

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
WESTERN DIVISION**

2015 JUN -0 A 9 50

AMY BORSETH,

Claimant,

v.

**CLAIM NO. 30120206380
Workers' Compensation**

STATE OF TENNESSEE,

Defendant

JUDGMENT

This matter came to be heard on April 24, 2015, before Nancy C. Miller-Herron, Commissioner, Tennessee Claims Commission, Western Division, at the Madison County Courthouse, Jackson, Tennessee. Mr. Ricky Boren, Esq., represented Claimant. Ms. Heather Ross, Esq., represented Defendant, State of Tennessee.

Claimant, Amy Borseth, brings this action against the State of Tennessee, hereinafter referred to as Defendant, to recover under Tennessee Code Annotated § 9-8-307 (a)(1)(K), relating to workers' compensation claims by a state employee, for injuries to her neck and arms when she was assaulted by a patient during her employment at Western Mental Health, hereinafter referred to as Western. Claimant went to the emergency room the day of the assault complaining primarily of pain in her neck. While she was in physical therapy for her neck pain, Borseth developed numbness and tingling in both hands. After tests showed carpal tunnel syndrome, Dr. Keith Nord performed bi-lateral carpal tunnel releases on January 16, 2014.

I.

ISSUES FOR TRIAL

The parties are in agreement: 1) that Claimant's workers' compensation rate is two hundred ninety dollars and ninety-five cents (\$290.95); 2) that Claimant returned to her work as a psychiatric technician at the same rate of pay; 4) that Claimant has a compensable claim for the injury to her neck.

The issues presented are: (1) whether the carpal tunnel syndrome suffered by Claimant arose out of her employment as a psychiatric technician; (2) the degree of permanent partial disability to the body as a whole suffered by the Claimant.

II.

FACT TESTIMONY

Forty-four year-old Amy Leigh Borseth testified in the trial of this matter. Borseth testified that she finished 12th grade, then joined the Navy and went straight to boot camp. (Tr., p. 19, lines 14-21) While in the Navy, Borseth served as a hospital foreman, which is like a certified nursing assistant. (Tr., p. 19, line 22-p. 20, line 3) She stated she did not get a certificate. (Tr., p. 20, lines 4-5)

After serving in the Philippines and Cuba, Claimant moved to Virginia Beach, Virginia. (Tr., p. 20, lines 11-18) While she was in Virginia she worked part-time, at McDonald's and as a bartender at Day's Inn. (Tr., p. 21, lines 2-4) She moved back to Tennessee in 2003 where she worked for two or three years as a cashier and cook at the East View Quick Stop. (Tr., p. 21, lines 8-18)

Claimant began working as a psychiatric technician at Western State in November, 2007. (Tr., p. 22, lines 1-5) Borseth stated that her duties involve direct

patient care, included feeding and bathing patients. She occasionally has to lift patients. She said when she was hired, it was a job requirement that she be able to lift 50 pounds; that requirement has been increased to 75 pounds. (Tr., p. 22, lines 13-22)

Amy Borseth described the assault on February 14, 2012. She said a patient came at her and hit her in the temple; she fell to the ground. While she was on the ground, the patient was hitting her repeatedly in the neck. When she tried to get up, really shaken, her head hit the back of the decorative wall. (Tr., p. 23, lines 7-20)

Borseth was evaluated by nurses at Western, then drove herself to the emergency room. (Tr., p. 23, line 23- p. 24, line 4) Borseth testified that at the hospital doctors took X-rays, gave her a shot and told her to follow up with her primary care provider. (Tr., p. 24, lines 5-11) Borseth saw her physician several times before she was referred to Campbell Clinic, where she saw Dr. Dockery.

Dr. Dockery initially ordered physical therapy. During the therapy, Claimant developed problems in her upper extremities. (Tr., p. 25, lines 23-25) She said after physical therapy "it felt like I had a pinched nerve in my arm, like maybe I had tweaked something while I was doing physical therapy. I had a big knot there when I went to physical therapy the next time." (Tr., p. 26, lines 3-6) She described the physical sensations she was feeling in her left arm as "burning" (Tr., p. 26, line 12), "sharp pain" (Tr., p. 26, line 12) and tingling and numbness. (Tr., p. 26, lines 13-14)

Borseth testified she began developing right arm problems on Mother's Day. (Tr., p. 26, lines 23-25) She went back to Dr. Dockery, who sent her to a hand surgeon. (Tr., p. 27, lines 5-13) Claimant had bilateral carpal tunnel release in January, 2014 and was off work for about four months. (Tr., p. 28, lines 1-7)

Claimant said following her surgery she had good days and bad days. "There were days that I could hold on to stuff and days that I couldn't hold on to stuff." (Tr., p. 28, lines 13-15) She said during that time she was still having problems with her neck. (Tr., p. 28, line 22) She said it "progressively kind of got worse after I went back to work." (Tr., p. 29, lines 5-6)

In February, 2015, Claimant went back to Dr. Dockery.¹ He ordered X-rays and prescribed physical therapy and pain medication. (Tr., p. 29, line 24- p. 30, line 1) Claimant said she had a nerve block the week before trial. (Tr., p. 30, lines 2-3) She said the nerve block helped, but she still is having some pain. (Tr., p. 30, lines 6-8)

Claimant testified that when she gets really tired her neck drops and that it hurts when she reads. (Tr., p. 30, lines 12-13) Claimant testified that she can no longer do scrapbooking because she tends to drop scissors. (Tr., p. 30, line 18- p. 31, line 5) She also said, "I would still like to be able to kayak and canoe." (Tr., p. 32, lines 1-2) Claimant testified that at work she sometimes has trouble holding a notebook or lifting a laundry hamper. (Tr., p. 32, lines 9-11)

Claimant testified that before her most recent nerve block, her neck pain was between five and six on a ten point scale. Now it is a one or a two. (Tr., p. 33, lines 4-12)

On cross-examination, Claimant admitted that she drives herself to work 45 minutes each way every day and that she does her own cooking, laundry, housekeeping and yard work. (Tr., p. 34, line13- p. 35, line 25)

¹ Claimant introduced as Exhibit 5 the January 16, 2015 letter from Defense counsel to Claimant's counsel to verify that the State requested Claimant go to Dr. Dockery in February, 2015 for an impairment rating. (Tr., p. 45, lines 16-24)

III.

MEDICAL TESTIMONY

J. Dee Dockery, M.D., who practices at Campbell Clinic in Memphis, Tennessee, first testified by deposition on September 11, 2013. Dr. Dockery testified that he first treated Amy Borseth on April 2, 2012. (Tr. Ex. 2, p. 6, lines 13-14) He said Borseth reported being hit in the head on the right and on the left side of her neck during her work at a psychiatric facility. Dockery said she had a Spurling's maneuver, which caused severe pain in the neck muscles on her left and in her shoulder blade muscles as well as in the midline. She also had a limited range of motion in her neck. (Tr. Ex. 2, p. 7, line 16- p. 8, line 10)

Dr. Dockery put her on Celebrex, as well as a muscle relaxer and a pain pill prescribed physical therapy as well. (Tr. Ex. 2, p. 8, lines 18-24) He also put her on desk work activity "to let her muscles rest." (September, 2013 Dep. of Dockery, p. 9, line 7)

When Dr. Dockery saw Borseth again on May 14, 2012, the improvement in her symptoms had plateaued. She still had intense pain three or four days a week as well as "numbness and tingling down the left arm." (Tr. Ex. 2, p. 10, line 22) At that point, Dockery recommended an MRI, which showed "mild age appropriate changes at one level, but overall just normal MRI of her neck." (Tr. Ex. 2, p. 11, lines 10-12)

Dockery saw Borseth again on June 15, 2012. She reported "that her pain in her shoulder was ninety percent improved." (Tr. Ex. 2, p. 11, lines 18-19) He said she was mainly bothered by "numbness and tingling in her first three fingers. It initially started on her left side and then moved to the right side. (Tr. Ex. 2, p. 11, lines 21-23) Borseth

reported this started while she was doing physical therapy. (Tr. Ex. 2, p. 11, line 24- p. 12, line 2)

Dockery then ordered a nerve conduction study to determine whether Claimant had carpal tunnel syndrome. (Tr. Ex. 2, p. 12, lines 10-17) He said the report showed "moderate to severe carpal tunnel in both wrists, essentially in both arms." Tr. Ex. 2, p. 12, lines 23-24) Dockery said his diagnosis at that time was that Borseth had "resolving cervical strain symptoms but had developed symptoms down her arms consistent with carpal tunnel confirmed by an EMG." (Tr. Ex. 2, p. 13, lines 7-9) Dockery said her symptoms could be related to her job injury and/or the physical therapy that followed it. (Tr. Ex. 2, p. 13, lines 10-23) Dockery stated that he referred Claimant to a hand doctor. (Tr. Ex. 2, p. 14, lines 15-18)

On cross-examination, Dockery was asked about the significance of the fact that Claimant had a negative Hoffman's and a negative Spurling's to the left. He said a Hoffman's result "just indicates whether there is an abnormality in the upper neuron sign, which is above the peripheral nerve, meaning spinal cord and above." (Tr. Ex. 2, p. 18, lines 3-6) Dockery went on to say that "Hoffman's especially indicates we're not dealing with something that's more of an emergent basis in terms of some sort of spinal cord or brain injury." (Tr. Ex. 2, p. 18, lines 13-16) Dockery explained that a Spurling's maneuver "helps to evaluate whether there is nerve root compromise in the neck, such as you have a disc that's irritated, a disc herniation or some sort of foraminal narrowing from some arthritis and stenosis . . ." (Tr. Ex. 2, p. 18, lines 17-21)

Dr. Dockery acknowledged that during his April 2 visit with Claimant, he wrote down "has no pain in the shoulder or down the arm." (Tr., Ex. 2, p. 19, lines 1-5)

During the same day, he evaluated her upper arm strength at 5 out of 5. (Tr. Ex. 2, p. 19, lines 10-13) He further acknowledged that on that day he found the range of motion for the upper extremities to be within the normal range. (Tr., Ex. 2, p. 19, lines 14-17) He also found negative Hawkins and Neer, which are rotator cuff tests. (Tr., Ex. 2, lines 17-23)

Dockery further testified that on April 2, 2012, the x-ray of Claimant's spine and her MRI were normal. (Tr. Ex. 2, p. 20, lines 12-18) Claimant apparently was returned to full duty (with no restriction regarding her neck) on June 15, 2012. (Tr. Ex. 2, p. 20, line 23- p. 21, line 7)

Dr. Dockery stated that on June 15, 2012, Claimant's Tinel's, Phalen's and median nerve compression tests, which are used to assess for carpal tunnel, were negative. (Tr. Ex. 2, p. 21, line 24- p. 22, line 2) He noted that these tests are clinical tests "so they're not a hundred percent sensitive or specific." (Tr. Ex. 2, p. 22, lines 7-8)

Dr. Dockery testified that on September 4, 2012, he felt that the symptoms in Claimant's arms were related to "peripheral compression of the median nerve, the carpal tunnel." (Tr. Ex. 2, p. 23, lines 15-17) Dockery testified that anatomically the condition affecting Claimant's neck and the carpal tunnel are separate. (Tr. Ex. 2, p. 24, line 4)

Dr. Dockery testified that he is aware of how to diagnose carpal tunnel, but he does not do the specialty treatment for it. (Tr. Ex. 2, p. 27, lines 10-12) So when he saw the results of Claimant's EMG-nerve conduction study, he referred her to a hand specialist. (Tr. Ex. 2, p. 27, lines 13-17) Dr. Dockery conceded that carpal tunnel can have multiple causes. (Tr. Ex. 2, p. 30, lines 17-20)

When asked if there was a connection between the neck and the carpal tunnel, Dr. Dockery explained: "What I said was there is the injury, the actual trauma of the event of the fall, and whatever happened subsequently after that is what I am saying there is a relationship with, not from the actual neck hurting, not from her strained neck." (Tr. Ex. 2, p. 33, line 22- p. 34, line 2) Dockery went on: [T]here is a relationship that somebody with a fall landing on their—however she landed can cause symptoms that were lying dormant of carpal tunnel." (Tr., Ex. 2, p. 34, lines 13-15)

Dr. Dockery testified again on April 8, 2015. (Tr. Ex. 1) Dr. Dockery said he saw Claimant again on February 3, 2015, at which time he took a new history. (Tr. Ex. 1, p. 7, lines 12-16) That visit was the first time he had seen Borseth in 2 ½ years. (Tr. Ex. 1, p. 7, lines 18-19) Claimant reported that her neck pain had gotten significantly worse in the last 7 months. (Tr. Ex. 1, p. 7, lines 23-24) She reported this pain, which had been a 3 or 4 on a 10-point scale, was now a 7 or 8, and that it goes down into her shoulder blades. (Tr. Ex. 1, p. 7, line 24- p. 8, line 3)

When asked about the relationship between the assault and work and her present pain, Dockery noted that her pain had never gone away. And "she had a lot of symptoms in her arm with numbness and tingling down her left arm more than the right despite her treatment and therapy." (Tr. Ex. 1, p. 9, lines 14-17) Dockery said "the question was, is this, the symptoms in her arms, from the neck or is it something else?" (Tr. Ex. 1, p. 9, lines 17-19) So Dockery ordered an MRI, which showed "some narrowing of the left C4 foramen, spondylosis, which is arthritis." (Tr. Ex. 1, p. 9, lines 21-22)

When asked whether he had an opinion regarding whether Claimant's continued problems were related to her original injury, Dockery responded: "Yeah, these are continued problems from the original injury." (Tr. Ex. 1, p. 11, lines 9-10) Dockery noted that Claimant's physical exam included a "positive Spurling's, which is the manner in which you test nerve root irritation of the neck in the upper extremity." (Tr. Ex. 1, p. 12, lines 8-10) Dockery said she had normal strength in her arm but her range of motion in her cervical spine was "limited to about 15/20 degrees of extension." (Tr., Ex. 1, p. 13, lines 1-3) She also had pain in her midline at C7-T1, pain in the trapezius area. (Tr. Ex. 1, p. 13, lines 12-17) Dr. Dockery said the osteophytes were worse, with osteophyte buildup at C3, C4 and C5. (Tr. Ex. 1, p. 14, lines 12-14)

Dr. Dockery said Claimant came back for another visit on March 7, 2015. Claimant reported that "the numbness that was going down her arm was better, but the pain she was having in her neck and shoulder blade was still going on." (Tr. Ex. 1, p. 15, lines 10-13) Claimant reported some relief with Robaxin, but did not think the Celebrex helped. She received temporary relief from therapy, but her symptoms came right back. (Tr. Ex. 1, p. 15, lines 13-16)

Dr. Dockery stated that an MRI was performed after the March visit. It showed "a narrowing of the foramen at C4." (Tr. Ex. 1, p. 17, lines 22-23) Dockery explained that the C4 "stops at the level of the AC joint." (Tr. Ex. 1, p. 18, lines 11-12) "So if you have narrowing at the C4 foramen, you know, you're going to get pain in your neck and the shoulder blade only." (Tr. Ex. 1, p. 18, lines 15-17) Dockery testified that he recommended "doing a cervical epidural steroid injection." (Tr. Ex. 1, p. 21, lines 11-12) He hoped this would reduce the nerve inflammation. (Tr. Ex. 1, p. 21, lines 18-19) He

said these injections often work to reduce the pain (or even make it go away) for a few months or even years. (Tr. Ex. 1, p. 22, lines 7-21)

On cross-examination, Dockery acknowledged that in June, 2012, Claimant told him that with regard to her neck and shoulder she was 90% better. (Tr. Ex. 1, p. 48, lines 16-19) He noted that it still bothered her, but it was much better. She returned to work, full duty, with no restrictions related to her neck. (Tr. Ex. 1, p. 49, lines 15-21) Dockery noted that it is “not uncommon where people have flare-ups once down the road.” (Tr. Ex. 1, p. 50, lines 20-21)

Dockery stated that when Claimant came back to him in February, 2015 “she was hurting. Her symptoms had gotten worse six months prior.” (Tr. Ex. 1, p. 52, lines 1-2)

Dockery opined that based on the 6th Edition of the AMA Guides, Claimant sustained an eight percent permanent partial impairment. (Tr. Ex. 1, p. 20, lines 12-13) Dockery explained it was based on “spondylosis and radiculopathy. It’s from that pain in her shoulder blade.” (Tr. Ex. 1, p.53, lines 20-21) He went on:

once you have the underlying arthritis, you’re much more likely to have pain from that, from a trauma. So the trauma of her getting hit in the head, prior to that, there was no pain; after that, that’s when she had the pain. So she had the pain to her shoulder blade. (Tr. Ex. 1, p. 54, lines 7-11)

Dockery testified the impairment rating was based both on Claimant’s physical symptoms and on the imaging. (Tr. Ex. 1, p. 54, lines 21-22) He acknowledged the injury “didn’t cause an anatomical change on the imagining; but it could cause a physiological change causing the pain, which is irritating the C4 nerve root.” (Tr. Ex. 1, p. 55, lines 14-16)

When asked whether he would agree that the 2015 MRI showed no significant narrowing on C4, Dockery replied: "I think on that MRI report, they indicated there was disc bulges as well, so." (Tr. Ex. 1, p. 57, line 24- p. 58, line 1) He went on, "So for her, you know . . . in my opinion, the main issue is that narrowing of the C4 foramen." (Tr. Ex. 1, p. 58, lines 15-17) "And on her MRI report, I think it's more of the radicular pain. So I put her in the radiculopathy class." (Tr. Ex. 1, p. 63, lines 9-11)

Dockery insisted he was not rating her based on her arthritis. "I'm rating her on her radiculopathy, her radiculitis, nerve root pain that's continued for three years." (Tr. Ex. 1, p. 64, lines 5-7)

Dockery further explained why Claimant's pain might have gotten worse:

So if you have a disc herniation or you have stenosis or you have foraminal narrowing, you can do an injection to calm it down. It may go away, but you know, six months, a year down the road, it can flare back up. (Tr. Ex. 1, p. 73, lines 4-8)

Samuel J. Chung, DO, testified by deposition on January 6, 2015. (Tr. Ex. 4). Dr. Chung did an independent medical evaluation of Ms. Borseth on August 25, 2014. (Tr. Ex. 4, p. 3, lines 9-20) Dr. Chung said Claimant told him she was injured on February 14, 2012, while working as a psych tech. She said a patient hit her in the right temple, causing her to fall backwards, bracing her fall with an outstretched arm. She hit a glass wall when she tried to get up and was hit multiple times in the back of the neck. (Tr. Ex. 4, p. 4, lines 1-8)

Dr. Chung said in this case he thought the symptoms of carpal tunnel overlapped with Claimant's neck pain. He explained:

Neck pain or disk condition originating from the neck tends to have radiating symptoms down to the arm and vice versa.

The carpal tunnel syndrome tends to have symptoms of neuropathy in the distal extremities and sometimes radiate up to the arm and to the neck. (Tr. Ex. 4, p. 6, line 22- p. 7, line 1)

Chung testified that the C4 foraminal narrowing evident on the MRI “correlated with some of her symptoms in her neck, upper neck.” (Tr. Ex. 4, p. 7, lines 6-7)

Dr. Chung opined that “the causation of her bilateral carpal tunnel syndrome . . . likely resulted when she fell on her outstretched arm bracing her fall with her outstretched hand.” (Tr. Ex. 4, p. 9, lines 21-24) He went on to say the trauma caused swelling in her wrist which later brought on symptoms of peripheral neuropathy. (Tr. Ex. 4, p. 9, line 24- p. 10, line 3) Dr. Chung further stated that the physical therapy Claimant underwent could “cause some degree of acute inflammation that could bring on further symptoms of symptoms in this case carpal tunnel syndrome.” (Tr. Ex. 4, p. 10, lines 12-14)

Dr. Chung testified he did “monofilament testing” of Ms. Borseth, which revealed she had some loss of “sensitivity to sensory nerves in the median nerve even after the outcome of surgical release in both wrists.” (Tr. Ex. 4, p. 13, lines 9-11) She also had slightly decreased grip strength. (Tr. Ex. 4, p. 13, lines 17-20)

Dr. Chung assessed the impairment rating for Claimant’s neck injury using Table 17-2 on page 564 of the *Guide*. Chung determined she had a strain/strain injury and place her in Class 1. (Tr. Ex. 4, p. 14, lines 17-22) Chung further testified Borseth falls overall in a Class 1, Grade D and is entitled to a three percent (3%) permanent partial impairment to the body as a whole. (Tr. Ex. 4, p. 15, lines 12-16)

With regard to the carpal tunnel release, Chung stated that under Table 15-14, Claimant has a sensory deficit of one and a motor deficit in the normal range. (Tr. Ex.

4, p. 15, line 22- p. 16, line 2) Chung testified that under Table 15-21, mild sensory deficit is Class 1 with normal motor exam. Chung said Claimant fell under a grade modifier 2 because of pain in her wrist with activity. (Tr. Ex. 4, p. 16, lines 3-24) He opined that the "overall net adjustment is plus one." (Tr. Ex. 4, p. 15, line 25) In summary, Chung opined that Claimant should be "placed under Category 1, Grade D." (Tr. Ex. 4, p. 17, line 1) Chung found an 8 percent impairment to each upper extremity. (Tr. Ex. 4, p. 17, lines 1-23)

With regard to the combined ratings for the neck and two arms, Chung opined that Claimant suffered a thirteen percent (13%) impairment to the body as a whole. (Tr. Ex. 4, p. 18, line 4) With regard to workplace restrictions, Chung made the following recommendations:

Recommended she should avoid overhead work and work away from the body and avoid work requiring repetitive flexion, extension, and rotation of the neck, and that patient should avoid repetitive work and heavy gripping using both upper extremities. (Tr. Ex. 4, p. 18, lines 10-14)

Dr. Chung testified that under the 6th Edition of the *Guides*, there is more than one way to assess impairment for carpal tunnel syndrome. He stated the first way, "the peripheral nerve impairment section" involves table 15-21 on page 436. (Tr. Ex. 4, p.18, line 21- p. 19, line 10) Chung stated the second method involves Table 15-23 on page 449, a "separate subsection just for entrapment neuropathy." (Tr. Ex. 4, p. 19, lines 12-13) When asked if there are directions in the *Guides* regarding which method to use, Chung testified that Table 2-1 on page 20 lists 14 specific fundamental principles to be followed. (Tr. Ex. 4, p. 20, lines 2-7) He says number 12 specifically provides that if

there is more than one method, “the method producing the higher rating must be used.” (Tr. Ex. 4, p. 20, lines 10-11; Emphasis added.)

On cross –examination, Chung testified that with regard to the carpal tunnel and how it was aggravated, “it’s possible during the treatment phase, while she was getting therapy, it was a little more aggressive than they ought to be and brought on . . . clinical symptoms in her wrists.” (Tr. Ex. 4, p. 35, lines 6-10) Chung said even with an acute trauma, the symptoms of carpal tunnel can present “fairly soon, within a week period, or can be somewhat delayed.” (Tr. Ex. 4, p. 36, lines 13-15)

Chung summarized his opinion as follows:

I think this event, traumatic event, that brought on the neck problems and pain related to her cervical radiculitis, as well as symptoms of carpal tunnel syndrome that followed after. I do believe that her clinical symptoms became more severe and more intense after some treatment, but I still believe . . . some type of event and trauma took place there and then, subsequently, things became much worse later on. (Tr. Ex. 4, p. 38, line 18- p. 39, line 1)

Chung acknowledged that if he had used Table 15-23 to evaluate Claimant’s carpal tunnel, she would have to have been under a Class 3 to receive an 8 percent impairment rating. He further acknowledged that using that particular table (Table 15-23), an impairment rating of 7, 8 or 9 indicates axon loss. (Tr. Ex. 4, p. 60, line 23- p. 61, line 13) Chung further testified: “To say that peripheral nerve impairment section is only used for a knife or sharp object injury to the nerve is really not correct.” (Tr. Ex. 4, p. 63, lines 10-12) “So the mechanism injury is not as important as the degree of damage to the injury (sic).” (Tr. Ex. 4, p. 64, lines 20-22)

Keith Nord, M.D., testified by deposition on January 12, 2015. (Tr. Ex. 3) Dr. Nord testified that he treated Claimant for carpal tunnel syndrome. He said Claimant reported “that she was assaulted by a patient while she was working as a psych tech,” (Tr. Ex. 3, p. 8, lines 17-18) and that “the numbness and her wrist pain started while she was in therapy for this injury.” (Tr. Ex. 3, p. 8, lines 20-21)

When asked whether he believed her carpal tunnel was work-related, Nord replied: “Yes, but I do think it probably was something that gradually occurred over time, and then the injury and then the therapy just kind of brought it to light.” (Tr. Ex. 3, p. 11, lines 1-3)

Dr. Nord testified that he performed bilateral carpal tunnel releases on January 16, 2014 and that Ms. Borseth returned to full work duty on April 23, 2014. (Tr. Ex. 3, p. 11, lines 8-12) Nord said she reached maximum medical improvement on June 9, 2014. (Tr. Ex. 3, p. 11, lines 13-15)

Dr. Nord opined that, according to the 6th Edition of the AMA Guides, as a result of the carpal tunnel, Borseth sustained a two percent (2%) permanent partial impairment to the body as a whole. (Tr. Ex. 3, p. 13, lines 11-22) Nord testified that he used Table 15-23, page 449 which is “specifically for entrapment compression neuropathy.” (Tr. Ex. 3, p. 14, lines 10-11)

Nord said Table 15-21 on page 448 is not the correct table for entrapment neuropathy. Rather, it is for other injuries such as lacerations or crush injuries, not carpal tunnel syndrome. (Tr. Ex. 3, p. 15, lines 9-20) Nord noted Table 15-21 of the *AMA Guides* contains the following language: “See Table 15-23 for carpal tunnel syndrome.” (Tr. Ex. 3, p. 15, lines 22-23)

Nord stated that he did think the carpal tunnel syndrome was precipitated or caused by her physical therapy after the assault. (Tr. Ex. 3, p. 17, lines 16-19) He also testified that it would be reasonable to think that the original trauma also played a role in the carpal tunnel. (Tr. Ex. 3, p. 18, lines 6-9)

Nord acknowledged that on April 8, 2014, Ms. Borseth rated her pain level at one out of ten. (Tr. Ex. 3, p. 19, line 23- p. 20, line 1) The notes from her May 22, 2014 visit state: "She returned to therapy with no new complaints. Continues to complete home exercise program with good tolerance. Continues to have some stiffness at times but is not terrible." (Tr. Ex. 3, p. 20, lines 21-24)

David Yakin, M.D., who is board certified in orthopedic surgery, testified by deposition on February 12, 2015. (Tr. Ex. 6, p. 6, lines 16-18) He also is certified by the Board of Independent Medical Examiners. (Tr. Ex. 6, p. 7, lines 12-14)

Dr. Yankin testified that Table 15-23 on page 449 is the section of the *AMA Guides* used for evaluating carpal tunnel syndrome. (Tr. Ex. 6, p. 9, lines 15-18) He stated that you go to this section of the *Guides* for compression neuropathy or entrapment neuropathy, which he characterized as synonymous terms. (Tr. Ex. 6, p. 9, line 24- p. 10, line 1) Yankin insisted that in the vast majority of cases, Table 15-23 is to only table evaluators are permitted to use for carpal tunnel. (Tr. Ex. 6, p. 10, lines 14-15) The exceptions for deviating involve certain nonspecific wrist pain and "when there has been an injury to the nerve intraoperatively during the surgery." (Tr. Ex. 6, p.10, lines 23-24) And a surgical injury would require a worsened post-operative nerve conduction study before the peripheral nerve injuries section, Table 15-21, could be

used. (Tr. Ex. 6, p. 11, lines 4-10) A third exemption would be a patient with complex regional pain syndrome. (Tr. Ex. 6, p. 11, lines 12-13)

Dr. Yankin then stated that you would not use Table 15-21 without a nerve conduction study (exception 2). And you would not use Table 15-21 if the patient developed complex regional pain syndrome. The only time 15-21 is used is "if there was an injury to the median nerve during surgery and the post operative documentation of that with a worsening nerve conduction study." (Tr. Ex. 6, p. 13, lines 3-6) Yankin pointed to language on page 429 of the *Guides* which states: This section is *not* "used for nerve entrapments since nerve entrapments are not isolated traumatic events." (Tr. Ex. 6, p. 17, lines 4-5)

Yankin said there are some types of injuries, such as rotator cuff injuries, when two types of evaluations should be done and the higher one taken. Carpal tunnel typically is not one of them. (Tr. Ex. 6, p. 18, line 19- p. 19, line 25)

Dr. Yankin conceded on cross-examination that he had not reviewed any of Amy Borseth's records. (Tr. Ex. 6, p. 20, lines 15-18)

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The trajectory of Amy Borseth's neck injury and pain was explained by her treating physician, Dr. Dockery, in his April, 2015 deposition.

So if you have a disc herniation or you have stenosis or you have foraminal narrowing, you can do an injection to calm it down. It may go away, but you know, six months, a year down the road, it can flare back up. (Tr. Ex. 1, p. 73, lines 4-8)

Dr. Dockery explained that the type of injury Ms. Borseth suffers is often marked by periods of time when the pain is much more manageable after an injection, followed by periodic flare-ups. Dr. Dockery's explanation tracks with Claimant's testimony that her pain was a five or a six on a ten-point scale before her latest injection, then fell to a one or a two. (Tr., p. 33, lines 4-12) It further appears that Borseth's pain is better when she has recently had an injection and been off work for a while, then rises again when she goes back to work. (Tr., p. 29, lines 5-6) There seems to be little doubt that she has sustained vocational impairment as a result of the injury to her neck and that she is likely to have additional flare-ups in the future.

After her February, 2015 office visit, Dr. Dockery opined that Borseth sustained a permanent partial disability of eight (8%) to the body as a whole as a result of the injury to her neck. (Tr. Ex. 1, p. 20, lines 12-13) Dr. Dockery testified that he based this rating on her radiculopathy, her radiculitis, nerve root pain that's continued for three years." (Tr. Ex. 1, p. 64, lines 5-7)

All of Claimant's treating physicians agree that her carpal tunnel syndrome was caused either by her attempt to brace herself when she fell during the February 14, 2012 assault or as a result of an injury she sustained during physical therapy for injuries she received during the assault. Dr. Dockery explained: "What I said was there is the injury, the actual trauma of the event of the fall, and whatever happened subsequently after that is what I am saying there is a relationship with, not from the actual neck

hurting, not from her strained neck.” (Tr. Ex. 2, p. 33, line 22- p. 34, line 2) Dockery went on: [T]here is a relationship that somebody with a fall landing on their—however she landed can cause symptoms that were lying dormant of carpal tunnel.” (Tr., Ex. 2, p. 34, lines 13-15)

Dr. Nord, the surgeon who did the carpal tunnel releases, stated that he thought the carpal tunnel syndrome was precipitated or caused by her physical therapy after the assault. (Tr. Ex. 3, p. 17, lines 16-19) He also testified that it would be reasonable to think that the original trauma also played a role in the carpal tunnel. (Tr. Ex. 3, p. 18, lines 6-9)

Dr. Nord opined that, according to the 6th Edition of the AMA Guides, as a result of the carpal tunnel, Borseth sustained a two percent (2%) permanent partial impairment to the body as a whole. (Tr. Ex. 3, p. 13, lines 11-22) Nord testified that he used Table 15-23, page 449 which is “specifically for entrapment compression neuropathy.” (Tr. Ex. 3, p. 14, lines 10-11)

As the Tennessee Supreme Court stated in *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672, (Tenn. 1991), “[i]t seems reasonable that the physicians having greater contact with the Plaintiff would have the advantage and opportunity to provide a more in-depth opinion, if not a more accurate one.” The Commission agrees that this is the case here.

The Commission **FINDS** that Claimant sustained a ten percent (10%) permanent partial impairment to the body as a whole as a result of her neck injury and a three percent (3%) permanent partial impairment to the body as a whole as a result of the injury to her arms, for a combined thirteen percent (13%) impairment to the body as a

whole for both injuries. The Commission **FURTHER FINDS** that this entitles Claimant to a judgment of fifteen thousand one hundred twenty-nine dollars and forty cents (\$15,129.40).

The Commission **FURTHER FINDS** that Claimant should be awarded all future reasonable and necessary medical expenses connected with her employment related injury.

The Commission **FURTHER FINDS** that the Claimant's attorney, Ricky L. Boren, is entitled to receive twenty percent (20%) of the judgment in attorneys' fees and that Mr. Boren's fee was earned as the result of good and valuable services provided to Claimant.

The Commission **FURTHER FINDS** that Claimant desires a finding with regard to lifetime amortization for Social Security purposes and exclusive of Defendant's interests. Notwithstanding the method and timing of payment to the Claimant as above and pursuant to Tenn. Code Ann. § 50-6-207(6), the Commission affirmatively **FINDS** Claimant, was 41 years old on the date of injury and, according to the mortality tables contained in Volume 13 of the Tennessee Code Annotated, has an expectation of 44.05 years of life remaining, or 528.6 months from the date of accident. The sum of all permanent partial or total benefits, paid or payable to Claimant, excluding attorney's fees and medical costs, is twelve thousand one hundred three dollars and fifty-two cents (\$12,103.52). Accordingly, the amortized monthly benefit received by the Claimant for the sole purpose of calculating any set-off of any Federal Social Security disability is twenty-two dollars and ninety cents (\$22.90) per month and represents future income replacement. This paragraph is intended for Federal Social Security purposes only and

not for any other purpose, including, but not limited to, disability retirement benefits from the Tennessee Consolidated Retirement System, pursuant to § 50-6-207, Tenn. Code Ann., as amended by Public Chapter 919, effective July 1, 1996.

Claimant's motion for commutation of the award is granted, it being found that commutation of the award is in Claimant's best interest.

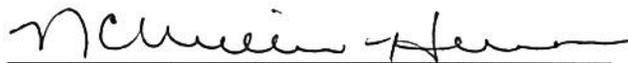
IT IS THEREFORE ORDERED that Claimant, Amy Borseth, is awarded compensation for a thirteen percent (13%) permanent partial impairment to the body as a whole in the amount of fifteen thousand one hundred twenty-nine dollars and forty cents (\$15,129.40).

IT IS FURTHER ORDERED that Claimant is entitled to all future reasonable and necessary medical expenses connected with her employment related injury.

IT IS FURTHER ORDERED that Claimant's attorney, Ricky L. Boren, Esq., is entitled to a fee for his professional services to Claimant in the amount of twenty percent (20%) of the award, or three thousand twenty-five dollars and eighty-eight cents (\$3,025.88), which shall be paid in a lump sum pursuant to T.C.A. § 50-6-229 (a).

Costs of this cause are taxed pursuant to T.C.A. § 9-8-307 (d).

IT IS SO ORDERED.


NANCY C. MILLER-HERRON
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. Ricky L. Boren, Esq.
1269 North Highland
P.O. Box 3539
Jackson, TN 38303-3539

Ms. Heather C. Ross, Esq.
Senior Counsel
Civil Rights & Claims Division
P.O. Box 20207
Nashville, TN 37202-0207

on this the 6th day of June, 2015.

Paula Merrifield

**PAULA MERRIFIELD, CLERK
TENNESSEE CLAIMS COMMISSION**