

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GARRY CHERRY)	
Claimant)	
V.)	
)	CS-00-0443-752
MANHATTAN OGDEN UNIFIED SCHOOL)	AP-00-0450-620
DISTRICT 383)	
Respondent)	
AND)	
)	
UNITED WISCONSIN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the April 15, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Roger D. Fincher appeared for Claimant. Matthew Schaefer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the Independent Medical Evaluation of Dr. Danny Gurba, dated November 21, 2019, the ALJ's orders dated September 10, 2019, and April 15, 2020, and the letter from the ALJ to Dr. Gurba dated September 10, 2019.

ISSUES

Claimant appeals arguing his accidental injury arose out of and in the course of his employment, the work accident was the prevailing factor causing his left knee injury and need for medical treatment. Claimant contends his injury was sudden and unexpected when he hit his left knee twice at work. Claimant denies having left knee pain or problems prior to the accident on January 11, 2019.

Respondent argues the ALJ's Order should be affirmed. Respondent argues Claimant did not sustain an injury arising out of and in the course of his employment and the incident on January 11, 2019, is not the prevailing factor causing the left knee injury,

medical condition and resulting disability or impairment. Dr. Gurba's medical opinion given as a result of a Court order is well-founded and the ALJ was correct to deny benefits.

The issue on appeal is:

Whether Claimant met with personal injury arising out of and in the course of employment with Respondent on January 11, 2019, specifically was the accident on January 11, 2019, the prevailing factor causing Claimant's left knee injury and need for medical treatment?

FINDINGS OF FACT

The ALJ ruled Claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment.

In the ALJ's Order dated September 10, 2019, it was noted that a preliminary hearing was held. There was no transcript from said hearing and no recorded testimony or exhibits. The only medical evidence before the Board is the Court ordered Independent Medical Evaluation of Dr. Gurba.

On January 11, 2019, while employed by Respondent, Claimant hit his left knee on a padded chair frame and later on a metal post near the bus driver. He hit his left knee hard enough to cause significant pain, swelling and bruising over the anterior aspect of the knee, which was noted primarily the following morning.

Dr. Danny Gurba examined Claimant on November 21, 2019, at the request of the Court. Claimant reported ongoing, stabbing left knee pain located primarily medially. He complained of intermittent numbness with standing in the medial aspect of his calf going into the foot and to the toes. He had more anterior knee pain with sitting for prolonged periods of time. He reported he is unable to go up and down stairs without pain. Claimant denied any prior left knee problems despite x-rays showing arthritis, never saw a physician for his left knee before. He does not take medication for his left knee.

Claimant underwent an L4-L5 spine fusion in the mid-1990s by Dr. Bernhardt. For that reason, he takes a significant amount of Dilaudid daily. Approximately five years ago, Claimant underwent a left total hip arthroplasty by Dr. Gardiner and he feels he is doing well. Claimant reported, according to Dr. Bernhardt, no further surgical intervention was possible for his spine. Claimant, in addition to the left knee pain, complains of intermittent numbness with standing in the medial aspect of his calf going into the foot and to the toes. Claimant believes this is due to a circulatory problem.

Dr. Gurba noted when he entered the exam room, Claimant was bent at a 90-degree angle at the waist leaning on the exam table with his knees extended. He told Dr. Gurba he was trying to get circulation back in his lower leg. Dr. Gurba felt these symptoms

were more of a neurogenic problem, possibly related to lumbar spine issues and not related to the left knee.

Dr. Gurba's examination of Claimant's left knee showed moderate diffuse swelling and moderate effusion. Dr. Gurba compared x-rays of Claimant's left knee taken in May 2014 with the x-rays he took in November 2019. This comparison showed the same pattern of wear and tear at the patellofemoral joint. Dr. Gurba opined this is consistent with advanced patellofemoral arthritis and basically unchanged over the last five-plus years. The patellofemoral arthritis explains the anterior left knee pain with bent knee activities such as stair climbing and sitting with the knee bent for extended periods of time. Dr. Gurba diagnosed preexisting patellofemoral osteoarthritis in the left knee. He believed Claimant's left knee symptoms may have been aggravated to some degree by the work injury. The patellofemoral arthritis did not explain the numbness of the lower leg, which Dr. Gurba attributes to lumbar nerve root impingement. According to the doctor, the work accident of January 11, 2019, was not prevailing factor for patellofemoral arthritis which clearly preexisted over five years ago.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2019 Supp. 44-508(h) states:

(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.

K.S.A. 2019 Supp. 44-508(d) states:

"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.

K.S.A. 2019 Supp. 44-508(f) states in part:

(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.

(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.

K.S.A. 2019 Supp. 44-508(g) defines as:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The only evidence in the record is the Court-ordered evaluation of Dr. Gurba.

Dr. Gurba diagnosed Claimant with preexisting patellofemoral osteoarthritis. The existence of the patellofemoral arthritis was documented by 2014 x-rays of Claimant's left knee showing the same pattern of wear and tear at the patellofemoral joint area. Dr. Gurba did not diagnose a new injury or change in Claimant's left knee due to the work accident of January 11, 2019. These left knee symptoms are solely an aggravation. Dr. Gurba further opined the accident of January 11, 2019, was not the prevailing factor for the patellofemoral arthritis or Claimant's left knee symptoms. It is found and concluded that Claimant's left knee complaints did not arise out and in the course of Claimant's employment because it is solely an aggravation of a preexisting condition.

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.¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 15, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Roger D. Fincher, Attorney for Claimant
Matthew Schaefer, Attorney for Respondent and its Insurance Carrier
Honorable Bruce E. Moore, Administrative Law Judge

¹ K.S.A. 2018 Supp. 44-534a.