

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GALEN J. EDGECOMB)
Claimant)
V.)
USD 290)
Respondent) Docket No. 1,072,121
AND)
KANSAS ASSOCIATION OF SCHOOL BOARDS)
WORKERS COMPENSATION FUND)
Insurance Carrier)

ORDER

STATEMENT OF THE CASE

Claimant appealed the June 10, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, 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 10, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUE

Did claimant's accidental injury arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

The facts concerning how claimant was injured are not in dispute. Claimant, a school custodian, asserts he sustained low back and right lower extremity injuries. On January 31, 2014, claimant was applying chemicals to a tile floor, stepped on a hose with both feet, causing his feet to go out from under him and he fell, striking his right buttock on the floor. Claimant indicated he fell with full force on his backside and had immediate right buttock pain. After some time, claimant was able to get up, but "just didn't feel like I could

pick it [right leg] up by itself. I just had to kind of throw it.”¹ Claimant indicated his pain is in his right buttock, not his back, and the pain he reported to his chiropractor before his accident was different than the pain he is now experiencing.

Claimant testified that following his 2014 accident, he sought treatment from his family physician, Dr. John Shell, received injections from Dr. Greenfield and underwent an MRI. Neither the 2014 MRI report nor the records of Drs. Shell and Greenfield were placed into evidence.

Claimant testified he underwent back surgery in 2004. He indicated he received no permanent restrictions, had no problems with his right leg and was able to perform all his job duties when he went to work at respondent.

July 13, 2004, medical records from the Lafayette Home Hospital emergency department indicated claimant reported left hip pain radiating into his left anterior and medial thigh and medial calf. A July 21, 2004, MRI report noted severe spinal stenosis at L3-4 secondary to posterior element hypertrophy and a prominent diffuse disc bulge, a left lateral disc herniation at L3-4 with associated compression of the left L3 nerve root, moderate predominantly right-sided posterior disc bulge at L4-5 with associated posterior element hypertrophy and moderate right neural foraminal narrowing, and moderate facet hypertrophy at L5-S1.

On August 10, 2004, Dr. Jeffrey L. Crecelius performed a lumbar laminectomy at L3-4 left with lateral discectomy at L3-4 left decompressing the left L3 root. Dr. Crecelius' diagnosis was lumbar stenosis at L3-4 and lateral herniation at L3-4 left with compression of the left L3 root.

Chiropractic records of Lynn Wilson, D.C., from April 27, 2012, through July 11, 2014, reflect claimant made numerous visits. From April 27, 2012, through September 21, 2013, the notes of Dr. Wilson from each appointment were very similar, as he indicated claimant's chief complaint involved right cervical region and right lumbar region symptoms. Each time, Dr. Wilson's diagnosis was lumbago and/or cervicgia and he manipulated claimant at C1, C2, T3, T4, T5, L4 and L5. On February 22, 2014, Dr. Wilson indicated claimant reported symptoms at the right ilium region at the gluteal area, that claimant had been evaluated by two physicians and had been treated for a deep bruise. The doctor diagnosed claimant with a hip sprain and “thigh nec” due to a fall. The doctor manipulated claimant at L4, L5, sacrum and right ilium.

At the request of respondent, claimant was evaluated by Dr. Dale D. Dalenberg on November 17, 2014. The doctor indicated claimant reported having an L4-5 discectomy around 2000 for right radicular pain. Dr. Dalenberg did not have claimant's medical

¹ P.H. Trans. at 6.

records from his prior back condition. Claimant reported that after the January 2014 accident, he had right leg weakness and lack of coordination and persistent right buttock pain. The doctor indicated a 2014 MRI showed mild compression deformities, but no acute marrow changes at L3 and L4; a moderate bulging disc at L3-4 with severe degenerative changes of the facets and ligamentum flavum hypertrophy; similar changes at L4-5; and significant foraminal stenosis at L5-S1 with severe degenerative facet arthrosis and ligamentum flavum hypertrophy. An MRI of the pelvis and hips was unremarkable.

Dr. Dalenberg opined the prevailing factors for claimant's condition and impairment were the prior laminectomy, the ongoing disc/facet/ligamentum degeneration and hypertrophy, and the typical aging changes that lead to lateral recess stenosis and nerve root entrapment. The doctor indicated claimant, more likely than not, would have the same symptoms at some point had he not sustained a work injury.

Dr. Dalenberg saw claimant again on December 17, 2014, after he had three lumbar epidural steroid injections. The doctor indicated claimant brought MRI and radiographic images and left the discs. The doctor did not specify the date of the studies, but indicated they showed some foraminal stenosis on the right, more significant at L4-5 than anywhere else, which most likely accounted for his buttock pain. Dr. Dalenberg noted the study showed an extensive wide hemilaminectomy on the left, focused on the L3-4 disc space, which was his prior operation from about the year 2000. The doctor noted claimant was not having left-sided symptoms.

Claimant, at the request of his counsel, was evaluated by Dr. Harold A. Hess on February 18, 2015. Claimant reported right hip and buttock pain. Dr. Hess indicated that a review of records and questioning of claimant revealed claimant underwent a left L3-4 laminectomy and discectomy in 2004 for left leg pain, which totally resolved the left leg pain. Claimant reported undergoing occasional chiropractic treatment for intrascapular tightness and neck adjustments. Dr. Hess reviewed a 2014 MRI that showed claimant was status post left L3-4 laminectomy and had L4-5 stenosis with right L4-5 and right L3-4 foraminal disc protrusions causing foraminal stenosis on the right at both levels. One of his impressions was right lumbar radiculopathy, most likely related to the right-sided L4-5 and right-sided L3-4 foraminal disc protrusions causing foraminal stenosis. The doctor opined:

I would disagree with Dr. Dalenberg's assessment. This patient had a prior history of low back pain and left leg pain for which he underwent a left-sided L3-L4 laminectomy and discectomy. He currently has right buttock pain and hip pain, which would be unrelated to the prior pathology for which he had surgery in 2004.

The chiropractic treatments were for intrascapular tightness and for neck symptoms and not for low back pain, and in any case at the present time the patient does not have low back pain, he has right buttock pain and right hip pain.

It is therefore my opinion, within a reasonable degree of medical certainty, that the work-related injury of January 31, 2014 is the prevailing factor in causing this patient's current medical condition and in causing his current symptoms.²

The ALJ ruled claimant's injury did not arise out of and in the course of his employment, stating:

K.S.A. 44-508(f)(2) says an injury is not compensable solely because it aggravates, accelerates, or exacerbates a preexisting condition or renders a preexisting condition symptomatic. The section further says an injury shall be deemed to arise out of the employment only if the work accident was the prevailing factor in causing the injury.

Here, there was persuasive evidence on both sides of the causation question. Following the work accident, the claimant experienced new right leg symptoms, which tended to show a new injury and support Dr. Hess' opinion. Dr. Dalenberg related the claimant's current condition, in part, to the prior surgery which [Dr.] Dalenberg mistakenly believed was on the right, which undermined, at least in part, Dr. Dalenberg's opinion. But Dr. Dalenberg had the benefit of the chiropractic records which showed the claimant having right sided lumbar symptoms long before the work accident. Also, the condition which the claimant needs treated, stenosis at L3-L5, was present on MRI clear back in 2004.

It is a close call, but the preponderance of the evidence tips slightly more to this being an aggravation of a preexisting condition or a preexisting condition made symptomatic rather than a new injury for which the slip-and-fall was the prevailing causative factor.³

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "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."⁵

K.S.A. 2013 Supp. 44-508(f), in part, states:

² *Id.*, Cl. Ex. 1 at 2-3.

³ ALJ Order (June 10, 2015) at 2.

⁴ K.S.A. 2013 Supp. 44-501b(c).

⁵ K.S.A. 2013 Supp. 44-508(h).

(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.

K.S.A. 2013 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.

The Board has found work-related injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. These decisions tend to show compensability where there is a demonstrated physical injury above and beyond an aggravation of a preexisting condition:

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.⁶
- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.⁷

⁶ *Homan v. U.S.D.* #259, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

⁷ *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.⁸
- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.⁹
- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.¹⁰
- A motor vehicle accident did not solely aggravate, accelerate or exacerbate a claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.¹¹

Conversely, the Board has found claims not compensable because the injury solely aggravated an injured worker's preexisting condition and the work activity was not the prevailing factor causing the injury, medical condition, disability and need for medical treatment:

- Claimant had preexisting AC joint arthritis and asserted he had a possible left shoulder labral tear. A Board Member held the possibility of a labral tear did not rise to a more probably true than not true burden of proof and the labral tear, if present, could be due to a degenerative condition, aging or activities of daily living.¹²
- Unloading heavy boxes from a truck at work solely aggravated, accelerated or exacerbated claimant's preexisting cervical degenerative disease and was not the prevailing factor causing claimant's injury, medical condition or current level of disability.¹³

⁸ *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

⁹ *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

¹⁰ *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

¹¹ *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

¹² *Rybeck v. Husky Hogs, LLC*, No. 1,059,545, 2012 WL 6811293 (Kan. WCAB Dec. 7, 2012).

¹³ *Priest v. Foot Locker Retail, Inc.*, No. 1,062,248, 2013 WL 2455713 (Kan. WCAB May 1, 2013).

- An ankle injury sustained when claimant pushed a large trash container solely aggravated a preexisting condition and the accident was not the prevailing factor causing the ankle injury.¹⁴
- A Board Member found claimant's longstanding degenerative arthritis was a preexisting condition that caused her left knee complaints and need for surgery. Claimant failed to prove pulling a pallet of frozen products at work caused chondral bodies in her left knee to become loose and lodge in her medial compartment.¹⁵

This Board Member finds claimant proved he sustained personal injury by accident arising out of and in the course of his employment with respondent. Like the ALJ, this Board Member finds this is a close call. Drs. Dalenberg and Hess provided differing opinions on prevailing factor and whether claimant's accident aggravated a preexisting back condition.

Claimant's 2004 back condition affected his left leg only and his 2004 MRI report noted a left lateral disc herniation at L3-4 with associated compression of the left L3 nerve root, severe spinal stenosis at L3-4 secondary to posterior element hypertrophy and a prominent diffuse disc bulge, moderate predominantly right-sided posterior disc bulge at L4-5 with associated posterior element hypertrophy and moderate right neural foraminal narrowing and moderate facet hypertrophy at L5-S1. Dr. Hess noted claimant's 2014 MRI showed a right L3-4 foraminal disc protrusion causing foraminal stenosis, which was not noted in the 2004 MRI report.

Claimant did see Dr. Wilson numerous times prior to his accident for chiropractic treatment and one of his chief complaints was right lumbar pain. Dr. Wilson indicated claimant had lumbago. Claimant indicated that after his fall, his pain is primarily in his right buttock and was different than the lumbar pain of which he complained to Dr. Wilson. That is corroborated by Dr. Hess, who indicated claimant reported right buttock pain, but not lumbar back pain. Dr. Dalenberg stated claimant reported the majority of his pain was in the right buttock.

Dr. Hess' opinions are more credible than those of Dr. Dalenberg, who initially thought claimant had an L4-5 discectomy in approximately 2000 to relieve claimant's right lower extremity pain. Dr. Hess was aware claimant underwent a left L3-4 laminectomy. Dr. Hess noted claimant's 2014 MRI showed a right L3-4 foraminal disc protrusion.

¹⁴ *Hastings v. Kansas Expocentre*, No. 1,062,292, 2013 WL 1384405 (Kan. WCAB Mar. 14, 2013).

¹⁵ *Nelson v. Wal Mart*, No. 1,061,944, 2013 WL 1384404 (Kan. WCAB Mar. 18, 2013).

Dr. Dalenberg noted claimant had moderate disc bulging at L3-4, but did not note the disc bulging was on the right.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁷

WHEREFORE, the undersigned Board Member reverses the June 10, 2015, preliminary hearing Order entered by ALJ Hursh and remands this matter for further proceedings consistent with the above findings that claimant sustained personal injury by accident arising out of and in the course of employment with respondent.

IT IS SO ORDERED.

Dated this ____ day of August, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
jeff@jkcooperlaw.com; toni@jkcooperlaw.com

Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
fgreenbaum@mvplaw.com; mvpkc@mvplaw.com; jpearce@mvplaw.com

Kenneth J. Hursh, Administrative Law Judge

¹⁶ K.S.A. 2014 Supp. 44-534a.

¹⁷ K.S.A. 2014 Supp. 44-555c(j).