

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICTOR M. LUYANDA)	
Claimant)	
)	
VS.)	Docket No. 1,046,327
)	
PRATT LOVE BOX CO., LLC.¹)	
Self-Insured Respondent)	

ORDER

Self-insured respondent requests review of the November 14, 2011 Award by Administrative Law Judge Thomas Klein. The Board heard oral argument on March 16, 2012.

APPEARANCES

Michael L. Snider of Wichita, Kansas, appeared for the claimant. William L. Townsley of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant alleged he suffered a back injury while performing his job duties. Respondent denied the claim and argued claimant's back complaints were related to an antalgic gait claimant developed from a knee injury. Respondent further argued its medical expert concluded claimant's back condition was not related to his work. Claimant argued the treating physician and claimant's medical expert attributed claimant's back condition to his work-related injury and both provided claimant with a permanent functional impairment.

The Administrative Law Judge (ALJ) found claimant sustained a 5 percent functional impairment and a 91.65 percent work disability based upon a 100 percent wage loss and an 83.3 percent task loss.

¹ Respondent's name changed to Pratt Industries in November 2005.

Respondent requests review and primarily argues claimant failed to meet his burden of proof that he sustained an injury arising out of and in the course of employment. And in the alternative, if the claim is compensable, respondent requests review of the nature and extent of disability.

Claimant argues the ALJ's Award should be affirmed.

The issues for Board determination are whether claimant suffered accidental injury arising out of and in the course of his employment and, if so, the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant had been employed by respondent since 2003 and his job was working on the bander line operating a banding machine which put plastic bands around boxes. These loads of product were being pushed on rollers and sometimes the rollers would get stuck so claimant had to push even harder to move the product along on the rollers. Claimant testified that he was working on the bander line pushing loads weighing about 200 pounds when he had a sudden pain in his back. This incident occurred on June 15, 2009. Claimant had light pain but he continued to work and completed his shift on June 15, 2009. He did not report the injury because he thought it was temporary.

The next day claimant told his supervisor, Mr. Pete Vega, that his side was hurting. Claimant testified that he told Mr. Vega that he was pushing the loads and felt pain in his back. Claimant was pushing in an awkward position between two banding machines when he began to notice back pain on his right side. He said it felt like he was getting stuck with something sharp. Claimant's pain had increased from Monday to Tuesday, June 16th. Claimant testified:

Q. Okay. And when you told Pete about the back pain, did you tell him it was because of something you were doing at work?

A. I told him it was from pushing the loads.

Q. And then what happened over the next couple hours as you were finishing up your shift? Did your pain change?

A. I kept working with the pain until I finished my day.²

² Luyanda Depo. at 36-37

Mr. Vega's version of the conversation was that on June 16, 2009, claimant told him that his side was hurting and it had started the day before. Mr. Vega asked if claimant had twisted wrong, or bent over, or if it was from pushing loads and claimant responded that it was maybe from pushing loads.³

On June 17, 2009, claimant was in more pain so he sought medical treatment at his family doctor's office. X-rays were taken and the physician's assistant advised claimant to take off work the rest of the week. Claimant received a prescription for pain medication and also a letter excusing him from work. Claimant took the letter to his supervisor and was told to take off the rest of the week and then return to work on Monday.

On Thursday, Mr. Vega contacted claimant about a meeting on Friday with the safety manager. At this meeting claimant explained to them how his accident happened. Claimant was then asked to see respondent's doctor.

Claimant was seen by Dr. Ronald Davis, respondent's physician, and diagnosed with a pinched nerve. The doctor prescribed some medication and told claimant to return to work on Monday. Claimant worked only five minutes on Monday and then he was notified that he had been terminated. Vincent Miller advised claimant that he had been fired due to not reporting his injury the same day it had happened.

Claimant was later referred to Dr. Pat Do for additional treatment. Dr. Do diagnosed claimant with low back pain with a possible component of radicular type pain and degenerative disc disease. Claimant was provided conservative care including medication and physical therapy. On May 4, 2010, Dr. Do concluded claimant had reached maximum medical improvement and released claimant from treatment. Dr. Do recommended that claimant wear a back brace during activity for needed comfort and also continue with home exercises. Dr. Do provided permanent restrictions and a 5 percent whole person functional impairment.

Dr. George Flutter, board certified in physical medicine and rehabilitation as well as an independent medical examiner, evaluated claimant on June 14, 2010, at claimant's attorney's request. The doctor took a history from claimant and also reviewed his medical records. Claimant had complaints of aching and distressing pain affecting his lower back. Upon physical examination, Dr. Flutter found claimant had: 1) tenderness to palpation in the lumbar paravertebral muscles and buttocks bilaterally, 2) tenderness to palpation over the PSIS and sacroiliac joints bilaterally, and, 3) tenderness to palpation over the greater trochanters bilaterally, lumbar range of motion is limited in all planes with pain. The doctor diagnosed claimant as having status post work-related injury on or about June 14, 2009, low back pain, lumbosacral strain/sprain, myofascial pain affecting the lower back, bilateral sacroiliac joint dysfunction and bilateral trochanteric bursitis. Dr. Flutter opined that claimant's current condition was caused by claimant's repetitive work-related activities involving bending and lifting.

³ Zink Depo., Ex. 5.

Based on the *AMA Guides*⁴, Dr. Fluter placed claimant in the DRE Lumbosacral Spine Impairment Category II for a 5 percent whole person impairment due to claimant's myofascial pain. The doctor also rated both right and left sacroiliac joint dysfunction at 1 percent each as well as both right and lower extremity at 1 percent each due to chronic trochanteric bursitis. Using the Combine Values Chart, these whole body impairments added together result in a 9 percent impairment. But Dr. Fluter agreed that the trochanteric bursitis was likely related to an antalgic gait and not the back condition.

Dr. Fluter placed permanent restrictions on claimant of: (1) no lifting, carrying, pushing or pulling greater than 35 pounds occasionally and 15 pounds frequently; (2) restrict bending, stooping, crouching, twisting and stair climbing to an occasional basis; (3) avoid squatting, kneeling, crawling and climbing; (4) avoid prolonged standing and walking; (5) change position periodically for comfort; and, (6) standing and walking should be limited to no more than 30 minutes per hour. Dr. Fluter reviewed the list of claimant's former work tasks prepared by Mr. Doug Lindahl and concluded claimant could no longer perform 10 of the 12 tasks for an 83.33 percent task loss.

Dr. John McMaster, board certified in Preventive Medicine, Family Practice and also as an Independent Medical Examiner, evaluated claimant on November 2, 2010, at respondent's attorney's request. The doctor reviewed claimant's medical records and also took a history from him. Upon physical examination, Dr. McMaster diagnosed claimant as having lumbosacral spondylosis, degenerative joint disease and status post bilateral knee arthroscopies. The doctor opined that claimant had sustained a transient exacerbation of his preexisting degenerative back condition on or about June 16, 2009. Claimant's condition has been diagnosed as acute low back pain with associated degenerative disk disease. Dr. McMaster testified that he could not identify any structural change or lesion to claimant's body that he would attribute to claimant's occupational incident.

Based upon the *AMA Guides*, Dr. McMaster said claimant's lumbosacral spondylosis without loss of motion segment integrity or radiculopathy placed him in the DRE Category II for a 5 percent whole person impairment. The doctor opined that claimant did not need any permanent restrictions and claimant could perform work within the physical demand category of medium to heavy. Dr. McMaster reviewed the list of claimant's former work tasks prepared by Mr. Steve Benjamin and concluded claimant has not sustained any loss of task performing ability. The doctor testified that the records and evaluations by other providers identified that claimant had the ability to return to the workplace on June 20, 2009.

Doug Lindahl, a vocational rehabilitation counselor, conducted a personal interview with claimant on July 1, 2010, at the request of claimant's attorney. He prepared a task list of 12 non-duplicative tasks claimant performed in the 15-year period before his injury.

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

At the time of the interview, the claimant was not working. Mr. Lindahl opined claimant still has the capacity to perform sedentary work paying minimum wage.

Steve Benjamin, a certified rehabilitation counselor, conducted a personal interview with claimant on November 30, 2010, at the request of respondent's attorney. He prepared a task list of 30 non-duplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, claimant was receiving unemployment benefits.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.⁵ A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."⁶ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁷ The existence, nature and extent of the disability of an injured workman is a question of fact.⁸ A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.⁹

Respondent's primary argument is that claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. Respondent relies upon Mr. Vega's written statement to conclude that claimant did not know what was causing his back pain and that it was maybe from pushing loads. But the claimant's answer was to a question whether his pain was due to bending or twisting or pushing loads and in that context claimant was asked which work-related activity caused his problem. And his response was maybe pushing loads.

Moreover, when claimant saw Dr. Davis he provided a history of pushing a load when he felt a pinch in his lower back. At the June 19, 2009 meeting claimant told respondent about the problems with the bander machine which caused his back to start hurting on June 15, 2009. Dr. Do treated claimant and provided a 5 percent rating for his back. Dr. McMaster initially attributed a 5 percent impairment to claimant's occupational incident but later concluded claimant had only suffered a transient aggravation.¹⁰ Consequently, Dr. McMaster also agreed claimant suffered a work-related accident. And

⁵ K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁶ K.S.A. 44-501(a).

⁷ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁸ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁰ McMaster Depo. at 16.

Dr. Fluter specifically attributed claimant's back condition to the work-related incident. The Board finds the preponderance of credible evidence establishes claimant suffered accidental injury arising out of and in the course of his employment.

Both Drs. Do and Fluter provided a 5 percent functional impairment rating for claimant's low back injury. Likewise, Dr. McMaster provided a 5 percent functional impairment rating for claimant's low back although he ultimately concluded it was for claimant's degenerative condition and not due to the occupational incident. Dr. Fluter additionally provided claimant with a rating for trochanteric bursitis and for his sacroiliac but agreed those were likely due to an antalgic gait. The ALJ adopted Dr. Fluter's 5 percent whole person rating for claimant's back and the Board agrees and affirms.

The injury to claimant's low back is not an injury addressed in the schedule of K.S.A. 44-510d. Accordingly, claimant's permanent partial general disability benefits are governed by K.S.A. 44-510e, which provides, in part:

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means 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. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,¹¹ the Kansas Supreme Court, determined that a claimant's work disability is calculated, pursuant to K.S.A. 44-510e(a), by averaging the claimant's postinjury wage loss percentage with the claimant's task loss percentage. And the reason for the claimant's postinjury wage loss is irrelevant.

¹¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

At the time of the regular hearing claimant had been terminated by respondent and was unemployed which results in a 100 percent wage loss. Dr. Fluter provided an 83.3 percent task loss opinion. The ALJ did not find Dr. McMaster’s opinion persuasive in light of the findings by Dr. Do and Dr. Fluter that claimant needed permanent restrictions. The Board agrees and affirms the ALJ’s determination claimant is entitled to compensation for a 91.65 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated November 14, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 27th day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Emailed: Michael L. Snider, Attorney for Claimant, mlesnider@sbcglobal.net
William L. Townsley, Attorney for Respondent, wtownsley@fleeson.com
Thomas Klein, Administrative Law Judge

¹² K.S.A. 2010 Supp. 44-555c(k).