

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

<b>TRACY WRIGHT</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,058,254
	)	
<b>GEAR FOR SPORTS</b>	)	
Respondent	)	
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL FIRE INS. CO. and</b>	)	
<b>CHARTIS INS. CO.</b>	)	
Insurance Carriers	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier Chartis Ins. Co. appealed the March 23, 2012, Preliminary Decision entered by Administrative Law Judge (ALJ) Marcia L. Yates. Steffanie L. Stracke of Kansas City, Missouri, appeared for claimant. Stephanie Warmund of Overland Park, Kansas, appeared for respondent and its insurance carrier Liberty Mutual Fire Ins. Co. (Liberty). L. Anne Wickliffe of Kansas City, Missouri, appeared for respondent and its insurance carrier Chartis Ins. Co. (Chartis).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 22, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

**ISSUES**

Claimant filed an Application for Hearing alleging that repetitive employment activities each day worked before and after April 22, 2011, caused injuries to her “right and left upper extremity and baw.”<sup>1</sup> Claimant asserted her work activities were the prevailing

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<sup>1</sup> Application for Hearing (filed Oct. 27, 2011). The term “baw” is used to mean body as a whole injury.

factor causing her bilateral carpal tunnel syndrome. Claimant requested that orthopedic specialist Dr. Joel R. Lane be appointed as authorized treating physician to perform a left carpal tunnel release.

In her Order, ALJ Yates found claimant's date of accident was October 7, 2011, the date claimant was taken off work by Dr. Lane. The ALJ stated in her Order, "the statutory requirements that the repetitive nature of the injury has been demonstrated by diagnostic or clinical tests and that the repetitive trauma is the prevailing factor in causing the injury have been met."<sup>2</sup> She also determined claimant's work activities constituted repetitive trauma as contemplated by K.S.A. 2011 Supp. 44-508.

Respondent had two workers compensation insurance carriers while claimant was employed. Liberty Mutual Fire Ins. Co. provided coverage until June 30, 2011, while Chartis Ins. Co. provided coverage beginning July 1, 2011.

Chartis appealed the ALJ's Preliminary Decision. Respondent and both insurance carriers asserted claimant failed to prove that the repetitive work activities at her employment were the prevailing factor causing her injuries. They cite the fact that none of the physicians who examined and/or treated claimant specifically indicated in their reports that claimant's work activities constituted the prevailing factor causing her medical condition, impairment or disability.

Neither Liberty nor claimant disputed ALJ Yates' finding that October 7, 2011, was claimant's date of accident. In its Application for Review of Preliminary Decision, Chartis asserted that "the finding that the appropriate date of accident is October 7, 2011, is not supported by substantial competent evidence sufficient to satisfy the statutory definition of a compensable injury."<sup>3</sup> Neither Liberty nor Chartis contended claimant failed to give timely notice of her repetitive trauma injuries. At the preliminary hearing, the ALJ stated that the parties stipulated that respondent received oral notice on April 22, 2011, and written notice on October 27, 2011.

The issues on appeal are as follows:

1. What was claimant's date of injury by repetitive trauma? The date of claimant's personal injury determines whether her claim falls under the Kansas Workers Compensation Act (Act) that was in effect prior to May 15, 2011 (Old Act) or the Act effective May 15, 2011 (New Act). This is paramount in this claim as K.S.A. 44-508 was significantly amended in the New Act to provide that a claimant's accident or repetitive

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<sup>2</sup> ALJ Preliminary Decision (Mar. 23, 2012) at 1.

<sup>3</sup> Application for Review of Preliminary Decision (filed Apr. 3, 2012) at 3.

trauma injury must be the prevailing factor in causing claimant's present need for medical treatment.

2. Did claimant prove by a preponderance of evidence that she suffered personal injuries by repetitive trauma arising out of and in the course of her employment with respondent? Specifically, did claimant prove her repetitive work activities were the prevailing factor in causing her present need for medical treatment?

#### FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the preliminary hearing, claimant testified she had been employed by respondent for ten years, eight months as a replenisher. Claimant worked four 10-hour days and her job duties as a replenisher required her to drive a stand-up order picker. Claimant drove the order picker to eight store locations and picked up boxes ranging from ten to forty pounds. The steering wheel on the order picker has a knob on it which claimant grasped to assist her in turning. She scanned in the boxes using a laser scanning gun and put the boxes on the order picker. When the order picker was full of boxes, claimant took them to a location known as A picking and scanned the boxes into A picking. She then unloaded the boxes, cut them open with a box cutter knife and placed the boxes in A picking.

Around 2003, claimant first noticed symptoms in her upper extremities when she felt shooting pain from her fingertips to her forearms. The symptoms worsened over time. On April 22, 2011, claimant's symptoms (including numbness and tingling in both hands and shooting pains) became so severe that she spoke to Charlie Rist, her supervisor, about them. Claimant requested to see the company doctor for her hands. Mr. Rist did not know how to handle the situation, so he had claimant talk to Cindy Olivarez, Director of Warehousing. According to claimant, she was not allowed to see the company doctor by Ms. Olivarez. Claimant then went to see a physician on her own.

On May 3, 2011, claimant saw her family physician, Dr. Steven J. Broxterman. The records of Dr. Broxterman from the May 3, 2011, appointment indicated claimant had an onset of pain in her forearms seven years earlier, with the right forearm worse than the left. His note from that visit indicated claimant reported picking orders of clothing from boxes all day, 12 hours a day, three days a week. Dr. Broxterman referred claimant to neurologist Dr. Gordon R. Kelley and orthopedic specialist Dr. Joel R. Lane. Approximately four or five years prior to May 3, 2011, claimant saw Dr. Broxterman for an unrelated medical problem. At that visit claimant mentioned the numbness and tingling in her hands to Dr. Broxterman and he suggested splints. Claimant tried using splints, but they did not help.

On May 12, 2011, Dr. Kelley performed bilateral nerve conduction studies on claimant's median and ulnar nerves and bilateral EMG studies. Dr. Kelley noted the

findings were consistent with the presence of bilateral carpal tunnel syndrome, more advanced on the right than the left. Claimant then saw Dr. Lane on May 19, 2011. In a letter dated the same day to Dr. Broxterman, Dr. Lane also opined claimant had bilateral carpal tunnel syndrome, right worse than left. Dr. Lane's records indicate that during the May 19, 2011, visit he discussed operative and non-operative options with claimant. Claimant had no medical treatment again until October 3, 2011, when she saw Dr. Lane and decided to have a right carpal tunnel release. Claimant testified things were busy at work and because she wanted to work overtime, she postponed surgery until October 2011. On October 7, 2011, Dr. Lane performed a right carpal tunnel release. Claimant was off work for five weeks and used vacation time. Dr. Lane has recommended claimant also undergo a left carpal tunnel release.

Dr. Lane did not testify in this claim. In a letter to claimant's attorney dated December 8, 2011, Dr. Lane stated, "Due to the repetitive nature of her work environment, I do feel that this is a contributing factor to her carpal tunnel syndrome that she has been treated for, undergoing operative release on the right side with a good result."<sup>4</sup>

Claimant testified she asked Drs. Broxterman and Lane if her symptoms were attributed to her work activities. However, claimant did not indicate whether she was informed her symptoms were work related by Drs. Broxterman or Lane.

At the request of her attorney, claimant was examined by Dr. Lynn D. Ketchum. Dr. Ketchum did not testify, and his report contained in a letter to claimant's attorney dated January 12, 2012, was introduced by claimant's attorney as an exhibit at the preliminary hearing. Dr. Ketchum indicated claimant gave the same work history she testified to at the preliminary hearing. Dr. Ketchum noted in the January 12, 2012, letter, "[n]ow she [claimant] is not having symptoms on the right but the left is much worse than the right at this time although before surgery the right was worse than the left."<sup>5</sup> Dr. Ketchum further stated:

She does all the things, repetitive-type work, that can cause this and if it did not cause it, her work is certainly aggravating this condition. In my opinion, she needs a left carpal tunnel release. . . .

With a positive nerve conduction study for moderate carpal tunnel syndrome, I am recommending a left carpal tunnel release. It is my opinion, within a reasonable degree of medical certainty, that this left carpal tunnel syndrome, if not caused by work, is a work-aggravated condition. . . .<sup>6</sup>

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<sup>4</sup> P.H. Trans., Cl. Ex. 3.

<sup>5</sup> *Id.*, Cl. Ex. 2 at 1.

<sup>6</sup> *Id.*

ALJ Yates found claimant's date of accident was October 7, 2011, the date Dr. Lane took claimant off work following the right carpal tunnel release. The ALJ further found that the repetitive nature of the injury was demonstrated by diagnostic or clinical tests and that the repetitive trauma was the prevailing factor in causing claimant's injuries and that claimant's work activities constituted repetitive trauma. ALJ Yates then designated Dr. Lane as claimant's authorized treating physician.

#### PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-508(d) was in effect prior to May 15, 2011 (Old Act). It states in part:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

None of the actions cited in K.S.A. 2010 Supp. 44-508(d) took place prior to May 15, 2011. Claimant had no authorized treating physician. Claimant did not give written notice of her injury to respondent until October 27, 2011. Claimant complained of hand problems to Dr. Broxterman four to five years prior to May 3, 2011, and again on May 3, 2011, but there is no evidence that during those visits he either diagnosed claimant's condition as work related or provided her with a written diagnosis that her hand problems were work related. Nor is there evidence that prior to May 15, 2011, Drs. Kelley or Lane gave claimant a written diagnosis that her injury was work related. Therefore, because claimant's date of accident did not occur until after May 15, 2011, her claim does not fall under the auspices of the Old Act.

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

(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.

ALJ Yates found that the first event cited in K.S.A. 2011 Supp. 44-508(e) that established claimant's date of repetitive trauma injury was when Dr. Lane took claimant off work on October 7, 2011. This Board Member concurs. As of October 7, 2011, claimant was still employed by respondent and did not have her work activities modified by a physician. The only possible date of injury earlier than October 7, 2011, would have been the date a physician advised claimant that her repetitive trauma injuries were work related. Claimant did not testify that any of the physicians she saw prior to October 7, 2011, indicated the bilateral carpal tunnel syndrome was work related. Nor did any of the medical records of physicians who saw claimant indicate that they advised claimant prior to October 7, 2011, that her condition was work related. Therefore, this Board Member finds claimant's date of injury was October 7, 2011.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>7</sup> "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."<sup>8</sup>

K.S.A. 2011 Supp. 44-508(e) requires the repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. This Board Member is satisfied that this

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<sup>7</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>8</sup> K.S.A. 2011 Supp. 44-508(h).

requirement has been met as claimant underwent diagnostic tests and Drs. Lane and Ketchum opined claimant's injuries were repetitive in nature. However, K.S.A. 2011 Supp. 44-508(e) also requires that repetitive trauma must be the prevailing factor in causing the injury. K.S.A. 2011 Supp. 44-508(f)(2)(A)(iii) provides that an injury by repetitive trauma shall be deemed to arise out of employment only if, "the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment." As this claim is at the preliminary hearing stage, the issue is whether claimant's repetitive work activities are the cause of her present need for medical treatment. K.S.A. 2011 Supp. 44-508(g) defines "prevailing" as:

"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.

In *Macintosh*,<sup>9</sup> a physician opined Macintosh's accident was the prevailing factor that caused his injury and was the direct and prevailing factor causing his need for medical treatment, restrictions and impairment. In *Strome*,<sup>10</sup> it was alleged Strome sustained an accidental injury when he twisted his back at work. Strome's treating physician indicated Strome's twisting motion could have exacerbated his underlying back condition, but was not the prevailing cause of the back condition. The Board Member who decided *Strome* found Strome failed to prove by a preponderance of the evidence that he sustained personal injury by accident arising out of and in the course of his employment. The Board Member stated:

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.

None of the physicians who examined or treated claimant testified. Dr. Broxterman's records do not render an opinion as to what caused or aggravated claimant's bilateral carpal tunnel syndrome. The records of Drs. Lane and Ketchum do not

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<sup>9</sup> *Macintosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

<sup>10</sup> *Strome v. US Stone Industries*, Nos. 1,058,202 & 1,058,204, 2012 WL 758316 (Kan. WCAB Feb. 24, 2012).

mention the term “prevailing factor.” As indicated in the brief of Chartis, “This is more than a question of whether the doctor has used the specific words required by the statute.”<sup>11</sup>

Dr. Lane’s statement that claimant’s work activities contributed to her carpal tunnel syndrome does not prove by a preponderance of the evidence that her work activities were the prevailing or primary factor causing her injuries. A contributing factor is not a prevailing factor. Dr. Ketchum stated, “It is my opinion, within a reasonable degree of medical certainty, that this left carpal tunnel syndrome, if not caused by work, is a work-aggravated condition.”<sup>12</sup> Dr. Ketchum’s opinion does not explicitly state whether claimant’s work activities caused or merely aggravated claimant’s carpal tunnel syndrome. This is significant as K.S.A. 2011 Supp. 44-508(f)(2) provides:

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.

The focus of the parties was whether claimant’s work activities were the prevailing factor causing her injuries. Respondent and its insurance carriers did not present any alternate theories as to the prevailing, or primary, factor which caused claimant’s injuries. None of the physicians indicated claimant’s carpal tunnel syndrome preexisted her employment with respondent or was caused or aggravated by non-work activities.

This Board Member finds the language contained in the records of Drs. Lane and Ketchum coupled with claimant’s testimony regarding the nature of her work activities and the onset of symptoms does not prove by a preponderance of the evidence that claimant’s work activities were the prevailing factor causing her present need for medical treatment. It is not necessary for a physician to specifically state that an accident or work-related repetitive activity is the prevailing factor causing a claimant’s injury in order for a fact finder to make such a finding. However, a claimant’s task of proving his or her work activities are the prevailing factor causing the present need for medical treatment becomes much more difficult when no physician gives a specific opinion on prevailing factor. If a physician does not opine in his or her report that a claimant’s accident or repetitive trauma is the primary factor causing the injury, the better practice would be to depose the physician to ascertain the physician’s opinion on the prevailing cause.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>13</sup> Moreover, this review of a

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<sup>11</sup> Chartis Brief at 2 (filed Apr. 16, 2012).

<sup>12</sup> P.H. Trans., Cl. Ex. 2 at 1.

<sup>13</sup> K.S.A. 2011 Supp. 44-534a.

preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>14</sup>

**CONCLUSION**

1. Claimant's date of injury was October 7, 2011.

2. Claimant failed to prove by a preponderance of the evidence that she sustained a personal injury by repetitive trauma arising out of and in the course of her employment with respondent. Specifically, claimant failed to prove by a preponderance of the evidence that her work activities were the prevailing factor causing her present need for medical treatment.

**WHEREFORE**, the undersigned Board Member reverses the March 23, 2012, Preliminary Decision entered by ALJ Yates.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2012.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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<sup>14</sup> K.S.A. 2011 Supp. 44-555c(k).