BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TERRY D. BRUBAKER Claimant	)	
V.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	
AND	)	Docket Nos. 1,076,920 & 1,031,953
LM INS. CORP a.k.a. **GALLAGHER BASSETT** Insurance Carrier	)	
AND	)	
LIBERTY INS. CORP. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and Gallagher Bassett requested review of the May 4, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven Roth. John M. Ostrowski of Topeka, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent and its insurance carrier, Gallagher Bassett, in association with Docket No. 1,076,920. Stephanie Warmund of Kansas City, Missouri, appeared for respondent and its insurance carrier, Liberty Insurance Corporation, in association with Docket No. 1,031,953.

The ALJ found claimant proved he suffered a repetitive work-related injury on February 19, 2016, as claimed in Docket No. 1,076,920. The ALJ ordered respondent and Gallagher Bassett to provide medical treatment as recommended by the authorized treating physician, Dr. Alexander Bailey. Further, the ALJ noted Liberty Insurance Corporation will continue as a party of interest in this matter until excused or dismissed.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 7, 2016, Preliminary Hearing and the exhibits, and the transcript of the February 13, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent and Gallagher Bassett argue the preponderance of the credible evidence proves claimant's current symptoms are a direct and natural consequence of his 2006 work-related injury, which was settled on a running award basis under Docket No. 1,031,953.

Claimant contends the ALJ's Order should be affirmed. Alternatively, should the Board alter the ALJ's decision, claimant requests medical care with Dr. Harold Hess.

The issue for the Board's review is: did claimant's February 19, 2016, repetitive injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant has worked for respondent for 25 years. Most recently, claimant was a package car driver, delivering from 170 to 400 packages per day. The packages weighed from a few ounces to 150 pounds. During peak seasons, claimant explained he would handle up to 2 tons cumulatively each day.

Around December 15, 2015, during the Christmas peak season, claimant began experiencing headaches and pain in his neck and arm. Claimant reported his symptoms to the center manager, Brad Williams, and was eventually authorized to visit Dr. Harold Hess.

Prior to the 2015 incident, claimant had a history of neck problems and treatment with Dr. Hess. In 2006, while working for respondent, claimant sustained injury to his neck resulting in a cervical decompression and fusion at C5-6 and C6-7 on March 7, 2007. Claimant continued to treat with Dr. Hess until his release at maximum medical improvement on March 7, 2008. Claimant stated Dr. Hess told him he would have problems with the fusion in the future. Claimant testified:

> What [Dr. Hess] said to me was I remember him saying after you have a fusion like this he says you will be back in here again, his exact words, in 8 to 10 years.[1]

Claimant stated he had no pain following the surgery. He saw Dr. Hess on March 7, 2008, one year after the surgery, and reported he was pain-free. He did not see Dr. Hess following his release until February 2016. Claimant testified he received no medical treatment for his neck between March 2008 and February 2016.

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[1] *Id.* at 29.

Claimant entered into a settlement related to his 2006 neck injury on October 11, 2007. The settlement represented a 15 percent permanent partial impairment to the body as a whole related to claimant's neck, on a running award basis, leaving open his right to future medical treatment.

On February 19, 2016, claimant returned to Dr. Hess as authorized by respondent. Claimant complained of pain in his neck and shoulders with pain and weakness in both arms. Dr. Hess performed a physical examination and recommended claimant undergo an MRI of the cervical spine, in addition to providing work restrictions. Claimant has not seen Dr. Hess since that time.

Dr. Hess provided a causation opinion on March 3, 2016, stating:

> It would be my opinion that the more recent work-related incident of approximately two and a half months ago would be the prevailing factor in causing the patient's current medical condition and his symptoms. I do not believe it would be related to his original injury of October 26, 2006.[2]

Dr. Alexander Bailey examined claimant on April 12, 2016, at respondent's request. Claimant's chief complaints were neck and arm pain. Dr. Bailey reviewed claimant's available history and medical records, and ordered x-rays and the MRI recommended by Dr. Hess.

The x-rays showed:

> Plate and hardware were positioned across 5-6 and 6-7. There is [*sic*] no definitive findings of fusion across either level. Adjacent levels appear to be relatively well maintained. There is no hardware failure or gross hardware loosening, but I cannot identify specifically solid fusion across the interbody spaces. It is possible, but cannot be determined on direct radiographic findings. Pseudoarthrosis is likely based on x-ray findings.

Dr. Bailey performed a physical examination, concluding claimant was status-post two level cervical fusion at C5-6 and C6-7, with possible pseudarthrosis at those levels with associated cervical facet disorder. Dr. Bailey stated the MRI showed no evidence of dramatic neurologic impingement at the adjacent levels. Dr. Bailey noted neck pain with secondarily low-grade radiculopathy as well. Dr. Bailey provided a causation opinion:

> Obviously this presents some difficulty. . . . [Claimant's] overall symptoms are consistent with facet disorder available for treatment but causation is exceptionally difficult to define. This is related to his previous cervical fusion in my opinion and he has had some aggravation of his cervical facet joints possibly related to

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[2] P.H. Trans. (Apr. 7, 2016), Cl. Ex. 1 at 1.

> pseudarthrosis. I would indicate that this more likely than not relates back to his previously injury where he led to surgical intervention in 2007. This appears to be some aggravation of this underlying condition and sequelae of his previous fusion versus a brand new specific injury. . . . Given all available information, it is my opinion the prevailing factor appears to be pre-existing dating back to 2007. . . . MRI scans and x-rays do not show an acute process that I could define to be related to a 12/15/2015 injury or repetitive use injury.[3]

Dr. Bailey recommended claimant undergo physical therapy and cervical facet injections. He indicated claimant should be restricted to light duty during active evaluation and treatment.

Claimant stated he believed his current condition was related to his 2006 incident. He testified:

> Q. Okay, and isn't it true, though, you also told Brad [Williams] you thought all your problems with your neck were related to this original injury and accident?
>
> A. Yes.
>
> Q. Okay, in your own mind, do you believe your neck condition really relates back to 2006 and all these other problems you've always had?
>
> A. Yes.[4]

Claimant has not worked since February 19, 2016, because respondent was unable to accommodate Dr. Hess' restrictions. Claimant testified he continues to have pain in his neck and down his right arm in addition to headaches.

PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[3] Bailey Report (Apr. 12, 2016) at 3.

[4] P.H. Trans. (Apr. 7, 2016) at 30.

K.S.A. 2015 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2015 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2015 Supp. 44-508(f) states, in part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The ALJ relied on Dr. Hess' relationship as claimant's treating physician. Dr. Hess performed a cervical fusion on claimant in 2006 and wrote examination reports in 2008 and 2016. In his March 8, 2008 report, one year after claimant's cervical fusion, Dr. Hess noted claimant was pain-free. Claimant testified he was pain-free from the time he saw Dr. Hess in 2008 and his alleged injury in December 2015. On February 19, 2016, Dr. Hess again

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2015 Supp. 44-555c(j).

examined claimant and recommended an MRI. On March 3, 2016, Dr. Hess provided his causation opinion without the benefit of the MRI he recommended.

Dr. Bailey had the benefit of reviewing the most current MRI. Based upon his examination of claimant and review of the MRI, Dr. Bailey concluded claimant was experiencing cervical facet disorder and possible pseudarthrosis related to C5-6 and C6-7. This explanation of claimant's neck and arm pain is consistent with claimant's medical history. Dr. Bailey's opinion that he could not find evidence of a new injury, based upon his review of x-rays and the MRI, is uncontroverted.

Dr. Hess did not identify any evidence of a change in claimant's medical condition resulting from the 2016 injury. Dr. Bailey, having the benefit of reviewing the most current MRI, also did not identify a change in claimant's preexisting condition. As such, the undersigned finds the evidence insufficient to show claimant had a change in his physical structure as a result of the 2016 injury. The greater weight of the evidence supports a finding that claimant's current need for treatment arises from his preexisting condition.

CONCLUSION

Claimant's current need for medical treatment is related to his October 26, 2006, injury and resulting cervical fusion.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven Roth dated May 4, 2016, is reversed.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Steven Roth, Administrative Law Judge