

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**GLEND A L. ELLIS** )  
Claimant )  
V. )  
**TRI COUNTY SPECIAL EDUCATION** )  
**COOP 607** ) Docket No. 1,065,434  
Respondent )  
AND )  
**KANSAS ASSOC. OF SCHOOL** )  
**BOARDS WC FUND INC.** )  
Insurance Carrier )

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the April 15, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to sustain her burden of proving her July 19, 2015, fall was the natural and probable consequence of her November 13, 2012, work injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 14, 2016, Preliminary Hearing and the exhibits; the transcript of the January 28, 2016, Preliminary Hearing and the exhibits; and the transcript of the September 12, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant did not submit a brief in this matter.

Respondent argues the ALJ's Order should be affirmed. Respondent maintains there is a lack of both medical evidence and subjective findings relating claimant's leg weakness to her initial 2012 work injury.

The issue for the Board's review is: did claimant sustain her burden of proving the July 19, 2015, fall was the natural and probable consequence of her November 13, 2012, work injury?

#### FINDINGS OF FACT

On November 13, 2012, claimant sustained an injury to her back while working as a paraprofessional for respondent. Claimant was involved in an altercation with a violent student. Claimant received treatment for her back before her release at maximum medical improvement (MMI) on May 30, 2013. Dr. Smith indicated claimant underwent an MRI related to her complaints of leg weakness. He wrote:

I was skeptical of [claimant's] injury and examination on her first visit warranted a MRI based on the weakness in her legs. The MRI was completely negative. She did not sustain a lumbar injury in accordance with her findings on exam. She is at MMI now and I see no reason for further work up or treatment. Her disability rating will also change based on the MRI and be considerably lower as there is basically no objective findings for her pain.<sup>1</sup>

Claimant began treatment with Dr. F. Allen Moorhead, Jr., in September 2014. Dr. Moorhead treated claimant with medications and physical therapy, noting claimant reported leg weakness and numbness. In a letter dated October 10, 2014, Dr. Moorhead noted claimant had uncontrolled diabetes and recommended a nerve conduction study. He wrote, "Of course long-standing diabetes causes a neuropathy which can cause pain so there may be a possibility that this is somewhat of a contributing factor."<sup>2</sup> In a letter dated March 3, 2015, Dr. Moorhead indicated claimant "has had a complete workup and we have not been able to demonstrate any physical defect causing her problem."<sup>3</sup>

Claimant underwent an NCT/EMG on both lower extremities on May 28, 2015, performed by Dr. Rizwan Hassan. He concluded, "This study is suggestive of lumbar spondylosis L4-5 - S1. As slower NCV on right posterior tibial nerve, consider right S1 Radiculopathy."<sup>4</sup>

Claimant testified she fell while going down her back porch and injured her right shoulder on July 19, 2015. Claimant stated her right leg went completely numb, causing her to fall. Claimant explained:

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<sup>1</sup> P.H. Trans. (Jan. 28, 2016), Resp. Ex. 1 at 2.

<sup>2</sup> P.H. Trans. (Jan. 28, 2016), Cl. Ex. 2 at 34.

<sup>3</sup> P.H. Trans. (Apr. 14, 2016), Resp. Ex. 2 at 1.

<sup>4</sup> P.H. Trans. (Jan. 28, 2015), Cl. Ex. 2 at 27.

[My right leg] just gave way and I just went flying. I missed four steps and landed on the cement below.<sup>5</sup>

Claimant stated she felt immediate pain in her right shoulder and was at first unable to move. Her husband took her to Mercy Hospital, where she was given an x-ray of her right wrist and stitches to a laceration on her elbow. She testified no treatment was provided to her right shoulder while at the hospital. Hospital records indicate claimant reported no back pain at that time. There is no indication she reported numbness in her right leg as the cause of her fall.<sup>6</sup>

Dr. Moorhead examined claimant on June 24, 2015, and wrote:

Her diabetes is not part of her W/C injury but she was reminded that she should get this under control as this will definitely affect peripheral neuropathy and nerve conduction. This will be difficult to determine whether or not her neuropathy is due to her injury or to the diabetes . . . .<sup>7</sup>

Claimant returned to Dr. Moorhead on July 24, 2015, for follow up of her back pain. His progress note indicated claimant reported a fall to him in which she injured her elbow. He did not record a reason for the fall. Dr. Moorhead diagnosed claimant with chronic pain syndrome and degenerative osteoarthritis of the lumbosacral spine. He noted claimant was scheduled to see Dr. Douglas Burton for evaluation of her radicular symptoms and to undergo an MRI. Dr. Moorhead wrote:

It was again advised that the diabetes can effect [sic] the nervous system as well as it is going to be difficult to determine whether her symptoms are from her diabetes not being controlled or from the injury. The longer she puts off the control of her diabetes, the worse the symptoms could be. The neurological examination did not separate this so it is assumed that this is from her injury based on her symptoms but the MRI should help it.<sup>8</sup>

On September 1, 2015, claimant underwent an MRI of her lumbar spine, which was read to reveal degenerative disc and facet disease in the mid/lower lumbar spine, the greatest at L3-4. Dr. Burton noted claimant's MRI showed degenerative discs at multiple levels with no stenosis and no herniation. He indicated claimant had continued back and right leg pain. Dr. Burton recommended claimant have a course of physical therapy and

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<sup>5</sup> P.H. Trans. (Jan. 28, 2015) at 19-20.

<sup>6</sup> P.H. Trans. (Apr. 14, 2016), Resp. Ex. 4 at 1.

<sup>7</sup> P.H. Trans. (Jan. 28, 2016), Resp. Ex. 2 at 16.

<sup>8</sup> P.H. Trans. (Apr. 14, 2016), Resp. Ex. 5 at 1.

remain on sedentary duty, but she did not need surgery. He opined claimant would remain at MMI once the course of therapy was completed.<sup>9</sup>

On September 24, 2015, Dr. Moorhead reported claimant's shoulder injury occurred when her right leg gave out, causing her to fall. Claimant complained of chronic right shoulder pain, and Dr. Moorhead noted x-rays indicated an injury. He recommended claimant have an MRI of the right shoulder.

Claimant also complained of radiculopathy down her right leg into the calf. Dr. Moorhead reported:

Patient still complains of radiculopathy down her right leg into her calf. Has been showed by nerve conduction studies that there appears to be something causing this but the back expert at KU did not feel that there was anything that could be done about this. The best we can do is try to control this with medication . . . . She has also been advised that uncontrolled diabetes can also make her have neuropathy in the back and nervous system so it is important that she try to get her diabetes under control.<sup>10</sup>

Claimant testified she understood the MRI to have revealed a torn rotator cuff. She has not seen Dr. Moorhead since she underwent the MRI.

Dr. Moorhead provided a causation opinion prepared by claimant's attorney and dated February 2, 2016. When given the choice of "yes" or "no" in the letter, he agreed that, within a reasonable degree of medical probability, claimant's July 2015 fall and resulting shoulder injury was the natural and probable consequence of her November 2012 back injury and leg weakness.<sup>11</sup>

Claimant worked for respondent until her last day of September 15, 2015. Claimant testified she has treated with physical therapy and medication for her back condition, but she has been unable to have further treatment for her shoulder. Claimant stated she has little movement from her right shoulder and cannot lift it. Claimant's authorized treatment was transferred to Dr. Rodrigo Cayme in January 2016.

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<sup>9</sup> See P.H. Trans. (Apr. 14, 2016), Resp. Ex. 6 & Resp. Ex. 7.

<sup>10</sup> P.H. Trans. (Jan. 28, 2016), Cl. Ex. 2 at 9-10.

<sup>11</sup> See P.H. Trans. (Apr. 14, 2016), Cl. Ex. 1 at 2.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

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. 2012 Supp. 44-508(h) states:

“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. 2012 Supp. 44-508(f) states, in part:

(2)(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.

K.S.A. 2012 Supp. 44-508(g) states:

“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. 2012 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

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>12</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>13</sup>

### ANALYSIS

In his Order, the ALJ wrote:

The Court concludes that the evidence does not show the [sic] that the work injury is the prevailing factor for the Claimant's leg weakness and resulting fall. The February 2, 2016, letter signed by Dr. Moorhead was not written by him, although a review of his records presented at the January 28, 2016, hearing indicates that he has taken extensive notes and written letters regarding the Claimant's condition on several previous occasions. The February 2, 2016, letter says that the fall was the natural and probable consequence of the November 13, 2012, back injury and leg weakness, but it does not say that the leg weakness was the result of the work accident. And there is no explanation for the conclusion that is given by Dr. Moorhead.

The undersigned agrees with the ALJ's conclusion. Nothing in the record ties claimant's leg weakness to the November 13, 2012, back injury. Dr. Moorhead's agreement with claimant's attorney's causation statement is inconsistent with the contemporaneous comments made in his clinical notes of June 24, 2015, and July 24, 2015. It is apparent from his clinical notes that Dr. Moorhead thought claimant's neuropathy could be related to her uncontrolled diabetes or her back injury.

The only objective evidence of claimant's low back condition is the MRI, which shows only degenerative changes in the lumbar spine with no nerve involvement.<sup>14</sup> The undersigned finds it equally probable that claimant's leg giving out on July 19, 2015, could have been caused by diabetic neuropathy, preexisting degenerative changes in the spine, or her initial injury on November 13, 2012.

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<sup>12</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>13</sup> K.S.A. 2015 Supp. 44-555c(j).

<sup>14</sup> See P.H. Trans. (Jan. 28, 2016), Resp. Ex. 2.

**CONCLUSION**

Based upon the record, the undersigned finds claimant failed to meet her burden of proving it is more probable than not the November 13, 2012, back injury was the prevailing factor causing her fall and resulting shoulder injury on July 19, 2015.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated April 15, 2016, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2016.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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Hon. Gary K. Jones, Administrative Law Judge