. Zarr rated Claimant's impairment at 1% of the left knee.

Having considered the entire record, the Board finds the opinions of Dr. Zarr more credible than Dr. Murati's. Dr. Zarr's diagnosis is more consistent with Claimant's reported residual problems and current activities. Dr. Murati's multiple diagnoses at the left knee are not supported by the radiologic studies. Dr. Murati's diagnoses of injuries to other parts of the body are not supported by Claimant's testimony or another physician's clinical examination. Claimant is currently working in retail sales on a full-time basis without accommodation. Having considered the record as a whole, the Board concludes Claimant's functional impairment is 1% of the left leg at the 200-week level, referable to the left knee. The award of permanent partial disability compensation contained in the Award is affirmed.

3. THE DENIAL OF FUTURE MEDICAL TREATMENT IS AFFIRMED BASED ON A PREPONDERANCE OF THE CREDIBLE EVIDENCE.

Claimant argues the denial of future medical treatment was erroneous because Dr. Murati's opinion Claimant will require future physician intervention constitutes medical evidence it is more probably true than not additional medical treatment will be necessary.

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 effects of the injury.¹⁵ An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹⁶ 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 that it is more probably true than not that 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.¹⁷

The Board recently ruled K.S.A. 44-510h requires an employee to prove entitlement to future medical treatment by a preponderance of the evidence in the record.¹⁸ In *Endicott*, the award of future medical treatment was affirmed because Dr. Zimmerman recommended

¹⁴ See K.S.A. 44-501b(b).

¹⁵ See K.S.A. 44-510h(a).

¹⁶ See K.S.A. 44-508(f)(2)(B)(ii).

¹⁷ See K.S.A. 44-510h(e).

¹⁸ See, e.g., *Endicott*, 2024 WL 1472278 at *8.

future medical treatment, Dr. Twiss recommended some additional medical treatment, Dr. Divelbiss did not recommend future medical for some injuries but was silent on other injuries, and Claimant testified to ongoing problems.¹⁹

In this case, Dr. Murati recommended extensive future medical treatment, including treatment for parts of the body not affected by the work-related accident. Claimant did not testify to ongoing back or hip problems. Dr. Murati's treatment recommendations are conditioned on Claimant's having complications, which is speculative. Dr. Zarr did not think Claimant required future medical treatment other than over-the-counter medication. Dr. Zarr's assessment of Claimant's condition is more credible than Dr. Murati's. Having considered the record as whole, the Board finds Claimant failed to prove by a greater weight of the credible evidence she is entitled to future medical treatment for the left knee. The denial of future medical treatment is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of a majority of the Appeals Board the Award issued by Administrative Law Judge Kenneth J. Hursh, dated April 19, 2024, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of September, 2024.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

SEPARATE OPINION

¹⁹ See *id.*

The undersigned agrees with the majority on the nature and extent of Claimant's disability. The Board does not possess authority to consider Claimant's constitutional argument. The undersigned, however, disagrees with the majority's ruling on future medical.

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.²⁰ 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.²¹

When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.²² 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. Whether an injury is characterized as minor is irrelevant under the version of the statute in effect on the date of accident.

In this case, Dr. Zarr did not recommend future medical treatment. Dr. Murati recommended future physician intervention, including yearly examinations of the left knee. Dr. Murati also recommended additional treatment options if Claimant developed complications. Arguably, the additional treatment recommendations are speculative, but not the yearly examinations. As a physician licensed to practice medicine in Kansas, Dr. Murati is qualified to provide a medical opinion and his testimony constitutes medical evidence. Dr. Murati's opinion Claimant will require future evaluation by a physician constitutes medical evidence it is more probably true than not additional medical treatment will be necessary. By the barest of margins, this evidence satisfies the particular burden of proof contained in K.S.A. 44-510h. Therefore, the undersigned would award future medical treatment under the plain language of the Act, subject to Claimant's burden to establish eligibility under K.S.A. 44-510k.

²⁰ See K.S.A. 44-510h(a).

²¹ See K.S.A. 44-510h(e).

²² See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

CHARITA LARKINS

11

**AP-00-0482-667
CS-00-0472-914**

**WILLIAM G. BELDEN
APPEALS BOARD MEMBER**

c: (Via OSCAR)

Mitchell W. Rice
Jodi J. Fox
Frank Matande
Hon. Kenneth J. Hursh