



Claimant then applied for preliminary hearing benefits for neck treatment. After considering Dr. Stein's IME and the testimony in his evidentiary deposition, Judge Moore denied claimant's requests in an Order dated December 31, 2012, which is the subject of this appeal.

In his December 31, 2012, Order, the ALJ stated:

While the work accident of November 25, 2011 caused a structural injury to Claimant's right shoulder, the accident did not cause a lesion or change in the physical structure of her neck. Claimant had pre-existing, albeit asymptomatic, degenerative disk disease which was rendered symptomatic subsequent to the work accident. K.S.A. 2012 Supp 44-508(f)(2) provides that "an injury is not compensable solely because it aggravates, accelerates or renders a pre-existing [sic] condition symptomatic."

The right shoulder is compensable; the neck is not.<sup>1</sup>

Claimant requests that the December 31, 2012, Order be reversed and that she be granted the right to medical treatment for her neck. Claimant claims her degenerative disk disease of the cervical spine was asymptomatic and within normal limits until the accident of November 25, 2011. Claimant asserts ALJ Moore should have ordered medical treatment because the accident was the prevailing factor in her neck injury and need for treatment.

Respondent argues that the Board does not have jurisdiction to hear this appeal as K.S.A. 2011 Supp. 44-534a(a)(2) denies jurisdiction in appeals concerning denial of medical treatment. In the alternative, respondent requests that the Order be affirmed.

The issues raised on review are:

1. Does the Board have jurisdiction to review the ALJ's Order denying medical treatment?
2. Did claimant's alleged neck injury by accident arise out of and in the course of her employment with respondent?

#### **FINDINGS OF FACT**

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

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<sup>1</sup> ALJ Order (Dec. 31, 2012) at 1.

Claimant is a 60-year-old woman who at the time of the incident was employed as a Certified Nurse Aide with respondent. Her duties included directly caring for residents and assisting nursing personnel with resident care, which required physical activities such as reaching, bending, and grasping. The position required the ability to lift, support, and bodily manipulate the weight of a patient. Claimant was taken off work by Dr. Stein on November 6, 2012.

On Friday, November 25, 2011, claimant was assisting a nurse in the care of a combative patient. While using a gait belt to attempt to lift the patient, claimant felt acute pain in the back of her neck and right shoulder. Claimant continued working that day and went to a chiropractor on the following Saturday morning for an adjustment. Claimant then reported to work and she reported her injury to respondent.

Respondent referred claimant to Dr. Ronald Whitmer, respondent's workers compensation physician. Claimant presented with right shoulder pain on November 30, 2011. Dr. Whitmer had the impression that claimant had a rotator cuff tear and ordered x-rays and an MRI. December 1, 2011, MRI scan of the right shoulder showed an acromioclavicular degenerative change with impingement and possible minimal partial thickness tear, with evidence of possible rotator cuff tendinosis.

Claimant was seen by orthopedic surgeon Dr. Ranjan Sachdev on January 11, 2012, with complaints of worsening symptomatology including "numbness and tingling 'in her hands and down her arm'."<sup>2</sup> She had been undergoing physical therapy prior to this appointment. X-rays of claimant's cervical spine taken on January 11, 2012, showed degenerative change. An MRI scan of her cervical spine on February 1, 2012, portrayed degenerative osteophyte at C4-5, and degenerative change at C5-6 and C6-7. An EMG/NCT of the right upper extremity taken on February 14, 2012, was a normal study. Dr. Sachdev's opinion was that claimant's shoulder injury aggravated a preexisting degenerative condition in her neck, causing it to become symptomatic.

Claimant was referred to Dr. Bell Razafindrabe by Dr. Sachdev on February 29, 2012, for physical medicine and rehabilitation. Claimant presented with pain in her neck and shoulder on the right side, with an average intensity of 9 out of 10 and sometimes reaching 10. Dr. Razafindrabe diagnosed claimant with brachial plexopathy, radiculopathy, cervical, neuropathic pain and prescribed work restrictions and Neurontin. A cervical epidural steroid injection was given on this date. Claimant underwent bilateral C3-6 medial branch blocks on both March 8, 2012, and March 20, 2012, after which she reported improvement in her headache and neck pain for more than seven days. Radiofrequency ablation was recommended after claimant went to the emergency room in April 2012 with complaints of intractable pain in her neck, headache, and dizziness. Authorization for said

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<sup>2</sup> Stein Depo., Ex. 2 at 11.

ablation was not provided. Dr. Razafindrabe noted on April 30, 2012, that claimant's pain was "aggravated by everything and movement, while it is alleviated by nothing".<sup>3</sup>

Judge Moore appointed Dr. Stein, a neurosurgeon, certified with the American Board of Neurological Surgery, as a neutral physician to perform an independent medical examination on June 15, 2012. Dr. Stein saw claimant on August 9, 2012, at which time she complained of pain and limited movement in her right shoulder, neck pain with constant headaches, difficulty extending her head, difficulty sleeping due to headaches, numbness and tingling into her right arm, difficulty with balance, and dizziness.

In Dr. Stein's IME report dated August 9, 2012, he noted that claimant's treatment records do not indicate complaints regarding her neck until January 11, 2012. He further stated:

Assuming the accuracy of the patient's history that her neck pain started at the time of the work incident or shortly thereafter, the incident at work would be considered a precipitating or triggering factor aggravating the preexisting degenerative disk disease in the cervical spine. Also assuming the absence of a prior history of neck symptomatology, it would be my opinion that the incident at work is the prevailing factor regarding the current neck symptomatology and need for treatment.<sup>4</sup>

Dr. Stein submitted a follow-up report dated September 23, 2012, after his receipt and review of claimant's radiology reports. Dr. Stein diagnosed claimant's neck with moderately severe degenerative change at C4-5, C5-6, and C6-7, as well as reversal of curvature. He states that the degenerative change in her cervical spine was preexisting while noting that he cannot be sure of the reversal of curvature, not having radiology reports that predate claimant's November 2011 work incident. According to Dr. Stein, the reversal of curvature may be from muscle spasms. He recommended epidural steroid injections and noted that a possibility might arise in the future concerning surgery.

Dr. Stein additionally recommended psychological testing and evaluation by Dr. T. A. Moeller. He states that claimant has pathology consistent with complaints but that he strongly suspects a significant amount of overreaction and symptom magnification in relation to her neck symptoms. He believes the level of pain reported by claimant is out of proportion to the definitive findings and that any future consideration of surgical intervention should be preceded by a full psychological evaluation.<sup>5</sup>

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<sup>3</sup> Stein Depo., Ex. 2 at 11.

<sup>4</sup> *Id.*, Ex. 2 at 8.

<sup>5</sup> *Id.* at 11-12.

On November 6, 2012, Dr. Stein submitted an additional follow-up report after receiving a call from someone identifying himself as claimant's husband. Claimant's husband stated that claimant had been returned to work, could not sleep at night and "was up all night crying" due to terrible pain. Dr. Stein decided to take claimant off work until the evaluation was completed, although he was unsure as to how much of claimant's complaints were symptom magnification.

Claimant informed Dr. Stein that although she had occasional "stiff neck" in the past, a condition that anyone might have, she never had a substantial preexisting neck problem. Dr. Stein further noted that he does not have a definite preexisting diagnosis because claimant did see a chiropractor in the past for her back, but there are no records of these visits. Dr. Stein stated in his evidentiary deposition, "As far as I know, no physician or certainly no orthopedic or neurosurgical specialist had treated or evaluated her neck before."<sup>6</sup>

In his deposition dated December 10, 2012, Dr. Stein agreed that in his medical opinion an event that only elicits prior symptoms to reemerge constitutes an aggravation of a preexisting condition, but an event that precipitates a new symptom or structural change or pathology is a prevailing factor of a new injury. He continues to say that, medically, "just because something's a precipitating factor doesn't mean it can't be a prevailing factor. It's not either/or, it can be both."<sup>7</sup> Upon further clarification regarding the case in question, Dr. Stein relates that the prevailing factor of claimant's neck symptomatology is the accident which precipitated the symptoms from the cervical degenerative disease. He states, "If this incident hadn't occurred, she . . . very well may not be symptomatic today."<sup>8</sup>

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Does the Board have jurisdiction to review the ALJ's Order denying medical treatment?

The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-551(i)(2)(A). In addition K.S.A. 2011 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified therein. Respondent asserts claimant is not entitled to medical treatment because her neck injury was not work-related. The Board has considered this jurisdictional issue numerous times and has

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<sup>6</sup> Stein Depo. at 16.

<sup>7</sup> *Id.* at 24-25.

<sup>8</sup> *Id.* at 27-28.

consistently ruled that the Board has jurisdiction to review a preliminary order under these circumstances.<sup>9</sup>

2. Did claimant's alleged neck injury by accident arise out of and in the course of her employment with respondent?

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>10</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>11</sup>

K.S.A. 2011 Supp. 44-508(f)(2) states, in part:

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.

It seems clear the Kansas Legislature, in enacting the May 15, 2011, amendments, intended to limit recovery in claims that involve aggravations of preexisting conditions or which render preexisting conditions symptomatic. Ordinarily, courts presume that, by changing the language of a statute, the legislature intends either to clarify its meaning or to change its effect.<sup>12</sup>

Dr. Stein opined that claimant's accident was the prevailing factor regarding her symptomatology and current need for treatment. When taken in isolation, that opinion indicates claimant's neck injury arose out of and in the course of her employment with respondent. However, Dr. Stein also opined that claimant's accident was the precipitating or triggering factor aggravating claimant's preexisting cervical spine degenerative disk disease.

No medical records or reports document any separate lesion or change in the body's physical structure. The testing shows no disk herniation, fracture or dislocation.

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<sup>9</sup> See, e.g., *Compton v. Burnett Automotive, Inc.*, No. 1,050,026, 2010 WL 3093232 (Kan. WCAB Jul. 30, 2010); *Vick v. State of Kansas*, No. 1,033,888, 2010 WL 2937769 (Kan. WCAB Mar. 2, 2010); *Reese v. Beverly Healthcare Pittsburg*, No. 1,024,449, 2007 WL 1445602 (Kan. WCAB Sep. 18, 2007).

<sup>10</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>11</sup> K.S.A. 2011 Supp. 44-508(h)

<sup>12</sup> *Watkins v. Hartsock*, 245 Kan. 756, 759, 783 P.2d 1293 (1989).

Admittedly, claimant had no symptoms in her neck before the incident on December 13, 2011. The evidence also supports the finding that following the incident claimant developed neck pain and right shoulder symptoms. Claimant's neck symptoms were serious enough that Dr. Stein indicated claimant needs additional treatment. However, no physician opined claimant's widespread disk disease and bony degeneration were the result of claimant's accident. Claimant's preexisting condition was rendered symptomatic by the December 31, 2011, accident. Therefore, under K.S.A. 2011 Supp. 44-508(f), claimant's alleged neck injury is not compensable.

By statute, the above preliminary hearing findings and conclusions 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 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>

**WHEREFORE**, the undersigned Board Member finds that the December 21, 2012, preliminary hearing Order entered by ALJ Moore is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2013.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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

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