

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

REYFORD BONNER)
Claimant)
VS.)
CREEKSTONE FARMS PREMIUM BEEF)
Respondent)
AND)
LIBERTY INSURANCE CORPORATION)
Insurance Carrier)

Docket No. **1,059,138**

ORDER

Respondent and its insurance carrier (respondent) request review of the August 24, 2012, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. Daniel S. Bell, of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the Administrative Law Judge and consists of the preliminary hearing transcript dated March 27, 2012, with exhibits, and all pleadings contained in the administrative file.

ISSUES

Judge Barnes found claimant was injured at work on June 29, 2011, when a hydraulic cylinder fell and struck him in the head. Judge Barnes ruled “the prevailing factor for claimant’s current symptoms and the need for medical treatment is the work related accident of June 29, 2011.”¹ Judge Barnes ordered medical treatment with Dr. Pedro Murati, concluding respondent refused to provide medical treatment after July 12, 2011. Judge Barnes ordered payment of medical bills and expenses identified at the preliminary hearing.

¹ ALJ Order (August 24, 2012) at 2.

Judge Barnes awarded claimant temporary total disability benefits beginning February 22, 2012, at the rate of \$400 per week. Judge Barnes specifically noted claimant was not terminated for cause.

Respondent seeks review of Judge Barnes' preliminary hearing Order and raises the following issues:

(1) whether Judge Barnes erred in finding claimant proved personal injury by accident arising out of and in the course of his employment concerning the diagnoses provided by Dr. Murati, including post-concussive syndrome, vestibular disorder, myofascial pain syndrome of the shoulder girdles extending into the cervical and thoracic spine, as well as neck pain with signs and symptoms of radiculopathy;

(2) whether Judge Barnes exceeded her authority by ordering payment of temporary total disability benefits if claimant was terminated for cause;

(3) whether Judge Barnes' preliminary hearing Order was untimely to the financial detriment of respondent;

(4) whether Judge Barnes exceeded her jurisdiction by ordering payment for medical bills related to claimant's preexisting condition and unrelated to his work injury;

(5) whether Judge Barnes exceeded her jurisdiction by ordering medical treatment for injuries identified by Dr. Murati that were not contained in the initial medical records and reports from authorized physicians;

(6) whether Judge Barnes exceeded her jurisdiction by ordering medical treatment not reasonably necessary to cure and relieve claimant from the effects of his injury; and

(7) whether claimant provided timely notice of the various injuries identified by Dr. Murati as requiring medical treatment.

Claimant asserts Judge Barnes' preliminary hearing Order should be affirmed. Claimant argues respondent is precluded from asserting a notice defense not initially raised to Judge Barnes.

FINDINGS OF FACT

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

A 60-pound cylinder struck claimant directly in the forehead on June 28, 2011, as he was working for respondent in its maintenance department.² Although he did not lose consciousness, claimant testified that everything went black, he was dizzy or dazed, he was “seeing stars,”³ and his neck was bothering him. He was bleeding from a laceration on his forehead. He provided immediate notice of his accident to respondent.

Respondent sent claimant to the emergency room (ER) at South Central Kansas Medical Center (SCKMC), where he reported a pain level of “7” on a 0 to 10 scale.⁴ Claimant testified he told the ER personnel that he was dizzy and was suffering from neck pain. He also said he told them he did not feel anything in his back. The SCKMC records noted claimant had a laceration above his left eye on the forehead but that he was oriented to person, place and time. Claimant’s Glasgow Coma Score was 15, and no neurological problems were listed in the record. Claimant was given nine stitches to his forehead and sent back to work.

Claimant testified that after he was seen at SCKMC, he continued to have numbness on his left side as well as left-sided sinus pressure. He said he began suffering from headaches after the accident. Claimant denied having had any prior head injuries, such as concussions, and he had not been treated for any sinus problems. Claimant also alleged he had not really experienced headaches until after this accident.

Claimant became concerned because no x-rays were taken at SCKMC, so respondent sent him to Roderick Heger, D.O. Dr. Heger evaluated claimant on July 7, 2012. Claimant denied headaches or dizziness but reported still having “pressure around the point of impact” and “pressure in head.”⁵ Dr. Heger assessed contusion and facial laceration. Dr. Heger ordered a CT scan of the maxillofacial area.

Claimant had a CT scan at William Newton Hospital on July 12, 2011. The CT report stated: “Sinus pressure for one month. Recent head trauma on 06/29/11 when being hit in the head at work with a heavy object. The patient has constant frontal sinus pressure and headache.”⁶ The radiologist, Dr. Melissa Malone, noted severe pansinusitis, thinning of the ethmoid sinus walls suggestive of bony erosion, a focal area of bone destruction involving the inferior right frontal sinus, and obstruction of the osteomeatal unit

² Although claimant testified the accident occurred on June 28, 2011, the Application for Hearing and many of the medical records reflect a June 28, 2011, accident. Claimant testified he was taken to the emergency room within an hour of the accident. The emergency room records are dated June 29, 2011.

³ P.H. Trans. at 67.

⁴ P.H. Trans., Resp. Ex. 1 at 3; of note, page one of this exhibit listed claimant’s pain as “mild.”

⁵ P.H. Trans., Resp. Ex. 2 at 1.

⁶ P.H. Trans., Resp. Ex. 3 at 1.

bilaterally. Dr. Malone stated, "Given the severity of the pansinusitis and the recent history of head trauma, this patient may be at risk for brain abscess. Aggressive therapy and consultation with ENT is suggested."⁷

Dr. Heger referred claimant to Dr. Philip Harris. Dr. Harris evaluated claimant on July 18, 2011. Claimant complained of "blurred vision, headaches, fullness and pressure on the left hand side."⁸ Dr. Harris noted claimant's cranial nerves II-XII were grossly intact. Claimant underwent endoscopy to check for "purulent discharge, bloody discharge or other abnormality."⁹ Dr. Harris concluded claimant had "[f]rontal headache pressure posttraumatic injury to left forehead with scar present."¹⁰ Dr. Harris recommended a full CT scan of the sinus to "assess for a frontal or posterior table fracture given his headache complaint, fullness complaint and recent head trauma injury to the sinus area."¹¹

On July 19, 2011, Dr. Harris reviewed the July 12, 2011, CT images and characterized them as "not too helpful," apparently because he was unable to view or scroll through all of the images.¹² The available CT images would not allow Dr. Harris to verify the possibility of posterior table fracture. Dr. Harris diagnosed a right hand side anterior table fracture, which was not sinus related, and ethmoid disease, maxillary disease and bilateral sphenoid disease, i.e., "sinus disease," which caused claimant to have pressure, congestion and difficulty breathing. Dr. Harris recommended repairing the anterior table fracture, a full sinus CT and treatment of the sinus disease. Dr. Harris stated the fracture and the sinusitis were two separate and distinct things. The right hand side anterior table fracture was not surgically repaired.

Claimant had a maxillofacial CT scan on September 19, 2011. The listed relevant clinical history was, "[i]ntermittent frontal headaches since trauma, 4 months ago, to left frontal region requiring stitches."¹³ The CT scan was interpreted as not revealing acute or recently subacute-appearing facial bone fractures. The CT scan was also interpreted as showing pansinusitis with worsening of bilateral maxillary sinusitis, more marked on the right. Ethmoid sinus disease and frontal and sphenoid disease were present but improved over the July 12, 2011, CT.

⁷ *Id.*

⁸ P.H., Trans., Resp. Ex. 5 at 2.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² P.H. Trans., Resp. Ex. 5 at 1.

¹³ P.H. Trans., Resp. Ex. 6 at 1.

Renee Davis, ARNP, evaluated claimant at Dr. Harris' office on September 19, 2011. Claimant reported no pain and had no neck stiffness. Nurse Practitioner Davis and Dr. Harris agreed claimant's sinus disease was not related to the workers compensation injury. Nurse Practitioner Davis' report noted claimant had a "left orbital fracture which Dr. Harris states at this time does not need surgical intervention."¹⁴ She recorded that Dr. Harris no longer saw the right hand side anterior table fracture.

The record contains an October 24, 2011, report from Dr. Harris stating claimant would have a thorough examination, followed by the potential need for a CT of the sinuses, and a potential endoscopy. A nasal endoscopy was apparently performed, but respondent would not pay for it. The record does not contain any October 24, 2011, report from Dr. Harris showing whether a thorough examination was performed. However, Dr. Murati reported that Dr. Harris decided at the October 24, 2011, visit to continue nasal irrigation for sinusitis and to discuss claimant's issues of headaches and memory loss with a neurologist and/or have cognitive testing done.

Liberty Mutual Case Manager Ada Rivas' November 16, 2011, letter noted that Liberty Mutual accepted claimant's June 29, 2011, visit to SCKMC and the July CT scan but denied any treatment to the right side of claimant's face or for sinus issues, as well as further workers compensation benefits.

On November 23, 2011, claimant failed to "lock down" a machine on which he was working. Claimant testified he was still having headaches, pressure, blurred vision, neck pain, neck stiffness, and equilibrium problems as of November 23, 2011, but continued to work and did not complain about these symptoms because he needed to work. Respondent terminated claimant on November 29, 2011.

Claimant has not worked subsequent to being terminated by respondent. Claimant applied for unemployment and sought work with various employers.

Dr. Murati examined claimant on February 22, 2012. Dr. Murati opined claimant had post-concussion syndrome, vestibular disorder, myofascial pain syndrome involving the shoulder girdles and into the cervical and thoracic spine, and neck pain with signs and symptoms of radiculopathy. Dr. Murati suggested:

- rest for claimant's post-concussion syndrome to heal;
- referral to an ear, nose and throat specialist for vestibular disorder;
- physical therapy, trigger point injections, and medication for myofascial pain syndrome;

¹⁴ P.H. Trans., Resp. Ex. 6 at 2-3.

- cervical spine MRI, bilateral upper extremity NCS/EMG, including the cervical paraspinals, and depending on the results, physical therapy, medication, cervical epidural steroid injections and surgical evaluation; and

- restricting claimant from lifting more than 20 pounds occasionally or more than 10 pounds frequently, above shoulder work, work more than 24 inches from the body, and climbing, crawling and awkward neck positions.

Dr. Murati concluded the claimant's diagnoses were the direct result of the accident and the accident was the prevailing factor in causing claimant's disability and medical conditions.

Dr. Murati made no recommendations for treatment for claimant's sinus disease, sinus fractures or headaches.

Claimant was not under any restrictions prior to receiving Dr. Murati's report. Claimant testified Dr. Murati's restrictions precluded him from doing any of his past work.

Dr. Edward Prostic conducted a records review at respondent's request and prepared an April 6, 2012, report. Dr. Prostic did not personally evaluate claimant. Dr. Prostic noted claimant's accidental injury potentially caused a temporary aggravation of co-existent sinus disease. Dr. Prostic stated the prevailing factor and need for treatment of claimant's sinus issues was his "pre-existing abnormalities."¹⁵ Dr. Prostic opined the claimant was at maximum medical improvement and any treatment for the June 29, 2011, injury had already been provided. Dr. Prostic observed that Dr. Murati's diagnoses, if accurate, were more likely due to intervening trauma or disease instead of the June 29, 2011, accidental injury.¹⁶

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 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.

...

¹⁵ P.H. Trans., Resp. Ex. 9 at 2.

¹⁶ P.H. Trans., Ex. 9.

(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.

...

(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.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.¹⁷

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.¹⁸

¹⁷ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, Syl. ¶ 3, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

¹⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 2011 Supp. 44-510h(a) states, "It shall be the duty of the employer to provide the services of a health care provider . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury."

ANALYSIS

Respondent asserts Judge Barnes erred in finding claimant's accidental injury resulted in the various diagnoses and need for medical treatment identified by Dr. Murati. The Board has jurisdiction to hear this appeal. Whether claimant suffered injury and needs medical treatment directly attributable to his work-related accident is reviewable based on whether the injury and need for medical treatment stem from an injury by accident that arose out of and in the course of his employment.¹⁹

Claimant certainly had a compensable accident. A 60-pound object struck his forehead. He had a right hand side anterior table fracture and a left orbital fracture. The right hand side anterior table fracture may have healed, as it was not identifiable on the second set of CT scan images. Claimant's headaches, while not initially noted in the SCKMC records or in Dr. Heger's July 7, 2011, report, are contained in the July 12, 2011, William Newton Hospital CT scan report; Dr. Harris' July 18, 2011, report; and Nurse Practitioner Davis' September 19, 2011, report. According to Dr. Murati, headaches were mentioned in Dr. Harris' October 24, 2011, report, but this Board Member does not have the benefit of reviewing Dr. Harris' entire October 24, 2011, report, as it appears Claimant's Exhibit 3 is incomplete. Claimant proved that he suffered headaches due to his June 29, 2011, accident.

Unfortunately for claimant, the medical records from SCKMC, Dr. Heger, Dr. Harris and Nurse Practitioner Davis do not corroborate claimant's allegation of post-concussion syndrome, vestibular disorder, bilateral shoulder, neck and thoracic area pain or neck pain with signs and symptoms of radiculopathy. This Board Member does not agree with Judge Barnes that claimant's accidental injury resulted in the diagnoses made by Dr. Murati.

Claimant's accident certainly could have resulted in a concussion, but contemporaneous medical records do not support a finding that it is more probably true than not true that claimant sustained a concussion. Similarly, there is no pre-Dr. Murati diagnosis of vestibular disorder. Aside from Dr. Murati, there is no mention of potential cervical radiculopathy. No medical professional, other than Dr. Murati, mentioned bilateral shoulder, neck or thoracic area pain. Indeed, Nurse Practitioner Davis' September 19, 2011, report stated claimant had no pain and no neck stiffness. This Board Member concludes claimant has not proven by a preponderance of the evidence that the diagnoses

¹⁹ *Rome v. Wal-Mart Supercenter*, Nos. 1,051,405 & 1,051,406, 2011 WL 2693260 (Kan. WCAB June 8, 2011); *Byrum v. Kindsvater, Inc.*, No. 1,052,356, 2011 WL 2693261 (Kan. WCAB June 24, 2011).

and need for medical treatment set forth by Dr. Murati arose out of and in the course of his employment.

The claimant was never under any restrictions until being evaluated by Dr. Murati. He was able to return to work on the date of accident and apparently worked his regular and full-time job until being terminated in late November 2011. He subsequently applied for work with various employers and also represented being ready, willing and able to work by seeking unemployment benefits.

Based on the entirety of the evidence, this Board Member disagrees with Judge Barnes' preliminary hearing Order that the diagnoses identified by Dr. Murati arose out of or in the course of claimant's employment. Judge Barnes' orders for medical treatment and temporary total disability are reversed, insofar as they flow from Dr. Murati's diagnoses that are otherwise not supported by the bulk of the medical evidence.

This finding renders the remaining issues moot, other than the issue regarding payment of medical bills. Respondent agrees that Dr. Murati's bill should be paid as unauthorized medical.²⁰ Judge Barnes ordered the medical bills to be paid. The record does not reflect that the medical bills ordered paid by Judge Barnes were for a preexisting condition or for treatment unrelated to claimant's June 29, 2011, accidental injury. Respondent is responsible to pay the medical bills in Claimant's Exhibit 1.

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that he suffered personal injury involving concussion, vestibular disorder, myofascial syndrome involving the shoulders, neck or thoracic spine, or neck pain with signs and symptoms of radiculopathy that was the result of an accident arising out of and in the course of his employment.

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.²¹ 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.²²

WHEREFORE, the undersigned Board Member finds that the August 24, 2012, preliminary hearing Order entered by Administrative Law Judge Barnes is hereby affirmed

²⁰ K.S.A. 2011 Supp. 44-510h(b)(2).

²¹ K.S.A. 2011 Supp. 44-534a.

²² K.S.A. 2011 Supp. 44-555c(k).

in part, concerning the payment of medical bills listed in Claimant's Exhibit 1, and reversed in part, concerning whether claimant proved by a preponderance of the evidence that he suffered personal injury involving concussion; vestibular disorder; myofascial syndrome involving the shoulders, neck or thoracic spine; or neck pain with signs and symptoms of radiculopathy that was the result of an accident arising out of and in the course of his employment.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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