

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MCKINZIE FOGARTY)	
Claimant)	
V.)	
)	
MENARD INC.)	CS-00-0447-283
Respondent)	AP-00-0453-357
AND)	
)	
XL INSURANCE AMERICA, INC.)	
Insurance Carrier)	

ORDER

Respondent requests review of the September 22, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Troy A. Larson.

APPEARANCES

Richard Fisk appeared for Claimant. Kristina Mulvany appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record of appeal is the same as that considered by the ALJ, and consists of the transcript of Preliminary Hearing held September 15, 2020, with exhibits attached, and the documents of record filed with the Division. The parties agreed to include additional pages of medical records to Claimant's Exhibit #3 to the above-referenced preliminary hearing transcript.

The ALJ determined Claimant met her burden of proof for additional medical treatment related to the symptoms of her anxiety disorder caused by the work injury, and ordered Respondent to provide a list of two physicians for Claimant to choose one as an authorized treating physician.

Respondent appeals, arguing Claimant failed to prove her work accident caused her psychological condition and therefore did not arise out of and in the course of her employment; Claimant merely exacerbated her preexisting anxiety disorder, and therefore her psychological condition is not compensable pursuant to K.S.A. 44-508(f)(2).

Respondent states the work accident might be the prevailing factor for Claimant's current anxiety symptoms, but not the prevailing factor in Claimant's overall anxiety condition; and Claimant failed to prove her psychological condition is directly traceable to the work injury. Therefore, Respondent argues the ALJ's Order should be reversed and medical benefits related to Claimant's psychological condition denied.

Claimant argues the ALJ's Order should be affirmed.

ISSUES

Is Claimant entitled to additional medical treatment for her psychological condition?

FINDINGS OF FACT

On April 15, 2019, a forklift ran over Claimant's right foot. Claimant was diagnosed and is receiving on-going pain management for complex regional pain syndrome. Claimant has a long history of psychological issues. Claimant has received treatment, including prescription medication, for these issues through her family physician since 2011. Her primary issue has been Generalized Anxiety Disorder.

Following Claimant's injury, her family physician referred her to Dr. Lolitta Aznaurova for a psychiatric assessment of her depression and anxiety. Claimant met with Dr. Aznaurova on September 5, 2019. Claimant reported several stressors, including her current work injury. She reported worsening of stress and depressive symptoms, with a general functional decline over the past 3 months. Specifically, Claimant reported becoming more withdrawn, being socially anxious and easily overwhelmed with recurrent panic attacks and feeling unmotivated and negative. She suffered from a lack of interest in activities and constantly worried about everything. Lastly, she reported nightmares about being run over by a vehicle or getting trapped.

Dr. Aznaurova diagnosed Claimant with anxiety, post-traumatic stress disorder and regional compartmental pain syndrome. She discontinued Claimant's prescriptions for Prozac and Propranolol. She wrote prescriptions for Cymbalta, Neurontin and referred her for cognitive Behavioral Therapy (CBT). Claimant was instructed to return in three weeks.

Claimant met with Dr. Aznaurova again on October 3, 2019. She continued to struggle with a high level of anxiety, anhedonia, lack of energy, and poor concentration. She continued to have issues with coping. She was non-compliant with her medication and therapy. Claimant was encouraged to take her medication as prescribed and to attend therapy sessions. Claimant was told to return for follow up only if she chose to take the medication.

Claimant elected to take the medication prescribed and met with Dr. Aznaurova three times over the next six months beginning November 14, 2019. During this time, Claimant took her medication regularly. Her symptoms remained essentially unchanged. The severity levels of her symptoms, unfortunately, fluctuated up and down. Overall, Dr. Aznaurova found Claimant to be calmer and her functioning improved. Unfortunately, Claimant had not received the CBT recommended from the outset.

Claimant met with Dr. Guillermo Ibarra on May 21, 2020, for a Court-ordered psychiatric evaluation. Claimant related her April 15, 2019, accident involving a forklift and the physical effects she has suffered. Dr. Ibarra noted Claimant was diagnosed with complex regional pain syndrome and continues to receive pain management treatment.

After evaluating Claimant, Dr. Ibarra noted:

In summary, the main psychiatric problem is anxiety, a symptom that colors most aspects of her life. Present since elementary school, it predates the accident by many years. The accident has given her anxiety a new face and a new set of symptoms. Instead of starving herself to cachexia, as she did before, she now has nightmares and remembrances of the day the forklift ran over her foot. Instead of dropping out of school, she now remains avoidant and unemployed. The basic baseline is unchanged. Her anxiety remains free floating, her response of frustration excessive and her ability to adapt to stress remains poor. Just as before.¹

Further,

In summary, from the psychiatric standpoint, there is not much change since before the accident. The topics of her anxiety have changed because there is now an identifiable stressor. If she goes to bed with pain, her dreams are likely to be unpleasant, if she dreams. Her remembrances of the accident are manifestations of the way we humans learn, somewhat exaggerated in her case due to her anxiety. Whether she has PTSD or not, is only of academic significance. Her anxiety was prominent and remains prominent regardless of the name we give it. The factors for her anxiety now have been enumerated above. The main destabilizing factor at present remains her chronic pain and her inability to sustain gait or station. Her anxiety about her occupational potential is proportionate to the stressor. . . . The impact of chronic pain in the quality of her life and in her state of anxiety are significant.²

¹ P.H. Trans., Cl. Ex. 2 at 6.

² P.H. Trans., Cl. Ex. 2 at 7.

Regarding current treatment, Dr. Ibarra stated:

Ms. Fogarty is in need of treatment, including medications for palliation of symptoms and psychotherapy. The immediate goal should be a return to the functional baseline before the accident, not necessarily to address her emotional fragility. The former goal is associated with the accident, the second is constitutional.³

At the request of the Court and counsel, Dr. Ibarra provided an addendum to his earlier report (August 17, 2020). He opined:

Ms. Fogarty suffers from Generalized Anxiety Disorder, a condition present for many years, one likely to remain present for life and one that has no association with the accident. Treatment for this condition is necessary, perhaps for many years, since this condition has been the cause of great distress and the cause of academic, interpersonal and occupational dysfunction.

She had a Generalized Anxiety Disorder when she went to work the morning of April 15, 2019. The emotional symptoms resulting from this accident illustrate the manner in which a person with this condition adapts to an incident like her accident at work. The accident is the prevailing factor to those symptoms alone and to her maladaptive emotional response. Treatment for better adaptation to those symptoms is necessary and will require a time-limited intervention, at the end of which she will remain an anxious, fragile and vulnerable person, as she was the morning of April 15, 2019 before she sent to work.⁴

He further opined:

- The claimant has an anxiety condition that was present before the accident. This condition has been the cause of severe social and academic limitations of function.
- The accident exacerbated this chronic condition and manifested itself in additional symptoms that require treatment.
- Treatment for her chronic condition is necessary for an indefinite period of time.
- Time-limited, behaviorally-focused treatment is necessary for the symptoms that arose after the accident and that can be reasonably attributed to the accident. Techniques aimed at de-learning that anything that reminds her of a forklift, sounds, thoughts, things backing up, etc., are necessarily forewarnings of a catastrophe. This should be focused and time-limited, aiming at the return to the pre-accident level of functioning. This aim is also essential considering that occupational invalidism would be a disaster at her age.

³ P.H. Trans., Cl. Ex. 2 at 7.

⁴ P.H. Trans., Cl. Ex. 2 at 9 (Page 1 of Dr. Ibarra's Addendum).

- The accident is the prevailing factor only of those symptoms that can be reasonably attributed to the accident and not of her pre-existent anxiety disorder.⁵

In summation, Dr. Ibarra stated:

I feel often unable to provide the black and white answers that professionals in your position would like me to give. Ms. Fogarty's is a complex situation.⁶

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2018 Supp. 44-508(f)(2)(A) states:

(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.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard to which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2018 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

The traumatic neurosis rule found in *Gleason*⁷, requires three elements to establish a compensable claim:

⁵ P.H. Trans., Cl. Ex. 2 at 10 (Page 2 of Dr. Ibarra's Addendum).

⁶ P.H. Trans., Cl. Ex. 2 at 10 (Page 2 of Dr. Ibarra's Addendum).

⁷ *Gleason v. Samaritan Home*, 260 Kan. 970, 977, 926 P2d 1349 (1996).

1. a work-related physical injury;
2. symptoms of the traumatic neurosis; and
3. the neurosis is directly traceable to the physical injury.

In finding Claimant was entitled to additional medical treatment, the ALJ stated:

Following this traumatic neurosis rule, it is first not disputed that Claimant sustained a work-related physical injury. Second, while Dr. Ibarra opined that Claimant had a preexisting anxiety condition, he also opined that additional symptoms for this condition were caused by the work injury. Third, Dr. Ibarra directly connects this neurosis to Claimant's physical injury. It irrelevant that Claimant had a preexisting anxiety condition, given that K.S.A. 44-508(f)(2) concerns physical injuries and given that Dr. Ibarra's opinions establish a compensable claim for traumatic neurosis.⁸

The ALJ based his Order on his interpretations of Dr. Ibarra's opinions. This Board Member disagrees with the ALJ's interpretation of Dr. Ibarra's opinions and his application to the traumatic neurosis rule found in *Gleason*. There is no disputing Claimant experienced new symptoms caused by the work injury. What is disputed is the ALJ's finding Dr. Ibarra directly connects the neurosis to Claimant's physical injury. Dr. Ibarra attributes the new symptoms to the work injury, not the neurosis itself. Dr. Ibarra directly, and in great detail describes how Claimant's neurosis and the attendant issues associated with her neurosis have been present since 2011.

. . . the main psychiatric problem is anxiety, a symptom that colors most aspects of her life. Present since elementary school, it predates the accident by many years. . . .the basic baseline is unchanged. Her anxiety remains free floating, her response of frustration excessive and her ability to adapt to stress remains poor. Just as before.⁹

. . .

. . . Similarly to her disproportionate reaction to stress, she now has a disproportionate reaction to a minor soft tissue injury.

. . .

⁸ ALJ Order at 2.

⁹ P.H. Trans., Cl. Ex. 2 at 6 (Page 5 of Dr. Ibarra's report)..

In summary, from the psychiatric standpoint, there is not much change since before the accident.¹⁰

Ms. Fogarty suffers from Generalized Anxiety Disorder, a condition present for many years, one likely to remain present for life and one that has no association with the accident.¹¹

Gleason requires “that the neurosis is directly traceable to the physical injury.” Claimant’s on-going neurosis is Generalized Anxiety Disorder, has been present since 2011. An increase in Claimant’s symptoms as a result of her work injury is an aggravation of her existing anxiety condition, and non-compensable under K.S.A.44-508(f)(2).

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.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order of Administrative Law Judge Troy A. Larson dated September 22, 2020, should be reversed. Claimant’s request for additional medical treatment is denied pursuant to K.S.A. 44-508(f)(2) because she failed to prove she sustained a compensable psychiatric injury.

¹⁰ P.H. Trans., Cl. Ex. 2 at 10 (Page 2 of Dr. Ibarra’s Addendum).

¹¹ P.H. Trans., Cl. Ex. 2 at 9 (Page 1 of Dr. Ibarra’s Addendum).

¹² K.S.A. 2018 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Richard Fisk, Attorney for Claimant
Kristina Mulvany, Attorney for Respondent and its Insurance Carrier
Troy A. Larson, Administrative Law Judge