BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JORGE H. PLEITEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,637
RV PRODUCTS, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY CO.	)	
OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 18, 2013, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

APPEARANCES

James B. Zongker, of Wichita, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations as did the ALJ and has considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing dated April 18, 2013, with exhibits attached and the documents of record filed with the Division. Claimant's Discovery Deposition was taken on January 3, 2013, and respondent alluded to the discovery deposition at the time of the preliminary hearing, even indicating the discovery deposition would be "marked".[1] However, the discovery deposition transcript was never actually marked as evidence in this matter and there was no agreement regarding the court's authorization to consider it as evidence. Therefore, the Board did not consider claimant's Discovery Deposition when determining this matter.

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[1] P.H. Trans. at 8-9.

ISSUES

The ALJ found claimant was injured out of and in the course of his employment with respondent through April 9, 2012. The ALJ authorized Dr. Bernard Hearon as claimant's treating physician, for treatment to the upper extremities, including right shoulder surgery.

Respondent appeals arguing the Order should be reversed as claimant's injury did not arise out of and in the course of his employment with respondent. Respondent contends the prevailing factor of claimant's upper extremity injuries is his outside work on automobiles and his activities buying and selling tires and chrome wheels, neither of which was a part of his employment with respondent.

Claimant argues the Order should be affirmed, as there is no medical evidence to contradict Dr. Hearon's opinions that claimant's upper extremity problems are the result of his work for respondent. Claimant also points out that respondent had the opportunity to show the surveillance video to Dr. Hearon prior to the hearing, but chose not to.

FINDINGS OF FACT

Claimant testified through an interpreter. Claimant's job with respondent was as an assembler. The job required the use of an air gun with claimant's arms in an overhead position. He also used an impact gun in an overhead position. Claimant worked in the overhead position seven hours a day. When claimant began to notice problems with his shoulders and wrists, he reported it to Alberta Huerta, in Human Resources. After reporting his problems, claimant was sent for physical therapy. Despite this therapy, claimant's problems failed to improve. Claimant began receiving injections with Bernard F. Hearon, M.D., on April 19, 2012. Dr. Hearon, who specializes in upper extremity surgery, diagnosed claimant with a right shoulder injury caused by repetitive overhead work, and subacromial impingement syndrome on the right. Dr. Hearon assigned claimant a 20 pound lifting restriction on the right side, with no overhead work.

When claimant began treatment, he was authorized to do nothing more than perform oil changes for respondent. He would however, as a side job not associated with respondent, gather tires and wheels and resell them to either tire stores or his friends. These tires weighed around 15 pounds, which is within his 20 pound lifting restriction. Since claimant was injured, he has performed work outside his restrictions. Despite a series of injections and therapy, claimant has shown no improvement in his right shoulder.

Claimant is alleging injury to both shoulders and wrists from January 3, 2012 through April 9, 2012, while working for respondent. Claimant denied any prior workers compensation claims while working for any other employers. He did not recall filing prior workers compensation claims for repetitive injuries to his shoulders while working for meat processing plants in western Kansas.

Claimant was asked about mechanical work he would perform on cars. He claimed to only work on his own cars, and denied working on any cars other than his own. He also denied buying wheels weighing more than 15 pounds, and could not explain working on a Honda truck, as he does not own a Honda truck.

Claimant's son, Bryan Pleitez, testified that he has helped claimant pick up tires and wheels on several occasions from the salvage yard. He denies helping with any chrome wheels. He testified that the work claimant completed on the cars he owned was mostly oil changes and a few battery changes. Bryan testified that the wheels, tires and occasional batteries they would purchase weighed less than the 20 pound weight restriction his father was on. However, on cross-examination, he admitted he had never weighed those items and his weight estimates were just guesses.

Mike Casey, factory manager for respondent, testified that his job is to supervise the production and maintenance operations in the facility. Mr. Casey testified claimant spent two to three hours a day riveting and performing overhead work. This overhead work involved a mixture of picking up a pan, putting a sticker on it, shooting a few screws, shooting some inserts, taking them out of a tub and moving them down the line. Mr. Casey stated that claimant moved 300 to 400 units down the line a day. When claimant was assigned restrictions he was moved to another unit where he worked at a slower pace only moving 110 to 120 units a day. Mr. Casey confirmed this work did not exceed claimant's 20 pound restriction.

Respondent's insurance carrier had claimant put under video surveillance to determine/document claimant's activities and use of both hands/wrists and right shoulder. It was shown that claimant was working on cars during non-working hours. Claimant was observed over the course of two days. He was seen leaning and reaching in and around a vehicle. Claimant was also observed working on another vehicle in his garage. On another occasion, claimant was seen unloading tires and wheels from the back of a truck and a trailer.

Claimant's treatment with Dr. Hearon continued for several months. He was diagnosed with work-related carpal tunnel syndrome, bilaterally on May 17, 2012, and left shoulder pain. An MRI of the right shoulder was recommended. The MRI indicated shoulder impingement for which claimant was administered a subacromial injection with temporary relief. By June 28, 2012, claimant was displaying right neck pain as well as bilateral shoulder and upper extremity pain. Dr. Hearon opined that the upper extremity problems may stem from degenerative cervical discs.

A third injection into claimant's right shoulder was administered on August 14, 2012, with the no lifting over 20 pounds and no overhead work limitations remaining in effect. When claimant showed no improvement at the September 11, 2012, exam, Dr. Hearon recommended a diagnostic arthroscopy of the right shoulder with possible subacromial decompression and possible arthroscopic rotator cuff repair.

PRINCIPLES OF LAW AND ANALYSIS

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

(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.
(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 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(d)(e) states:

(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.
(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.

K.S.A. 2011 Supp. 44-508(f) states:

(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.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(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.
(B) The words "arising out of and in the course of
employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees

> while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2011 Supp. 44-508(g) states:

> (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.

Respondent contends claimant's upper extremity injuries stem from work performed by claimant on his own and other person's automobiles, and not from his work for respondent. Claimant's testimony regarding the physical nature of his job, and the necessity of working with his upper extremities, often above shoulder level is convincing and persuasive. The video placed into the record by respondent shows claimant performing physical activity with his upper extremities, but only occasionally above shoulder level. Additionally, there is no indication claimant has exceeded the 20 pound weight limit placed on him by Dr. Hearon. Additionally, the video placed into the record by respondent, was not provided to Dr. Hearon. Thus, there is no evidence to contradict the testimony of claimant and his son that claimant has not violated Dr. Hearon's restrictions.

While Dr. Hearon does not use the words prevailing factor in his reports, he does, on several occasions, report that claimant's upper extremity problems are due to claimant's repetitive overhead work.[2] This Board Member finds claimant has proven that his upper extremity problems stem from his work for respondent, and that work is the prevailing factor causing claimant's injuries and current need for medical treatment. The Order of the ALJ is affirmed.

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.[3] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed as claimant has proven that

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[2] P.H. Trans, Cl. Ex. A.

[3] K.S.A. 2012 Supp. 44-534a.

he suffered personal injury by repetitive trauma which arose out of and in the course of his employment with respondent, and his employment activities for respondent are the prevailing factor leading to claimant's current injuries and need for medical treatment. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated April 18, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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John D. Clark, Administrative Law Judge