

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

**HAROLD WAYNE WILSON** )  
Claimant )  
VS. )  
**TRIANGLE TRUCKING, INC.** )  
Respondent )  
AND )  
**AMERICAN INTERSTATE INS. CO.** )  
Insurance Carrier )

Docket No. 1,063,281

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the October 28, 2013, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Brian D. Pistotnik of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to establish he is in need of additional treatment as a result of a February 6, 2012 work accident. Further, the ALJ found claimant's need for medical care is a product of an intervening accident or trauma not explained in the record before the Court.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 11, 2013, Preliminary Hearing and the exhibits; the transcript of the January 7, 2013, Evidentiary Deposition of claimant; and the transcript of the July 18, 2013, Evidentiary Deposition of claimant, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues the ALJ's decision was a finding his injury did not arise out of and in the course of employment; therefore, the Board has jurisdiction to hear this appeal. Further, claimant contends he has been consistent and credible regarding how the accident occurred. Claimant requests the ALJ's Order denying pain management be

reversed, as the court-ordered independent medical evaluation supported claimant regarding causation.

Respondent argues the Board lacks jurisdiction to address the issue of whether the ALJ erred by denying claimant's request for medical treatment. However, should jurisdiction exist, respondent maintains the ALJ was correct when denying medical treatment. Further, respondent argues the number of misrepresentations, inconsistencies, inaccuracies, and discrepancies in this case establish claimant is not credible.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review claimant's appeal?
2. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent, including whether his accident was the prevailing factor causing claimant's need for medical treatment?

#### FINDINGS OF FACT

Claimant was employed by respondent as an over-the-road truck driver. Claimant would transport loads between Salina, Kansas, and various cities on the east coast. Claimant testified this position did not require manual labor, as he did not physically load or unload the tractor-trailers.

On February 6, 2012,<sup>1</sup> claimant was in Lancaster, Pennsylvania, to retrieve a load of wooden planters. Claimant arrived at the Lancaster terminal at approximately 3:30 p.m. Claimant testified the space available to dock his truck was limited, and he exited the truck to check for clearance. Upon exiting the truck, at some time between 3:30 p.m. and 6:00 p.m., claimant stated he slipped on some gravel on the truck's running board and fell. Claimant did not fall to the ground. Claimant held the steering wheel in one hand and the truck seat in the other hand, hanging from the side of the truck and striking his lower back on the door frame. Claimant stated his back was immediately sore, but initially improved.

Claimant testified his back condition progressively worsened over the next two weeks. He described additional symptoms, including radiating pain from the middle of the back to the left side of the hip, with pain down the left leg. Claimant stated he had numbness in his left foot. Claimant then reported the accident to respondent.

Claimant initially treated with his family physician, Dr. John Shetlar. Claimant underwent conservative treatment and an MRI, which revealed a left L5-S1 disk herniation.

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<sup>1</sup> Originally claimant testified his accident date was February 5, 2012. Claimant later testified his correct accident date was February 6, 2012.

Dr. Shetlar referred claimant to Dr. B. Theo Mellion, a neurosurgeon, for care in March 2012.

Claimant presented to Dr. Mellion with lower back pain radiating into the left lower extremity. Conservative treatment did not alleviate claimant's symptoms. Claimant testified epidural injections and physical therapy provided at this time were not beneficial. Dr. Mellion performed a left L5-S1 hemilaminotomy, foraminotomy, and microdiscectomy for claimant's herniated disk and lumbar spondylosis on August 1, 2012. Claimant received postoperative physical therapy and followed up with Dr. Mellion over the ensuing months. Claimant reported increased lower back and left lower extremity pain in November 2012, after falling on a porch when his leg muscle spasmed and gave way. Claimant testified the fall did not worsen his symptoms.

Claimant stated the August 2012 surgery did not alleviate the pain or numbness in his leg, though it did allow him to work without the use of a walker. Claimant testified Dr. Mellion told him the surgery did not work. Dr. Mellion ordered a CT myelogram to determine the cause of claimant's symptoms.

In a letter dated November 15, 2012, Dr. Mellion indicated the CT myelogram revealed a hemilaminotomy on the left at L5-S1, as well as some disc degeneration and spondylitic changes, but there was no obvious recurrent disc herniation and no obvious defect. Further, Dr. Mellion noted he does not have a good explanation for claimant's reported leg muscle spasms, and there was no obvious nerve root compression. He stated any further surgery would require an interbody fusion and posterior instrumentation, which is not guaranteed and could cause a worsening of claimant's pain. Dr. Mellion noted claimant was at maximum medical improvement from the microdiscectomy if no additional surgery was to be considered. Claimant refused additional surgery.

Dr. David E. Harris, a physical medicine and rehabilitation physician, examined claimant for purposes of an independent medical evaluation on January 24, 2013, at respondent's request. Dr. Harris noted claimant was cooperative and sincere, although there were occasions of inconsistencies during the examination. Claimant presented with constant low back pain, located to the left side of the back just above the waistline and along the lumbosacral junction radiating leftward. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Harris diagnosed claimant with the following:

1. Assumed work injury from February 5, 2012.
2. Chronic pain syndrome.
3. Low back pain.
4. Radicular symptoms in the left lower extremity in an S1 dermatome pattern with mild L5 dermatomal overtones.
5. There are MRI findings of leftward disk protrusion at L5-S1 causing some impingement.

6. Status post L5-S1 microdiscectomy.
7. Failed back surgery syndrome with persistent radicular symptoms and low back pain.<sup>2</sup>

Dr. Harris noted claimant's present condition is the result of an injury. However, Dr. Harris opined he did not anticipate the mechanism of claimant's February 2012 injury to result in claimant's condition. Dr. Harris noted in his report:

It is my opinion then that [claimant's] history of injury does not account well for his current condition.

....

Given the lack of a plausible mechanism of injury, I do not feel that this particular incident in [claimant's] work history could be the prevailing factor that resulted in his injury and the current condition. Additionally, given the delayed development of symptoms, it is very plausible that a different incident or activity is more likely the prevailing factor in [claimant's] injury.<sup>3</sup>

Dr. Harris recommended claimant receive primarily conservative treatment. He agreed with Dr. Mellion's opinion that posterior instrumented fusion would likely cause claimant more harm than good.

Dr. Paul S. Stein, a board certified neurosurgeon, examined claimant at his counsel's request on April 11, 2013, for an independent medical examination. Claimant's chief complaint was low back pain. Dr. Stein reviewed claimant's history, medical records, and performed a physical examination. Dr. Stein concluded in his report:

[Claimant] had an accident at work and sustained injury to the lower back on 2/6/12 resulting in a herniated disk on the left at L5-S1 with S1 radiculopathy. The work incident is the primary or prevailing factor in the resulting disk herniation and radiculopathy, although there may have been some preexisting weakness in the annulus predisposing to herniation. I have no difficulty accepting the mechanism of injury in this case as resulting in the disk herniation.<sup>4</sup>

Using the *AMA Guides*,<sup>5</sup> Dr. Stein opined claimant has a total 12 percent permanent partial impairment of function to the body as a whole. He recommended the following

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<sup>2</sup> P.H. Trans., Resp. Ex. E at 10.

<sup>3</sup> *Id.* at 11.

<sup>4</sup> P.H. Trans., Cl. Ex. 1 at 5-6.

<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

permanent work restrictions: no lifting more than 40 pounds with any single lift up to twice per day, 30 pounds more often but avoid repetitive lifting; avoid lifting from below knuckle height or above chest height; avoid frequently repetitive bending and twisting of the lower back; and have the opportunity to stand and stretch for five or ten minutes of every one or two hours sitting. Dr. Stein noted claimant should receive pain management.

The Court appointed Dr. Terrence Pratt as a neutral physician for independent medical evaluation purposes. Dr. Pratt examined claimant on October 10, 2013, when claimant presented with continuous steady left low back pain radiating posteriorly to the thigh, calf, and around the left ankle. Claimant reported left lateral foot numbness involving the fourth and fifth toes, with less frequent numbness on the third toe. After reviewing claimant's medical history, medical records, and performing a physical examination, Dr. Pratt determined:

1. Low back pain with history lumbar spondylosis and herniated nucleus pulposus L5-S1. Status post operative intervention.
2. Inappropriate responses on the examination.<sup>6</sup>

Dr. Pratt indicated claimant may benefit from the use of neuropathic medication and a transcutaneous electrical nerve stimulator, but claimant is not a good candidate for additional procedures.

Regarding prevailing factor, Dr. Pratt noted:

In the absence of any additional traumatic events, I would have to relate the involvement to his February 6, 2012 event as the prevailing factor, but this would rely on him being credible in relationship to his historical information and no additional events occurring between February 6, 2012 and when he presented for evaluation on February 25, 2012.<sup>7</sup>

Claimant testified he continues to have pain in the lower back from the middle to the left side at his belt area. Claimant also stated he has pain in his left calf and the front of his left thigh with numbness in the left foot. He testified he is unable to perform his truck driving duties for respondent and has not done so since March 2, 2012. Claimant remains employed by respondent.

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<sup>6</sup> Pratt IME (Oct. 14, 2013) at 5.

<sup>7</sup> *Id.* at 6.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

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

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

....

(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.

(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.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is reviewable. Under K.S.A. 2011 Supp. 44-551 and K.S.A. 2011 Supp. 44-534a, the Board can review allegations that an administrative law judge exceeded his or her jurisdiction, including: (1) whether the worker sustained an accident, repetitive trauma or resulting injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice; and, (4) whether certain defenses apply. "Certain defenses" refer to defenses which go to the compensability of the injury under the Workers Compensation Act.<sup>8</sup>

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> 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), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>10</sup>

### ANALYSIS

#### 1. Jurisdiction

Respondent argues the Board does not have jurisdiction to review the ALJ's denial of medical treatment. However, the Board has held that when the underlying point of

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<sup>8</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

<sup>9</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>10</sup> K.S.A. 2012 Supp. 44-555c(k).

contention is whether claimant's accident was the prevailing factor in causing the medical condition, the Board has jurisdiction under K.S.A. 2011 Supp. 44-534a.<sup>11</sup>

The definition of "accident" mandates that the accident be the "prevailing factor" in causing the injury.<sup>12</sup> Whether an accident arose out of employment is appealable. An injury by accident arises out of employment only if the accident is the "prevailing factor" in causing the injury, medical condition and resulting disability or impairment.<sup>13</sup> The prevailing factor issue is a necessary component of "arising out of."<sup>14</sup> The Board has jurisdiction to review claimant's appeal.

## 2. Prevailing Factor

This Board member disagrees with the ALJ's conclusions regarding prevailing factor. To again quote the court-appointed physician:

In the absence of any additional traumatic events, I would have to relate the involvement to his February 6, 2012 event as the prevailing factor, but this would rely on him being credible in relationship to his historical information and no additional events occurring between February 6, 2012 and when he presented for evaluation on February 25, 2012.

There is insufficient evidence in the record that would suggest claimant suffered an intervening accident.

## CONCLUSION

Claimant suffered an injury by accident arising out of and in the course of his employment with respondent on February 6, 2012. The prevailing factor for claimant's need for medical treatment is the February 6, 2012 accidental injury.

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board member that the Order of Administrative Law Judge Bruce E. Moore dated October 28, 2013, is reversed. Claimant is entitled to medical treatment pursuant to the recommendations of Dr. Pratt.

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<sup>11</sup> *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013).

<sup>12</sup> K.S.A. 2011 Supp. 44-508(d).

<sup>13</sup> K.S.A. 2011 Supp. 44-508(f)(2)(B)(ii).

<sup>14</sup> See also *Shaffer v. Matcor Metal Fabrication, Inc.*, No. 1,058,166, 2012 WL 5461470 (Kan. WCAB Oct. 10, 2012), and *Berkley Frye v. Angmar Medical Holdings, Inc.*, Nos. 1,059,923 & 1,059,925, 2012 WL 6101123 (Kan. WCAB Nov. 30 2012).

**IT IS SO ORDERED.**

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

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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