

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|--------------------------|---|----------------|
| TRINETTE McMENAMY |) | |
| Claimant |) | |
| |) | |
| V. |) | |
| |) | |
| DREAM TEAM PIZZA |) | CS-00-0152-301 |
| Respondent |) | AP-00-0450-870 |
| |) | |
| AND |) | |
| |) | |
| KANSAS WORKERS |) | |
| COMPENSATION FUND |) | |

ORDER

Administrative Law Judge Thomas Klein issued a preliminary Order on April 30, 2020. The claimant, Trinetta McMenemy (McMenamy), through her attorney, Jeffrey K. Cooper, requested review of the decision. Kirby Vernon represents the uninsured respondent, Dream Team Pizza. The Kansas Workers Compensation Fund is represented by Darin Conklin, but did not appear based on a stipulation Dream Team Pizza was financially able to pay medical compensation.

RECORD AND STIPULATIONS

The record consists of three preliminary hearing transcripts dated August 29, 2018, August 27, 2019, and January 28, 2020, all exhibits attached to such transcripts, the pleadings, the case file and the parties' briefs. Any stipulations are adopted.

ISSUE

Are McMenemy's right knee and right iliotibial (IT) band injuries caused primarily from and the natural and probable consequence of her May 9, 2018 left toe injury?

FINDINGS OF FACT

McMenamy is an employee of Dream Team Pizza. On September 23, 2017, she accidentally dropped a tray of pizza dough on her left foot, requiring surgery for her second toe. She worked in a walking boot until April 2018. Such matter was assigned a different case number and is not involved in this appeal.

The subject matter of this case involves an incident on May 9, 2018, in which McMenemy fractured her left big toe while trying to push a pallet with her left foot. She had surgery for this toe injury on June 29, 2018.

At an August 29, 2018 preliminary hearing, McMenemy testified Jon Morgan, D.P.M., restricted her to using crutches from August 21 until a return appointment set for September 21, 2018. McMenemy testified she needed to use a walking boot. That same day, the judge ordered benefits, including authorizing Dr. Morgan as the treating physician.

Dr. Morgan referred McMenemy for treatment of her right knee to John Babb, M.D. On April 22, 2019, McMenemy told Dr. Babb her right knee and IT band pain began on or after her May 9, 2018 work accident. There is also reference to her symptoms beginning 12 months earlier. Dr. Babb recorded her gait as normal. The doctor injected McMenemy's right IT band, recommended physical therapy, and prescribed medication.

Dream Team Pizza, through counsel, sought Dr. Babb's prevailing factor opinion. In a May 17, 2019 letter, Dr. Babb stated:

In regards to prevailing factor on Trinette McMenemy's current right knee pain, patient has an extensive history of left foot surgeries requiring nonweightbearing status to her left lower extremity. With the majority of patient's weight being placed on the right knee and the multiple surgeries on her left foot which were work compensable injuries, her current right knee pain over the IT band is more likely than not associated with her left lower extremity nonweightbearing status.¹

At an August 27, 2019 preliminary hearing, McMenemy testified her first walking boot lasted one year, the second boot failed after two months, and she was in her third boot. She complained of right hip problems she attributed to wearing the boot and walking. McMenemy denied hip pain after a right knee total knee arthroplasty (TKA) in March 2016.

In a preliminary Order dated August 30, 2019, the judge authorized Dr. Babb to provide conservative treatment for McMenemy's right knee, but any non-conservative treatment would require another court order.

McMenemy received a second IT band injection from Dr. Babb on September 23, 2019. On November 8, 2019, Dr. Babb recommended a bursectomy for McMenemy's right knee and a right IT band lengthening procedure.

Dream Team Pizza sought a second opinion from Daniel Prohaska, M.D., who saw McMenemy on January 9, 2020. The doctor noted a tray fell on McMenemy's foot on May 9, 2018, and she had a subsequent work accident pushing boxes with her left foot. She complained about right knee and hip pain developing about a month following her left foot injury. X-rays showed a right TKA in good alignment and not loose. Otherwise, the right knee x-ray showed no bony abnormalities. McMenemy had hip and groin pain with active motion. The doctor diagnosed her with right knee pain.

¹ P.H. Trans. (Jan. 28, 2020), Ex. A3 at 1.

Dr. Prohaska's report explained the IT band is a tendon running from the top of the pelvis or hip to the tibia. He stated the IT band can be irritated by a number of causes:

- Between 5-10% of patients develop IT band pain for unknown reasons following a TKA.
- The doctor strongly suspected McMenemy had hip osteoarthritis and noted such degeneration can cause IT band pain.
- Dr. Prohaska noted altered gait can cause IT band pain. However, the doctor stated "the use of crutches, light or nonweightbearing" would not cause undue stress or tension on the IT band of the right knee.² Dr. Prohaska indicated, "I can find no way to state that there is a prevailing factor positive way to relate her pain in her right lateral knee, to her left foot."³

Based on Dr. Prohaska's report, Dream Team Pizza denied compensability. A third preliminary hearing was held January 28, 2020. Testimony was not taken, but the parties agreed McMenemy "would testify that until she suffered this injury and started the boot as required and walking differently, she had no problems with her right knee with regard to the IT band or the bursectomy prior to this injury."⁴

The April 30, 2020 Order stated: (1) Dr. Prohaska conducted a court-ordered evaluation; (2) Dr. Prohaska did not find McMenemy's left foot accident was the prevailing factor in her right knee injury; and (3) the court adopted Dr. Prohaska's opinion. As a result, the judge denied McMenemy's request for the additional medical treatment recommended by Dr. Babb. McMenemy appealed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b states an employer is liable to pay compensation to an employee who proves personal injury by accident arising out of and in the course of employment. Such statute and K.S.A. 44-508(h) state the worker's burden is based on the entire record under a "more probably true than not true" standard. An employer must prove any affirmative defenses.⁵

² *Id.*, Ex. B1 at 5.

³ *Id.*

⁴ *Id.* at 6.

⁵ See *Anderson v. PAR Electrical Contractors, Inc.*, No. 118,999, 2018 WL 6074279 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

K.S.A. 44-508 states, in part:

(f)(2) An injury is compensable only if it arises out of and in the course of employment. . . .

(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 that occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury that arose out of a neutral risk with no particular employment or personal character;

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

(iv) accident or injury that arose either directly or indirectly from idiopathic causes.

. . .

(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.

Employees are entitled to compensation for secondary injuries which are the natural and probable result of the primary injury.⁶ "[A]ll injuries, including secondary injuries, must be caused primarily by the work accident."⁷ Under the law in effect from May 15, 2011, forward, secondary injuries are compensable if caused primarily by the original work accident and are the natural and probable consequence of the original injury.⁸

⁶ See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515-16, 154 P.3d 494 (2007).

⁷ *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 951, 379 P.3d 428 (2016).

⁸ See *id.*

The Board historically gives some deference to the opinions of treating and neutral physicians.⁹ Yet, “Neutrality isn't the only marker of credibility; an expert's conclusions, to be reliable, should be based on more than speculation.”¹⁰

Dr. Babb, who was previously ordered by the court to provide medical treatment for McMenemy's right knee, concluded her right knee complaints and IT band syndrome were due to nonweightbearing on the left lower extremity following two left foot surgeries. Dr. Babb's records show the first complaints of right knee and IT band pain occurred on or after the second work accident dated May 9, 2018. This Board Member does not conclude McMenemy's right knee and IT band symptoms predated the second toe injury.

This Board Member disagrees with the judge adopting Dr. Prohaska's opinion for the following reasons:

- The judge placed extra weight in Dr. Prohaska's opinion under the mistaken belief the opinion was generated at the request of the court. Dr. Prohaska's report was requested by Dream Team Pizza only after Dr. Babb provided the employer an unfavorable prevailing factor opinion and recommended more treatment.
- The doctor mistakenly noted the first accident occurred on May 9, 2018, (it was on September 23, 2017) and the second accident took place thereafter.
- Dr. Prohaska did not note McMenemy was in a walking boot for a considerable period of time. Dr. Prohaska emphasized the use of crutches would not cause a right knee or an IT band injury. The record does not demonstrate extensive use of crutches.
- Dr. Prohaska suspected McMenemy had underlying hip osteoarthritis. There are no imaging studies to confirm this suspicion. Moreover, the doctor only noted hip osteoarthritis “can” cause IT band pain. “Can” does not reach the level of more probably true than not true.¹¹
- Dr. Prohaska noted patients have a 5-10% chance of developing IT band symptoms following a TKA. McMenemy denied right hip complaints following her 2016 TKA. A 5-10% chance is not the prevailing factor for McMenemy's IT band injury or medical condition, as compared to other factors.

⁹ See *Nasi v. Jimmy's Egg*, No. 1,067,478, 2017 WL 898263, at *15 (Kan. WCAB Feb. 9, 2017).

¹⁰ *Buchanan*, 52 Kan. App. 2d at 955.

¹¹ See *Turner v. State*, No. 110,508, 2014 WL 3022644 (Kansas Court of Appeals unpublished opinion filed June 27, 2014).

Considering the entire record, McMenemy's right knee and right IT band syndrome were the direct and natural result of her left big toe injury on May 9, 2018, her subsequent surgery and wearing multiple walking boots over a lengthy period of time. McMenemy did not have right IT band symptoms following her TKA. Her right IT band syndrome did not spontaneously develop three years after the TKA surgery, but only after the May 9, 2018 injury by accident. This accident is the prevailing factor in causing the injuries and medical conditions at issue.

The preliminary Order is reversed and remanded for further proceedings consistent with this ruling.

CONCLUSION

McMenemy proved her right knee and IT band syndrome injuries arose out of and in the course of her employment. Her right knee and IT band syndrome injuries are the direct and natural result of her May 9, 2018 left big toe accident, surgery and required use of multiple walking boots over a long period of time.

WHEREFORE, this Board Member reverses the Order dated April 30, 2020.¹² This matter is remanded to the judge for a preliminary ruling consistent with the above findings and conclusion.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

Electronic copies via OSCAR to:
Jeffrey K. Cooper
Kirby Vernon
Darin Conklin
Honorable Thomas Klein

¹² These preliminary hearing findings and conclusions are not final nor binding and may be modified upon a full hearing. This review of a preliminary hearing Order has been determined by one Board Member, unlike appeals of final orders, which are considered by the entire Board.