

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION

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LINDA HARRIS,

Claimant,

v.

CLAIM NO. 30111159088
Workers' Compensation

STATE OF TENNESSEE,

Defendant

JUDGMENT

This matter came to be heard on October 20, 2015, before James A. Hamilton, III, Commissioner, Tennessee Claims Commission, Western Division, at the Shelby County Courthouse, Memphis, Tennessee. Mr. Christopher Taylor, Esq., represented Claimant, Linda Harris. Ms. Laura Miller, Esq., represented Defendant, State of Tennessee.

Linda Harris, hereinafter referred to as Claimant, brings her action against the State of Tennessee, hereinafter referred to as Defendant, pursuant to Tennessee Code Annotated §9-8-307(a)(1)(K) asserting a claim for workers' compensation benefits for injuries she sustained during the course and scope of her employment as a custodian at the University of Memphis on October 17, 2011.

I.

STIPULATIONS

The parties stipulated and are in agreement that: 1) while acting in the course and scope of her employment claimant sustained a work-related injury on October 17,

2011, when she was throwing bags of trash into a dumpster; 2) proper and timely notice of the injury was given; 3) claimant sustained bilateral rotator cuff tendinitis with impingement; 4) all temporary total disability benefits owed to date have been paid; 5) all authorized medical expenses incurred to date have been paid and 6) claimant's weekly workers' compensation rate is \$259.79.

II.

ISSUES PRESENTED

The issues to be determined are: 1) whether Claimant is entitled to permanent total disability benefits or permanent partial disability benefits; 2) if Claimant is entitled to permanent partial disability benefits, the degree of permanent disability to the right shoulder and/or left shoulder; 3) whether the Claimant's cervical degenerative disc disease was aggravated by the work incident on October 17, 2011, and 4) the degree of permanent partial disability to which Claimant may be entitled if the cervical disc disease was aggravated by the work incident.

III.

FACTUAL SUMMARY

Claimant testified that from January 25, 2000, until October 17, 2011, she was employed by the State of Tennessee and worked as a custodian at the University of Memphis. (Tr., p. 18, line 17-p. 19, line 12) On October 17, 2011, Claimant was throwing bags of trash into a trash dumpster at which time something "popped" in her right shoulder. (Tr., p. 20, lines 16-24-p. 21, line 23-p. 22, line 3) The incident was timely reported to the employer. (Tr., p. 21, lines 6-9) Following the October 17 incident Claimant continued to perform her job duties but used her left arm to do many of the

things she normally did with her right arm. Claimant did not request medical treatment until sometime in early November 2011. (Tr., p. 32, lines 17-20)

Claimant was first seen in the emergency room at Baptist Minor. After an initial diagnosis of bilateral shoulder strain Claimant was told she needed to be seen by an orthopedic specialist. (Tr., p. 23, lines 3-10) Claimant was next seen by Arsen Manugian, MD, an orthopedic surgeon. Dr. Manugian was familiar with Claimant since he had been her doctor since 1987. (Tr., p. 23, lines 12-23) Dr. Manugian had previously performed surgery on one or both of Claimant's shoulders. (Tr., p. 24, lines 4-6)

Claimant was first seen by Dr. Manugian on November 11, 2011, at which time she had complaints of bilateral shoulder pain with the right side being worse than the left side. (Tr. Exh 4, p. 9, lines 3-24) Dr. Manugian's initial diagnosis was rotator cuff tendinitis of both shoulders. (Tr. Exh 4, p. 11, lines 17-23) Dr. Manugian was of the opinion the tendinitis was caused by Claimant's work activities. (Tr. Exh 4, p. 11, lines 17-23) Dr. Manugian's examination of Claimant's neck on November 11, 2011, was normal. (Tr. Exh 4, p. 10, line 21) A conservative course of treatment consisting of injections and physical therapy was commenced. (Tr. Exh 4, p. 11, lines 10-16) In addition, certain restrictions were imposed by Dr. Manugian which consisted of no continuous lifting in excess of five (5) pounds, no intermittent lifting in excess of ten (10) pounds and no climbing, pushing, pulling or above shoulder activity. (Tr., p. 11, lines 13-14; Tr. Exh 4, November 11, 2011 office note) Claimant was unable to perform her job duties as a custodian with the restrictions imposed by Dr. Manugian, therefore,

remained off work. (Tr., p. 27, line 21-p. 28, line 1) Claimant was paid temporary total disability benefits while off work. (Tr., p. 4, lines 20-23)

After physical therapy was begun Claimant saw some improvement in her left shoulder. However, Claimant continued to complain of pain and restricted motion in the right shoulder. Due to Claimant's ongoing symptoms of the right shoulder Dr. Manugian ordered an MRI. (Tr. Exh 4 p. 12, lines 18-24) The MRI performed on December 8, 2011, disclosed degenerative changes to one of the rotator cuff muscles, namely, the infraspinatus muscle, and a partial tear of approximately fifty percent (50%) to the supraspinatus muscle. Dr. Manugian was of the opinion the tear was not caused by an acute or recent event. (Tr. Exh 4, p. 13, lines 3-11) By December 23, 2011, Dr. Manugian found Claimant had a full range of motion in her left shoulder and her condition on the left side seemed to have resolved back to her pre "original visit" state although she still had complaints of pain. (Tr. Exh 4, p. 17, lines 8- 20)

During the course of treatment Claimant also developed complaints of neck pain. Dr. Manugian was of the opinion Claimant was having referred pain in the shoulders which was originating from her neck. (Tr. Exh 4, p. 37, lines 18-23) On January 20, 2012, Dr. Manugian diagnosed the Claimant with degenerative cervical disc disease with intermittent bilateral periscapular pain along with rotator cuff tendinitis with impingement, previous rotator cuff surgery. (Tr. Exh 4, office note of January 20, 2012) An MRI of the cervical spine was also obtained at Dr. Manugian's request on February 1, 2012. Based upon the Claimant's complaints and the findings noted on the cervical MRI it was recommended by Dr. Manugian that Claimant undergo a cervical epidural block. (Tr. Exh 4, p. 39, lines 1- 22) The cervical epidural block was not approved by

the State and/or workers' compensation insurance carrier. (Tr. Exh 4, p. 41, lines 5-22- Tr., p. 26 lines 16-24) In his note dated April 20, 2012, Dr. Manugian stated "most of her shoulder symptoms on the right are secondary to multi-level spondylolytic changes of her cervical spine." (Tr. Exh 4, p. 39, lines 14-17; office note dated April 20, 2012, which is part of Exh 4)

Dr. Manugian also expressed the opinion the spondylolytic changes in the cervical spine had been "aggravated but not caused by her (Claimant's) work." (Tr. Exh 4, p. 39, line 14- p. 40, line 1) Although the cervical epidural block was recommended by the treating physician it was never performed. Dr. Manugian opined the aggravation of the preexisting cervical disc disease would remain symptomatic until the condition was addressed. Dr. Manugian was further of the opinion that until the cervical degenerative disc disease was treated, Claimant would be restricted in her ability to work without restrictions. (Tr. Exh 4, p. 22, lines 15-22) Dr. Manugian was of the opinion Claimant would not benefit from surgery. (Tr. Exh 4, p. 30, lines 12-15)

Upon completion of the conservative course of treatment Claimant was discharged from Dr. Manugian's care. Dr. Manugian's final examination of Claimant took place on June 1, 2012. At the conclusion of the June 1, 2012, visit Dr. Manugian imposed the following restrictions due to her cervical complaints: 1) No continuous lifting over 5 pounds; 2) No intermittent lifting over 10 pounds; 3) No climbing, kneeling, bending, stooping, twisting, push/pull, reaching or overhead activity; 4) No driving at work and 6) No operating of machinery. (Tr. Exh 4, p. 42, lines 9-21- Tr. Exh 4, p. 44, lines 5-9 and the June 1, 2012, office note) The restrictions concerning Claimant's right shoulder are set forth in the Final Medical Report prepared by Dr. Manugian. Dr.

Manugian states in the Final Medical Report Claimant should avoid repetitive continuous overhead pulling, pushing and reaching with her right upper extremity. (Tr. Exh 4, Final Medical Report which is Exh 2 to Depo.)

Dr. Manugian was of the opinion the limitations should remain in place until the cervical spinal block could be administered. Dr. Manugian did not assign a permanent impairment rating for the cervical spine condition even though he had stated in the April 20, 2012, office note the work incident had aggravated the preexisting degenerative disc condition.

In addition to the restrictions Dr. Manugian was of the opinion Claimant had sustained a permanent anatomical impairment of one percent (1%) to the body as a whole as a result of the shoulder injury sustained during the October 17, 2011, work incident. (Tr. Exh 4, p. 23, line 22-p. 24, line 3) The permanent impairment rating was based on the Guides to the Evaluation of Permanent Impairment, Sixth Edition. Dr. Manugian did not assign a permanent impairment rating to the left shoulder since it was asymptomatic on April 20, 2012. (Tr. Exh 4, p. 24, lines 4-7) Although Dr. Manugian had performed surgery on Claimant's left shoulder and right shoulder in the late 1980's and early 1990's he had no record or recollection of having imposed any restrictions or limitations following either surgery. (Tr. Exh 4, p. 32, lines 10-24) Dr. Manugian was of the opinion Claimant was capable of returning to her custodial position even with the restrictions he imposed. (Tr. Exh 4, p. 33, lines 3-6)

In September 2012 Claimant's attorney referred Claimant to Apurva Dalal, MD, for an independent medical evaluation. (Tr. Exh, 1, p. 6, lines 1-8) Dr. Dalal reviewed the medical records of Dr. Manugian, the results of the MRI of the right shoulder as well

as the cervical MRI. He also performed a physical examination of Claimant. (Tr. Exh 1, p. 8, lines 12-23)

Dr. Dalal administered both active and passive range of motion tests to Claimant. (Tr. Exh 1, p. 12, lines 3-4) Dr. Dalal found Claimant had lost 50% to 75% percent of her range of motion in each shoulder during the active range of motion testing. (Tr. Exh 1, p. 13, lines 18-20) When reviewing the MRI he noted a rotator cuff tear. Dr. Dalal found crepitus in the shoulders and multilevel degenerative disc disease in the cervical area. (Tr. Exh 1, p. 9, lines 3-11-p. 13, line 21-p. 14, line 2) Dr. Dalal also found moderate paraspinal muscle spasms in the cervical spine. In his medical opinion, the muscle spasms were caused by degenerative disc disease at multiple levels in the neck. (Tr. Exh 1, p. 15, lines 8-16) Dr. Dalal diagnosed Claimant's condition as multilevel degenerative disc disease of the cervical spine with radiculopathy and impingement syndrome of both shoulders with decreased range of motion. (Tr. Exh 1, p. 16, lines 10-13) Based solely upon the loss of range of motion Dr. Dalal assigned a permanent anatomical impairment rating of twenty three percent (23%) to each upper extremity which converts to fourteen percent (14%) to the body for each upper extremity. (Tr. Exh 1, p. 18, line 20-p. 19, line 5) He also assigned a permanent anatomical impairment of three percent (3%) to the body as a whole based upon the findings made with regard to the cervical spine. (Tr. Exh 1, p. 19, lines 15-24) Dr. Dalal's opinions as to permanent impairment were based on the Guides to the Evaluation of Permanent Impairment, Sixth Edition. (Tr. Exh 1, p. 18, lines 20-22) Dr. Dalal suggested Claimant engage in no lifting greater than five (5) pounds and avoid overhead work, work away from the body, pulling, pushing and lifting. (Tr. Exh 1, p. 20, lines 7-11)

Defendant requested an independent medical examination of Claimant. On March 23, 2015, an examination of Claimant was conducted by Dr. John Brophy, a neurologist in Memphis, Tennessee. (Tr. Exh 3, p. 7, line 10) Dr. Brophy obtained a history from the Claimant and reviewed the treating physician's medical records. Dr. Brophy diagnosed Claimant's condition as: 1) vertigo and light headedness which is considered unrelated to the October 17, 2011, incident; 2) bilateral shoulder issues, which by history, were aggravated by the 2011 work incident and 3) cervical spondylosis without clinical evidence of cervical radiculopathy and myelopathy which was considered to be unrelated to the 2011 occurrence at work. (Tr. Exh 3, p. 10, lines 5-20) Dr. Brophy further opined the Claimant had chronic shoulder problems which were separate and distinct from her cervical spondylosis. (Tr. Exh 3, p. 12, lines 15-18) Dr. Brophy was of the opinion Claimant's shoulder complaints were due to her chronic shoulder problems with multiple surgical procedures.

According to Dr. Brophy, the Claimant sustained no permanent impairment to her cervical spine because of the October 17, 2011, work incident since he found no evidence of cervical radiculopathy and no anatomical changes in her neck. (Tr. Exh 3, p. 13, lines 4-14) He did not recommend that any work restriction be imposed with regard to any cervical spine issues. (Tr. Exh 3, p. 15, lines 18-21) Dr. Brophy deferred to the orthopedic surgeons with regard to any work restrictions concerning Claimant's shoulders. (Tr. Exh 3, p. 16, lines 3-5)

The Claimant, who is now sixty two (62) years of age, testified she has sought other employment since June 1, 2012, but to date has not been successful in securing a new job. (Tr., p. 49, lines 3-15) Claimant had applied for work at numerous places

including Wal-Mart, Target and various other places. (Tr., p. 49, lines 6-18) Claimant admitted she has no sought employment since 2013. (Tr., p. 49, lines 17-22)

Claimant is a high school graduate. (Tr., p. 12, lines 17-19) She later obtained a certificate in business from Memphis School of Commerce in 1973. (Tr., p. 12, lines 20-p. 13, line 4) She testified most of her previous employment involved manual labor. Claimant had worked as a laborer at Southern Cotton before securing employment at the University of Memphis. (Tr. p. 13, lines 12-14) Claimant's prior employment included various housekeeping jobs at Service Master, Chemco, Hyatt Regency, Hampton Inn and Marriot Hotel. (Tr. pages 14, 15, 17, and 18) Claimant supervised a housekeeping crew while employed at Marriot but would have to fill in when a crew member failed to show up for work. (Tr., p. 51, line 19-p. 52, line 2) She worked as a stocker and cashier at a Kroger grocery store, a waitress at the Little Tea Shop and a machine operator and stacker at E. L. Bruce Lumber. (Tr. p. 15, line 7-p. 16, line 19) She had also held jobs which involved food preparation. During her career Claimant drove a school bus. (Tr., p. 17, lines 2-3) Claimant is also a Certified Nurse Assistant who has worked in nursing homes and as a private sitter for elderly individuals. (Tr, p. 41, lines 5-p. 42, line 15)

When Claimant was initially hired at the University of Memphis she worked as a custodian 1. (Tr., p. 18, lines 20-22) As of October 17, 2011, she held the position of custodian 2. As a custodian 2, Claimant was responsible for cleaning 105 offices and four (4) private baths. She had to manually pull trash bags down the three (3) flights of stairs of the building in which she worked since the building was not equipped with an elevator. (Tr., p. 19, line 10-p. 20, line 7)

Claimant acknowledged she drives a motor vehicle even though it is in violation of one of Dr. Manugian's restrictions. (Tr., p. 39, lines 14-20)

Claimant testified her hobbies and daily activities have been affected by the injury. She is currently unable to trim her pecan trees or clean out the gutters on her house. Claimant still mows her yard but uses a self-propelled mower. She does not fish because casting causes discomfort. (Tr., p. 29, line 16-p. 30, line 6)

IV

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission has thoroughly reviewed the record in this case and carefully weighed the credibility of the witness. Consideration was given to the extent of claimant's injury, her age, education, work history, Claimant's own testimony about her physical condition, and the medical evidence summarized above.

The medical opinions regarding Claimant are varied. Dr. Manugian testified Claimant had a permanent injury to the right shoulder and assigned a permanent anatomical impairment rating of one percent (1%) to the body as a whole. Dr. Manugin made no award of permanent impairment to the left shoulder because she was found to have a full range of motion in the shoulder as of December 23, 2011, and was not symptomatic on April 20, 2012.

Dr. Manugian was also of the opinion the work incident aggravated Claimant's pre-existing multi-level spondylolytic changes in the cervical spine and that the aggravation was causing Claimant to experience ongoing symptoms in her right shoulder. Dr. Manugian was of the opinion a cervical epidural block would relieve Claimant's symptoms but the Defendant and/or its workers' compensation insurance

carrier would not approve the procedure. Although he found the work incident had aggravated Claimant's pre-existing degenerative changes in the cervical spine Dr. Manugian expressed no opinion as to permanent anatomical impairment. Dr. Manugian did impose work restrictions for both the neck and shoulder. Dr. Manugian's testimony carried great weight because he was very familiar with Claimant due to his prior medical treatment of her.

Dr. Dalal was in agreement with Dr. Manugian that Claimant had sustained an aggravation of multilevel degenerative disc disease in the cervical spine. Dr. Dalal assigned a three percent (3%) permanent impairment rating due to the aggravation of the degenerative changes in the cervical spine.

Dr. Dalal also awarded permanent anatomical ratings of fourteen percent (14%) to the body based upon active range of motion testing in each of Claimant's shoulders. Dr. Dalal's findings as to the range of motion of the shoulders are questionable and inconsistent with those of Dr. Manugian. First, Dr. Dalal found the loss of range of motion in each shoulder to be identical. Dr. Manugian found Claimant had a full range of motion in her left shoulder as of December 23, 2011. Furthermore, Claimant had few, if any, complaints regarding her left shoulder after December 23, 2011, and was noted to be asymptomatic in the left shoulder as of April 20, 2012. Second, Dr. Dalal was of the opinion the tear in Claimant's right shoulder was a new tear. Dr. Manugian testified the tear in the right shoulder was not an acute or recent tear. Third, the Guides to the Evaluation of Permanent Impairment, Sixth Edition, state a diagnosis based impairment is the method of choice for calculating impairment. The range of motion testing may be used as a factor in determining impairment. However, utilizing range of

motion testing only to determine impairment may not be the most reliable indicator of a patient's true condition.

Dr. John Brophy examined the Claimant three and one half years after the work incident and found no evidence of cervical radiculopathy and no anatomical changes in the cervical area. Dr. Brophy's opinion differs from that of both Dr. Manugian and Dr. Dalal and appears to be in conflict with the findings noted following the cervical MRI performed on February 1, 2012. Dr. Brophy was of the opinion Claimant's work incident had not aggravated the spondylosis in her cervical spine, therefore, was of the opinion she had no permanent anatomical impairment. Dr. Brophy yielded to the opinions of the orthopedic surgeons regarding any injuries to Claimant's shoulders.

Claimant has an extensive work record, the majority of which involved manual labor. However, to label Claimant as a manual laborer would be misleading since Claimant has also held supervisory positions or performed jobs that do not require excessive lifting.

Based on the foregoing, the Commission makes the following finding of fact and conclusions of law:

- 1) The Commission **FINDS** that as a result of the work incident on October 17, 2011, Claimant sustained rotator cuff tendinitis in both shoulders. The Commission **FURTHER FINDS** Claimant had a preexisting condition, namely, cervical spondylosis, which, according to both the treating physician, Arsen Manugian, MD, and Apurva Dalal, MD, was aggravated by the work incident.
- 2) The Commission **FINDS** that permanent partial disability to both the right shoulder and cervical spine was established by competent medical testimony. Furthermore, work restrictions and limitations have been imposed which have impaired claimant's earning capacity.
- 3) The Commission **FINDS** Claimant made a full recovery from any injury to her left shoulder and has sustained no permanent partial disability to the left shoulder.

- 4) The Commission **FINDS**, as a result of the work incident occurring on October 17, 2011, claimant has sustained a permanent partial disability to the body as a whole of fourteen percent (14%) which at Claimant's compensation rate equates to Fourteen Thousand Five Hundred Forty Eight and 24/100 Dollars (\$14,548.24) which shall be paid in a lump sum.
- 5) The Commission **FURTHER FINDS** Claimant is entitled to reasonable and necessary medical benefits associated with her employment related injury for the rest of her life by medical providers assigned to her pursuant to Tenn. Code Ann. §50-6-204.
- 6) The Commission **FINDS** that Ms. Harris' attorney, Christopher Taylor, is entitled to an attorney's fee in the amount of Twenty Percent (20%) of the award or Two Thousand Nine Hundred Nine and 65/100 Dollars (\$2,909.65)
- 7) The Commission **FINDS** Claimant was born on January 2, 1953, was fifty nine years of age on the date of maximum medical improvement with a life expectancy of 23.3 years or 279.6 months according to the Morality Tables set forth in Table 1 (Total Population) of the most recently published Centers for Disease Control Life Expectancy Tables. Accordingly, the amortized monthly benefit received by Claimant is \$11,638.59 divided by 279.6 months or \$41.63 per month and represents a future income replacement. This paragraph does not describe the manner of calculation for disability retirement benefits from the Tennessee Consolidated Retirement System.
- 8) The costs of this cause are taxed pursuant to Tenn. Code Ann. § 9-8-307(d).



JAMES A. HAMILTON III
COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed by first class U.S. mail, postage prepaid, electronically transmitted, or hand-delivered to:

Mr. Christopher L. Taylor, Esq.
Taylor & Toon, PLLC
191 Jefferson Avenue
Memphis, TN 38103

Ms. Laura Miller, Esq.
Civil Rights & Claims Division
P.O. Box 20207
Nashville, TN 37202-0207

on this the 30 day of November, 2015.

Paula Merrifield

PAULA MERRIFIELD, CLERK
TENNESSEE CLAIMS COMMISSION