

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**CURTIS L. WHALEY** )  
Claimant )  
V. )  
**OLD DOMINION FREIGHT LINE, INC.** )  
Respondent ) Docket No. 1,073,277  
AND )  
**NEW HAMPSHIRE INSURANCE COMPANY** )  
Insurance Carrier )

**ORDER**

**STATEMENT OF THE CASE**

The parties appealed the March 30, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, 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 March 29, 2016, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

**ISSUES**

The ALJ determined claimant fell at work on January 7, 2015, but his fall was not the prevailing factor for his back injury and need for medical treatment. The ALJ stated:

The Respondent denies that the Claimant had an accident within the course and scope of his employment. The Claimant's testimony that he fell at the New Age warehouse is uncontradicted. The Court concludes that the Claimant did suffer a fall while working for the Respondent.

K.S.A. 44-508(f)(2)(B) states that the accident must be the prevailing factor causing the injury and medical condition. Dr. Van Norden's records of February 4, 2015, say the Claimant has back pain as a result of a fall at work and the Claimant has no history of previous back pain. Dr. Pedro Murati and Dr. John Estivo both say the work accident was the prevailing factor for the Claimant's back condition,

although neither doctor was aware of records from Dr. Brantley. The Claimant denied any significant prior back problems when seen by Dr. Murati and Dr. Estivo.

The Court concludes that the Claimant has not met his burden to show that the accident was the prevailing factor for his medical condition and need for treatment. The Claimant saw Dr. Brantley shortly before the work accident with complaints of low back pain of eight on a scale of 10, and this information was not disclosed to any of the doctors who examined the Claimant after the accident. The Court finds the opinions from Drs. Van Norden, Murati and Estivo were based on incomplete information.<sup>1</sup>

Claimant's application for review asserts the ALJ erred by finding claimant failed to prove he met with personal injury by accident arising out of and in the course of his employment and his accident was the prevailing factor in his need for medical treatment. Respondent asserts claimant never suffered an accident. Neither party filed a brief.

The sole issue is: did claimant sustain a personal injury by accident arising out of his employment, including whether claimant's accident was the prevailing factor causing his back injury and need for medical treatment?

#### **FINDINGS OF FACT**

Claimant drove a truck for respondent, picking up and delivering freight. On January 7, 2015, claimant was at a warehouse owned by New Age in Norton, Kansas. At the time, it had sleeted. As claimant was descending some steps between 4:30 p.m. and 6:30 p.m., he slipped on ice and fell. He did not recall the exact time he fell. Claimant continued working. His cell phone records indicated that at 6:03 p.m., he called respondent. Claimant testified he called respondent's dispatcher or night supervisor to let them know he was on his way back and that he fell.

The next morning at approximately 5 a.m., claimant awoke with excruciating pain in his left hip. He could not move and could not get out of bed. Claimant indicated his pain was eight on a pain scale of one to ten, with ten being the worst pain. He called his doctor, but could not get in until the next week.

Claimant, on cross-examination, confirmed the first treatment he received for his alleged work injury was from Scott R. Brantley, D.C. Claimant saw Dr. Brantley on January 15. Claimant testified he went to see Dr. Brantley for leg pain. Claimant acknowledged he did not report his work injury to Dr. Brantley. When asked why not, claimant testified, "I just didn't."<sup>2</sup>

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<sup>1</sup> ALJ Order at 2-3.

<sup>2</sup> P.H. Trans. at 73.

On January 15, 2015, claimant went to see Mark Van Norden, D.O., for back pain attributed to the fall at work. Dr. Van Norden's notes indicate claimant's back pain was not discussed in detail. The doctor recommended claimant contact his employer and get it approved as a workers compensation claim and follow up, if medical treatment was approved. Claimant indicated that he spoke to Jason Marable, respondent's manager of sales and service, about the fall after seeing Dr. Van Norden on January 15. At Mr. Marable's suggestion, claimant applied for short-term disability benefits.

Claimant returned to see Dr. Van Norden on February 4 and asked the doctor to complete short-term disability forms for the back condition. Claimant reported having no history of back pain. The doctor again explained to claimant this was a workers compensation issue. Claimant reported the accident date as January 9. With claimant's permission, Dr. Van Norden contacted Mr. Marable, who indicated claimant did not work on January 9, but did work in Norton on January 7.

Claimant acknowledged suffering a back injury in 2013 when he lifted 200 pounds or more of trash while working at Great Bend Co-op. Claimant underwent chiropractic treatment with Dr. Brantley for approximately one month. Claimant indicated he had no continued complaints from that injury.

Dr. Brantley's records indicate he first saw claimant on October 18, 2013. Claimant reported low back pain at a level of eight on a scale of one to ten, with ten being the most severe. The chiropractic doctor noted motion palpation revealed joint fixation/restriction and static palpation revealed misalignment, tenderness and muscle spasm at L4, L3, sacrum, right pelvis and left pelvis. Dr. Brantley adjusted claimant's spine on the fixated areas. Dr. Brantley gave claimant exercises to perform and recommended claimant use ice. The chiropractor indicated he was going to treat claimant again in two weeks.

Claimant presented to Dr. Brantley on December 31, 2014, with sacral, left sacroiliac, left buttock, left posterior leg, left posterior knee and left calf discomfort. The chiropractor noted motion palpation revealed joint fixation/restriction and static palpation revealed misalignment, tenderness and muscle spasm at L4, L3, sacrum and left pelvis. Claimant's left hamstring, piriformis and gluteal muscles were taught and tender to palpation. Dr. Brantley treated claimant with ice, electric muscle stimulation and chiropractic manipulation. Dr. Brantley indicated he was going to treat claimant two times per week for ten weeks.

On January 15, 2015, claimant again saw Dr. Brantley, who noted the visit was for an update. Claimant presented with sacral, left sacroiliac, left buttock, left posterior leg, left posterior knee, left calf, left foot and right foot discomfort. No mention was made in Dr. Brantley's notes of a work accident. Dr. Brantley manipulated claimant's spine, provided electric muscle stimulation and recommended ice to reduce inflammation and pain.

At the request of his attorney, claimant was evaluated by Dr. Pedro A. Murati on July 20, 2015, for back pain related to his work accident. Claimant denied any significant preexisting low back or left hip injuries. Dr. Murati noted that in reviewing claimant's records, there were accident reports dated March 25, 2009, and January 5, 2008, indicating claimant had low back injuries, but no lost work time was reported. Dr. Murati reviewed Dr. Van Norden's records and indicated his February 4 notes stated claimant had no history of previous back pain. The doctor noted he had no other records regarding claimant's low back and left hip and Dr. Brantley's records were not mentioned. Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy, right sacroiliac joint dysfunction and a left hip sprain and opined the diagnoses were a direct result of claimant's work accident. Dr. Murati opined claimant's work accident was the prevailing factor causing his conditions. The doctor recommended a lumbar MRI, a bilateral lower extremity nerve conduction study/EMG, lumbar epidural steroid injections, cortisone injections, anti-inflammatory and pain medications and physical therapy.

On September 17, 2015, claimant was evaluated by John P. Estivo, D.O., at respondent's request. The doctor stated claimant denied having any lumbar pain prior to his 2015 accident. The doctor also noted claimant reported having a history of lumbar strain in 2013, which completely resolved after seeing a chiropractor. Dr. Estivo reviewed extensive medical records of claimant and noted there was no mention of lower back injuries or lower back complaints. However, Dr. Estivo's report does not reference Dr. Brantley's records. Dr. Estivo's impression was lumbar spine pain with occasions of left leg pain. The doctor opined the prevailing factor for claimant's lumbar spine pain with occasional left leg pain was his 2015 work accident. Dr. Estivo recommended medical treatment for claimant's lumbar spine, including an MRI.

Claimant acknowledged he did not tell Drs. Murati and Estivo about treating with Dr. Brantley, including the fact he saw Dr. Brantley on December 31, 2014. Claimant also acknowledged not telling Drs. Murati and Estivo that Dr. Brantley was the first doctor he saw after his January 7, 2015, accident.

Mr. Marable testified he was claimant's direct supervisor and claimant was to report any work accidents to him. Mr. Marable indicated claimant reported no work accidents or injuries on January 7 and 8, 2015. According to Mr. Marable, claimant worked his normal hours on January 8 and he observed claimant walk in a normal fashion that day.

On January 9, claimant did not appear for work. Mr. Marable unsuccessfully attempted to call claimant, but was able to reach his wife at work. Claimant's wife said he was ill. That same day, Mr. Marable received a call from claimant and was told he was ill with flu-like symptoms. On January 11, Mr. Marable called claimant to see if he was well enough to return to work the next day and claimant indicated he would do so. Claimant failed to appear at work on January 12, so Mr. Marable called him. Claimant indicated he had a relapse and was again ill. Mr. Marable advised claimant he should see a doctor and apply for short-term disability benefits. On January 15 and 22, Mr. Marable called claimant

and he again reported being ill. Mr. Marable indicated that during these conversations, claimant never indicated he had a work injury.

Mr. Marable indicated that on January 27, he received an email indicating claimant applied for unemployment benefits. The same day, Mr. Marable also received a note from Heartland Regional Health Clinic stating claimant would be off work until further notice.

The first time Mr. Marable learned of claimant's alleged work accident was on February 4, when he received a telephone call from Dr. Van Norden indicating claimant suffered a January 9 work injury. Mr. Marable thought that was suspicious because claimant did not work on January 9. Claimant called Mr. Marable on February 16 about filing a workers compensation claim. Because of the unusual circumstances, Mr. Marable instructed claimant to call respondent's corporate office.

### 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.<sup>3</sup> "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."<sup>4</sup>

K.S.A. 2014 Supp. 44-508(f)(2)(B) states:

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.

This Board Member concurs with the ALJ's finding that claimant's accident was not the prevailing factor for his low back injury and need for medical treatment. Therefore, claimant's accident did not arise out of his employment.

Claimant is not credible. Eight days prior to his alleged work accident, claimant sought chiropractic treatment for his low back from Dr. Brantley. Eight days after his alleged work accident, claimant sought treatment from Dr. Brantley, but never informed him

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<sup>3</sup> K.S.A. 2014 Supp. 44-501b(c).

<sup>4</sup> K.S.A. 2014 Supp. 44-508(h).

of suffering a work accident. Claimant reported having no history of back pain to Dr. Van Norden and no significant history of back problems to Dr. Murati. Claimant reported having low back issues in 2013 to Dr. Estivo, but indicated they had completely resolved with chiropractic treatment. From the record, it appears none of the medical doctors were aware claimant saw Dr. Brantley on December 31, 2014, and January 15, 2015. When Drs. Murati and Estivo rendered their prevailing factor opinions, they were unaware of the extent of claimant's preexisting low back condition. This Board Member also questions whether claimant fell on January 7, 2015. However, that issue is moot because claimant failed to prove his accident was the prevailing factor causing his injury and need for medical care.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> 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.<sup>6</sup>

**WHEREFORE**, the undersigned Board Member affirms the March 30, 2016, preliminary hearing Order entered by ALJ Jones.

**IT IS SO ORDERED.**

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

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
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Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier  
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Honorable Gary K. Jones, Administrative Law Judge

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<sup>5</sup> K.S.A. 2014 Supp. 44-534a.

<sup>6</sup> K.S.A. 2014 Supp. 44-555c(j).