BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL SHANNON	)	
Claimant	)	
V.	)	
	)	AP-00-0475-935
REDTAIL INVESTMENTS LLC	)	CS-00-0463-215
Respondent	)	
AND	)	
	)	
NATIONAL AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 2, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Sylvia B. Penner appeared for Claimant. Ronald J. Laskowski appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division, and the following:

1. Transcript of Preliminary Hearing, held January 17, 2023, including exhibits and the testimony of Claimant, Gabino Beraza, Wyatt Morgan, Mark Stephen Howard and Kristoph Ryan Howard;

2. Independent Evaluation Report (IME) of David W. Hufford, M.D., dated April 4, 2023.

ISSUES

1. Did Claimant sustain personal injury by accidents arising out of and in the course of his employment with Respondent on July 30, 2021, and August 31, 2021, including whether the accidents are the prevailing factor causing Claimant's medical condition?

2. Does the Board have jurisdiction to review the ALJ's Order related to medical treatment, TTD, payment of medical bills, reimbursement of medical mileage, out of pocket prescriptions, and unauthorized medical?

FINDINGS OF FACT

Claimant is 42 years of age and worked for Respondent since 2016 in Respondent's oilfield and ranching businesses. Claimant operated heavy machinery and performed whatever tasks Respondent instructed him to do. Mark Stephen Howard (Mr. Howard) is Respondent's owner.

Claimant testified on Friday, July 30, 2021, he was hauling hay. He stopped to pick up a large rock out of Respondent's hayfield. Claimant described the rock as weighing 150 to 200 pounds. He squatted down, picked the rock up with his arms and placed it into the back of a flatbed truck, which was approximately waist high. Claimant felt immediate pain in his low back. He returned to where his coworkers, Gabino Beraza and Wyatt Morgan, were working. Claimant told Mr. Beraza and Mr. Morgan he injured his back. At the end of the day, Mr. Beraza pushed the rock out of the back of the truck into a ditch.

Claimant testified on the Monday following his injury, he talked to Mr. Howard. Claimant advised Mr. Howard he injured his back while picking up a rock and he was going to see a chiropractor. Mr. Howard told him to do what he needed to do and to take care of it with his company credit card or let him know if he needed cash to pay for it. Claimant did not complete paperwork regarding his injury.

On August 4, 2021, Claimant saw Dr. Joshua Mettling for chiropractic care. Claimant filled out paperwork stating the reason for his visit was "work," the location of his pain was the "lower right back" and this condition began "two weeks ago." Claimant did not provide specifics or describe how his injury occurred. Dr. Mettling performed a manual adjustment of Claimant's lumbar spine.

Claimant had seen Dr. Mettling for various conditions in the past:

- November 5, 2010, for rib pain,
- June 2014, for middle to the upper right side of his back,
- July 28, 2015, for low back complaints,
- February 1, 2017, for a slip and fall injury,
- July 28, 2017, for low back complaints,
- January 16, 2018, for low back complaints, and
- January 26, 2018, for low back complaints.

Claimant testified he has not seen Dr. Mettling or any other healthcare providers for his low back or neck complaints since January 26, 2018, until these alleged injuries.

Claimant went to Winfield Medical Arts for a scheduled DOT physical and high blood pressure issues on August 11, 2021. He was seen by Cherie Bahm, APRN. He reported back pain and receiving two chiropractic adjustments, which did not help. He also reported he injured himself at work, but did not provide a description of his injury. Claimant was placed on blood pressure and pain medication.

On August 23, 2021, Claimant saw his family physician, Rodrick Heger, M.D., for his back pain. Dr. Heger ordered MRIs of his lumbar and cervical spine, which were performed on September 4, 2021. The poor quality of the MRIs rendered them unhelpful. Claimant testified Mr. Howard gave him $1,000 for the MRIs.

Claimant continued to work for Respondent through August 31, 2021. Claimant testified he injured his neck on this date, when he picked up a set of elevators weighing 50 to 60 pounds from the ground and put them on the rack. Claimant testified he reported this injury to Mr. Howard and said his back pain was not improving. Mr. Howard advised Claimant they needed to report his injury to workers compensation and gave him the rest of the day off. Claimant has not returned to work for Respondent since August 31.

Claimant saw Dr. Heger again on September 22, 2021, who referred him to James Weimer, M.D., at Abay Neuroscience. Dr. Weimer evaluated Claimant on September 29, 2021, and recommended repeat MRI imaging of the cervical and lumbar spine. The repeat MRI scans have not been performed because Respondent denied the claim.

Claimant was evaluated by Pedro A. Murati, M.D., on March 22, 2022, at his attorney's request. Dr. Murati diagnosed multiple medical conditions, assigned temporary work restrictions and recommended additional medical treatment. He opined Claimant's accident and multiple repetitive traumas at work were the prevailing factor causing his medical condition and need for treatment.

Claimant was evaluated by Michael Johnson, M.D., on June 14, 2022 at Respondent's request. Dr. Johnson opined Claimant's back and neck pain were due to his morbid obesity and genetics, and unrelated to any work injury.

Gabino Beraza and Wyatt Morgan testified. Neither are currently employed with Respondent, having been terminated by Mr. Howard. Mr. Beraza knew Claimant prior to working with him for Respondent for four years. He wrestled with one of Claimant's sons in high school. Mr. Beraza testified he, Claimant and Mr. Morgan were putting up hay on Friday, July 30, 2021. Mr. Beraza noticed a large rock in the back of the flatbed truck driven by Claimant. He stated Claimant told them he may have tweaked his back a little when he lifted the rock and placed it in the truck. As they were finishing their work day, Mr. Beraza

pushed the rock out of the truck and into a ditch. The following Monday, he, Claimant, Mr. Howard and Mr. Wyatt were at the front of the shop greasing up the baler. Mr. Beraza overheard a conversation between Claimant and Mr. Howard, where Claimant reported he hurt his back, how it happened, he was hurting and wanted to see somebody. Mr. Beraza also overheard Mr. Howard telling Claimant he could use his card or get some cash for his treatment.

Mr. Morgan worked for Respondent from August 2020 through December 2021. He grew up in Winfield and was friends with Claimant's son. Claimant helped Mr. Morgan get a job with Respondent. He testified he, Claimant and Mr. Morgan were putting up hay on Friday, July 30, 2021. It was part of their job tasks to keep the fields cleaned, i.e., get rocks out of the field to protect the farm equipment. Mr. Morgan testified he saw the rock on the bed of the truck. He testified he was present at the front of the shop on the following Monday when he overheard a conversation between Claimant and Mr. Howard where Claimant told Mr. Howard about his back and Mr. Howard said they would figure something out one way or another.

Mr. Morgan further testified he had known Claimant his whole life and Claimant was a tough guy. After the July 30 weekend, he didn't think Claimant's health was the same, Claimant never missed a day of work and Claimant was not hurt prior to July 30.

Mr. Howard testified Claimant came to work the first week of July, barely able to walk, due to a personal injury. Claimant reported to him he had been involved in an altercation at a swimming hole and was slammed on a rock shelf. Claimant told Mr. Howard, "boss don't worry about it, it didn't happen at work."[1] Mr. Howard was not present when the alleged swimming hole incident occurred, but he testified Claimant admitted to him the incident did occur.[2] Mr. Howard stated Claimant was severely hurt and his condition did not improve as he continued to work. Mr. Howard placed Claimant on light duty, meaning he cautioned Claimant not to lift heavy objects, but he knew Claimant would continue to try and do his work, because Claimant was a good worker and it was difficult to limit his work effort. Mr. Howard testified:

> A He's a hell of a worker and always has been, so wasn't like you could stop him from doing much, but we kept him from trying to pick up things like elevators or anything else.
>
> Q Okay. And he understood that?

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[1] P.H. Trans (Jan. 17, 2023) at 130.

[2] *Id.* at 132.

A He knew that but he still tried.[3]

.....

Q Okay. At any point after Mr. Shannon told you about this incident at the swimming hole, did he ever work full duty?

A I don't know how to answer that, he was a good hand.

Q Uh-huh.

A If he was on light duty, he probably outworked some men around him.

Q Okay. Did he ever have official light duty, or is that just something you --

A He was limited, he was physically limited and I tried to limit him, okay, but ...[4]

Mr. Howard testified Claimant told him about hurting himself lifting the rock in the hayfield "somewhere in the middle of August, late August."[5] Mr. Howard later testified "sometime, somewhere between the 7th and–probably the middle half, he told me about this rock thing."[6] Finally, "At the end of August? I want to say it was right there in the first week of August. Okay. Around the 7th."[7]

Mr. Howard further testified he did not believe Claimant was capable of lifting a 100-pound rock given his physical condition following the alleged swimming hole incident. Mr. Howard denied he offered to pay Claimant's medical bills and he gave Claimant a $1,000 advance not to pay his medical bills, but because he was without pay. Mr. Howard acknowledged the first time the water hole incident was mentioned was when he testified at the preliminary hearing.[8]

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[3] *Id.* at 134.

[4] *Id.* at 139.

[5] *Id*. at 129.

[6] *Id*. at 134.

[7] *Id.* at 141.

[8] *Id.* at 156.

When asked about the lifting elevators incident, Mr. Howard replied, "Could have happened."[9] Further,

Q The event involving the elevators, you were also told about that; is that correct?

A Correct.

Q You didn't witness it, correct?

A Not while I was setting on the job it supposedly happened on.

Q Could have happened, maybe didn't happen, correct?

A I don't know, I wasn't standing there every hour, I trusted my men and that's why I hire them.

Q And he told you about it?

A Yes.

Q And I believe you testified on direct, quote, it could have happened, end quote?

A It could have happened.[10]

When asked if he had seen any medical records setting forth the extent of Claimant's injuries, Mr. Howard testified, "I don't know if I'd know or be able to remember that far back."[11] When asked if he gave Claimant a credit card to pay medical expenses, Mr. Howard testified, "I don't remember conversations back then, I don't think that's what our conversation was. He seems to but I don't think it was."[12] And finally, Mr. Howard was asked about a lawsuit regarding paying employees under the table, which he initially denied and later admitted. He testified,

Q My question is have you ever paid people under the table for their work?

A No, not unless it was I-9 work.

Q Were you sued in the Western District of Oklahoma in 2009 for that very thing?

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[9] *Id.* at 137.

[10] *Id*. at 150.

[11] *Id.* at 138.

[12] *Id.* at 139.

A No, ma'am.

Q You were not?

A No, I was caught up on a class action suit by corporate Buffalo. How dare you?

Q That named you and your son in your individual capacities as the defendants, do we need to pull up the case, sir?

A Please do. That was a class action lawsuit where corporate got me drug in their bad affairs, my goodness.

Q And by bad affairs, you mean --

A Buffalo Wild Wings corporate.

Q -- not reporting overtime because you paid them under the table?

A It had nothing to do with my stores whatsoever, it was a class action.

Q Let's see, civil cover sheet, Chris Ray was the plaintiff?

A You know what, I correct myself, on that, you're right.

Q Oh, okay, so now you remember?

A I remember my son's married family being mad at him and suing me in this lawsuit, and the least I could do was pay to get rid of it.

Q Okay.

A My daughter-in-law still hates about half of her family over that lawsuit, and I settled it and signed it off the way I did because of my own daughter-in-law and grand babies. To a bunch of drug users. But go ahead, anything else? I do remember the suit now.[13]

Kristoph Ryan Howard (K. Howard), is Mr. Howard's son and part owner of Respondent. He testified he was aware of two different incidents regarding how Claimant hurt his back in the summer of 2021. He was at the farm, on the south side of the shop working on a rig. Claimant arrived for work. Claimant reported to K. Howard he was hurting from moving a rock. Claimant's son starting laughing, saying "yeah, mowing the yard at our

[13] *Id.* at 157 - 158.

house." According to K. Howard, Claimant told his son to shut up, he hurt himself in the hayfield.

K. Howard testified the second incident occurred when he and Claimant were working on a burnt down rig and Claimant's back was hurting. According to K. Howard, Claimant told him not to worry, it did not happen on company time, he would be right after a couple of days and a trip to the chiropractor. Claimant shared the water hole incident with K. Howard, including he had gotten into a scuffle and had been slammed to the ground.

A preliminary hearing was held on January 17, 2023. The ALJ issued her Order on March 10, 2023. She found Claimant met his burden of proving he met with personal injury by accident while working for Respondent on July 30, 2021, lifting a rock, and August 31, 2021, while lifting elevators. The ALJ also found Claimant gave timely notice to Respondent. She stated:

> Although no one specifically witnessed Claimant lifting the rock into the back of the pickup truck and injuring his back, both Mr. Gabino and Mr. Wyatt consistently testified that they remembered seeing the rock in the back of Claimant's truck, and Mr. Gabino testified he pushed the rock out of the back of the truck for Claimant. They also both testified that Claimant told them that same day that he thought he had hurt his back when lifting the rock. More importantly, Steve Howard, Respondent's owner, testified more than once that Claimant told him sometime in the first month of August 2021 that he had an accident while lifting a rock. Mr. Howard also testified that Claimant told him that he injured himself lifting elevators at the end of August 2021 as well.[14]

The ALJ was not able to issue an order regarding prevailing factor. Citing the parties dispute on how Claimant was injured, and the conflicting medical opinions of Dr. Murati and Dr. Johnson, the ALJ ordered an independent medical evaluation with David W. Hufford, M.D., and took Claimant's preliminary hearing requests under advisement pending receipt of Dr. Hufford's report.

Claimant was evaluated by Dr. Hufford on April 4, 2023. He opined Claimant suffered two occupational lifting injuries affecting his cervical and lumbar spine, including the possibility of disc herniations. He opined the prevailing factor for Claimant's injuries to his cervical and lumbar spine were the two acute occupational incidents, stating:

> Mr. Shannon describes two acute and specific injuries in the course of his employment. He describes a specific lumbar injury on July 30, 2021 and a specific injury to the cervical spine on or about August 31, 2021. He has received limited treatment for these injuries. There appears to have been a significant attempt to

[14] ALJ Order (Mar. 10, 2023) at 14.

> muddy the water regarding the circumstances for these injuries and the extensive chronology in the order you have provided is appreciated in regard to this issue as a physician can not be a trier of fact in the context of a medical examination. For example, there appears to have been a possible injury to the lumbar spine that occurred in an altercation by a "watering hole" that Mr. Shannon states was fabricated and never occurred. There are also notes from Dr. Mettling pre-dating the occupational injuries. These primarily involve the low back andappear to have been self-limited serial visits with significant improvement in his symptomatology, no evidence in the historical record for any chronic low back pain, prior evaluation with advanced imaging or treatment with physical therapy or procedural interventions or need for ongoing treatment including frequent chiropractic visits or medication. The prevailing factor for the injuries to his cervical and lumbar spine are the 2 acute occupational incidents he has described. There is at least the suggestion of disc herniationations in the cervical and lumbar spine that would be acute alterations to the tissue resulting from the occupational incidents. The source and prevailing factor for his neck and low back pain are not the consequences of any serial occupational activities that have caused ("worn out"), aggravated or accelerated degenerative findings in the cervical and lumbar spine. He has no current evidence of right shoulder pathology that would be attributed to his occupational injuries in an acute or serial manner. He has no evidence by symptomatology of bilateral carpal tunnel syndrome (it is difficult to see where this diagnosis provided by APRN Cherie Bahm on August 11, 2021 arose) as the result of serial occupational activities.[15]

Dr. Hufford recommended additional medical treatment and assigned temporary work restrictions. He also ruled out the possibility Claimant's neck and low back pain are the result of any serial occupational activities causing an aggravation or acceleration of the degenerative findings in the cervical and lumbar spine.

A telephone status conference was held on April 24, 2023. The ALJ issued a preliminary order on June 2, 2023. This order incorporated the content of the prior March 10, 2023 Order. After listening to Respondent's arguments regarding the previous Order finding Claimant met his burden of proving he met with personal injury by accident while working for Respondent on July 30, 2021, while lifting a rock, and August 31, 2021, while lifting elevators and he gave timely notice to Respondent, the ALJ maintained the prior order of compensability.

> The Court previously analyzed the facts of Claimant's allegations regarding his injuries as well as the testimony of all of the witnesses in its March 10, 2023, Order and made findings and incorporates them herein by reference. Respondent argues that the Court improperly disregarded the testimony of Steve Howard and Kristoph Howard regarding Claimant telling them about an incident at the watering hole that occurred a few weeks prior to his work-related accident lifting the rock. The Court

[15] ALJ Order (April 24, 2023) at 1.

> will note that it did not disregard that testimony. Rather, the Court found that the testimony of Steve Howard and Kristoph Howard did not sufficiently undermine the credibility of Claimant's testimony about how and when he was injured while working for Respondent. As noted in the Court's prior Order, the Court also finds it significant that Steve Howard testified that Claimant reported both the rock lifting incident and injury as well as the elevator lifting incident and injury shortly after each incident occurred. Claimant's testimony was further bolstered by the testimony or Mr. Wyatt and Mr. Gabino.[16]

The ALJ found Claimant was entitled to authorized medical treatment and ordered Respondent to provide Claimant a list of two qualified spine surgeons, from which Claimant may select an authorized treating physician for all treatment, tests, and referrals. The ALJ further ordered payment of medical bills, unauthorized medical to Claimant's counsel, mileage and temporary total disability compensation (TTD) beginning September 7, 2021. The ALJ denied Claimant's request for reimbursement of out-of-pocket prescription costs.

Respondent argues Claimant failed to meet his burden of proving he suffered personal injury by accident arising out of and in the course of his employment. Specifically, Respondent argues Claimant lacks credibility, because there are no contemporaneous medical records corroborating his alleged injuries. Respondent argues its owners are credible witnesses and the Court should conclude Claimant's injury personal in nature. Claimant maintains the ALJ's 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.[17] The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.[18] 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.[19] Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify

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[16] ALJ Order (June 2, 2023) at 3.

[17] K.S.A. 44-501b(c) and K.S.A. 44-508(h).

[18] K.S.A. 44-555c(a).

[19] See *River v. Beef Products, Inc.,* No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

live,[20] the Board is not required to do so and may modify an award as it deems necessary.[21]

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.[22] The accident must be the prevailing factor causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[23] 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.[24]

It is not disputed Claimant injured his back and needs medical treatment. There are discrepancies in the record as to how Claimant was injured. The ALJ found the testimony of Stephen and Kristoph Howard did not undermine the credibility of Claimant's description of his two injuries and when they occurred while performing work for Respondent. Indeed, Mr. Howard testified Claimant reported both injuries shortly after they occurred. The testimony of Claimant's co-workers support his description of the events. In short, Respondent argues their two witnesses are credible and Claimant and his two witnesses are not. The ALJ disagreed and found Claimant's testimony credible. This Board Member agrees with the ALJ's analysis and conclusions Claimant met his burden of proving the accidents occurred.

The ALJ found the opinions of Dr. Hufford regarding prevailing factor to be credible and supported by the evidence, finding Claimant met his burden of proving the prevailing factor for his medical condition was the two described injuries. This Board Member agrees with this finding.

Based on the record, Claimant proved he sustained personal injury by accidents arising out of and in the course of his employment on the alleged dates, and the accidents were the prevailing factor causing his medical condition. The ALJ's Order regarding these issues is affirmed.

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

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

[22] K.S.A. 44-508(d).

[23] K.S.A. 44-508(g).

[24] K.S.A. 44-508(f)(2).

2. The Board does not have jurisdiction to review the ALJ's Order for medical treatment, TTD, payment of medical bills, reimbursement of medical mileage, out of pocket prescriptions, and unauthorized medical.

The Board's authority to consider appeals of preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma, or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether "certain defenses" apply.[25] In general, preliminary hearing orders granting or denying medical benefits, TTD, payment of medical bills, reimbursement of medical mileage, out of pocket prescriptions, and unauthorized medical are not subject to Board review. The authority to make a determination regarding these benefits rests clearly within the authority granted to the ALJ by K.S.A. 44-534a.[26] Requests for review of these issues are dismissed for lack of jurisdiction.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Ali Marchant, dated June 2, 2023, is affirmed.

IT IS SO ORDERED.

Dated this day of August 2023.

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CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Sylvia B. Penner, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Hon. Ali Marchant, Administrative Law Judge

[25] K.S.A. 44-534a(a)(2).

[26] See *Vizcarra v. LoanSmart, LLC*, No. 1,079,548, 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).