

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

<b>JENNIFER ANN TAYLOR</b>	)	
Claimant	)	
V.	)	
	)	
<b>POLICY STUDIES, INC.</b>	)	Docket No. 1,064,797
Respondent	)	
AND	)	
	)	
<b>FEDERAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of Administrative Law Judge Rebecca Sanders' June 17, 2014 preliminary hearing Order. Bruce A. Brumley of Topeka appeared for claimant. Jeff S. Bloskey of Overland Park appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the transcript of the February 11, 2014 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

**ISSUES**

Claimant alleged a series of repetitive trauma to both hands and wrists, with the left being worse than the right. Lynn D. Ketchum, M.D., a court-ordered physician, diagnosed claimant with mild ulnar impaction syndrome and thoracic outlet syndrome. Based on Dr. Ketchum's report, the judge found the prevailing factor for claimant's bilateral upper extremity complaints was her poor posture and congenital ulna-positive variance.

Claimant requests the Order be reversed. Claimant asserts her job duties caused injury by repetitive trauma and such repetitive trauma was the prevailing factor in causing her thoracic outlet syndrome. Claimant concedes the judge was correct in adopting Dr. Ketchum's prevailing factor opinion in relation to her mild ulnar impaction syndrome. Respondent maintains the Order should be affirmed.

The issue for the Board's review is: were claimant's work activities the prevailing factor in causing her injury?

FINDINGS OF FACT

Claimant began working for respondent, a government contract company that works with the State of Kansas to determine medical card eligibility, on December 9, 2009 as an Eligibility Specialist. On average, she handled 10 or more cases per day. For each case, she would spend approximately 30 to 40 minutes reviewing documents on her computer screen. This involved using the mouse with her right hand to move from document to document. While reviewing the documents, she would make handwritten notes and computations with her right hand. Once review of a file was complete, she would spend approximately 10 minutes typing case notes into a log. She testified out of every 50 minutes at work, she would type for 10 minutes. She would then start the process over with a new case and continued this throughout her eight hour shift. Typing, apart from sometimes holding a phone in her left hand, would be the only task in which she would use her left hand in addition to her right hand.

Claimant became pregnant in 2010 and delivered her baby in March 2011. She returned to work in late-April 2011.

In approximately June 2011, claimant began experiencing numbness and tingling in her left hand with sharp pains in her wrist. She reported the injury to her supervisor and was referred to Dale Garrett, M.D., for evaluation. By the time she saw Dr. Garrett on July 18, 2011, claimant was experiencing symptoms in both wrists which she described as “throbbing numbness.”<sup>1</sup> She rated her pain as a 5/10, presumably on a 0 to 10 pain scale, and indicated it radiated up to her elbow, left more than right. She reported typing and pressure make it worse.

Dr. Garrett diagnosed claimant with bilateral upper extremity overuse and sleep disorder. In addressing causation, Dr. Garrett stated: “This is not caused by work. Made symptomatic by work, but resolves with rest. She has decreased healing due to sleep disorder.”<sup>2</sup> Dr. Garrett released her to regular duty.

On August 2, 2011, claimant sought treatment on her own with her primary care physician. She was seen by Heather Myers, ARNP, for complaints of wrist pain. Claimant reported her bilateral wrist pain was aggravated by typing. Ms. Myers diagnosed her with wrist pain and paresthesias and recommended a nerve conduction study (NCS). On August 23, 2011, claimant underwent EMG/NCS testing with normal results. Claimant continued to work, but testified her pain “got progressively worse.”<sup>3</sup>

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<sup>1</sup> P.H. Trans., Resp. Ex. C at 1.

<sup>2</sup> *Id.*, Resp. Ex. C at 2.

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

On February 20, 2012, claimant was seen by Ryan Bennett, D.O., to establish a new primary care physician relationship. Claimant advised Dr. Bennett of her current health status and medical history, including a 2002 motor vehicle accident and 2007 fall, but provided no history of present or past complaints involving her upper extremities.

On April 18, 2012, claimant was terminated by respondent for attendance issues. She has not worked anywhere since.

Claimant filed her application for hearing on March 28, 2013.

On April 3, 2013, claimant was seen at the Stormont-Vail emergency room for complaints of pain, swelling over the right ulnar styloid of the wrist and paresthesias into the right 5th finger and up into the elbow after striking a wall. X-rays were negative. Claimant was diagnosed with a right wrist contusion and provided a velcro splint, as well as instructed to take ibuprofen or Tylenol for pain.

On April 29, 2013, claimant was seen at her attorney's request by Daniel Zimmerman, M.D. Claimant complained of pain and discomfort affecting both hands, wrists and fingers, with the left being worse than the right. Claimant did not mention having recently hit her right wrist<sup>4</sup> on a wall and being seen at the emergency room for numbness from her fingers to her elbow.

Dr. Zimmerman diagnosed claimant with bilateral upper extremity entrapment neuropathies, which he parenthetically described as carpal tunnel syndrome, and recommended an EMG/NCS, as well as evaluation by a hand specialist "such as Lynn Ketchum, M.D."<sup>5</sup> Regarding prevailing factor, Dr. Zimmerman stated:

The prevailing factor for the right and left upper extremity peripheral nerve entrapment syndromes (carpal tunnel syndromes) is the repetitive work duties performed in her employment at Policy Studies, Incorporated from December 9, 2009 through April 18, 2012.<sup>6</sup>

On September 13, 2013, claimant was seen at respondent's request by Erich Lingenfelter, M.D. Claimant reported her symptoms were just as bad, if not worse. Dr. Lingenfelter noted claimant was a side sleeper. Dr. Lingenfelter diagnosed claimant with bilateral hand numbness and tingling with subjective complaints consistent with carpal tunnel syndrome. In addressing causation and prevailing factor, Dr. Lingenfelter stated:

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<sup>4</sup> Claimant later testified it was her left wrist and the medical records reflecting the right wrist were incorrect. (See *Id.* at 39-40).

<sup>5</sup> *Id.*, Cl. Ex. 1 at 4.

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

[Claimant] has multiple risk factors and causes of carpal tunnel. . . . It is well established that pregnancy is a primary cause of carpal tunnel syndrome and frequently women do experience this during pregnancy. She gave birth in March 2011 and her symptoms began worsening in July 2011, which makes sense as to timing of carpal tunnel syndrome. I believe that it is a major cause and can also be a cause and has contributed to her carpal tunnel syndrome. I also know, based on multiple newer studies, that side sleeping is a significant contributor to the pathogenesis of the carpal tunnel syndrome and is a cause of carpal tunnel syndrome. The pressure on the cubital tunnel and the carpal canal is significantly higher in a flexed wrist position. Therefore, I think this is also a primary cause of her carpal tunnel. I am not a physician that dismisses data entry as a cause and I think it can also contribute to it, but we are asked to give an opinion regarding the primary prevailing factor. Given that we now have two risk factors, pregnancy and side sleeping, compared to one risk factor and cause, I cannot say within a reasonable degree of medical certainty that the primary prevailing factor is solely the work environment. My position is that it is not the primary prevailing factor and that the other risk factors outweigh the data entry as the primary prevailing factor.<sup>7</sup>

Claimant testified she did not know why Dr. Lingenfelter's report indicated she was a side sleeper because other than during pregnancy, when she did sleep on her sides, she was "mainly a stomach sleeper and a back sleeper."<sup>8</sup> Claimant denied upper extremity problems while pregnant or from sleeping on her side during pregnancy.

Following the preliminary hearing, the judge ordered Lynn Ketchum, M.D., to perform a neutral independent medical evaluation of claimant.

Claimant was evaluated by Dr. Ketchum on May 8, 2014. Dr. Ketchum noted most of claimant's numbness is during the day and she only experiences numbness a couple nights a week. Dr. Ketchum reported a positive provocative thoracic outlet test for numbness in the 3rd digits bilaterally and poor posture with rounded shoulders. Dr. Ketchum recommended thoracic outlet exercises, physical therapy and wrist braces. In addressing prevailing factor, Dr. Ketchum stated:

The prevailing factor is her congenital makeup of ulna-positive variance, but regarding her thoracic outlet syndrome, the prevailing factor in causing that since she had no symptoms prior to working at Policy Studies was the poor posture that she had during the period of time the 3 years that she worked there, working 40 hours a week typing most of the time, with poor posture which was collapses in the thoracic outlet area.<sup>9</sup>

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<sup>7</sup> *Id.*, Resp. Ex. A at 2.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> Ketchum Report (filed May 21, 2014) at 3.

The judge's June 17, 2014 Order states, in part:

It is found and concluded that the prevailing factor for Claimant's bilateral upper extremity complaints are personal conditions and not her work duties with Respondent. The Court concludes that it was Claimant's poor posture and the congenital make-up of ulnar-positive variance that are the prevailing factors for her complaints. It is this Court's interpretation of Dr. Ketchum's report that . . . Claimant's poor posture, which is controlled by Claimant, was the prevailing factor of the thoracic outlet condition.

Claimant filed a timely appeal.

#### PRINCIPLES OF LAW

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

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 provides, in pertinent part:

(f)(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:

...

(iii) accident or injury which arose out of a risk personal to the worker;

...

(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.

#### ANALYSIS

This Board Member affirms the preliminary hearing ruling, but for a different reason than used by the judge. While the judge concluded Dr. Ketchum opined the prevailing factor in claimant's development of thoracic outlet syndrome was her poor posture, this Board Member interprets Dr. Ketchum's opinion as vague and insufficient to meet claimant's burden of proof on the prevailing factor requirement.

Assuming claimant sustained repetitive trauma, this Board Member does not know if Dr. Ketchum would ascribe claimant's repetitive trauma as being the primary factor in the development of her thoracic outlet syndrome. It is unclear if Dr. Ketchum is stating claimant's poor posture is somehow a personal condition that led to her injury. It also appears Dr. Ketchum was misinformed. His report states claimant would type for most of a 40 hour work week. Perhaps Dr. Ketchum attributed claimant's thoracic outlet syndrome to her being hunched over while using a computer most of the day, but claimant's testimony was that she typed about 100 minutes in a day in 10 minute increments.

The prevailing factor opinions of Drs. Zimmerman and Lingenfelter are not sufficient for either to be adopted by this Board Member. This Board Member accepts Dr. Ketchum's diagnoses (thoracic outlet syndrome and mild ulnar impaction syndrome) as more valid than the diagnoses set forth by Drs. Zimmerman (bilateral upper extremity peripheral nerve entrapments/carpal tunnel syndrome) and Lingenfelter (bilateral hand numbness and tingling with subjective complaints consistent with carpal tunnel syndrome). Such doctors did not arrive at the same diagnoses as did Dr. Ketchum, the court-appointed physician, which causes this Board Member to question if their focus on prevailing factor may have been off the mark.

To his credit, Dr. Zimmerman reviewed claimant's testimony. However, Dr. Zimmerman's report, other than merely reiterating Dr. Garrett's statement about claimant's problems being associated with poor sleep, does not acknowledge any other factors which may be relevant to analyzing whether the claimant's accident was the prevailing factor in causing her injury and need for medical treatment. Dr. Zimmerman simply concludes claimant's injuries are due to her work. Additional analysis would have been helpful at least in this Board Member's opinion, especially when Drs. Lingenfelter and Ketchum looked at additional causative factors.

Dr. Lingenfelter's opinion is problematic. The prevailing factor opinion provided by Dr. Lingenfelter is based on a nearly impossible standard for a claimant to overcome. The standard is not based on medical certainty that the prevailing factor is solely the work environment. Moreover, this Board Member disagrees with Dr. Lingenfelter's conclusion that two factors – claimant's pregnancy and her side sleeping – necessarily outweigh one factor in claimant's favor – her repetitive work duties. Theoretically, a claimant could have numerous factors that could be relevant risks or contributors to a medical condition, but regardless as to the number of such factors, a worker's repetitive job duties might still be the prevailing factor in the development of the medical condition.

Again, this Board Member has confidence in Dr. Ketchum's diagnoses over the diagnoses of Drs. Lingenfelter and Zimmerman. This Board Member cannot discern from Dr. Ketchum's report if claimant sustained repetitive trauma that was the prevailing factor causing her injury and need for medical treatment.

#### CONCLUSIONS

Based on the current evidence, claimant did not meet her burden to prove she sustained repetitive trauma which was the prevailing factor causing her injury and medical condition.

**WHEREFORE**, the undersigned Board Member affirms the June 17, 2014 preliminary hearing Order.<sup>10</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2014.

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<sup>10</sup> 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. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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