BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES STROME	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,058,202 &
	)	1,058,204
US STONE INDUSTRIES	)	
Respondent	)	
AND	)	
	)	
MIDWEST BUILDERS' CASUALTY MUT. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the December 14, 2011, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Claimant appears by John J. Bryan, of Topeka, Kansas. Respondent and its insurance carrier (respondent) appear by Todd E. Cowell, of Topeka, Kansas.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's requests for preliminary relief because claimant's alleged accidents did not arise out of and in the course of his employment with respondent and because claimant's alleged accidents were not the prevailing factor in causing claimant's injury, medical condition, and need for treatment.

Claimant raises as issues whether his alleged accidental injuries arose out of and in the course of his employment and whether the accidents were the prevailing factor in causing his injury, medical condition, and need for treatment. Claimant argues that the ALJ's Order should be reversed.

Respondent maintains that the ALJ's Order should be affirmed.

FINDINGS OF FACT

Claimant was age 53 when he testified at the preliminary hearing. He began working for respondent in mid-March 2002 and still works there. There was a one-month period in which claimant left respondent to work for another employer. In connection with claimant's work with the other employer, he took a functional capacity evaluation (FCE) on May 10, 2002. The FCE showed that claimant was capable of performing heavy manual labor.[1]

Claimant denied having any problems with his back prior to June 29, 2011.

Claimant's position for respondent was plant manager. His job duties included operating and maintaining equipment, loading and unloading stone slabs for production, repairing head pulleys on conveyors, doing electrical work, and teaching mechanical welding to young apprentices. He testified that the dimensions of the stone slabs were 6 feet by 10 feet and ranged from 1 inch to 14 inches thick. Cranes were used to move the stone slabs on tables where the slabs would be sawed into appropriate sizes. Cranes were also used to move the cut sections of stone, however, there were left over pieces of stone, weighing from 5 pounds to 100 pounds, which had to removed manually.

Claimant worked seven days a week, five full weekdays and half days on Saturday and Sunday. Claimant testified he could spend two to three hours a day lifting.

Claimant testified that on June 29, 2011, he had been checking on an order at the request of the office manager, Kiera. As he was returning to the office to report to Kiera, claimant was startled by the sound of tires on gravel. The sound came from a company-owned pickup truck occupied by two of claimant's co-employees. Claimant jerked and twisted his back, which caused a stabbing pain in the middle of his low back. Immediately after the incident, claimant was told by the driver of the pickup, "Sonny", that the passenger, "Rowdy", pushed on the driver's leg, apparently causing an acceleration of the pickup and an increase in the sound the tires made on the gravel surface. Claimant reported the incident to Kiera, although he did not officially submit an accident report until eight days later because he hoped the pain would subside.

Respondent sent claimant to Dr. Matthew N. Henry, a neurosurgeon, who recommended epidural steroid injections. Dr. Milton Landers[2] administered two epidural injections, which provided claimant with no relief. Dr. Henry then recommended surgery, which claimant did not want because Dr. Landers allegedly told claimant that he had "a torn

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[1] P.H Trans., Cl's Ex. 3.

[2] Claimant testified that his epidural injections were administered by a Dr. Jones, but the medical records admitted into evidence indicate that it was Dr. Landers. P.H. Trans. at 19; Resp's Ex. A at 11, 13-15.

and bulging disc and he [Dr.Landers] could identify it with a discogram, but he [Dr. Landers] said Doctor Henry would not let him do it".[3] The surgery proposed by Dr. Henry was a decompressive laminectomy at L4, L5, and S1 with posterior instrumented fusion at L5-S1 and posterior lumbar interbody fusion.

Claimant received conservative treatment prescribed by his family physician, Dr. John D. Mosier, and Dr. Mosier's physicians assistant, Janel Silhan. The treatment consisted of medication, physical therapy, and a referral to Dr. Peloquin, a pain specialist, who administered facet injections.

At his counsel's request, claimant was seen in consultation by Dr. Glenn M. Amundson, an orthopedic surgeon, who recommended a discogram. Claimant desired that Dr. Amundson be authorized to provide him with additional treatment. Claimant is currently taking medication for pain and depression.

Claimant underwent two lumbar MRI scans: the first on July 13, 2011 and the second on October 19, 2011. The initial MRI scan revealed narrowing and dehydration of the L5-S1 disc; mild posterior bulging of the L5-S1 disc; and bilateral narrowing of the foramina of L5-S1. According to Dr. Amundson, the most recent scan revealed a degenerative disc at L2-L3; a "relatively normal" L3-L4; an L4-L5 degenerative disc with posterior annular tear; L5-S1 "nearly completely collapsed, complete loss of disc height"; and no clear evidence of nerve root impingement except a small left eccentric herniation/bulge at L5-S1.[4]

In addition to low back pain, claimant developed a limp and experienced constant shooting pain down his right leg. Claimant testified that the medication makes the pain better and that moving, sitting, standing and driving aggravate his symptoms. Sometimes his legs give out and he has to catch himself. The first time claimant recalls losing control of his legs was at the end of November 2011, three weeks before the preliminary hearing.

Claimant alleges a second accident on July 14, 2011, when he lost his footing on a concrete deck, stepped backward approximately one foot, and felt a cracking sensation and pain in his back and neck. According to claimant, he fell on his right side. Claimant testified that he was in so much pain he couldn't move. He reported this incident to Kiera, but he could not recall the exact date he reported the incident. He thinks he reported the accident about one week after the event. Claimant was again seen by Dr. Henry and was ultimately told that he was being denied workers compensation benefits.

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[3] P.H. Trans. at 19.

[4] P.H. Trans., Cl's Exs. 4, 5.

In his report dated September 14, 2011, Dr. Henry states:

> After reviewing Mr. Strome's medical records it appears we have a couple different reports on how his injury occurred. The employer's report of accident states, "Jim was walking in parking lot and turned quickly when he heard a noise and strained his lower back." Based upon this report of accident, compared to the radiographic studies, the degenerative disc disease and modic endplate changes are not the primary result as it relates to his accident. Although, Mr. Strome's twisting motion could have exacerbated his underlying condition, it is not the prevailing cause.[5]

Claimant continues to work on light duty with other employees assisting with the heavier tasks.

PRINCIPLES OF LAW AND ANALYSIS

L. 2011, ch. 55, New Section 1 states in part:

> (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.
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> (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.
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> (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.

L. 2011, ch. 55, sec. 5 states 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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[5] P.H. Trans., Resp. Ex. A. at 1.

(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.

. . . .

(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.

(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.

. . . .

(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.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS

The undersigned Board Member is persuaded that a preponderance of the credible evidence does not establish that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on June 29, 2011 or July 14, 2011. Claimant also did not sustain his burden of proof that his alleged accidents were the prevailing factor in causing his injury, medical condition, or need for treatment.

The extensive amendments to the Kansas Workers Compensation Act which became effective on May 15, 2011, contain several provisions which bear directly on the issues in these claims. To be compensable, an "accident" must now be the prevailing factor in causing the injury. The definition of "arises out of and in the course of" has been amended to provide that an injury is not compensable because work was a triggering or precipitating factor and that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. The new amendments also provide that an injury by accident shall be deemed to arise out of employment only if the accident is the prevailing factor in causing the injury, medical condition, and resulting disability or impairment.

The amendments specify that the words "arising out of and in the course of employment" shall not be construed to include an injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living. "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 claim, the ALJ shall consider all relevant evidence submitted by the parties.

Here, the evidence does establish that claimant had no problems with his back before the June 29, 2011, event; that claimant probably had degenerative disc disease in his low back which preexisted the alleged accidents; that claimant's preexisting disease was likely made symptomatic, aggravated, triggered, or precipitated by the accident; and that the degenerative disease probably developed as a result of the natural aging process.

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[6] K.S.A. 44-534a.

[7] K.S.A. 44-555c(k).

The intent of the legislature, as plainly expressed in the new statutory language, is that some claims which were compensable before May 15, 2011, should now to be considered to be non-compensable.

In *Casco*,[8] the Kansas Supreme Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[9]

More recently, the Kansas Supreme Court stated:

> [C]ourts must give effect to [a workers compensation statute's] express language rather than determine what the law should or should not be.[10]

The medical evidence in this claim supports the ALJ's findings. The diagnostic testing, including the two lumbar MRI scans, reveal nothing that shows a traumatic injury occurred in either of claimant's alleged accidents. Dr. Amundson does not provide any opinion which supports the notion that any of the abnormalities in claimant's low back were caused by either of claimant's alleged accidents. Nor does Dr. Amundson state that either of claimant's alleged accidents were the prevailing factor in causing claimant's injury, medical condition, or need for treatment. On the contrary, the only medical opinion in the claim which can be fairly said to address the "prevailing factor" issue is the report of Dr. Henry dated September 14, 2011, which concludes that although claimant's incident on June 29, 2011, may have exacerbated the claimant's underlying degenerative disease, it was not its prevailing cause.

Claimant's injury consisted of multi-level degenerative disease which did not develop as a result of the alleged accidents. Claimant's evidence that he was asymptomatic before the June 29, 2011, event and became symptomatic thereafter is relevant to the issues raised by claimant, but it is insufficient to sustain claimant's burden of proof in light of the provisions of the amended Act and the unrefuted opinions of Dr. Henry.

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[8] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh'g denied (2007).

[9] *Id.* at Syl. ¶ 6.

[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

CONCLUSION

(1) Claimant did not sustain his burden of proof that he suffered personal injury by accident arising out of and in the course of his employment with respondent on June 29, 2011, or July 14, 2011.

(2) Claimant did not sustain his burden of proof that either of his alleged accidents were the prevailing factor in causing claimant's injury, medical condition or need for treatment.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated December 14, 2011, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Todd E. Cowell, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge