

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**GABRIELA ORNELAS** )  
Claimant )  
V. )  
**PENNEY OPCO LLC** ) AP-00-0463-985  
Respondent ) CS-00-0462-614  
AND )  
**AIU INSURANCE CO (NATIONAL** )  
**UNION FIRE OF PITTS PA)** )  
Insurance Carrier )

**ORDER**

Respondent and its insurance carrier (Respondent), through Christopher McCurdy, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's preliminary hearing Order dated February 24, 2022. Hyemin Byun appeared for Claimant.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript with exhibits, held February 16, 2022; the evidentiary deposition transcripts of Elena Rodriguez and Oswaldo Ochoa, taken February 21, 2022; and documents of record filed with the Division.

**ISSUE**

Did Claimant sustain personal injury by accident arising out of and in the course of her employment, including whether the accident was the prevailing factor in Claimant's current medical condition and need for treatment?

**FINDINGS OF FACT**

Claimant, a Spanish-speaking individual, began working for Respondent in the warehouse on July 22, 2021. On September 20, 2021, she was retrieving merchandise using a cart with a ladder attached. While standing on the third rung of the ladder, she lost her balance and jumped down. Claimant immediately grabbed the cart to stop herself from

falling backwards, causing a swinging back-and-forth motion. She felt immediate pain in her low back. Claimant took ibuprofen and continued working.

On September 22, 2021, Claimant reported the accident to her supervisors telling them she “felt bad.”<sup>1</sup> Elena Rodriguez, one of her supervisors who is fluent in Spanish, testified Claimant told her she was not feeling well and had been having “headaches” for a week. Ms. Rodriguez directed Claimant to Oswaldo Ochoa, another supervisor. Mr. Ochoa, who is not fluent in Spanish, testified Claimant told him her back was hurting, but denied injuring herself at work. Ms. Rodriguez was present during the exchange and testified she heard Claimant tell Mr. Ochoa it was not work related.

On September 23, 2021, Claimant was seen at Concentra, with her husband assisting with translation. Claimant reported low back pain from doing a lot of lifting, twisting and placing objects onto high shelves on September 20, 2021. Claimant was diagnosed with a low back strain, given prescription medication, referred to physical therapy (3 times per week for 2 weeks), and provided temporary work restrictions. Claimant presented her work restrictions to Mr. Ochoa who testified Claimant notified him the injury was work related even though she had denied it on two prior occasions. He stated Claimant told him she bumped into something with a cart, causing her to be pushed back. He denied Claimant said she was injured jumping off a ladder.

Claimant continued working within her restrictions. According to Claimant, Concentra ultimately referred her to a specialist for treatment.

On September 24, 2021, Ms. Rodriguez saw Claimant and asked about her injury. According to Ms. Rodriguez, Claimant told her she had injured herself after hitting the corner with the cart and being pushed back.

Claimant testified she re-injured her low back at work on October 7, 2021, but did not give any specifics.

In November 2021, Respondent denied Claimant’s claim. Claimant sought treatment on her own with Dr. Jade Meylor, a chiropractor. Dr. Meylor began treating Claimant on November 24, 2021. Claimant reported injuring herself at work on September 20, 2021, when she missed a step on the ladder and quickly grabbed the handles, causing the ladder to jerk backwards. Dr. Meylor diagnosed Claimant with thoracic facet syndrome, other myositis and segmental and somatic dysfunction of the thoracic region. Dr. Meylor’s last chiropractic note is dated January 21, 2022. The note mentions Claimant was seen by the pain doctors who recommended an SI joint injection, heat and referral to physical therapy.

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<sup>1</sup> P.H. Trans. at 8.

At the preliminary hearing on February 16, 2022, Claimant testified she had treated with Dr. Meylor following a motor vehicle accident in February 2021, for injuries to her left shoulder, knee and upper back. Dr. Meylor's records reflect complaints of pain in the left lumbar, lumbar and left sacroiliac area as far back as February 24, 2021. Claimant denied any prior low back problems or knowledge of Dr. Meylor diagnosing her with low back problems and testified:

A. No. No, because I was not complaining of anything in my lower back and I didn't feel pain in my lower back. I was able to do my work at JC Penney. I was able to do all that I had to do at home. Before the injury, I was able to do everything.

Q. And it's your testimony still, even though these records say you had prior complaints of low back pain, that you didn't have any back pain before September 20, 2021; true?

A. I didn't have - - I didn't have that pain. And if I would have had that pain, I wouldn't have been able to do the job I was doing at JC Penney for even one day.<sup>2</sup>

Claimant stated her husband does not know perfect English, but helps her with translation and was present during her visit with Concentra on September 23, 2021, and some of the visits she had with Dr. Meylor.

On December 17, 2021, Claimant testified she re-injured her low back at work and had to be wheel-chaired out of the warehouse and taken for treatment. According to Claimant, she was prescribed muscle relaxers and told to follow-up with her primary care physician, Dr. Maria Palmeri.

On December 20, 2021, Dr. Meylor noted Claimant's pain had gone lower and added additional diagnoses of low back pain and segmental and somatic dysfunction of the lumbar region. Claimant was taken off work for two weeks. Respondent was unable to accommodate.

Claimant currently works for Respondent in a different area. She reports severe low back pain which radiates down her leg. She experiences fatigue when going up and down stairs and now suffers from depression. Claimant takes diclofenac, gabapentin, and ibuprofen as needed. She currently receives treatment from Drs. Meylor and Palmeri and has been referred to the pain clinic at Shawnee Mission Hospital.

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<sup>2</sup> *Id.* at 22-23.

The ALJ found:

There were many contradictions in the record. The claimant's version of the accident differed from what her supervisors reported and from Concentra's records. The claimant was not honest about prior low back pain. Rodriguez said the claimant approached her only about a headache. Yet, Rodriguez then referred the claimant to Ochoa, who asked her about a work injury. Ochoa said the claimant first denied having hurt her back at work, then reported a work injury the next day, along with work restrictions. The timing of Ochoa's statements fits the claimant being given work restrictions on September 23, 2021, which were provided that date by Concentra, who clearly saw the claimant under workers compensation. The claimant did have low back pain following the car accident, but the record only showed it being an issue until six months prior to the alleged work injury.

The court finds preliminarily, and narrowly, the claimant suffered a work-related low back strain on September 20, 2021. The respondent and insurance carrier shall refer the claimant back to Concentra for authorized medical treatment at their direction.

There may have been periods of temporary total or temporary partial disability. However, the record fell far short of showing what the periods were and what benefits were due. The claimant's request for temporary disability benefits is denied.

Respondent argues Claimant failed to provide any credible evidence she sustained a work accident or the alleged work accident is the prevailing factor in her current medical condition and need for treatment. Respondent asserts Claimant's injury is an aggravation of the preexisting condition originating in February 2021. Claimant maintains the Order should be affirmed.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.<sup>3</sup>

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.<sup>4</sup> The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of

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<sup>3</sup> K.S.A. 44-501b(c) and K.S.A. 44-508(h).

<sup>4</sup> K.S.A. 44-508(d).

all relevant evidence.<sup>5</sup> An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.<sup>6</sup>

Based on the record, Claimant failed to prove she sustained personal injury by accident while in the course of her employment and the accidental injury alleged is the prevailing factor causing her medical condition and need for treatment. The medical evidence in the record are two medical notes from Concentra, Dr. Meylor's treatment records and Claimant's testimony.

Concentra records reflect Claimant was seen on two occasions, September 23 and 27, 2021. Claimant was diagnosed with a low back strain. She was given prescription medication, referred to physical therapy and was returned to work with temporary restrictions. At the second appointment, Claimant's temporary restrictions were continued, but medications were not prescribed or dispensed. In summary, Dr. Meylor's records provide detailed information regarding his treatment regimen. Claimant testified she is continuing her treatment, at her own expense, with her primary care physician, Dr. Palmeri, and Dr. Meylor. None of this sets forth a prevailing factor opinion regarding the cause of Claimant's medical condition or need for treatment.

An injured worker is not required to present medical evidence in support of his or her request for medical treatment or to establish prevailing factor. K.S.A. 44-508(g) does not require an expert medical opinion to prove prevailing factor. It requires a determination of the primary factor, based upon consideration of all relevant evidence.<sup>7</sup> The Board has held the testimony of an injured worker may be sufficient to support an award of medical benefits, assuming the testimony is credible.

Simply put, Claimant's testimony is not credible. She alleges an accidental injury on September 20, 2021. Two days later, she reported headaches she had for a week and was "feeling bad" to Ms. Rodriguez. Moments later, Claimant told Oswaldo Ochoa, another supervisor, her back was hurting, but denied injuring herself at work. Ms. Rodriguez was present during the exchange and testified she heard Claimant tell Mr. Ochoa it was not work related.

The following day at Concentra, with her husband interpreting, Claimant reported low back pain from doing a lot of lifting, twisting and placing objects onto high shelves on

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<sup>5</sup> K.S.A. 44-508(g).

<sup>6</sup> K.S.A. 44-508(f)(2).

<sup>7</sup> See *Langdon v. C.J. Foods*, No. 1,071,116, 2014 WL 7521751 (Kan. WCAB Dec. 3, 2014) and *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 316 P.3d 796 (2013).

September 20, 2021. The same day, Claimant presented her work restrictions to Mr. Ochoa and informed him her injury was work related even though she had previously denied it. Claimant told Mr. Ochoa she injured herself when she bumped into something with a cart, causing her to be pushed back.

When Claimant began treatment with Dr. Meylor on November 24, 2021, she reported injuring herself at work on September 20, 2021, when she missed a step on the ladder and quickly grabbed the handles, causing the ladder to jerk backwards.

More importantly, Claimant was dishonest regarding the prior back injury and treatment she received as a result of a motor vehicle accident in February 2021. Claimant treated with Dr. Meylor on ten separate occasions from February 24, 2021 through March 22, 2021. At each and every appointment, Claimant was asked to rate her pain to her low back region and received treatment for this location of her body. Claimant denied the prior low back injury and treatment at her preliminary hearing. At her first appointment at Concentra, Claimant denied prior back injuries.

After considering the entire record, this Board Member finds Claimant's testimony, alone, is not credible evidence Claimant failed to prove by a greater weight of the evidence she was involved in a work-related injury on September 20, 2021, resulting in an injury to her low back. Accordingly, the preliminary Order finding Claimant sustained a compensable injury to her low back and awarding medical treatment is reversed, and Claimant's request for benefits in connection with an injury occurring on September 20, 2021, should be denied.

**WHEREFORE**, the Board reverses the February 24, 2022, Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2022.

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CHRIS A. CLEMENTS  
BOARD MEMBER

c: (via OSCAR)  
Hyemin Byun  
Christopher McCurdy  
Hon. Kenneth Hursh