BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HILDA GAMBOA	)	
Claimant	)	
V.	)	
	)	
DUNKIN DONUTS	)	AP-00-0476-013
Respondent	)	CS-00-0467-238
AND	)	
	)	
SEQUOIA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, through Jeff Cooper, requested review of Administrative Law Judge (ALJ) Ali Marchant's preliminary hearing Order, dated June 1, 2023. Kristina Mulvany appeared for the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of: (1) the preliminary hearing transcript, held August 9, 2022; (2) the preliminary hearing transcript, held April 20, 2023; (3) all exhibits uploaded and admitted under HE-00-0068-767 and HE-00-0079-595; (4) documents filed with the Division; and (5) the parties' briefs.

ISSUE

Was the claimant's work-related accident the prevailing factor causing her low back injury and medical condition?

FINDINGS OF FACT

The claimant began working as a baker for the respondent on April 4, 2022. On April 18, 2022, she saw Pedro Murati, M.D., for an independent medical examination (IME) related to an August 31, 2021, work accident with a different employer. The claimant complained of low back, right knee and foot pain, right knee instability, limping after a long day and difficulty walking for extended periods.

Dr. Murati diagnosed the claimant with, among other things, probable lumbar radiculopathy. The doctor recommended an MRI of the lumbar spine and bilateral lower extremity NCS/EMG, including the lumbosacral paraspinals, to document radiculopathy. Depending on the results, Dr. Murati recommended potential physical therapy, anti-inflammatory medications, lumbar epidural injections, and if those did not work, radiofrequency ablation or a surgical evaluation.

On April 23, 2022, five days after seeing Dr. Murati, the claimant slipped and fell while working for the respondent, injuring her head, low back and hips. She went to Wesley emergency room where an MRI of the lumbar spine showed mild degenerative changes in the lower lumbar spine at L5-S1, but no acute fracture or dislocation.

At her attorney's request, the claimant saw Dr. Murati on June 1, 2022, for an IME. The claimant complained of, among other things, low back pain towards the center of her back and lack of sleep due to her pain. Dr. Murati noted the claimant previously saw him on March 26 and November 21, 2019, and April 18, 202[2], for low back and other injuries.

Dr. Murati diagnosed the claimant with, among other things, lumbar radiculopathy, aggravation of preexisting; bilateral SI joint dysfunction, left new, right aggravation of preexisting; and bilateral trochanteric bursitis, left new, right aggravation of preexisting. The doctor imposed temporary work restrictions and recommended treatment, including cortisone injections, physical therapy, anti-inflammatory medications and pain medication. The doctor opined the work accident caused enough permanent structural change in the claimant's low back to be the prevailing factor in the development of her condition.

Based on the claimant having preexisting low back complaints, the ALJ, in an Order dated September 21, 2022, appointed Terrence Pratt, M.D., to provide his opinion regarding whether the claimant's work accident was the prevailing factor or primary factor, in relation to any other factor, causing the claimant's injury and medical condition.

The claimant saw Dr. Pratt on October 24, 2022. The claimant complained of continuous low back discomfort which had increased since the April 2022 work accident. Dr. Pratt reviewed medical records and performed a physical examination. Dr. Pratt diagnosed the claimant with, among other things, lumbosacral syndrome with spondylosis. The doctor recommended an MRI of the lumbar spine for purposes of determining whether the work accident is the prevailing factor. The MRI was performed on November 21, 2022.

On January 25, 2023, Dr. Pratt issued an addendum report. The doctor reported the MRI showed mild multilevel lower lumbar facet hypertrophy and associated ligamentum thickening, as well as a degenerative disk with an annular bulge and a small right disk protrusion at L5-S1. Dr. Pratt recommended additional treatment, including a course of physical therapy with modalities, neuromuscular re-education, and manual therapy. The doctor noted there was preexisting symptomatic involvement and degenerative-type

changes and findings of a disk protrusion resulting in right S1 nerve root involvement. Dr. Pratt stated, "The lumbosacral involvement is a result of a combination of the preexisting involvement as well as the more recent event."

The ALJ's opinion stated:

> Taking into account Dr. Pratt's opinions as well as the fact that Claimant had low back complaints with a diagnosis of probable lumbar radiculopathy and recommendations for medical treatment only five days before her present work-related accident, the Court finds that Claimant has not met her burden to prove that her April 23, 2022, work-related accident is the prevailing factor causing her low back injury and need for medical treatment. As such, Claimant's request for medical treatment for her low back is hereby considered and denied.[1]

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues she proved the work accident is the prevailing factor in causing her low back injury and need for medical treatment. In the alternative, the claimant requests the Board remand this issue back to Dr. Pratt for further clarification on the prevailing factor issue. The respondent maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[2] The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[3] The provisions of the Workers Compensation Act are applied impartially to all parties.[4] The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation depends.[5] The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.[6]

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[1] ALJ Order (June 1, 2023) at 4.

[2] See K.S.A. 44-501b(b).

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

[4] See *id*.

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

[6] See *id*.

The Board's review of an order is de novo on the record.[7] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[8] On de novo review, the Board makes its own factual findings.[9]

K.S.A. 44-508 states, in pertinent part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (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.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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[7] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[8] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[9] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

. . .

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Proof of "prevailing factor" is not dependent on medical evidence alone.[10] Preexisting degenerative conditions can be the prevailing factor,[11] but the presence of a preexisting condition does not always preclude compensability after an accident.[12]

The claimant did not prove the accident of April 23, 2022, was the prevailing factor in causing her injury, medical condition, and resulting disability.

The accident must be the prevailing factor in causing the injury. For an injury by accident to arise out of employment, other than the required causal connection between the work and the accident, the accident must be the prevailing factor causing the injury, medical condition, and resulting disability.

The undersigned agrees with ALJ Marchant's analysis. Dr. Pratt did not conclude the accident dated April 23, 2022, was the prevailing factor causing the claimant's injury, medical condition, and resulting disability. Dr. Pratt stated, "The lumbosacral involvement is a result of a combination of the preexisting involvement as well as the more recent event." Such conclusion does not find the work accident in question was the prevailing or primary factor causing the injury, medical condition, and resulting disability. Dr. Pratt's prevailing factor opinion is presently unknown. Based on the current record, the claimant did not prove the prevailing factor requirement. The ALJ's preliminary Order is affirmed.

WHEREFORE, the undersigned Board member affirms the preliminary hearing Order, dated June 1, 2023.

IT IS SO ORDERED.

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[10] See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, at *5 (Kan. WCAB July 12, 2018).

[11] See *Shook v. Waters True Value Hardware*, No. CS-00-0368-737, 2019 WL 6695514, at *5, fn. 14 (Kan. WCAB Nov. 19, 2019).

[12] See *id.* at fn. 15.

Dated this _____ day of August, 2023.

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JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Kristina Mulvany
Hon. Ali Marchant