BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEE E. PARRISH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,700
CERTAINTEED CORPORATION	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 10, 2009, Award and Nunc Pro Tunc Award of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded a 15 percent whole body functional disability after the ALJ determined that claimant had suffered separate accidental injuries on March 26, 2007, and March 3, 2008, to both his right upper extremity and his low back.

Claimant appeared by his attorney, Richard Billings[1] of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Lenexa, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award and the Nunc Pro Tunc Award of the ALJ. At the November 10, 2009, oral argument to the Board, the parties stipulated that claimant suffered an accidental injury to his right upper extremity resulting in a 10 percent functional impairment at the level of the forearm. The parties also agreed that the appropriate date of accident for the right upper extremity injury was the March 3, 2008, date claimed. The parties further stipulated that the calculation of the award should be separate, as between the right upper extremity and the low back.

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[1] Appearing on behalf of Roger D. Fincher.

ISSUES

1. Did claimant suffer an accidental injury to his low back which arose out of and in the course of his employment with respondent on March 3, 2008? Respondent contends that claimant suffered an accidental injury at home in his garage on Sunday, March 2, 2008, and initially reported same to his supervisor. Respondent contends that, as claimant did not report an accident at work for several days, no such accident occurred. Therefore, any award for the alleged injury to claimant's low back from the March 3, 2008, date of accident should be denied. Claimant contends that he initially denied a work-related accident when talking with his supervisor for fear of costing his fellow workers the $35.00-per-quarter safety bonus which they would lose if an accident occurred. But, after discussing the matter with his chiropractor, claimant decided to tell the truth. Additionally, the initial intake interview form provided to the chiropractor detailed an injury suffered at home in claimant's garage on Sunday, followed by a return to work Monday morning and an aggravation of claimant's back injury due to the heavy lifting at work. Therefore, claimant argues that the accident would be compensable under the Kansas Workers Compensation Act.

2. What is the nature and extent of the injury suffered to claimant's low back on March 3, 2008? The parties agree that if a second work-related accident to claimant's low back is determined to have occurred, whether it is a series through March 3, 2008, or a specific trauma on that date is irrelevant for the purposes of calculating this award. Therefore, if the Board finds claimant suffered a second accident to his low back, the March 3, 2008, date will be used for the purposes of calculating this award.[2]

FINDINGS OF FACT

Claimant had worked for respondent as a machine operator for three years when, on March 26, 2007, he suffered an accidental injury to his right hand and low back. This injury is no longer disputed. Claimant was provided with medical treatment and light duty for over three weeks. Claimant then returned to his regular duties as a machine operator. On March 3, 2008, claimant was working a different machine called a flex machine. The flex machine required that claimant lift rolls of paper weighing 50 to 75 pounds and put those rolls on the machine. On March 3, 2008, while loading a roll on the flex machine, claimant was bent over when he felt something pop in his low back. Claimant also

[2] It is noted that no issue regarding claimant's entitlement to unauthorized medical treatment or the payment of any or all of the chiropractic treatment was raised to nor decided by the ALJ. Additionally, no argument was presented to the Board on these issues. Therefore, no determination of these issues is contained in this Award.

described a sharp pain in his back. Claimant described this pain as being worse than before. Claimant did not initially report this accident, feeling that if he took a couple of days off, he would start feeling better. When claimant first discussed his back pain with Gary Swartz, the plant manager, he reported that the accident occurred at home over the weekend. Claimant did not want to claim a work-related accident as he did not want to be back on light duty, because it paid less than regular duty. Additionally, if claimant reported a lost injury claim, his co-workers would each lose a $35.00 bonus, which was normally paid each quarter. When claimant first went to his chiropractor, claimant stated that he had hurt his back working in his garage and, then, went to work the next day and was doing heavy lifting and that made his back worse. The chiropractor advised that claimant should report the accident as being work related. When claimant's supervisor contacted claimant to see how he was doing, claimant advised that the injury actually did occur at work. This occurred 2 to 3 days after the injury.

Claimant was examined by his chiropractor, Terry Shroyer, D.C., on March 5, 2008. Claimant initially thought this would be a "quick fix"[3] but ended up seeing the chiropractor 15 to 20 times. The initial March 5, 2008, interview notes from the chiropractor's office state that claimant hurt his back at home in the garage on Sunday. Then, the notes state that on Monday, claimant did a lot of lifting at work and his back hurt worse, at which time claimant went home.[4] After the injury, claimant called his mother to take him home. A co-worker named Gerald Devon Cherry drove claimant to a truck stop where claimant's mother met them. During the drive, claimant told Mr. Cherry that he had hurt his back over the weekend at home. Claimant last worked for respondent on April 3, 2008. However, respondent has acknowledged that when claimant gets a full release, he will be eligible to return to work for respondent at his regular job.

After claimant reported the accident as being work related, he was referred to Occupational Health Services at Geary Community Hospital. There, on March 10, 2008, claimant was examined by T. Scott Webb, D.O., and diagnosed with a sprained muscle in his back. Dr. Webb recommended that claimant obtain x-rays of his low back and placed claimant on work restrictions.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation expert Lynn A. Curtis, M.D., for an initial examination on April 4, 2008. Dr. Curtis diagnosed claimant with an aggravation of lumbar degenerative disc disease, L5-S1 disc herniation with sciatica, right wrist injury, an injury to the thumb ligament and carpal tunnel syndrome, and right medial and lateral epicondylitis. At some point, Dr. Curtis was appointed as the authorized treating physician. The second time Dr. Curtis examined claimant was on January 29, 2009. At that time, he diagnosed claimant with

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[3] P.H. Trans. at 23.

[4] P.H. Trans., Cl. Ex. 3.

lumbar degenerative disease, L5-S1 disc herniation with sciatica and injuries to his right upper extremity which are no longer in dispute. When Dr. Curtis first examined claimant, he determined that claimant had a possible 10 percent impairment for the low back problems under the fourth edition of the AMA *Guides*.[5] However, claimant was referred for treatment, and the medical treatment was of benefit. At the last examination, Dr. Curtis determined that claimant had a 5 percent permanent partial whole body disability for the low back injuries. The radiculopathy originally present was no longer found in the last examination, and thus the lower rating.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., for an examination on April 23, 2009. Dr. Carabetta found a depressed ankle jerk reflex on claimant's left side, consistent with radiculopathy. He attributed this to the March 3, 2008, accident, as the 2007 medical notes appeared to indicate only a lumbar sprain, which had resolved. X-rays indicated that claimant had disc space narrowing at L5-S1. An MRI done on April 1, 2008, showed degenerative changes and a left-sided disc herniation. Dr. Carabetta determined that the accident was probably the source of the disc herniation, although he did not rule out an injury at home being the cause.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact 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.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[6] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 2007 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[10]

Claimant suffered an accidental injury on March 26, 2007, to both his right upper extremity and low back. The parties have agreed that injury resulted in only temporary injuries and no permanent disability. Additionally, the injury on March 3, 2008, is no longer disputed with regard to the right upper extremity. However, a significant controversy exists with regard to the low back from that accident. Claimant initially denied any work involvement from that accident, but later recanted and claimed the low back was actually injured during that incident at work. The record verifies that claimant did deny the work connection from that injury. However, the medical records from Dr. Shroyer support claimant's contention of a work-related connection with this injury. Claimant apparently did injure himself at home on Sunday. This would render the low back problem non-work-related if left alone. However, the injuries occurring on Monday at work result in a compensable aggravation of the preexisting low back condition. There is no dispute that claimant went to work on Monday, March 3, 2008, and performed heavy lifting for about one and a half hours. Claimant then had to go home due to the low back pain he was experiencing. Additionally, while the initial intake form provided to the chiropractor detailed the Sunday injuries in claimant's garage, they also detail the lifting at work the next day, resulting in the aggravations.

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.[11]

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[11] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

The Board finds that claimant suffered an accidental injury on March 3, 2008, while at work. This accident served to aggravate claimant's preexisting low back problems and rendered the condition compensable under the Kansas Workers Compensation Act. The decision of the ALJ to award benefits for that low back injury is affirmed.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[12]

Both Dr. Curtis and Dr. Carabetta rated claimant's low back injury pursuant to the fourth edition of the AMA *Guides*.[13] Dr. Curtis, claimant's hired expert and subsequent authorized treating physician, found no radiculopathy associated with the low back injury on March 3, 2008. However, Dr. Carabetta, respondent's hired expert, found radiculopathy and rated claimant's impairment at 10 percent pursuant to the AMA *Guides*.[14] The most recent examination by Dr. Curtis occurred on January 29, 2009. Dr. Carabetta examined claimant last on April 23, 2009, at which time claimant was displaying a reduction in the Achilles tendon reflex response coinciding with an apparent first sacral nerve root compromise. This indication of radiculopathy supports Dr. Carabetta's 10 percent impairment rating to the low back, pursuant to Category III of the fourth edition of the AMA *Guides*.[15] After reviewing the medical opinions, the Board finds that claimant has suffered a 10 percent permanent partial whole body disability to his low back for the injuries suffered on March 3, 2008, while working for respondent. The Award of the ALJ will be modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award and the Nunc Pro Tunc Award of the ALJ should be affirmed with regard to the issue of whether claimant suffered an accidental injury which arose out of and in the course of his employment on March 3, 2008, but modified with regard to the amount of

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[12] K.S.A. 44-510e(a).

[13] AMA *Guides* (4th ed.).

[14] AMA *Guides* (4th ed.).

[15] AMA *Guides* (4th ed.).

impairment suffered from that accident, and the method of calculating the award. Claimant has suffered an accidental injury to his right upper extremity and has a 10 percent functional impairment to his right upper extremity at the level of the forearm from the accident on March 3, 2008, pursuant to the stipulation of the parties. Claimant also has a 10 percent whole body permanent partial disability to his low back from the accident on March 3, 2008.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and the Nunc Pro Tunc Award of Administrative Law Judge Rebecca Sanders dated August 10, 2009, should be, and is hereby, affirmed with regard to whether claimant suffered an accidental injury on March 3, 2008, and with regard to the functional impairment suffered to claimant's right upper extremity and low back, but modified with regard to how the award is calculated.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Lee E. Parrish, and against the respondent, Certainteed Corporation, and its insurance carrier, Ace American Insurance Company, for an accidental injury which occurred March 3, 2008, and based upon an average weekly wage of $506.61.

Right Upper Extremity

The claimant is entitled to 20 weeks permanent partial disability compensation at the rate of $337.76 per week in the amount of $6,755.22 for a 10 percent impairment to the right upper extremity at the level of the forearm. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

Low Back

The claimant is entitled to 41.5 weeks permanent partial disability compensation at the rate of $337.76 per week in the amount of $14,017.04 for a 10 percent whole body impairment. As of the date of this award, this entire amount is due and ordered paid in one lump sum, minus any amounts already paid.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Richard Billings, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge