

The issues for the Board's review are: Is claimant's claim compensable? If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent, Love Box Co., LLC, now Pratt Industries, for approximately 20 years. As a singleface operator/corrugator, claimant's job was to load paper rolls weighing 1- 2 tons onto a machine. This position required bending, stooping, lifting, twisting, and pushing activities. At times, claimant would have to push the rolls into the proper position.

Claimant suffered from prior sciatic nerve problems. On May 26, 2011, claimant believed he injured himself while pushing a roll of paper. Claimant suffered pain in his left leg and lower back. He stated he did not submit a workers compensation claim at that time because in the past his pain had resolved. Claimant saw Dr. Rick W. Friesen, a board certified physician specializing in family practice and claimant's personal physician, the next day with complaints of returning sciatica symptoms. Dr. Friesen has treated claimant with respect to his low back/sciatica since 2008. On May 27, 2011, he provided claimant with treatment for the same condition, but it was, according to Dr. Friesen, more active and severe at that time. Claimant's condition seemed to resolve at the end of May before flaring up again, causing him to go the emergency room at Galichia Heart Hospital on June 17, 2011.

Claimant presented to the Galichia emergency room on June 17, 2011, with complaints of sciatic nerve pain at a level of 10 out of 10. It was noted claimant suffered from chronic pain and that there was no new injury. After a physical examination with normal results, claimant was diagnosed with left-sided sciatica and discharged with pain medication.

Claimant followed up with Dr. Friesen on June 22, 2011. Dr. Friesen requested an MRI to address claimant's ongoing pain. The MRI, dated June 24, 2011, revealed multilevel disc disease with a small disc herniation at L3-4, and a left paracentral disc extrusion at L5-S1, which was causing effacement of left S1 nerve root and likely related to claimant's symptoms.

Claimant returned to work and performed his regular job. On July 5, 2011, claimant was only two hours into his shift when he experienced pain in his lower back after pushing a paper roll. Claimant stated his pain was a 10 out of 10 on the pain scale. Claimant could no longer perform his work and informed Tony Hernandez, the second shift supervisor, that he needed to leave work and go to the emergency room. Claimant testified that Vince Miller and Carl Freeman told him he should seek medical attention and have it processed through his health insurance carrier Blue Cross Blue Shield.

Carl Freeman, safety and health manager for respondent, testified that he first became aware of claimant's workers compensation claim on July 13, 2011. However, he had been informed on July 5, 2011, that claimant left work early to seek medical attention. According to Mr. Freeman, claimant told him the problems were not work-related. On July 13, 2011, after claimant reported the work-related injury, an incident report was filed. Claimant was accommodated with light duty when he returned to work.

Claimant followed up with Dr. Friesen over the ensuing months for pain medication. Claimant received a series of epidural injections in this time period.

Claimant's employment was terminated on August 26, 2011, after his third offense in three months involving damage to company equipment. Respondent estimated that the damage losses exceeded \$10,000. The first incident was for the destruction of a panel screen, and the second incident occurred when claimant drove a transfer cart outside of its railing causing the wiring to become unhooked. There was no property damage with the cart incident. The third incident involved a forklift damaging a sprinkler, spraying water over stacks of paper.

Mr. Freeman testified that every new hire attends an initial four to five hour safety and health training session in which each department reviews its safety procedures. Also, every week there is a seven minute safety training session for each department.

Mr. Freeman stated claimant's termination had nothing to do with the workers compensation claim. Claimant alleges that other employees have caused the same type of damage to company property and were not terminated. Mr. Freeman testified that after claimant was terminated, another employee was also terminated for damaging company property. Rod Tormey, a plant scheduler for respondent, testified that terminations are done on a case by case basis. Shannon Zink, the regional human resource manager for respondent, also testified that no employee is allowed to be terminated without review. Further, aside from threatening situations, respondent utilizes a three-step process for termination: first warning, second offense, and third offense.

Following the preliminary hearing of October 11, 2011, claimant was authorized for medical treatment. Claimant began receiving medical treatment from Dr. Paul Stein in December 2011, before Dr. Stein referred him to Dr. James D. Weimar, a board eligible neurosurgeon. Dr. Weimar initially evaluated claimant on January 30, 2012. After reviewing claimant's prior records and performing a physical examination, Dr. Weimar determined claimant was a candidate for surgery. Claimant underwent a left L5-S1 hemilaminotomy with microdiscectomy and left L5-S1 foraminotomy on March 13, 2012. Claimant was discharged the following day with pain medication. Dr. Weimar provided postoperative restrictions of no bending or twisting excessively and lifting/pushing/pulling weight restrictions of 5-10 pounds. Claimant was released to work with restrictions on May 22, 2012.

Claimant attended physical therapy. He was released at maximum medical improvement with no restrictions by Dr. Weimar on July 25, 2012. Additionally, Dr. Weimar testified that because he did not assign claimant permanent work restrictions, claimant has no task loss as a result of his condition.

Dr. Pedro Murati, a certified independent medical examiner, evaluated claimant at his counsel's request on October 1, 2012. Claimant presented to Dr. Murati with low back pain shooting down the left leg, numbness and tingling in the left lower extremity, a limp, and the inability to work around the house due to low back pain. After reviewing claimant's medical records and performing a physical examination, Dr. Murati diagnosed claimant with status post-surgery, failed back surgery syndrome, and bilateral SI joint dysfunction. Dr. Murati recommended claimant follow up on a yearly basis regarding any low back complications, pain management, a spinal cord stimulator evaluation, and an evaluation by a spine specialist for a probable lumbar spine fusion.

Using the *AMA Guides*,¹ Dr. Murati opined claimant falls between DRE Categories III and IV for a 15 percent whole person impairment. Further, he noted claimant was essentially and realistically unemployable. Dr. Murati noted:

[Claimant] has significant clinical findings that have given him diagnoses consistent with his multiple repetitive traumas at work. Therefore, it is under all reasonable medical certainty and probability the prevailing factor in the development of his conditions is the multiple repetitive traumas at work.²

Dr. John F. McMaster, a board certified physician specializing in emergency medicine, performed an independent medical evaluation of claimant at respondent's request on December 3, 2012. After reviewing claimant's history and performing a physical examination, Dr. McMaster diagnosed claimant with lumbosacral degenerative disk disease, non-occupational in origin, and L5-S1 radiculopathy, status post-surgery. Dr. McMaster determined claimant has a DRE Category III impairment of 10 percent to the whole person using the *AMA Guides*. However, he opined claimant's physical capacity has not been permanently altered by his condition; therefore, claimant sustained no loss of task abilities as a result of the July 5, 2011 occurrence.

Based on that MRI, combined with the records I was provided and the history I was provided by the examinee, he had symptoms that – involving his low back and radicular symptoms that predated the alleged date of injury in the workplace by years in that he had numerous encounters with Dr. Friesen even prior to 2011 for

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Murati Depo., Ex. 1 at 4.

low back complaints that were, in my medical opinion, evidence of the degenerative changes being the prevailing factor giving rise to his symptoms again in June and then July of 2011.³

Paul S. Hardin and Jerry D. Hardin, vocational consultants, evaluated claimant at claimant's counsel's request on October 18, 2012. They concluded that claimant is "permanently incapable of engaging in any type of substantial and gainful employment."⁴ Dr. Murati agreed with this assessment.

Steve L. Benjamin, a vocational expert, interviewed claimant on February 1, 2013, for a task and wage loss assessment at respondent's request. Mr. Benjamin reviewed the reports of Drs. Weimar, McMaster, and Murati to arrive at his conclusions. Regarding claimant's ability to obtain gainful employment, Mr. Benjamin offered two opinions. Firstly, based upon Dr. Weimar's report and restrictions, claimant should be able to return to a position similar to his employment at respondent and earn a comparable wage. Secondly, based upon Dr. Murati's restrictions, Mr. Benjamin opined claimant would not be able to return to the workforce. Dr. McMaster reviewed the task list prepared by Mr. Benjamin and opined claimant has sustained a 0 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(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 claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in part:

(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.

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³ McMaster Depo. (Feb. 12, 2013), at 14-15.

⁴ Hardin Depo. at 7.

(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.

.....

(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.

.....

(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.

(h) "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.

ANALYSIS

The ALJ found claimant's condition and need for medical treatment was the result of a preexisting condition and denied compensability based on the language contained in K.S.A. 44-508(f)(2). The Board has found that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite the claimant also having an aggravation of a preexisting condition.⁵

Dr. Murati testified on behalf of claimant. Dr. Murati is board certified, *inter alia*, in rehabilitation and physical medicine. Dr. Murati examined claimant and opined that the prevailing factor in claimant's disability is the alleged accident on July 5, 2011. He stated on cross examination that if there were other records supporting that claimant was in great

⁵ *Homan v. U.S.D. # 259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012). *Macintosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012). *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012). *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012). *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

pain during the period prior to the accident, he could change his opinion.⁶ Dr. Murati acknowledged that claimant went to the Galichia emergency room on June 17, 2011, with 10 out of 10 pain. Dr. Murati also acknowledged claimant had an MRI done on June 24, 2011, that revealed an extrusion which caused effacement of the left S1 nerve root and was likely related to claimant's symptoms.

Dr. Murati agreed it would be significant if claimant's complaints at the emergency room on the alleged date of accident suggested that he was having continuing problems similar to his prior episodes. The medical records for the July 5, 2011, emergency room visit confirms claimant had similar symptoms for one month and that the pain was sharp, similar to prior episodes.⁷ Dr. Murati said of the claimant, "he should have been more forthright. . . ."⁸ While Dr. Murati ultimately stood firm on his original prevailing factor opinion, his opinion carries little weight.

Dr. McMaster testified on behalf of the respondent. Dr. McMaster is board certified, *inter alia*, in preventive medicine, emergency medicine and family practice. Dr. McMaster testified that the June 24, 2011, MRI and the claimant's medical history with Dr. Friesen showed claimant's low back and radicular symptoms predated the alleged date of injury. He opined the MRI and medical history were evidence of degenerative changes that were the prevailing factor for his condition and need for medical treatment. This opinion is consistent with Dr. Weimar's opinion that the MRI results support claimant had degenerative disc problems that could warrant surgical intervention prior to the alleged date of accident.

Dr. Friesen was claimant's personal physician. Dr. Friesen noted pain all the way down claimant's left leg with straight leg lifting on October 2, 2008. On October 8, 2008, Dr. Friesen recorded sciatica with tenderness down the back of the left leg. Dr. Friesen prescribed Lortab at that time. On January 23, 2009, claimant saw Dr. Friesen with complaints of severe trouble related to sciatica. Dr. Friesen encouraged claimant to talk to his boss about making his job easier. After going to the Galichia emergency room the night before, claimant saw Dr. Friesen on June 22, 2011, with the same complaints of pain down the left leg and positive straight leg raise. He also had pain in the mid back. Dr. Friesen ordered an MRI, which was performed on June 24, 2011. It is obvious from reviewing Dr. Friesen's records that claimant's low back condition preexisted his alleged July 5, 2011 injury.

The Board finds the June 24, 2011, MRI to be significant. Dr. Weimar agreed the

⁶ Murati Depo. at 20.

⁷ Ford Depo., Ex. 2 at 1.

⁸ Murati Depo. at 27.

procedure he performed was to correct lesions objectively identified on the June 24, 2011 MRI. Dr. Weimar stated claimant had obviously herniated a disc prior to the alleged date of accident. Dr. Weimar stated he could not say that the event on July 5, 2011, made the disc herniation worse than what was shown on the June 24, 2011 MRI. He did agree that, looking at the objective evidence, claimant had a condition that existed prior to July 5, 2011, that could warrant surgical intervention. Because Dr. Weimar provided treatment and specializes in neurosurgery, his opinions are found to be persuasive.

On the Application for Hearing filed with the Division of Workers Compensation on September 12, 2012, claimant alleged only a single injury occurring on July 5, 2011. At the regular hearing, the parties stipulated that the date of accident was July 5, 2011. It was never argued that claimant suffered a series of repetitive injuries. As such, the Board must decide if that single incident at that single moment in time is the prevailing factor in causing claimant's disability and need for medical treatment.

There is no evidence in the record supporting a new physical finding or a change in the physical structure of the body as a result of anything that happened on July 5, 2011. Claimant failed to show by a preponderance of the evidence that his disability and need for medical treatment is related to an accidental injury occurring on July 5, 2011. After considering all relevant evidence submitted by the parties, the Board finds that claimant's condition preexisted the alleged date of injury and, at worst, claimant experienced a non-compensable sole aggravation of his preexisting condition.

CONCLUSION

Claimant has failed to prove he suffered a compensable injury on July 5, 2011.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 28, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Hon. John D. Clark, Administrative Law Judge