

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JARIN TABOR)
Claimant)
V.)
) AP-00-0463-695
CITY OF TOPEKA) CS-00-0460-981
Self-Insured Respondent)

ORDER

Claimant appeals the February 14, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Bruce A. Brumley appeared for Claimant. Samantha N. Benjamin appeared for self-insured Respondent.

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 January 27, 2022, with exhibits attached and the documents of record filed with the Division.

ISSUES

Did Claimant sustain an occupational disease or repetitive injury arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant works as an urban watershed horticulturist for the City of Topeka. He has worked for Respondent since February, 2020. His job duties are planting and maintaining native Kansas grasses and wild flowers, which requires him to work outdoors during the spring, summer and fall months. In the winter months, Claimant works in the office.

In July and August 2021, Claimant was focusing on areas with overgrown foliage. During this time, Claimant experienced increasing problems with his allergies. He had severe sinus congestion, bad headaches, severe watery and itchy eyes and itchy skin.

These symptoms persisted after he left the job site each day. His symptoms were slow to subside at the end of the day.

Claimant's headaches and congestion issues continued throughout the time he worked with vegetation, which stopped due to seasonal changes in late fall/early winter. Since moving to the office, Claimant's headaches improved, but he still has congestion. Claimant has suffered from seasonal allergies and has taken allergy medications off and on throughout his life. Claimant received medical treatment and medications for allergy related symptoms prior to his employment with Respondent. His primary care physician treated him for allergic rhinitis and headaches on October 8, 2018, and recommended ongoing use of Zyrtec and Flonase. Claimant testified he stopped taking Zyrtec and Flonase in July 2021.

On August 16, 2021, Claimant underwent allergen testing with Leonel Martinez, M.D. The test revealed positive allergens for Bermuda Grass, Box Elder/Maple Trees, Common Short Ragweed, Elm Tree and Timothy Grass. Claimant reported his condition and symptoms to Respondent.

Respondent referred Claimant to Cotton O'Neil Workcare where he was evaluated by Nurse Practitioner Ann McConkey and Soni Mathew, M.D., on August 23, 2021. Claimant reported headaches, nose congestion, teeth pain, sinus pressure, loss of taste and smell along with intense pain from the nostril throughout his head after spraying algaside chemical. Claimant was diagnosed with non-seasonal allergic rhinitis due to other allergic triggers. Ms. McConkey found Claimant's allergies escalated in the last year, but his allergies were not work-related.

At his attorney's request, Claimant met with Daniel Zimmerman M.D., on October 29, 2021. Dr. Zimmerman diagnosed Claimant with chronic sinusitis and allergic rhinitis. Like Dr. Martinez, he recommended a balloon procedure and allergy shots if symptoms persisted. Dr. Zimmerman opined the prevailing factor for Claimant's chronic sinusitis and allergic rhinitis was the exposure in his employment with Respondent.

Claimant continues to work for Respondent and continues to struggle with his allergies.

The ALJ found:

. . . the elements necessary to establish an occupational disease under K.S.A. 44-5a01 are not present in this case. Claimant comes closer in claiming a repetitive injury, as did Casey. As a repetitive injury, Claimant has the obligation to show that his allergies were caused, created, and originated by his work for Respondent, as Casey was able to prove. If not, then the worsening of Mr. Tabor's allergies is subject to K.S.A. 44-508(f)(2):

(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 evidence points most assuredly to the fact that Claimant's preexisting allergies were aggravated and exacerbated significantly in the middle months of 2021, while working in the watersheds. But that evidence does not show the watershed work created a unique, new allergy or a separate injury apart from the preexisting allergy so as to allow a prevailing factor comparison.

Uniquely, this case does not turn on deciding between Dr. Zimmerman's or APRN McConkey's differing views of whether the increased allergic symptoms are best identified as happening due to work or from leaving "his house (and being) exposed to any of these allergens." (B2) Rather, it is decided on largely uncontested facts, which then must be weighed within the definitions and plain meaning of key statutes which are refined in the crucible of case precedent.¹

Claimant appeals, arguing he suffers from various sinus issues and related allergen reactions as a result of his repetitive concentrated exposure to allergens while working for Respondent, which constitute a compensable work injury and/or occupational disease. Claimant asks the Board to reverse the ALJ, finding his claim compensable and award benefits. Respondent argues the ALJ's Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.²

"Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" means the employment the employee is engaged in creates an increased hazard of disease in excess of the hazard of disease in general due to a special employment-related risk. Ordinary diseases of life and conditions to which the

¹ ALJ Order at 6.

² K.S.A. 44-501b(b).

general public may be exposed outside of the particular employment are not compensable as occupational diseases.³

The ALJ, found Claimant failed in his burden of proving he suffered an occupational disease from exposure while employed with Respondent. Specifically, the ALJ found Claimant failed to present sufficient evidence establishing his work placed him in a “particular and peculiar hazard” different from other occupations and the hazard was not “in excess of the hazard of such disease in general.”⁴

The ALJ distinguished the cases relied upon by Claimant in support of his position. In the cases cited by Claimant, none of the injured workers suffered from preexisting conditions. They all developed conditions due to their exposure while at work. Here, Claimant suffered long-standing issues with allergies.

The ALJ also found Claimant failed to prove he suffered a repetitive trauma injury. Citing K.S.A. 44-508(f)(2), the ALJ found Claimant’s allergies were “aggravated and exacerbated significantly”⁵ from his exposure at work during the time period alleged, which does not create a compensable injury.

The ALJ’s decision is well-reasoned and supported by the evidence. This Board Member agrees with his analysis and conclusions. The greater weight of the credible evidence establishes Claimant’s exposure at work did not constitute an occupational disease or an injury by repetitive trauma.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Steven M. Roth dated February 14, 2022, is affirmed.

³ K.S.A. 44-5a01(b); see also *Casey v. Dillon Companies, Inc.*, 34 Kan App. 2d 66, 72-73, 114 P.3d 182 (2005).

⁴ K.S.A. 44-5a01(b).

⁵ ALJ Order at 6.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

CHRIS CLEMENTS
BOARD MEMBER

c: Via OSCAR

Bruce A. Brumley, Attorney for Claimant
Samantha N. Benjamin, Attorney for Self-Insured Respondent
Hon. Steven M. Roth, Administrative Law Judge