

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

BRADLEY C. RUPP)	
Claimant)	
VS.)	
)	Docket No. 1,056,867
SPIRIT AEROSYSTEMS, INC.)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant requested review of the June 21, 2013, Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on October 25, 2013, in Wichita, Kansas.

APPEARANCES

Michael L. Snider, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett and Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

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

ISSUES

The SALJ found that the greater weight of the credible evidence indicates claimant suffered from preexisting degenerative disc disease in the cervical and lumbar spine, and that at most, his work caused a temporary exacerbation, rendering those conditions

symptomatic. Therefore, claimant did not sustain a compensable injury “and the allegations of an injury are not the prevailing factor of his condition.”¹

Claimant argues the SALJ mistakenly applied the wrong standard with regard to repetitive trauma, i.e. requiring claimant have a series of traumas exceeding one week. Claimant also contends the SALJ rationalized that, under the new law, older workers could be subjected to work activity known to cause them symptomatic pain. Then, when they could no longer perform the job, they would be terminated for failing to be able to perform work which they were no longer suited to perform. Claimant also argues there is no evidence that he had cervical spinal stenosis or neck problems that were causing him any long term problems until respondent placed him in a job they knew he couldn't do and required him to perform it for a week. Claimant therefore, requests the Board award him an 83 percent work disability based on a 66 percent task loss and a 100 wage loss.

Respondent argues the decision should be affirmed and claimant denied compensation as claimant failed to carry his burden of proof that he suffered an injury or repetitive trauma arising out of and in the course of his employment. In the event the Board finds claimant is entitled to a work disability, respondent contends that claimant would be entitled to no more than a 6.5 percent work disability with a 0 percent task loss and a 13 percent wage loss.

Issues on appeal are:

1. Whether the SALJ erred in determining the claim is not compensable;
2. Whether the SALJ erred in finding claimant had a substantial preexisting injury to his cervical and lumbar spines;
3. Whether the SALJ erred in determining the nature and extent of claimant's disability.

FINDINGS OF FACT

Claimant worked for Boeing Aircraft (Boeing) and then for Spirit Aerosystems, Inc. (Spirit) for a total of 27 years. From 1984 to 2005 claimant worked for Boeing and then worked for Spirit from 2005 to 2011. Claimant's job was as a shop floor inspector. He admitted he had problems with his low back while he was working for Boeing and was awarded a 5 percent disability in September 2000 from an April 21, 2000, accident. He was also assigned permanent work restrictions in 2000. Claimant's restrictions were accommodated when he went to work for Spirit Aerosystems.

¹ SALJ Award (June 21, 2013) at 6.

In May 2011, claimant complained to Sprint's Director of Quality Assurance about his job. The complaints appeared to involve the areas claimant was required to inspect and whether required paperwork was being completed. At some point, claimant was moved to a different position as an inspector. Claimant raised objections to this move on July 8, 2011. Claimant met with William Hosman, a vocational rehabilitation counselor working with the International Machinist Union and Spirit, regarding the job he was being required to perform.

Mr. Hosman has held this position since October 1, 1997, and is considered a third party contractor to respondent for vocational assessments. Mr. Hosman testified he met with claimant on July 14, 2011, to review claimant's proposed new job in order to determine if it was within claimant's medical restrictions, as claimant was complaining of neck pain. Mr. Hosman reviewed all of claimant's restrictions, personal and occupational, and after observing the work claimant was being asked to perform, determined claimant could not perform it within the permanent restrictions he had been assigned. Mr. Hosman recommended a position for claimant where he could sit and stand as needed and work with very light parts.

A new job was created for claimant at a bench where claimant could sit/stand as needed. It was a very light job. Claimant alleged the new job exposed him to fumes causing him to become nauseated. Spirit then imposed a restriction that claimant wear a respirator. Claimant then went to his family doctor, Samuel Heck, D.O., and obtained a restriction against wearing a respirator due to neck pain, concerns about claustrophobia and claimant's history of anxiety issues. Mr. Hosman indicated the respirator restriction was a new one which was forwarded to him by Central Medical. To his knowledge, claimant never completed his respirator certification, which precluded him from performing any production work.

Claimant stopped working for Spirit Aerosystems in July 2011, after his restrictions could no longer be accommodated. Claimant's restrictions for his April 21, 2000, injury were: no bending repetitively over 15 degrees; stand up and stretch as needed; and decrease work in forward bent position. In July 2011, claimant had additional restrictions requiring he wear an appropriate respirator if around or exposed to sealant or chemical fumes; no lifting over 20 pounds; no constant bending or twisting; and no overhead work.

Claimant's employment was terminated effective September 16, 2011, after the Accommodation Review Board at Spirit determined there was no position claimant could be put in that would not cause him pain. Claimant testified that he would have continued to work if he was able. He has tried to find another job, but has been unsuccessful. One of the reasons cited for claimant's termination was that he couldn't wear a respirator to protect him from chemical fumes in one of the areas he was supposed to inspect. But, the primary reason was the injury to his neck and back.

Claimant testified his primary job was the inspection of tubes, which he could do without particularly awkward neck movements, and that his work in the functional test area also did not require awkward neck movements. However, he also indicated his work before July 2011 at times had him working in awkward positions. Claimant admits that he had occasional problems with his neck prior to July 2011. He also admits to a prior back claim in 2000, but does not recall his neck being an issue back then. Claimant has not worked since he was terminated. He filed for and began receiving unemployment benefits in late October 2011.

Claimant reported in February 2011, that an employee came up behind him and grabbed his neck, causing him pain and a cervical strain. However, his primary issue was with his low back, the reason for his work restrictions.

Claimant testified he doesn't recall receiving any treatment with Dr. Richard Shoffner for his low back complaints before treating with Dr. Heck. Claimant did present respondent with the work restrictions of Dr. Heck. Claimant was previously exposed to fumes and chemicals during his work as an inspector, but he did not think anything about the concentration levels. Claimant expressed to his supervisor that he could do the work as long as he stayed within his restrictions. However, when he had a change of supervisors, he was moved to another position in assembly that he did not believe he was able to perform because it required him to contort his body into various positions. Claimant attempted the job in assembly for a few days and reported severe pain in his back and neck. He was then notified that his employment was being terminated because his restrictions could no longer be accommodated.

Samuel Heck, D.O., testified claimant became his patient in July 2009, when he came in complaining of a headache. Dr. Heck determined claimant had a throat infection. A review of claimant's musculoskeletal system revealed neck stiffness, back pain, muscle pain and bone and joint systems. This was two years before claimant's work activities described to the doctor and before claimant's July 2011 incident. No MRI was completed at that time. Between 2009 and July of 2011, claimant was examined and treated for several nonwork-related conditions, none of which involved his neck or back.

Claimant returned to see Dr. Heck on July 25, 2011, with complaints of neck and low back pain. Dr. Heck noted claimant had a prior workers compensation injury from 2009 which caused back and neck problems and required restrictions. He indicated claimant's current problems began when he was moved to a new work area and then was exposed to chemicals. The chemicals made him ill and the respirator he was asked to wear irritated his neck.

On July 29, 2011, claimant had an MRI of the lumbar spine, which revealed mild lower lumbar spondylosis without significant stenosis, fracture or malalignment. An MRI of the cervical spine on that same date revealed mild to moderate degenerative changes

at C4-C5, C5-C6 and C6-C7. Claimant was diagnosed with chronic neck pain, low back pain and anxiety in September 2011.

When claimant was seen on July 10, 2012, he complained of acute neck, low back and shoulder pain. Dr. Heck opined claimant's back pain was gradual without injury. Claimant was provided with spinal manipulation for his cervical spine complaint in July 2012. An MRI showed degenerative conditions in the neck. This is not something that would have occurred overnight. Dr. Heck opined that with the degenerative changes claimant had, it would be awkward for him to do work in an extended position for a prolonged time period. He indicated that would aggravate claimant's neck and lower back conditions. Claimant had already reported his work aggravated his back and neck pain. Dr. Heck testified that increased motion would cause wear and tear in claimant's spinal structure and neck structure and that the posturing necessary to work above the head puts a lot of stress on the spine as well. Dr. Heck was unaware of how long claimant performed these new job duties prior to voicing complaints regarding his neck and low back.

Dr. Heck opined claimant should not wear a respirator because of the pressure on his neck. At the same time, Dr. Heck indicated claimant seemed to be sensitive to sealants and chemicals. He was not sure why claimant was no longer working for respondent.

Dr. Heck did not know what activities claimant may have been engaged in that would explain the recent worsening of his complaints in July 2012. He acknowledged it could be part of the natural aging process. Scans showed claimant had degenerative joint disease in the cervical spine, which didn't develop overnight in July 2011.

Claimant met with board certified orthopedic surgeon, John Estivo, D.O., for evaluation on July 27, 2011, at the request of respondent. Claimant admits to a prior lumbar spine injury while working for Boeing ten years ago, which he settled. Then, in July 2011 claimant began experiencing pain in his cervical spine and lumbar spine after performing job tasks in a new position at Spirit. Claimant advised the doctor that he was required to move his neck and lower back "a little bit more than he was used to doing."² This resulted in an increase in the chronic pain claimant was already experiencing.

Dr. Estivo examined claimant and found mild tenderness throughout with range of motion testing of the cervical spine and some mild tenderness to palpation. He also found some mild tenderness throughout the range of motion testing of the lumbar spine and some mild tenderness to palpation. Dr. Estivo diagnosed claimant with cervical spine and lumbar spine pain. Claimant had complete range of motion of the cervical spine and lumbar spine, but bending and twisting increased claimant's pain.

² Estivo Depo. at 5.

Dr. Estivo recommended MRIs of claimant's cervical and lumbar spines, and provided temporary work restrictions of no lifting more than 20 pounds, no constant bending or twisting and no overhead work. The doctor placed claimant on anti-inflammatory and pain medications. Dr. Estivo initially related claimant's pain to his July 2011 injury claim.

Dr. Estivo met with claimant on August 3, 2011, as followup. The MRI of the lumbar spine revealed mild degenerative changes, and the MRI of the cervical spine revealed age-related degenerative changes and degenerative disk disease at C4-5, C5-6 and C6-7. There was no indication of pressure on a nerve root in the cervical spine. Claimant continued to have mild tenderness throughout range of motion testing of the cervical spine and some mild tenderness to palpation. He also found mild tenderness throughout the range of motion testing of the lumbar spine and some mild tenderness to palpation. Dr. Estivo again diagnosed cervical spine strain and lumbar spine strain. He recommended claimant attend physical therapy three times a week for a month. Claimant was also advised to continue with his temporary restrictions and the anti-inflammatory medication.

On August 18, 2011, claimant reported that physical therapy was helping. He denied pain radiating to his upper or lower extremities and denied numbness or tingling to his upper or lower extremities. Claimant did not complain of cervical radiculopathy. He was instructed to continue with physical therapy and his temporary restrictions.

Claimant was last examined on September 1, 2011, and reported being significantly better, with a little bit of discomfort. Dr. Estivo felt that claimant's strains had resolved and found claimant to be a maximum medical improvement. He assigned claimant a 0 percent impairment based upon the *AMA Guides*³. He felt claimant did not require any further treatment or restrictions. After reviewing the vocational report of Steve Benjamin, Dr. Estivo did not find claimant to have a task loss.

Dr. Estivo opined the prevailing factor regarding claimant's cervical and lumbar spine complaints would have been the preexisting injury that occurred ten years prior to this injury. He felt claimant's recent problems with his cervical and lumbar spines were only temporary aggravations to claimant's preexisting condition.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation physician, George G. Flutter, M.D., for an examination on October 4, 2011. Claimant indicated he had pain in the neck, upper back and lower back. He described the pain as sharp, dull, aching and shooting, and constant. He reported that lying down, sitting, standing, bending, twisting and exercise make the pain worse. Claimant rated the pain at 2 to 8 on a scale of 1 to 10.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

Dr. Fluter examined claimant and diagnosed neck/upper back pain; lower back pain; cervicothoracic strain/sprain; lumbosacral strain/sprain; axial spine pain; probable sacroiliac joint dysfunction and possible cervical and lumbar facet joint dysfunction. He opined that, based on the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and a change in work-related activities resulting from the transfer from parts inspection to assembly inspection. Therefore, the prevailing factor is the change in work activities.

Dr. Fluter assigned claimant a 12 percent whole body impairment (5 percent permanent partial impairment to the body as a whole for the cervicothoracic spine; 5 percent permanent partial impairment to the body as a whole for the lumbosacral spine; 1 percent permanent partial impairment to the body as a whole for right-sided sacroiliac joint dysfunction and 1 percent for left-sided sacroiliac joint dysfunction).

Dr. Fluter assigned the following permanent restrictions: lifting, carrying, pushing and pulling up to 20 pounds occasionally and 10 pounds frequently; avoid holding the head and neck in awkward positions and/or extreme positions; restrict overhead activities to an occasional basis; restrict bending, stooping, crouching and twisting to an occasional basis; restrict squatting, kneeling, crawling and climbing to an occasional basis; and avoid use of a respirator other than in emergency situations. Dr. Fluter made no specific recommendations, but felt claimant would most likely need medical care in the future. He also felt claimant may require intermittent courses of physical therapy.

At respondent's request, claimant met with board certified neurological surgeon, Paul Stein, M.D., for an examination on January 31, 2012. Claimant had complaints of neck and lower back pain. Claimant's pain was described as persistent in the back of the neck, starting in the lower cervical area and extending up to the left side of the neck to the head and around the left eye. Looking upward is the worst position and turning the head to either side and flexing the neck for too long is also uncomfortable. Claimant did not have any persistent neck symptomatology in the year or two prior to the July 2011 work incident.

Dr. Stein examined claimant and found cervical range of motion moderately limited in rotation to either side, flexion and extension slow but full and accompanied by discomfort, lumbar flexion moderately restricted and extension mildly limited, lateral bending appeared intact, minimal tenderness to palpation noted in the lower lumbar midline and in the cervical thoracic junction midline, no cervical, thoracic or lumbar paraspinal muscular spasm was appreciated, no trapezius spasm, upper extremity reflexes were symmetric, strength was intact, no atrophy was observed and sensation was intact. Phalen's testing was negative bilaterally, lower extremity reflexes were symmetric, there were no long tract signs, strength was intact in muscle groups of both lower extremities, no atrophy was appreciated, no dermatomal sensory deficit and straight leg raising was negative.

In regard to the cervical spine, Dr. Stein concluded claimant displayed a substantial amount of preexisting degenerative disease in the cervical spine, particularly at C5-6 and C6-7. He found the degenerative disease to be symptomatic and the prevailing factor in the recent symptomatology to the cervical spine. Dr. Stein went on to opine that, without regard to causation, claimant has a 5 percent impairment to the body as a whole under DRE cervical thoracic category II.

In regard to the lumbar spine, Dr. Stein concluded claimant has degenerative disk disease which was symptomatic in 2000 and continued to be mildly symptomatic up to the time of the current exacerbation in July 2011. He opined that the prevailing factor was the preexisting degenerative disease. Dr. Stein went on to state that, without regard to causation, claimant has a 5 percent impairment to the body as a whole under DRE lumbosacral category II. He also indicated that the documentation of claimant's previous back injury indicates claimant was at least a category II before, and that there is no additional impairment of function over claimant's previous status from 2000.

Dr. Stein testified that for someone in claimant's condition, a couple of days of activity would cause discomfort, but not a permanent structural injury to the spine.

Claimant met with board certified physical medicine and rehabilitation specialist, Pedro Murati, M.D., for an examination on August 2, 2012, at the request of his attorney. Claimant had complaints of neck soreness; neck pain and nausea with certain activities; low back pain; bilateral shoulder pain more on the left; occasional left forearm pain; difficulty sleeping; and inability to have his neck in one position for very long. Dr. Murati examined claimant and diagnosed neck pain with signs of radiculopathy; myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; bilateral rotator cuff tear versus sprain; low back pain with signs of radiculopathy, preexisting; and bilateral SI dysfunction. He opined all of his diagnoses are, with the exception of the preexisting low back pain with signs of radiculopathy, within reasonable medical probability, a direct result of the work-related injuries that occurred in July 2011 and each and every working day during claimant's employment with Spirit. However, the history provided to Dr. Murati indicated claimant only worked the new job for two days.

Dr. Murati went on to assign the following permanent restrictions: no bending, crouching or stooping; no climbing ladders; no above the shoulder work on the right or the left; no lifting carrying, pushing or pulling over 10 pounds, 10 pounds occasionally and 5 pounds frequently; occasionally drive; no work more than 24 inches from the body on the right or left; occasionally sit; frequently stand and walk; alternate sitting, standing and walking; and avoid awkward positions of the neck. Dr. Murati assigned claimant a 19 percent whole person impairment (15 percent for the neck pain with signs of radiculopathy combined with 5 percent for the bilateral SI joint dysfunction).

Dr. Murati opined claimant sustained a repetitive work-related injury which resulted in neck and low back pain, and the prevailing factor for the neck and bilateral SI joint condition is the repetitive nature of claimant's job duties during his employment with Spirit. Dr. Murati reviewed the task list of Karen Terrill and opined claimant could no longer perform 6 out of 9 previous tasks for a 67 percent task loss.

Claimant met with board certified internal medicine specialist, Chris Fevurly, M.D., for an examination on October 26, 2012, at the request of respondent. Claimant had complaints of constant neck pain, aggravated by looking overhead and raising the arms above shoulder level and by downward pressure on the top of the head and constant low back pain that radiates into the bilateral buttocks on occasion, causing occasional tingling into the plantar surface of the left foot. Claimant reported that the neck and back pain is occasionally severe. Claimant reported he could perform the basic activities of daily living, such as grocery shopping, housekeeping, driving, and walking, but he avoids lifting.

Dr. Fevurly examined claimant and found tenderness over the cervical spinal processes and the low back. Claimant had full range of motion in the shoulders. He had mild limitation in the range of motion in the lumbar spine with forward bending to 60 degrees, extension 20 degrees and lateral motion 20 degrees, with mild pain in all motions of the lumbar spine. Claimant also had tenderness over the iliac crest bilaterally.

Dr. Fevurly opined claimant had chronic neck and low back pain since 2000; mild multilevel degenerative disk disease and spondylosis on MRI since 2000, but no evidence for neurogenic compromise or vertebral segmental instability; reported aggravation of neck and low back pain in 2011 from the change in job demand at Spirit and the use of a respirator; reported sensitivity to the inhalation of sealant fumes leading to headaches, recurrent nausea and lightheadedness producing the recommendation for respirator use.

Dr. Fevurly testified claimant's work activities in July 2011 caused an acute temporary exacerbation of chronic preexisting neck and low back pain, present since 2000/2001. He found there was no permanent aggravation and no new permanent impairment or change in physical structure of the cervical or lumbar spine as the result of the work activities in July 2011. He also found the work activities in July 2011 produced a hypersensitivity to the inhalation of sealant fumes leading to the recommendation for respirator use, which claimant could not tolerate. Claimant was found to be at maximum medical improvement by September 1, 2011.

Dr. Fevurly reviewed claimant's x-rays of the neck from 2001 and 2011, and found the findings to be similar. He testified the 2001 cervical x-ray showed degenerative disc disease with spurring in the mid cervical spine and large osteophytes with disc space height loss. The 2011 cervical x-ray was similar. With regard to the lumbar spine, the 2001 x-ray showed large osteophytes at L2-3 and L3-4 and accompanying degenerative changes at those levels. Dr. Fevurly testified large osteophytes are one of the hallmarks of degenerative disc disease, and can lead to central canal stenosis as well as

neuroforaminal stenosis if the bony overgrowth is significant enough to impinge on those areas.

Dr. Fevurly found claimant suffered no new or additional impairment to the cervical or lumbar spine produced by the work activity in July 2011. He went on to find no objective factors upon which to recommend permanent restrictions beyond the ones already in place. He also did not feel claimant was in need of any future medical or surgical intervention resulting from the July 2011 accident. After reviewing the task list created by vocational expert Steve L. Benjamin, Dr. Fevurly determined claimant had no task loss as the result of the 2011 accident.

Claimant met with Steve Benjamin for a vocational assessment on June 19, 2012. Mr. Benjamin's opinion is based on information he received from claimant regarding his work for Spirt Aerosystems from 2006 to 2011. Because claimant is not working he has a 100 percent wage loss. However, claimant is capable of earning a comparable wage if he returns to work in a position similar to the job he worked for respondent. Claimant would have a wage loss of 13 percent if he were forced to find work outside of the aircraft industry.

Claimant met with Karen Terrill for a vocational assessment. Ms. Terrill testified that claimant's chances are slim at best of finding work in the aircraft industry. Ms. Terrill noted claimant had his degree in psychology. However, that degree does not place claimant in a position to obtain a job. Realistically, claimant should be able to earn at least minimum wage, but between \$7.25 and \$13.75 an hour.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
- (c) 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.

K.S.A. 2011 Supp. 44-508(d)(e) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.

"Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto. In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought. In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-508(f)(1)(2) states:

(f)(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.

(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.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp 44-508(g) states:

(g) “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.

Claimant contends the SALJ has created a new requirement under the Kansas Workers Compensation Act, namely, that claimant must have repetitive trauma extending over one week. While the SALJ did comment on the length of time claimant suffered the alleged trauma, the SALJ did not cite this as a legal requirement. Instead, the SALJ determined claimant suffered only a temporary aggravation of preexisting cervical and lumbar spine degenerative conditions resulting from his work for respondent. The evidence supports a finding that claimant suffered from preexisting degenerative disc disease in both the cervical and lumbar spines. The onset of pain in those areas was determined by several of claimant’s examining physicians to be temporary only.

Dr. Estivo examined and treated claimant for several months, determining claimant suffered only a temporary aggravation of his preexisting degenerative conditions. This determination was made after the doctor had the opportunity to review the MRIs as well as the x-rays taken in 2011, performed on claimant’s cervical and lumbar spines. He found claimant’s work only temporarily aggravated claimant’s preexisting conditions. No permanent damage resulted. As noted above, an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Dr. Stein, a board certified neurosurgeon, also found claimant to have suffered only a temporary aggravation of his preexisting degenerative conditions. He did not believe that

only a couple of days of activity would cause a permanent and structural injury to claimant's spine.

Dr. Fevurly also determined claimant had suffered only an acute temporary exacerbation of his chronic preexisting neck and low back pain. This was after having the opportunity to review the x-rays from 2001 and comparing them to the x-rays taken of claimant's lumbar and cervical spines in 2011.

While this record does contain the opinions of Dr. Murati and Dr. Flutter, both of whom determined claimant suffered permanent damage to his cervical and lumbar spines resulting from his work with respondent, the Board finds the opinions of Dr. Estivo, Dr. Stein and Dr. Fevurly to be the more persuasive in this instance. Claimant failed to prove his work with respondent is the prevailing factor for his medical condition, disability or impairment. The award of the Special Administrative Law Judge is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be affirmed. Claimant has failed to prove he suffered a compensable injury while working for respondent and his labors are not the prevailing factor for claimant's medical condition, disability or impairment. The denial of benefits in this matter is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated June 21, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Jerry Shelor, Special Administrative Law Judge