

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LISA PLUMB)	
Claimant)	
V.)	
)	AP-00-0463-248
CAL-MAINE FOODS, INC.)	CS-00-0458-703
Respondent)	
AND)	
)	
INDEMNITY INS CO OF N AMERICA)	
(INA INS) (CT GEN))	
Insurance Carrier)	

ORDER

Claimant appeals the January 14, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Randy Stalcup appeared for Claimant. Timothy Emerson appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from September 1, 2021,¹ with exhibits attached; the transcript of Preliminary Hearing from January 14, 2022, with exhibits attached; and the documents of record filed with the Division.

ISSUE

Did Claimant meet her burden of proving personal injury arising out of and in the course of her employment on May 13, 2021?

¹ This transcript can be found in Claimant's companion case, CS-00-0458-702.

FINDINGS OF FACT

In CS-00-0458-702, Claimant alleged a work-related injury to her low back from repetitive bending in a series of repetitive traumas from December 1, 2020, through June 28, 2021. On September 20, 2021, the ALJ denied Claimant compensation stating she failed to sustain her burden of proving personal injury arising out of and in the course of her employment. Claimant failed to prove a change in the physical structure of her body. Claimant did not appeal.

Claimant filed another application for hearing under a new claim, CS-00-0458-703, with a single date of accident, May 13, 2021. This is the claim which is the subject of this appeal.

Claimant began working for Respondent in February 2020 in pest management. Her general duties were checking traps, putting poison out and filling holes in walls. On December 31, 2020, while walking up the basement steps in her home, she experienced a pop in her low back and had difficulty walking up the remaining steps. She had instant pain in her low back, pelvis and both hips. Claimant sought medical treatment the following Monday and was treated with two injections. She applied for FMLA through her employer and was off work January to mid-February 2021.

When Claimant returned to work, her job duties changed. Claimant's job duties were clean and sanitize all the bathrooms, tables, and doorknobs, empty trash, to sweep, mop and whatever else needed to be done. Claimant cleaned eight areas twice a day. Claimant believed these job duties were more strenuous than her previous job duties. Claimant's low back pain, left hip, right hip and pelvis pain were aggravated and did not allow her to bend, stoop or be on her knees. Approximately a week before May 13, 2021, Claimant reported her pain complaints to her supervisor, Theresa Killburn. Claimant's employer did not send Claimant to a doctor.

On May 13, 2021, Claimant got into the vehicle she used to go from job site to job site and as she lifted her leg to enter the vehicle, her low back popped.

Claimant completed an accident report. She was taken to see Dr. Dale Diener, the company physician. Dr. Diener evaluated her low back pain on May 17, 2021. Claimant reported her pain started on New Year's Day and continued to bother her off and on. Then, on May 13, 2021, it was severely aggravated at work while getting into her vehicle. Claimant has been treating her low back pain with Flexeril, Toradol and Norco.

The examination by Dr. Diener showed marked tenderness in the lumbar sacral region to light palpation. No muscle spasms were noted. Claimant showed poor flexion extension and lateral motion caused increased pain. Claimant was found to have low back pain and a low back strain. X-rays of the lumbar spine were ordered, her medication was

changed and an injection was administered. Claimant was restricted to no lifting or pulling over 10 pounds. The x-rays showed: "The lumbar vertebral bodies are normal in height and alignment. There is no acute fracture. There are minimal degenerative changes. There is slight convex left curvature of the upper lumbar spine. . . . Vascular calcifications are noted".²

Due to Claimant's restrictions, Respondent did not have any work for Claimant. Claimant did not work for Respondent after May 15, 2021.

Previously, Claimant was evaluated at Cordell Chiropractic Clinic on October 5, 2020, for pain in her back from a pop in her back. She described the pain as constant, severe and radiating into her legs. She rated her pain at a 4 out of 10 on the pain scale. On January 2, 2021, Claimant began treatment for pain in the thoracic spine; segmental and somatic dysfunction of sacral region; segmental and somatic dysfunction of pelvic region; segmental and somatic dysfunction of thoracic region; and segmental and somatic dysfunction of cervical region. Claimant made several visits to the clinic for chiropractic manipulation.

On July 14, 2021, Claimant slipped on concrete and fell on her back. This fall increased the low back pain.

Claimant met with Dr. Daniel D. Zimmerman on October 13, 2021, for evaluation at her attorney's request. Claimant's complaints were pain and discomfort affecting the lumbosacral spine, lumbosacral paraspinal musculature and lower extremities. Dr. Zimmerman noted Claimant's visit to the ER on January 1, 2021, when Claimant reported acute back and sacral pain. He also noted when Claimant was seen on May 17, 2021, by medical professionals, she reported her tailbone popping on May 13, 2021. Claimant reported she had stepped into her truck and felt something pop and twist in her back. After this incident, Claimant had ongoing severe back pain. Claimant was given lifting restrictions.

When Claimant saw Dr. Zimmerman, Claimant was not able to sit for more than 30 minutes without pain. She had to stop 5 times on the way to Dr. Zimmerman's office due to pain. She is only able to stand for 10-15 minutes before she has to get off her feet. She did not know how long she could walk without pain, but she does not walk long distances. Coughing and sneezing cause spasms in her low back. If she sits for too long, she gets tingling in her toes in both feet. Claimant reported weakness in her lower extremities when going up stairs. He noted Claimant had weekly visits with a chiropractor from January 2, 2021, through July 14, 2021. All of this pain causes disturbances in her sleep.

² Preliminary Hearing Transcript 9/1/2021, Claimant's Exhibit #6

Dr. Zimmerman's examination of October 13, 2021, noted there was no spasm of the lumbar paraspinous musculature in the right and left sides.

Dr. Zimmerman opined Claimant sustained an injury affecting the lumbosacral spine on May 13, 2021, while getting into her vehicle. He found the prevailing factor causing chronic lumbar paraspinous myofascitis is the work accident on May 13, 2021. He did not believe Claimant had yet achieved maximum medical improvement. Dr. Zimmerman felt Claimant should continue to receive medical treatment in the form of pain management, by her primary care physician. He recommended physical therapy management and an MRI of the lumbar spine.

In a followup report dated October 22, 2021, Dr. Zimmerman opined Claimant had a structural change in her lumbar spine in the form of a muscle spasm as a result of the May 13, 2021 accident. He identified the x-rays of May 17, 2021, showed a slight curvature of the lumbar spine. Using reasonable medical judgment, Dr. Zimmerman opined this slight curvature represented a muscle spasm and a change in Claimant's physical structure in her lumbar spine.

The ALJ found Claimant failed to sustain her burden of proof of personal injury arising out of and in the course of Claimant's employment and denied Claimant's request for compensation. Dr. Zimmerman's finding of physical change in structure due to muscle spasms is speculative and contradicted by a medical examination four days after the May 13, 2021 incident, where no muscle spasms were found.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues there is no question there is no countervailing medical evidence to the medical opinion of Dr. Zimmerman regarding the muscle spasm and the conclusion indicating a structural change existed on May 17, 2021, which is four days after the alleged work injury. Therefore, Claimant has met her burden of proof regarding personal injury by accident arising out of and in the course of her employment. Claimant's attorney believes this case is different from the previous case due to medical evidence from Dr. Zimmerman indicating physical change in the structure of Claimant's low back.

Respondent argues the accident was no more than an aggravation of a preexisting condition. Respondent also points out Claimant's pain did significantly intensify one week prior to seeing Dr. Zimmerman, therefore, could not have been associated with anything involving work. Respondent argues Claimant has not met her burden of proving a compensable injury and, at most, aggravated a preexisting condition. Therefore, the Order should be affirmed.

K.S.A. 2020 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. 2020 Supp. 44-508 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.

The injury to Claimant's low back, she alleges was primarily caused by her getting into a vehicle on May 13, 2021, while at work, is solely an aggravation or exacerbation of a preexisting condition. Claimant's low back complaints began after an incident in her home on December 31, 2020. The injury, as a result of this incident, caused her to seek medical treatment and be off work for approximately a month and half. According to Claimant, her low back pain never went away. However, after her May 13, 2021 incident, Claimant testified the symptom were more intense, like increasing pain. There are records Claimant sought chiropractic treatment for her back as early as October 2020.

Claimant presented the report of Dr. Zimmerman as evidence of a new injury, a physical change in structure as a result of the May 13, 2021, accident. Dr. Zimmerman opined there was change in the physical structure of Claimant's low back because x-rays taken on May 17, 2021, showed a slight curvature of Claimant's spine, which in Dr. Zimmerman's opinion, represent a muscle spasm and change in the physical structure of Claimant's low back.

Dr. Zimmerman, in his physical examination of Claimant's low back on October 13, 2021, noted there were no muscle spasms present. Dr. Diener, who examined Claimant on May 17, 2021, four days after the accident, noted there were no muscle spasms as a result of the accident on May 13, 2021. Claimant did not prove there is physical structural change as a result of the May 13, 2021 incident. Such evidence contradicts Dr. Zimmerman's opinion Claimant experienced muscle spasms as a result of the accident on May 13, 2021. For these reasons, it is found and concluded any injuries Claimant is alleging arose out of her accident of May 13, 2021, is solely an aggravation or exacerbation of a preexisting condition and not compensable. Claimant's request for benefits is denied.

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.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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 January 14, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Randy Stalcup, Attorney for Claimant
Timothy Emerson, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

³ K.S.A. 2020 Supp. 44-534a.