

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

JOHNIE RUST)
 Claimant)
))
VS.)
))
KELLY DONHAM)
 Respondent)
))
AND)
))
AMERICAN INTERSTATE INS. CO.)
 Insurance Carrier)

Docket No. **1,060,331**

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier request review of the June 14, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 14, 2012 preliminary hearing and exhibits thereto; the transcript of the May 2, 2012, deposition of claimant and exhibits thereto; and all pleadings contained in the administrative file.

The ALJ found:

After reviewing the testimony of the witness (claimant) and reading the exhibits, it is very clear that the prevailing factor for the Claimant’s low back injury was prying on a 300 plus pound piece of flat steel while on his knees.¹

The ALJ awarded temporary total disability benefits (TTD), temporary partial disability benefits (TPD), authorized medical treatment, and the payment of medical bills, including reimbursement of medical mileage.

¹ ALJ Order (Jun. 14, 2012) at 2.

ISSUES

Respondent contends the ALJ erred in finding that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Respondent argues the accident was not the prevailing factor in causing claimant's injury, but that claimant's injury instead resulted from preexisting lumbar degenerative disc disease.

Respondent also maintains the ALJ lacked jurisdiction to consider medical evidence which: a) was not included with claimant's notice of intent, b) was created after claimant's certification of the denial of his request for a change of benefits, c) was created after the filing of the application for preliminary hearing, and, d) did not accompany the filing of claimant's application for preliminary hearing. Finally, respondent claims the ALJ lacked jurisdiction to consider claimant's requests for preliminary relief because the notice of intent was insufficiently specific to satisfy the requirements of K.S.A. 2011 Supp. 44-534a.

Claimant argues the ALJ's Order should be affirmed.

The issues presented to the Board for consideration are:

1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent, including whether claimant's accident was the prevailing factor in causing his injury.

2) Whether the ALJ exceeded his jurisdiction in awarding claimant preliminary benefits because claimant's notice of intent was insufficiently specific to satisfy the mandates of K.S.A. 2011 Supp. 44-534a.

3) Whether the ALJ lacked jurisdiction to consider medical evidence offered by claimant at the preliminary hearing because such evidence was not included in claimant's notice of intent, was created after claimant's certification of denial of change of benefits, was created after the date claimant's application for preliminary hearing was filed, and which was not included with such application when it was filed with the Division.

FINDINGS OF FACT

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

Claimant was age 65 when he was deposed on May 2, 2012. He became employed for respondent in approximately February 2011. Respondent was in the business of buying and selling scrap metal as well as hauling and towing heavy equipment and materials. Claimant's job was to pick up and deliver heavy equipment such as forklifts. Claimant's job required him to drive equipment onto and off of trailers and operate a truck. He also

towed trucks and cars and at times changed oil in the trucks. Claimant described his accident of Saturday, November 12, 2011 as follows:

We'd moved the baler in a spot that was after hours, after the office closed down, he had a pile of tin that he wanted to get rid of and he had wanted the guy to bale the tin up after the office was closed. I backed the baler into the spot and you unhook the truck, but it's on this -- it's on hydraulic landing gear to hold it up, to hold it stable and we have these plates that are three-foot-by-three-foot square, one-inch thick and they weigh a little over 300 pounds, 350 pounds, and we put them under the stabilizers. And that's what we were doing is putting the plates under the stabilizers. To square them up you have to get a bar and put them under there by hand, and that's what I was doing, I was on my knees trying to pry these plates underneath the landing gear.²

Claimant testified he felt a twinge or sharp pain in his back which went down to his buttocks. His symptoms progressively worsened. On Monday morning, November 14, 2011, claimant went to work thinking his symptoms would improve. After work that day claimant contacted a chiropractor and scheduled an appointment on Tuesday, November 15, 2011.

Claimant saw chiropractor Dr. Jamie Stinemetz on November 15, 2011. He apparently received authorized treatment from Dr. Stinemetz until February 10, 2012, shortly before respondent withdrew its treatment authorization. Claimant also received conservative treatment from a physician's assistant, Jill Johnson-Smith with Dr. Stephen Lemon's office. Claimant consulted Ms. Johnson-Smith, PA, on November 17, 2011. In addition to chiropractic adjustments, claimant received a series of epidural steroid injections, and underwent a lumbar MRI scan ordered by Dr. Mark Dobyms. The MRI report is not in the record, however, according to Dr. Dobyms, it revealed a right-sided lesion at L4-5 consistent with spondylosis and neuroforaminal stenosis on the right. Although the MRI scan did not show any obvious nerve root impingement "clearly his [claimant's] symptoms are such that there is nerve root irritation."³ The MRI also revealed multi-level degenerative disc disease in the lumbar spine.

The records of Dr. Stinemetz reveal no history of a work-related injury in his chart entries from November 15, 2011 through January 11, 2012. However, a work status slip dated November 15, 2011, indicates claimant is unable to work "due to back injury."⁴ The records of Dr. Stinemetz from January 13, 2012 through February 10, 2012, do refer to claimant's injury at work on November 12, 2011, when claimant was moving a metal plate with a pry bar while on his knees and felt pain in his low back on the right side into his

² Rust Depo. at 18-19.

³ P.H. Trans., Cl. Ex. 9 at 1.

⁴ *Id.*, Cl. Ex. 1 at 1.

posterior right hip and leg. The records of Dr. Stinemetz from January 13, 2012, and thereafter indicate the cause of claimant's injury was the November 12, 2011 accident.

The record contains other evidence relevant to the issue of causation which is summarized as follows:

1) Dr. George G. Flutter examined claimant at the request of his counsel on May 23, 2012. He opined that there was a causal/contributory relationship between Mr. Rust's current condition and the reported injury of November 12, 2011. Dr. Flutter expressed the opinion that the prevailing factor in causing the injury was the accident occurring on that date and that no other prevailing factor was readily identifiable.⁵

2) The history set forth in the office note of Ms. Johnson-Smith dated November 17, 2011 was:

The patient states he started having some pain more in the right buttock area and on going down the right thigh on the 14th [of November, 2011]. He does a lot of lifting and bending on his job. He has not been able to work with this. He has had problems with low back pain in the past. There was nothing specific that really triggered this episode.⁶

3) A report signed by both Dr. Lemons and Ms. Johnson-Smith dated March 19, 2012 indicates:

I initially saw Johnie on 11-17-11. He was having severe pain in the right buttock area that was radiating into the right leg. He does a lot of bending and lifting on his job, and this has definitely been a triggering factor for the development of his pain. He has been seen in our office since July of 2002. Only once in that period of time have we seen him for low back pain, and that was November 9, 2002. That episode resolved without any sequela, so he does not have history of low back pain. His current symptoms are a new problem and were triggered by the repetitive, cumulative stress of bending and lifting on his job over the years. It is my opinion that his radicular symptoms to the right leg are the result of work-related damage to his low back. If further information is desired or required I can be contacted as noted below.⁷

4) Dr. David E. Harris examined claimant at the request of respondent on January 23, 2012. In his narrative report, Dr. Harris indicates:

⁵ *Id.*, Cl. Ex. 8 at 5.

⁶ *Id.*, Resp. Ex 1 at 1.

⁷ *Id.*, Resp. Ex 3 at 13.

1. Appears to be a work-related injury involving radicular symptoms down the right lower extremity resulting in an L5, and to a lesser extent L4, radiculopathy.
2. The etiology of the radiculopathy appears to be identified on the MRI as a disk bulge/protrusion with material eccentric to the right resulting in moderate to severe right neuroforaminal stenosis.
3. Regarding the question of causation: Given Mr. Rust's lack of history of any previous radicular symptoms, lumbar strains or complaints of low back injury or disk disease, and the history of sudden onset of symptoms in the line of work, it does seem apparent that his current condition is the direct result of the job task and activities in which he was engaged on the day of his injury. However, in regards to the question as to whether this activity was the sole and prevailing cause of his injury, there is evidence that he has several pre-existing conditions. Mr. Rust does have several risk factors for back pain/disease including a 40 pack-year smoking habit and a long history of truck driving. His MRI images show multiple levels of disk degeneration, desiccation, facet hypertrophy and ligamentum flavum hypertrophy, all of which contribute to some degree of foraminal and/or central canal stenosis. He also has bulging discs at every level of the lumbar spine. Considering these findings, it appears that Mr. Rust had several pre-existing conditions that were likely exacerbated into his current condition as a type of 'acute on [sic] chronic' back disease, by the activities of his job tasks on his date of injury. Therefore, in terms of causation, it is my opinion that his job task was not the prevailing factor resulting in his radicular symptoms today.⁸

Claimant testified that he had not experienced any problems with his back before the November 2011 accident. Claimant, however, did occasionally receive chiropractic adjustments for a number of years before the accident. Claimant began seeing Dr. Stinemetz eight to ten years before the accident. Claimant was also seen by Dr. Lemons for low back pain in 2002, although claimant recalled no specific injury. Claimant had no further low back pain or any radicular symptoms before the November 12, 2011 event.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501a(b) and (c) provides:

- (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.
- (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

⁸ *Id.*, Resp. Ex. 2 at 6.

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

K.S.A. 2011 Supp. 44-508(h) provides:

'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.

K.S.A. 2011 Supp. 44-508(d), (f) and (g) provides:

(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.

(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.

K.S.A. 2011 Supp. 44-534a(a)(1) and (2) provide:

After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment,

whether notice is given , or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.A.R. 51-3-5a provides:

(a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. If medical reports are not available or have not been produced before the preliminary hearing, either party shall be entitled to an ex parte order for production of the reports upon motion to the administrative law judge.

(b) If the decision of the administrative law judge is not rendered within five days of the hearing, the applicant's attorney shall notify the director, who shall make demand upon the administrative law judge for this decision.

(c) In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ 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.¹⁰

⁹ K.S.A. 2011 Supp. 44-534a.

¹⁰ K.S.A. 2011 Supp. 44-555c(k).

ANALYSIS

The undersigned Board member finds that the preliminary hearing Order should be affirmed in all respects.

Claimant alleged injury to his back, leg, and hip from “[b]ending, twisting, prying” on November 12, 2011.¹¹ Claimant’s testimony about how his accidental injury occurred is consistent with the preponderance of the evidence in the record, including the histories claimant provided to Drs. Stinemetz, Fluter and Harris. The material from Dr. Lemons and his physician’s assistant seem to associate claimant’s injury to repetitive bending and lifting over a period of time. However, Dr. Lemons and Ms. Johnson-Smith do find a causal relationship between claimant’s injury and the conditions under which his work was performed: “He does a lot of bending and lifting on his job, and this has definitely been a triggering factor for the development of his pain.”¹² Respondent’s suggestion that the claim should be denied because claimant failed to prove a single traumatic event, but rather a series of repetitive traumas, has little merit and is rejected by this Board member.

The undersigned Board member is also unpersuaded by respondent’s argument that claimant’s accident was not the prevailing factor in causing claimant’s injury. Under the definition of “prevailing” in the New Act, all relevant evidence should be considered. Claimant’s testimony is relevant on this issue and he related his injury to twisting while moving one of the iron plate.¹³ Although claimant did occasionally receive chiropractic adjustments in the years preceding the accident, there is no evidence that any prior injury or back pain played any role in causing claimant’s low back injury in this claim. There is no evidence that claimant suffered from radicular symptoms before November 12, 2011. According to Dr. Lemons, claimant was seen by him for back pain in 2002, however, that episode resolved without any sequela. There is no evidence that any prior low back issues interfered with claimant’s ability to perform physically demanding work. There is no evidence that claimant had a prior disc herniation at L4-5 which irritated a nerve root.

Respondent relies on the opinions of Dr. Harris, however, his opinions are inconsistent with his other opinions, as well as inconsistent with other evidence in the record. Dr. Harris recognized that “[g]iven Mr. Rust’s lack of history of any previous radicular symptoms, lumbar strains or complaints of low back injury or disk disease, and the history of sudden onset of symptoms in the line of work, it does seem apparent that his current condition is the direct result of the job task and activities in which he was engaged on the day of his injury.”¹⁴ Dr. Harris then made reference to “the sole and prevailing cause

¹¹ Form E-1, application for hearing filed April 9, 2012.

¹² P.H. Trans., Resp. Ex. 3 at 13.

¹³ Cl. Depo. at 56, 59.

¹⁴ *Id.*, Resp. Ex. 2 at 6.

of the injury,” which is not the test set forth in the New Act. Dr. Harris seemed to change course in mid-paragraph by emphasizing claimant’s history of smoking and the MRI evidence of multi-level degenerative disc disease. But, Dr. Harris does not identify what specifically he believed was the prevailing factor in causing claimant’s injury. Nor did Dr. Harris attempt to reconcile his opinion that claimant’s work activities on November 12, 2011, were not the prevailing factor in causing the injury with the history he received from claimant.

The preponderance of the credible evidence supports the finding of the ALJ that claimant sustained his burden of proof that he sustained personal injury by accident arising out of and in the course of his employment with respondent on November 12, 2011, and that claimant’s accident on that date was the prevailing factor in causing claimant’s injury, need for treatment, and current impairment or disability.

Respondent’s other arguments challenging the ALJ’s jurisdiction require little discussion. Respondent’s argument that claimant’s seven-day notice of intent was insufficient to satisfy the requirements of K.S.A. 44-534a is rendered unpersuasive when the changes in benefits set forth in claimant’s notice of intent are reviewed:

1. Reimbursement/Payment of outstanding medical bills (see attached);
2. Temporary total disability for days, weeks not paid, from 11-12-11 forward;
3. Temporary partial disability for days, weeks not paid, since returned to work;
4. Authorize medical treatment and doctors
5. Change of claimant’s treating physician;
6. Reimbursement of medical mileage in the amount of \$86.19 (see attached);
7. Reimbursement of unauthorized medical not previously reimbursed, if any;
8. Reimbursement to claimant for prescription costs not previously reimbursed.¹⁵

The specificity of the notice of intent fully complies with K.S.A. 2011 Supp. 44-534a(a).

Respondent maintains that the ALJ acted without jurisdiction by considering medical reports offered by claimant at the preliminary hearing. The basis for this argument is that the reports were secured by claimant after the filing of the application for preliminary hearing and were therefore not included with the filing of the application. However, neither K.S.A. 44-534a nor K.A.R. 51-3-5a support that contention. Respondent would have the Board add a clause or sentence to the statute or regulation which is simply not there, such as “medical evidence is inadmissible at a preliminary hearing when such evidence is received by claimant after the application for preliminary hearing was filed.” The undersigned Board member declines respondent’s invitation to amend or add to the statute or the regulation.

¹⁵ *Id.*, Resp. Ex. 3 at 2.

CONCLUSION

1) Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on November 12, 2011, and that accident was the prevailing factor in causing the injury, medical condition, and impairment or disability.

2) The ALJ did not exceed his jurisdiction by considering medical evidence offered at the preliminary hearing by claimant which was not included with the notice of intent, the certification of the denial of benefit change, and did not accompany the application for preliminary when filed with the Division.

3) The ALJ did not exceed his jurisdiction in awarding preliminary relief to claimant since claimant's notice of intent was sufficiently detailed to comply with K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member find that the June 14, 2012, preliminary hearing Order entered by ALJ John Clark is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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John D. Clark, Administrative Law Judge