BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSHUA L. MOSES
Claimant,

v.

CS-00-0101-186
AP-00-0452-563

WEAVER VENTURES, LLC,
d/b/a SEARS HOME,
a/k/a SEARS HOMETOWN STORE # 2761
Respondent,

and

FARM BUREAU PROPERTY & CASUALTY INS. CO.
Insurance Carrier,

and

KANSAS WORKERS COMPENSATION FUND

ORDER

Respondent and Insurance Carrier requested review of the August 10, 2020, Award issued by Administrative Law Judge (ALJ) Gary Jones. The Board heard oral argument on December 10, 2020.

APPEARANCES

Mitchell Rice appeared for Claimant. Matthew S. Crowley appeared for Respondent and Insurance Carrier. Jennifer Ouellette appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Appeals Board considered the record, consisting of the transcript of Regular Hearing held May 7, 2020; Preliminary Hearing Transcript held February 28, 2017, with Respondent's Exhibit 1; the transcript of Preliminary Hearing held July 18, 2017, including Claimant's Exhibits 4-6; Transcript of Preliminary Hearing and Motions held December 5, 2017; the transcript of the Deposition of Joshua L. Moses taken February 1, 2017; the transcript of the Evidentiary Deposition of Jay Huston taken February 6, 2017, including Exhibit 1; the transcript of the Deposition of Robert W. Barnett, Ph.D., taken May 22, 2020, including Exhibits 1-2; the transcript of the Deposition of Pedro Murati, M.D., taken June 3, 2020, including Exhibits 1-4; the transcript of Regular Hearing Testimony of Joshua

Moses taken June 8, 2020; the transcript of the Evidentiary Deposition of Steve L. Benjamin taken July 2, 2020, including Exhibits 1-3; the transcript of the Evidentiary Deposition of John P. Estivo, D.O., taken July 28, 2020, including Exhibits 1-3; the narrative report of Peter V. Bieri, M.D., dated September 19, 2017, concerning his Court-ordered independent medical examination; the email from ALJ Jones to counsel dated May 8, 2020; and the pleadings and orders contained in the administrative file.

The Appeals Board also adopted the stipulations listed in the Award. The Appeals Board reviewed Respondent's Brief and the Kansas Workers Compensation Fund's Declination to Brief. At oral argument, the parties stipulated Claimant's functional impairment caused by the alleged personal injury by accident was 12% of the body as a whole based on the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, if compensable, and the Affidavit of Carol Weigand obtained by Respondent and marked as Respondent's Exhibit 2 at the Preliminary Hearing held July 18, 2017, should be part of the record.

ISSUES

1. Did Claimant suffer personal injury by an accident arising out of and in the course of his employment with Respondent?

2. Did Claimant provide proper notice of the alleged injury?

3. What is the nature and extent of disability?

4. Is Claimant entitled to future medical treatment?

5. Are Respondent and Insurance Carrier entitled to reimbursement by the Fund for compensation paid under preliminary order?

FINDINGS OF FACT

Claimant worked for Respondent delivering and installing appliances on a part-time basis. Claimant worked with another coworker who drove the delivery truck. Claimant's supervisor was Jay Huston. Claimant also sold scrap metal with his father while working for Respondent, which involved loading and unloading old refrigerators and delivering them to the scrap metal dealer. Claimant denied prior back injuries, prior medical treatment for the low back or prior medical restrictions. Claimant is a high-school graduate. Claimant does not possess a drivers license because he did not pass the written test.

Claimant testified he was removing a refrigerator and installing a new refrigerator purchased by Ms. Weigand. Claimant's father was working with Claimant. According to

Claimant, he was moving the old refrigerator, which was a large, commercial-grade Viking refrigerator, approximately eighty-three inches tall and thirty-three inches wide, with a dolly. Claimant moved the refrigerator alone, and managed to get the refrigerator out of the house and onto the front porch. The front porch was composed of slate tiles with a couple of steps leading to the driveway. As Claimant was moving the refrigerator at the top of the steps, one of the tiles gave way and caused the refrigerator to tip and to fall on him. Claimant testified the refrigerator pushed him down to the ground in a crouched position. According to Claimant, he managed to push the refrigerator to an upright position and finished moving it to the delivery truck. Claimant continued working and completed installation of the new refrigerator. Claimant and his father returned to Respondent's location at the end of the working day, and loaded the old refrigerator into Claimant's truck to sell it as scrap metal. Claimant subsequently noticed pain in his low back running to the back of his left leg. Claimant could not independently recall the date of the accident. After reviewing Respondent's delivery records, Claimant alleged the accident date was July 29, 2016. Claimant denied he injured himself while moving the refrigerator inside Ms. Weigand's home.

Claimant testified returned to Respondent's store on the date of accident, and spoke with Mr. Huston. According to Claimant, Mr. Huston asked Claimant what took him so long to make his delivery, and Claimant said the refrigerator fell on him. Mr. Huston reportedly asked Claimant if he needed to see a doctor, and Claimant said he did not know. Claimant also testified he spoke with Mr. Huston the following day, and said he was in pain after Mr. Huston asked him why he was limping. Again, Claimant did not ask for medical treatment.

Claimant continued working his normal duties for Respondent until he was terminated on August 8, 2016, for fighting with a coworker in front of a customer, despite being reprimanded for prior instances of fighting. Claimant did not request medical treatment from Respondent between July 29, 2016, and August 8, 2016. Claimant did not seek medical treatment on his own during that time, either. Claimant first sought medical treatment for his injuries on his own on August 30, 2016, at the emergency department of the hospital in El Dorado. Claimant confirmed he reported to the hospital a history of dropping a refrigerator three weeks ago and reinjured his low back, and two days before twisted and reinjured the same area. Claimant could not recall a twisting incident. Claimant received medication at the emergency room, and returned two days later for stronger medication.

Approximately one month after his termination, Claimant obtained employment as a part-time dishwasher for approximately one month, followed by part-time employment as a cook for a fast-food restaurant, employment as a cook and cashier at another fast-food restaurant, employment at the assembly line at Pioneer Balloon and cleaning fifty-five gallon drums with a hand-held grinder for SDS.

Mr. Huston testified by deposition, and confirmed he was Claimant's supervisor. Mr. Huston stated Claimant never reported a work-related accident to him, and Mr. Huston did not recall having the conversations on July 29 and 30, 2016, described by Claimant. Mr. Huston testified he would have completed a written injury report and referred an employee to a health care provider if a work-related injury was reported to him. Mr. Huston also testified he would have made a record if an employee said he injured his back but did not need medical care. According to Mr. Huston, he first became aware of Claimant having a work-related injury after Claimant was terminated. Mr. Huston received bills from a pharmacy for medication prescribed to Claimant. Mr. Huston subsequently spoke with Claimant about the bills, and Claimant said the bills were sent to Mr. Huston in error and Claimant would take care of them. Claimant could not recall whether the conversation occurred. Mr. Huston stopped working for Respondent on August 31, 2016, and currently works for the State of Kansas. Mr. Huston received the pharmacy bills while he was still working for Respondent, but he could not recall the date he received the bills.

Ms. Weigand signed two affidavits prepared by Claimant's counsel and Respondent's counsel, and testified at the July 18, 2017, preliminary hearing. In her affidavits, Ms. Weigand stated she saw Claimant struggle to remove the old refrigerator from her home, and at times Claimant supported the weight of the refrigerator with his body. Ms. Weigand also saw Claimant take the old refrigerator off the front porch, and the lip of one of the slate tile steps was broken in the process. In both affidavits, Ms. Weigand stated she did not see the old refrigerator fall on anyone. At the preliminary hearing, Ms. Weigand confirmed the affidavits were correct. Ms. Weigand also testified she watched Claimant move the refrigerator the entire time it was on the front porch, and the refrigerator did not fall on Claimant or push Claimant to the ground. Ms. Weigand stopped watching Claimant after the refrigerator was off the porch and being loaded into the delivery truck. Ms. Weigand conceded Claimant could have been hurt while moving the refrigerator, but maintained the refrigerator did not fall on Claimant while he was moving it on the front porch.

Two preliminary hearings were held on the issues of compensability and notice. At the first preliminary hearing of February 28, 2017, ALJ Jones received the depositions of Claimant and Mr. Huston in lieu of live testimony and one of the affidavits signed by Ms. Weigand. ALJ Jones found the accident alleged by Claimant occurred because of the detail of Claimant's testimony and because Claimant's description of the accident was consistent with the history he gave Dr. Murati, Claimant's examining physician. ALJ Jones also thought it was possible the event occurred at a time Ms. Weigand was not looking. ALJ Jones also found Claimant proved he gave timely notice. On review, a single Appeals Board member affirmed the preliminary order, deferring to ALJ Jones' credibility determination and noting Claimant gave specific testimony concerning the conversation with Mr. Huston, which Mr. Huston could not recall.

The second preliminary hearing took place on July 18, 2017. Ms. Weigand and Claimant testified live, and the parties offered both affidavits signed by Ms. Weigand, copies of medical records and other materials. ALJ Jones appointed Dr. Bieri to perform a Court-ordered independent medical examination, which was performed on September 19, 2017.

Dr. Bieri noted Claimant was unable to recall the date of accident. Dr. Bieri stated Claimant reported a history of moving a refrigerator down stairs, the refrigerator slipped and landed on Claimant, and caused Claimant to fall on his low back. Claimant said he experienced an immediate onset of low back pain radiating into his left lower extremity. Dr. Bieri reviewed Claimant's course of medical treatment and performed a physical examination. Dr. Bieri diagnosed a herniated disc at L5-S1 with left-sided radiculopathy, and thought the alleged accident was the prevailing factor causing the medical condition. Additional medical treatment, including surgery, was recommended. No formal restrictions were imposed, and Dr. Bieri thought Claimant could perform his current work because it only involved lifting up to twenty-five pounds.

Following receipt of Dr. Bieri's report, another preliminary hearing and motion hearing was held on December 5, 2017, and ALJ Jones issued another preliminary order. ALJ Jones noted Claimant had difficulty remembering the date of accident, but consistently stated the accident occurred when a refrigerator fell on him. ALJ Jones found the date of accident was July 29, 2016. ALJ Jones considered the live testimony of Ms. Weigand, but found the accident occurred as Claimant described based on Claimant's testimony, the medical record of Via Christi Hospital generated one month after the accident and Dr. Bieri's report. ALJ Jones also found, based on Dr. Bieri's report, the accident was the prevailing factor causing Claimant's injury and need for treatment. Claimant's request for medical treatment was granted. On review, a single Appeals Board member affirmed the Order, deferring to ALJ Jones on his credibility determination when he concluded the accident occurred as described by Claimant and the determination Dr. Bieri was more credible on causation. The ALJ's determination on notice was also affirmed because no new evidence was present.

Dr. Weimar apparently was the authorized health care provider. On June 18, 2018, Claimant underwent a hemilaminectomy and microdiscectomy at L5-S1 by Dr. Weimar, followed by physical therapy and pain management. Claimant resumed work after the surgery. Claimant thought his symptoms were the same as before. An MRI performed on October 8, 2018, indicated a recurrent disc herniation at L5-S1. In February 2019, Dr. Weimar performed a fusion at L5-S1. Dr. Weimar declared Claimant at maximum medical improvement on July 29, 2019, and imposed permanent work restrictions. Claimant did not resume work after the second surgery. Claimant last worked one week before the second surgery. Claimant continues to experience constant back pain, and cannot lift as much as before. Dr. Weimar's restrictions were not admitted into evidence, but Claimant understood his restrictions were no lifting over twenty pounds, and no strenuous lifting,

bending, twisting or standing for long periods of time. Claimant cannot walk as far or lift as much as before the alleged accident. Claimant testified he looked for work online and through temporary agencies, but has not received any job offers.

Dr. Murati evaluated Claimant at Claimant's counsel's request on November 3, 2016, and September 9, 2019. Dr. Murati was not provided medical records for the first evaluation, and received all his information from Claimant. On November 3, 2016, Claimant reported a refrigerator and dolly slipped and fell on Claimant, and he pushed the refrigerator up. Within forty-five minutes, Claimant felt pain in the lower part of the left leg running up to his back. Dr. Murati diagnosed low back pain with radiculopathy, and thought the accident was the prevailing factor causing Claimant's medical condition. Additional medical treatment was recommended.

Dr. Murati reevaluated Claimant on September 9, 2019, noting Claimant's symptoms started after he injured his back moving a refrigerator. Claimant's course of medical treatment was reviewed. Claimant had more complaints at the second evaluation, which Dr. Murati attributed to a progressing radiculopathy. Physical examination was notable for missing right hamstring and ankle reflexes, decreased left-sided L5-S1 sensation, 4/5 strength and tenderness at L5. Dr. Murati diagnosed post-laminectomy/discectomy and post-fusion L5-S1. Dr. Murati thought the accident was the prevailing factor causing Claimant's condition, assuming Claimant's history was accurate. Dr. Murati imposed work restrictions of occasional sitting, standing and kneeling, frequent walking, rarely climbing stairs and ladders or squatting, no bending/crouching/stooping, no crawling, lifting/carrying or pushing/pulling over twenty pounds, and alternating sitting, standing and walking, based on an eight-hour working day. These restrictions are the same as the temporary restrictions Dr. Murati imposed on November 3, 2016. Dr. Murati reviewed the task list prepared by Dr. Barnett, and thought Claimant sustained 100% task loss. Dr. Murati also believed Claimant was not employable. Future medical consisting of yearly follow-ups, physical therapy, injections, radiologic studies, prescription medication and surgery was recommended. On cross-examination, Dr. Murati admitted he was not aware of Claimant's employment after his termination by Respondent.

Dr. Barnett performed a vocational evaluation of Claimant at Claimant's counsel's request on November 22, 25 and December 13, 2019. Multiple appointments were required because Claimant had difficulty providing information regarding his work history and Dr. Barnett wanted Claimant to provide additional documentation. Dr. Barnett did not find this unusual. Dr. Barnett was also provided Dr. Murati's work restrictions. Claimant was not working when Dr. Barnett evaluated him, and Claimant was looking for work in the fast-food industry. Dr. Barnett thought Claimant was unemployable based on Dr. Murati's physical restrictions, particularly the restriction for alternating sitting, standing and walking, and Claimant's chronic pain. Dr. Barnett also prepared a list of essential job tasks Claimant performed for the five years prior to the date of accident, which did not include tasks associated with customer service, attending safety meetings or travel. Dr. Barnett

assumed Claimant worked for Respondent on a full-time basis. Dr. Barnett was not aware of Claimant's employment after he was terminated by Respondent, did not assess the job market in Claimant's geographic area, and did not review other medical reports. Dr. Barnett noted Claimant did not have a drivers license because he did not pass the written test. Dr. Barnett assumed Claimant could not read because he failed the written drivers license test, but admitted he did not test Claimant's reading level.

Dr. Estivo evaluated Claimant at Respondent's request on September 26, 2019. According to Dr. Estivo, Claimant reported a refrigerator fell on him on a customer's front porch, with varying dates of accident. Claimant said the accident produced immediate lumbar spine pain radiating down the left leg. Claimant did not report improvement from either surgery. Claimant's course of treatment was reviewed. Examination was notable for tenderness during range of motion testing of the lumbar spine, a positive straight-leg raise test on the right side, numbness and tingling along the dermatome of the left foot, full range of motion of both lower extremities and a normal gait. Dr. Estivo diagnosed a post-microdiscectomy and post-fusion at L5-S1 following a herniated disc. Dr. Estivo thought the alleged accident was the prevailing factor causing Claimant's condition, based on Claimant's reported history of the event and the immediate onset of symptoms. Dr. Estivo acknowledged a twisting event could produce a disc herniation. Based on his experience, Dr. Estivo thought a disc herniation of the severity of Claimant's would be symptomatic from the onset and it would be unusual to wait a month before seeking medical treatment. Dr. Estivo imposed restrictions of no lifting over twenty-five pounds, and no constant bending or twisting. Dr. Estivo reviewed the task list prepared by Mr. Benjamin, and thought Claimant sustained 56.7% task loss. Dr. Estivo thought Claimant would be capable of performing the jobs identified by Mr. Benjamin if they were within Dr. Estivo's work restrictions. Future medical treatment, particularly pain management, was recommended.

Mr. Benjamin performed a vocational evaluation of Claimant at Respondent's request on April 15, 2020. Mr. Benjamin obtained a work history from Claimant for the jobs performed for the fifteen-year period before the accident date, as well as Claimant's post-accident work history. Mr. Benjamin noted the only post-accident job Claimant left because of physical limitations was the employment at Pioneer Balloon. Mr. Benjamin prepared a job task list. Mr. Benjamin also prepared a labor market analysis based on Claimant's geographic area and certain medical restrictions. Mr. Benjamin noted Claimant demonstrated the actual ability to obtain employment earning up to $288.00 per week after the alleged accident. Based on Dr. Bieri's restrictions, Mr. Benjamin thought Claimant could earn what he was earning with Respondent. Based on Dr. Estivo's restrictions, Mr. Benjamin thought Claimant could work full-time earning $322.22 per week. Mr. Benjamin admitted he was provided Dr. Murati's restrictions, but did not consider those restrictions when he performed the wage market analysis. Mr. Benjamin thought Claimant was capable of engaging in substantial and gainful employment, and had proven the actual

ability to do so. Mr. Benjamin was not aware Claimant did not return to work after the second surgery.

ALJ Jones issued the Award on August 10, 2020. ALJ Jones concluded Claimant sustained personal injury to his low back from an accident arising out of and in the course of his employment with Respondent on July 29, 2016, based on his prior preliminary orders. ALJ Jones found the accident was the prevailing factor causing Claimant's injuries, need for treatment and resulting disability based on the opinions of Drs. Murati, Estivo and Bieri. ALJ Jones also found Claimant provided timely notice. ALJ Jones, based on the opinions of Drs. Murati and Estivo, found Claimant's functional impairment was 12% of the body as a whole under the *AMA Guides*. ALJ Jones also found Claimant was permanently and totally disabled on account of his accidental injury, taking into account Claimant's high-school education, history of unskilled labor, two back surgeries and ongoing need for narcotics, and ALJ Jones' understanding of Dr. Weimar's work restrictions. A credit was awarded to Respondent for an overpayment of temporary total disability compensation. Finally, future medical was awarded to Claimant based on the opinions of Drs. Murati and Estivo. This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues ALJ Jones' determination Claimant sustained a compensable injury is erroneous because the greater weight of the credible evidence does not prove the accident alleged by Claimant occurred. Respondent also argues Claimant did not provide timely notice. Respondent contends if the matter is compensable, Claimant's permanent partial disability compensation should be based on 12% functional impairment to the body as a whole. Respondent also seeks reimbursement by the Fund if this matter is not compensable. Claimant argues the Award was correctly decided and should be affirmed.

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.[1] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[2] 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.[3] "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence the party's position is more

[1] *See* K.S.A. 44-501b(a).

[2] *See id*.

[3] *See* K.S.A. 44-501b(c).

probably true than not true based on the whole record, unless a higher burden of proof is specifically required under the Act.[4]

The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges,[5] and the Board possesses the authority to grant or refuse compensation, or to increase or diminish an award of compensation.[6] A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.[7] Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,[8] the Board is not required to do so, and may modify an award as it deems necessary.[9] For example, the Board previously reversed an administrative law judge's credibility determination of an employee's live testimony, after asserting its authority to conduct *de novo* review.[10] Moreover, the Board is as equally capable as an administrative law judge in reviewing evidence when a witness does not testify live.[11] Personal observation of testifying witnesses is a common basis for determining witness credibility, but another method to determine credibility is analyzing the facts and determining which witness' version makes the most sense based on those facts.[12]

---

[4] *See* K.S.A. 44-508(h).

[5] *See* K.S.A. 44-555c(a).

[6] *See* K.S.A. 44-551(l)(1).

[7] *See Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555, at *4 (Kan. WCAB June 22, 2017).

[8] *See, e.g., Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471, at *9 (Kan. WCAB Oct. 14, 2014).

[9] *See Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241, at *3 (Kan. WCAB June 22, 2011).

[10] *See Lichtenberger v. Air Capital Vending*, No. 1,012,933, 2004 WL 1778911, at *3 (Kan. WCAB July 16, 2004).

[11] *See Gilmore v. Henke Manufacturing Co.*, No. 1,074,792, 2016 WL 3208237, at *3 (Kan. WCAB May 12, 2016).

[12] *See Dick v. Park Electrochemical Corp.*, No. CS-00-0444-763, 2020 WL 2991808, at *2 (Kan. WCAB Mar. 19, 2020).

1. Claimant did not prove by a greater weight of the credible evidence the alleged accident of July 29, 2016, occurred.

The first issue is whether Claimant met his burden of proving by a greater weight of the credible evidence he sustained personal injury from an accident arising out of and in the course of his employment with Respondent on July 29, 2016. The ALJ initially found Claimant's testimony was credible, based on review of transcripts, because Claimant's testimony was detailed, consistent with the history he provided Dr. Murati and because it was possible the accident occurred when Ms. Weigand was not looking at Claimant. Subsequently, after viewing the live testimony of Claimant and Ms. Weigand, the ALJ concluded it was still more likely than not Claimant sustained an injury while moving a refrigerator based on Claimant's testimony, a medical record from Via Christi Hospital and the history in Dr. Bieri's report. In the Award, the ALJ incorporated the prior compensability determinations from the prior preliminary Orders.

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.[13] The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[14] In this case, Respondent challenges the ALJ's determination the alleged accident of July 29, 2016, occurred. If the event of July 29, 2016, occurred, the medical evidence of Drs. Bieri, Murati and Estivo all indicate it was the prevailing factor causing Claimant's injury, medical condition, need for treatment and resulting disability or impairment.

Having reviewed the record as a whole, the Appeals Board finds Claimant's testimony regarding the alleged accident is not credible evidence, alone. Claimant was unable to recall the date, or even the month, the accident occurred without consulting Respondent's delivery records. Claimant maintains the accident occurred while he was moving the refrigerator at the front porch of Ms. Weigand's house. Claimant denied he injured his back while moving the refrigerator elsewhere. Ms. Weigand watched Claimant the entire time he was moving the refrigerator on the front porch, and denied the refrigerator fell or pushed Claimant down. This would have been an obvious event observable by a disinterested witness, like Ms. Weigand. Both Ms. Weigand and Claimant confirmed Claimant's father was present at the front porch. If Claimant's version of events is correct, his father did not help Claimant either when the refrigerator was falling or when Claimant was pushing the refrigerator back up. If Claimant is to be believed, he was capable of pushing up a large, heavy refrigerator from the ground without assistance after

[13] *See* K.S.A. 44-508(d).

[14] *See* K.S.A. 44-508(d),(g).

herniating a lumbar disc. Claimant's father did not testify. According to Claimant, despite sustaining a herniated disc requiring two surgeries, Claimant continued moving the refrigerator to the truck, helped move and install the new refrigerator, returned to the store and moved the refrigerator to his truck for transport to the scrap metal dealer. Claimant allegedly told his supervisor about the event, but did not accept an offer of medical treatment. Mr. Huston indicated he would have completed an accident report and sent Claimant to a health care provider, if Claimant reported an accident. Despite being in pain for the next week, Claimant continued performing his usual work without accommodation and did not seek medical treatment on his own. This behavior is not consistent with someone who sustained a serious lumbar injury.

Claimant's subsequent behavior also undermines the credibility of his testimony. Claimant obtained subsequent employment without accommodation. Claimant did not seek medical treatment until a month after the injury, and only after he was terminated by Respondent for cause. According to Mr. Huston, when he discussed with Claimant the pharmacy bill he received after Claimant was terminated, Claimant said the bill was sent in error. Claimant could not recall whether the conversation occurred. Again, Claimant's behavior is not consistent with someone who sustained an acute low back injury.

Overall, Claimant's version of the facts does not make sense, compared to the consistent testimony of Ms. Weigand, who was not a party to the case. Claimant's testimony, alone, is not credible evidence of compensability. The Appeals Board finds the testimony of Ms. Weigand more credible, and concludes Claimant did not prove the event of July 29, 2016, occurred.

Turning to the medical evidence cited by the ALJ in support of his credibility determination, the histories reported by Drs. Murati, Bieri and Estivo were provided solely by Claimant. Dr. Murati testified his causation opinion was premised on the assumption the history Claimant provided was correct. The causation opinions of Drs. Bieri and Estivo are also based on Claimant's history being accurate. Because Claimant's history, alone, is not credible evidence, the prevailing factor opinions from the physicians based on Claimant's history are also flawed.

Having the considered the whole record, the Appeals Board concludes Claimant did not prove by a greater weight of the credible evidence the accident of July 29, 2016, occurred. Because the event of July 29, 2016, did not occur, it cannot be the prevailing factor causing the injury, medical condition, need for treatment or resulting disability or impairment alleged by Claimant. Accordingly, the claim for compensation must be denied.

2. Claimant did not meet his burden of proving by a greater weight of the credible evidence he gave proper notice to Respondent.

The Appeals Board next considers, in the alternative, whether Claimant met his burden of proving he gave proper notice. Where an employee alleges personal injury from an accident arising out of and in the course of employment, the employee must give the employer notice by the earliest of twenty days from the date of accident, twenty days from the date medical treatment is sought when the employee continues to work for the employer, or ten days from the last date worked if the employee no longer works for the employer, whichever is earliest.[15] Notice must be provided either to the employer's designee or to a supervisor or manager, must include the time, date, place and particulars, and must evidence the employee is seeking workers compensation benefits or sustained a work-related injury.[16]

In this case, Claimant no longer works for Respondent and did not seek medical treatment when he was working for Respondent. Twenty days from the date of accident is August 18, 2016, and ten days from the last day worked is August 18, 2016. Claimant must prove he put Respondent on notice he was either seeking workers compensation benefits or sustained a work-related injury by August 18, 2016.

Claimant testified on the date of the alleged accident he told Mr. Huston a refrigerator fell on him. Claimant's testimony, however, is not credible evidence. Mr. Huston testified he did not recall Claimant stating a refrigerator fell on him on July 19, 2016, or him asking Claimant if he wanted medical treatment. Mr. Huston consistently testified if Claimant said he was involved in a work-related accident, Mr. Huston would have sent Claimant to a medical provider and would have completed an accident report. Even if Claimant refused medical treatment, Mr. Huston would have made some record in his calendar of the conversation. Mr. Huston had no such record. Mr. Huston received a pharmacy bill indicating Claimant may be seeking workers compensation benefits, which arguably could constitute notice. However, according to Mr. Huston, Claimant said the bill was sent in error. Claimant could not recall whether the conversation occurred. The date the bill was received by Mr. Huston is unknown. Mr. Huston testified he received the bill after Claimant was terminated on August 8, 2016, and before Mr. Huston stopped working for Respondent on August 31, 2016. The testimony of Mr. Huston is more credible than the testimony of Claimant, but the Appeals Board cannot find the bill was received by Mr. Huston by August 18, 2016, without engaging in speculation. The Appeals Board concludes Claimant did not prove by a greater weight of the credible evidence he gave proper notice to Respondent.

---

[15] *See* K.S.A. 44-520(a).

[16] *See* K.S.A. 44-520(a)(2).

Because Claimant did not prove by a greater weight of the credible evidence the accident of July 19, 2016, occurred or proper notice was provided, the award of compensation contained in the Award dated August 10, 2020, must be reversed. The issues of nature and extent and future medical are moot.

3. Respondent and Insurance Carrier may seek certification from the Director for reimbursement by the Fund for compensation paid under preliminary order.

Respondent impled the Fund, and seeks certification for reimbursement of compensation previously paid under K.S.A. 44-534a(b). Both Respondent and the Fund ask the Appeals Board to rule on the reimbursement request. The Court of Appeals recently suggested the Appeals Board has authority to rule on requests for reimbursement by one insurance carrier to another insurance carrier under K.S.A. 44-556(e), and the Kansas Workers Compensation Fund may be impled under K.S.A. 44-566.[17] A second appeal of that case is pending before the Court of Appeals. The Kansas Supreme Court, however, ruled the certification process for reimbursement by the Fund for payment of compensation made by a single employer or insurer under K.S.A. 44-534a is a ministerial function performed by the Director.[18] Accordingly, the Appeals Board finds Respondent and Insurance Carrier paid compensation to Claimant under K.S.A. 44-534a, which has been totally disallowed. Pursuant to K.S.A. 44-534a(b), Respondent and Insurance Carrier may seek certification for reimbursement by the Director.

CONCLUSION

Having reviewed the entire evidentiary file contained herein, the Board finds and concludes Claimant failed to prove he met with personal injury from an accident arising out of and in the course of his employment with Respondent. Claimant also failed to prove he gave proper notice of an alleged personal injury by accident to Respondent. The remaining issues are moot. Respondent and Insurance Carrier may seek certification for reimbursement by the Director under K.S.A. 44-534a(b).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Gary Jones, dated August 10, 2020, is reversed. Claimant's request for an award of compensation herein is denied. Pursuant to K.S.A. 44-534a(b), Respondent and Insurance Carrier may seek certification for reimbursement by the

---

[17] *See Travelers Casualty Ins. v. Karns*, 56 Kan. App. 2d 388, 397, 431 P.3d 301 (2018).

[18] *See Schmidtlien Elec., Inc. v. Greathouse*, 278 Kan. 810, 833-34, 104 P.3d 378 (2005).

Director for the compensation previously paid. The costs of these proceedings, including the Court reporter's charges, shall be paid by Respondent and Insurance Carrier.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

_____
APPEALS BOARD MEMBER

_____
APPEALS BOARD MEMBER

_____
APPEALS BOARD MEMBER

c: (Via OSCAR)

Mitchell Rice
Matthew S. Crowley
Jennifer Ouellette
Hon. Gary Jones