

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**RYAN GREER**

Claimant

v.

**AGCO CORP.**

Respondent

AP-00-0475-720

CS-00-0469-741

and

**ZURICH AMERICAN INSURANCE CO.**

Insurance Carrier

**ORDER**

Claimant appeals the May 31, 2023, preliminary Order issued by Administrative Law Judge (ALJ) Thomas Klein.

**APPEARANCES**

Robert R. Lee, II, appeared for Claimant. Dallas L. Rakestraw appeared for Respondent and Insurance Carrier (Respondent).

**RECORD AND STIPULATIONS**

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held October 18, 2022, with exhibit attached; the transcript of the Evidentiary Deposition of Ryan Greer, taken September 14, 2022; the transcript of the Evidentiary Deposition of Maria Aleman taken October 31, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Thomas Hawk, taken October 31, 2022, with exhibits attached; the transcript of the Preliminary Hearing, held May 16, 2023; the medical records of ICT Internal Medicine, Dr. Barrett and the MRI reports downloaded into OSCAR and received into evidence; the narrative report of Dr. David Hufford, M.D., dated February 15, 2023, concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Did Claimant sustain a personal injury, as defined in K.S.A. 44-508(f)(1)?
2. Did Claimant sustain a personal injury from an accident arising out of and in the course of his employment with Respondent, including prevailing factor?
3. Is Claimant entitled to an award of temporary total disability compensation and medical treatment?

FINDINGS OF FACT

Claimant alleges he sustained a low back injury from an accident arising out of and in the course of his employment with Respondent on August 2, 2022. Claimant seeks authorized medical treatment and temporary total disability compensation. Following a preliminary hearing held on October 18, 2022, ALJ Klein issued an Order appointing Dr. Hufford to conduct a Court-ordered independent medical examination and to provide a report containing his opinions on diagnosis, prevailing factor and treatment recommendations. Although ALJ Klein deferred ruling on compensability pending completion of Dr. Hufford's examination, Respondent was ordered to pay temporary total disability compensation. The Board subsequently reviewed the preliminary Order.

On February 24, 2023, a single Board Member issued its Order. The findings of fact contained in the February 24, 2023, Order are incorporated herein as if fully set forth and do not require repetition. The Board Member preliminarily found Claimant had a history of multilevel degenerative disc disease, and concluded Claimant failed to prove the event of August 2, 2022, was the prevailing factor causing the need for treatment. The award of temporary total disability compensation was vacated because no determination was made Claimant sustained a compensable injury. The appointment of Dr. Hufford to perform the Court-ordered examination was not reviewed, for lack of jurisdiction under K.S.A. 44-534a.

On February 15, 2023, Dr. Hufford performed the Court-ordered independent medical examination of Claimant. Claimant reported he was lifting parts from a tub while working on August 1, 2022, and sustained an injury to his low back with left leg symptoms. Chronic illnesses were denied. Dr. Hufford reviewed approximately 2,000 pages of medical records. Dr. Hufford and other physicians in his group had seen Claimant previously for his low back. Dr. Hufford noted Claimant had a history of low back pain, as well as alcohol and opioid abuse. Claimant reported he was abstaining from opioids, and was using cannabis for his low back pain. Claimant underwent a preemployment physical before working for Respondent, and was declared capable of performing heavy to very heavy work. Dr. Hufford stated Claimant appeared to be a less-than-reliable historian.

Physical examination was notable for no direct vertebral tenderness. Diffuse paraspinal tenderness was noted, without trigger points or guarding. No direct sacroiliac tenderness on either side was noted. Strength of the lower extremities was full and symmetric. Dorsiflexion of the left great toe was reduced compared to the right. Reflexes at the knees and ankles was absent. Straight-leg raise testing was positive on the left side only. Gait was non-antalgic. Dr. Hufford reviewed the October 7, 2022, MRI of the lumbar spine ordered by Dr. Wilkinson, and noted diffuse degenerative changes with no discrete herniation or significant foraminal narrowing. Dr. Hufford thought no surgical pathology was indicated by the MRI.

Dr. Hufford initially diagnosed an occupational lifting injury with low back and left leg radicular pain. Dr. Hufford also stated,

The prevailing factor for his current low back pain is the occupational injury that occurred in the manner as stated. All low back injuries have multiple elements including a myofascial element that exists regardless of any underlying degenerative change. Secondly, these injuries can create lumbosacral neuritis which is a physiologic rather than anatomic alteration in the tissue and can not be imaged, proven or disproven. This condition is responsible for a portion of Mr. Greer's current low back pain also regardless of the underlying degenerative changes. He does not appear to have incurred an acute tissue alteration such as a herniated disc or other pathology as documented on the MRI. He does not appear to have incurred a sacroiliac strain as a portion of this injury.<sup>1</sup>

Dr. Hufford thought Claimant required additional treatment, and recommended physical therapy and lumbar epidural steroid injections. Dr. Hufford did not recommend prescribing opioid medications for pain, and other medication should be prescribed judiciously in light of Claimant's history.<sup>2</sup>

Following Dr. Hufford's examination, a second preliminary hearing on Claimant's requests for medical treatment and temporary total disability compensation took place on May 16, 2023. No additional testimony was taken, and the hearing consisted of arguments by counsel. At Respondent's request, medical records from ICT Internal Medicine, Dr. Barrett and various MRI scans were admitted into evidence.

The records of ICT Internal Medicine document pain management Dr. Nguyen provided from January 23, 2018, through December 21, 2018. Claimant received pain management for chronic low back pain with oral narcotic medication. Ultimately, Claimant was discharged as a patient after failing to appear for a random pill count. Dr. Barrett's

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<sup>1</sup> Hufford IME Report, p.4.

<sup>2</sup> See *id.*

records and the MRI scans document Claimant's long-standing history of low back pain and multi-level degenerative disc disease of the lumbar spine.

On May 31, 2023, ALJ Klein issued the preliminary Order. First, ALJ Klein explained the basis for the prior preliminary award of temporary total disability compensation. Second, ALJ Klein reviewed Dr. Hufford's report, particularly Dr. Hufford's opinions on the cause of Claimant's pain and condition. ALJ Klein concluded Claimant failed to prove he sustained an injury. ALJ Klein noted pain is not a lesion or a change in the structure of the body, particularly when it has been present for years. Claimant's request for medical treatment and temporary total disability compensation was denied. These review proceedings follow.

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

Claimant argues the preliminary Order is erroneous because Dr. Hufford's opinion Claimant's condition has myofascial and physiological components satisfies the statutory definition of "injury." According to Claimant, a lesion need not be readily identifiable to be compensable. Respondent argues the Order should be affirmed because there is no evidence of a change in the structure of the body, and Claimant's medical condition is preexisting.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>3</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>4</sup> The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.<sup>5</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>6</sup> "Injury" and "personal injury" are defined as any lesion or change in the physical structure of the body, causing damage or harm thereto.<sup>7</sup> The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor

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<sup>3</sup> See K.S.A. 44-501b(a).

<sup>4</sup> See *id.*

<sup>5</sup> See K.S.A. 44-501b(c).

<sup>6</sup> See K.S.A. 44-508(d).

<sup>7</sup> See K.S.A. 44-508(f)(1).

compared to any other factor, based on consideration of all relevant evidence.<sup>8</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>9</sup>

Claimant met his burden of proving the lifting event of August 2022 occurred. Claimant testified he sustained symptoms of an injury while lifting in service to Respondent. Although Respondent's witnesses directly contradict Claimant, they were not present at the job site when the event described by Claimant occurred. Based on the current evidence in the record, Claimant proved the occurrence of an accident.

The primary issue is whether Claimant met his burden of proving he sustained a compensable personal injury. The Act requires a lesion or change in the physical structure of the body, causing damage or harm thereto.<sup>10</sup> In prior cases, the Board and Court of Appeals looked to whether a physical change in the anatomy of an injured worker's body occurred.<sup>11</sup> Although pain can be indicia of an injury, not all pain arises from a change in physical structure, and rendering an asymptomatic preexisting condition symptomatic does not mean a change in the physical structure of the body occurred.<sup>12</sup> Instead, a court looks to whether an anatomic change is present.

Based on the current evidence in the record, Claimant failed to prove he sustained an injury, as defined in K.S.A. 44-508(f)(1). The medical records document extensive preexisting degenerative changes of the lumbar spine before August 2, 2022. Comparison of the reports of the MRIs of the lumbar spine indicate extensive degenerative changes of

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<sup>8</sup> See K.S.A. 44-508(d), (g).

<sup>9</sup> See K.S.A. 44-508(f)(2).

<sup>10</sup> See K.S.A. 44-508(f)(1).

<sup>11</sup> See, e.g., *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 199-200, 364 P.3d 571 (2015); see also *McGuire v. Walmart Associates, Inc.*, AP-00-0467-894, CS-00-0463-151, 2022 WL 4086273, at \*4 (Kan. WCAB Aug. 24, 2022)(citing *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012); *Homan v. U.S.D. No. 259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012); *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012); *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012); *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012); *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012); *Plumb v. Cal-Maine Foods, Inc.*, AP-00-0463-248, CS-00-0458-703, 2022 WL 1057717 (Kan. WCAB Mar. 31, 2022); *Krueger v. Kwik Shop, Inc.*, No. 1,062,995, 2015 WL 996896, at \*8 (Kan. WCAB Feb. 27, 2015), *aff'd*, *Krueger v. Kwik Shop, Inc.*, No. 113,418, 2016 WL 852938, at \*5 (unpublished Kan. App. opinion filed March 4, 2016).

<sup>12</sup> See *Krueger*, 2015 WL 996896, at \*7.

the lumbar spine before and after August 2, 2022. Dr. Hufford diagnosed an injury based on the presence of low back pain, and described in his report the physiologic process creating Claimant's pain. Dr. Hufford, however, identified no acute changes or signs of an anatomic change. Dr. Hufford did not state the myofascial element of Claimant's condition was a change in physical structure. In other words, Dr. Hufford did not identify a change in the physical structure of the body or a lesion. ALJ Klein's conclusion Claimant failed to prove he sustained an injury is affirmed.

Even if a change in the physical structure of the body, or a lesion, was shown, Claimant must prove the event of August 2, 2022, was the primary factor, compared to any other factor, causing the injury, medical condition and resulting disability or impairment.<sup>13</sup> Dr. Hufford opined the event of August 2, 2022, was the prevailing factor causing Claimant's pain symptoms, but he did not state the event was the prevailing factor causing a change in the physical structure of the body. Claimant has a long-standing history of symptomatic low back pain caused by his preexisting degenerative condition. Claimant required extensive treatment in the past for his preexisting condition, including orthopedic evaluations and pain management. Based on the evidence in the whole record, Claimant experienced worse symptoms after lifting at work, with no change in his body's physical structure. The physiologic pain process following the August 2, 2022, event is consistent with an aggravation or exacerbation of Claimant's preexisting condition. Aggravations of preexisting conditions are not compensable.<sup>14</sup> Based on the current record, Claimant failed to prove his alleged accidental injury arose out of his employment with Respondent.

Because Claimant failed to prove he sustained an injury from an accident arising out of and in the course of his employment with Respondent, it is not necessary to address the third point raised by Claimant.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Thomas Klein, dated May 31, 2023, is affirmed.

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<sup>13</sup> See K.S.A. 44-508(f)(2)(B)(ii).

<sup>14</sup> See K.S.A. 44-508(f)(2).

**RYAN GREER**

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**AP-00-0475-720  
CS-00-0469-741**

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2023.

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**WILLIAM G. BELDEN  
APPEALS BOARD MEMBER**

c: Via OSCAR

Robert R. Lee, II  
Dallas L. Rakestraw  
Hon. Thomas Klein