

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>MICHELLE JOHNSON</b>	)	
Claimant	)	
V.	)	
	)	
<b>NEK-CAP INC</b>	)	AP-00-0477-500
Respondent	)	CS-00-0474-281
AND	)	
	)	
<b>ACCIDENT FUND GENERAL INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the July 10, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) David J. Bogdan.

**APPEARANCES**

Roger Fincher appeared for Claimant. Kevin M. Johnson 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. Evidentiary Deposition of Katie Doyle, taken May 22, 2023;
2. Evidentiary Deposition of Scott Sisk, held June 15, 2023; and
3. Preliminary Hearing, held July 5, 2023, including exhibits.

**ISSUE**

Did Claimant sustain personal injury by accident out of and in the course of her employment with Respondent on June 24, 2022, including was Claimant's accident the prevailing factor causing her injury and medical condition?

**FINDINGS OF FACT**

Claimant was employed for Respondent doing light to medium maintenance and some construction work for approximately eighteen months. Her tasks included painting, framing, roofing and finishing concrete.

On June 24, 2022, Claimant and Scott Sisk, her supervisor, were in Holton to unload 16 pallets of mulch (1,000 pound bags) from the trailer of a semi-truck. The trailer was uncovered with two sides and a moving floor. Mr. Sisk was on the ground, operating a forklift, to unload the pallets. The first couple of pallets were unloaded without incident. Because it was raining, the pallets were shifting on the moving floor, causing them to jam and not move. Claimant got into the trailer to attach straps to the pallets so Mr. Sisk could free the pallets, so they could be unloaded. To attach the straps to the pallets, Claimant had to crawl on, around and over the pallets. She had to lean down to pull the straps through the holes of the pallets.

Claimant testified the job took two and one half hours to unload the trailer and the rain was pouring down at some points in time. When the trailer was unloaded, Claimant and Mr. Sisk returned to Hiawatha, approximately 30 miles. Claimant testified she was stiff, sore and hurting. She was certain Mr. Sisk was aware of her condition because she told him she was hurt and he observed her limping around. Upon arriving in Hiawatha, Mr. Sisk sent Claimant home early with pay.

Claimant testified she called Mr. Sisk the next day to tell him she was not able to walk and was having problems. She did not return to work on Monday.

Claimant sought treatment, at her own expense, from Michelle Koch, APRN, at the Kickapoo Nation Health Center on June 28, 2022. She reported back pain and was diagnosed with acute right sciatica. Claimant was given medication, restrictions and referred to physical therapy. An MRI was performed on July 24, 2022. The MRI revealed a Tarlov cyst at right S1 and a synovial herniated cyst at L4-5. No herniated discs were identified. Claimant believed her symptoms were a personal, non-work condition.

On November 16, 2022, Claimant was evaluated by Monica Blanton-Birzer, PA, at the University of Kansas Health System, St. Francis Campus Neurosurgery, under the direction of Matthew Rendel, M.D. She opined the cyst may be a red herring because her symptomatology followed an L5 nerve root pattern. She requested flexion-extension x-rays to evaluate for any dynamic instability and EMGs of the lower extremities. She noted Claimant had been through a lengthy course of conservative treatment without improvement and may be a candidate for fusion at the L4-5 level.

Claimant formally filed her claim for workers compensation benefits when she filed an E-1, Application for Benefits on March 13, 2023. The record is unclear if Claimant sought benefits under the Act informally prior to this date.

Respondent referred Claimant to Alexander S. Bailey, M.D., for evaluation on March 14, 2023. Dr. Bailey diagnosed spondylolisthesis, degenerative facet disorder, facet cyst formation, lateral recess stenosis at L4-L5, gaping of her facet joints and capsular synovitis. Dr. Baily opined Claimant's condition was a personal medical condition and not related to a work injury or work exposure surrounding the June 24, 2022 injury.

At her attorney's request, Claimant was evaluated by Daniel D. Zimmerman, M.D., on April 27, 2023. Dr. Zimmerman opined the June 24, 2022, work accident was the prevailing factor causing Claimant's chronic lumbar paraspinous myofasciitis with symptomatic lumbar disc disease at L4-L5, potentially related to Tarlov cysts. He did not believe Claimant had reached maximum medical improvement (MMI) and recommended additional treatment to include physical therapy, prescription medications, trigger point injections and potentially referral to a neurosurgeon. Dr. Zimmerman assigned work restrictions. He believed Claimant's condition had not been fully elucidated.

Claimant was off work for approximately three months following her injury. She returned to work because her FMLA leave was coming to an end. Mr. Sisk, instructed Claimant to return to work without restrictions and he would work with it. After returning to work, Claimant experienced difficulty with lifting, repetitive bending and driving. Around the end of March, 2023, Claimant was asked to consult with her physician to get specific restrictions to better manage her work tasks. Claimant was terminated around June 2, 2023.

Claimant started her own painting business in February 2023. She had family members performing the work.

Scott Sisk has been the Transportation Facilities Manager for Respondent for five and one-half years. Mr. Sisk testified Claimant complained to him she was experiencing sciatic pain approximately one year prior to June 24, 2022. He further testified Claimant did not report hurting herself on June 24 as a result of unloading the mulch; he did not see Claimant slip, but acknowledged anything is possible on a wet flatbed trailer; it took approximately one hour to unload the trailer; he sent her home on June 24 because they were soaking wet; he saw Claimant the day after June 24 and did not observe her exhibiting any difficulty performing her job or experiencing pain behavior; he saw Claimant limping approximately one and one-half weeks after June 24, and she told him she thought her sciatica was acting up; Claimant was off work for approximately three months and placed on light duty upon her return; and he believed Claimant was an honest employee.

Katie Doyle was the HR Director for Respondent until September 2022. She hired Claimant initially as a contractor and then to a full time job as a maintenance technician. Claimant did not have any prior injuries or work restrictions when Ms. Doyle hired her. She testified she had a great relationship with Claimant and they got along really well. Ms. Doyle and Claimant communicated regularly following June 24 and Claimant had multiple opportunities to report her injury being work-related, but she did not do so.

The ALJ found Claimant met her burden of proving personal injury by accident arising out of and in the course of her employment with Respondent and was entitled to additional medical treatment. He appointed Dr. Fotopolous as the authorized treating physician to provide treatment as may be appropriate, related to the injuries identified from the event of June 24, 2022. In addition, Respondent was ordered to pay up to \$500 for unauthorized medical.

Respondent appeals, arguing Claimant failed to present sufficient evidence Claimant suffered personal injury by accident on June 24, 2022 and the alleged work incident was the prevailing factor causing her injury, medical condition, and resulting disability and impairment. Claimant maintains the 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.<sup>1</sup> The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.<sup>2</sup> 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.<sup>3</sup> Although the Board frequently gives some credence to an administrative law judge’s credibility determination of witnesses who testify live,<sup>4</sup> the Board is not required to do so and may modify an award as it deems necessary.<sup>5</sup>

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<sup>1</sup> K.S.A. 44-501b(c) and K.S.A. 44-508(h).

<sup>2</sup> K.S.A. 44-555c(a).

<sup>3</sup> See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

<sup>4</sup> See *Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471 (Kan. WCAB Oct. 14, 2014).

<sup>5</sup> See *Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241 (Kan. WCAB June 22, 2011).

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> 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.<sup>7</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>8</sup>

It is not disputed Claimant is experiencing significant back and leg symptoms and needs medical treatment. It is not disputed Claimant experienced symptoms similar to this in the past. It is not disputed Claimant helped unload mulch in the rain and experienced an increase of her symptoms. It is also not disputed Claimant initially thought her symptoms were simply her sciatica flaring up again. This changed when Claimant was evaluated by Ms. Blanton-Birzer on November 16, 2022, and was informed the cyst might be a red herring, her symptomatology followed an L4-5 nerve root pattern and she might be a candidate for surgery. Unfortunately, the November 16 report does not provide a clear diagnosis or a prevailing factor opinion. Indeed, additional diagnostic studies were recommended to assist in the formation of a diagnosis.

Claimant relies on the opinions of Dr. Zimmerman to establish she met with personal injury by accident on June 24, 2022, when she helped unload mulch and this activity is the prevailing factor in causing her injury and medical condition. Dr. Zimmerman's opinions regarding causation and prevailing factor are not persuasive. His use of the word elucidated (make clear; explain) suggests he is not sure a working diagnosis has been identified. His own diagnosis is unclear, symptomatic lumbar disc disease at L4-L5 potentially related to Tarlov cysts, which are clearly not work-related. Dr. Zimmerman's wide range of treatment recommendations further suggests he is not sure what Claimant's medical condition is and how it should be treated.

This Board Member disagrees with the ALJ's analysis and conclusions Claimant met her burden of proving she sustained personal injury by accident arising out of and in the course of her employment with Respondent on June 24, 2022, and the accident was the prevailing factor causing her injury and medical condition. The ALJ's Order regarding these issues is reversed and Claimant's requests for benefits are denied.

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

<sup>7</sup> K.S.A. 44-508(g).

<sup>8</sup> K.S.A. 44-508(f)(2).

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of ALJ David J. Bogdan, dated July 10, 2023, is reversed.

**IT IS SO ORDERED.**

Dated this day of August, 2023.

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CHRIS A. CLEMENTS  
BOARD MEMBER

c: Via OSCAR

Roger Fincher, Attorney for Claimant  
Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier  
Hon. David J. Bogdan, Administrative Law Judge