

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VERNON OJEDA, JR.)	
Claimant)	
)	
V.)	
)	
HUTCHINSON SALT CO. INC.)	
Respondent)	CS-00-0258-006
)	AP-00-0454-091
AND)	
)	
AMERICAN MINING INSURANCE CO.,¹)	
TRAVELERS PROPERTY CASUALTY)	
CO. OF AMERICA,² and)	
ROCKWOOD CASUALTY INS. CO.³)	
Insurance Carriers)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier American Mining Insurance Co. (American Mining) requested review of the November 3, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Melinda G. Young, of Hutchinson, Kansas, appeared for Vernon Ojeda, Jr. Vincent A. Burnett and Brock J. Baxter, of Wichita, Kansas, appeared for respondent and Travelers Property Casualty Co. of America (Travelers). Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and American Mining (American Mining). Respondent and Rockwood Casualty Insurance Co. (Rockwood), represented by Kim R. Martens of Wichita, Kansas, did not appear.

The ALJ found Mr. Ojeda did not sustain a repetitive injury to his knee, as the prevailing factor for Mr. Ojeda's knee condition was underlying osteoarthritis. The ALJ determined, pursuant to the Board's previous Order in this case⁴ and the deposition of Dr. Terrence Pratt, Mr. Ojeda's back injury is a natural and probable consequence of the initial

¹ Insured respondent from Jan. 1, 2010, to Jan. 1, 2015.

² Insured respondent from Jan. 1, 2015, to August 1, 2016.

³ Insured respondent from August 1, 2016, to January 1, 2018.

⁴ *Ojeda v. Hutchinson Salt Co., Inc.*, 2019 WL 5865074 (Kan. WCAB Oct. 21, 2019).

knee injury occurring in November 2014. The ALJ found respondent and American Mining responsible for providing low back treatment with designated authorized treating physician Dr. Weimar.

The record on appeal is the same as considered by the ALJ and consists of the transcript of the April 4, 2018, Preliminary Hearing and the exhibits; the transcript of the June 24, 2020, Preliminary Hearing and the exhibits; and the transcript of the June 8, 2020, deposition of Terrence Pratt, M.D. and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Respondent and American Mining argue the November 2014 work accident is not the prevailing factor for any instability in Mr. Ojeda's left knee on March 30, 2017.

Respondent and Travelers argue Mr. Ojeda failed to meet his burden of proving a compensable injury to his knee on March 25, 2015. Further, Mr. Ojeda failed to meet his burden of proving he sustained an injury by repetitive trauma. Alternatively, if Mr. Ojeda did sustain an injury by repetitive trauma, his date of injury was not during Travelers' coverage period.

Mr. Ojeda argues the Board lacks jurisdiction to review this appeal pursuant to K.S.A. 44-534a(a)(2). Alternatively, Mr. Ojeda contends the ALJ's Order should be affirmed.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent and American Mining's appeal?
2. Did Mr. Ojeda meet his burden of proving a compensable knee injury occurring on March 25, 2015?
3. What is the prevailing factor causing Mr. Ojeda's back injury, need for medical treatment, and disability?
4. Did Mr. Ojeda meet his burden of proving he sustained a knee injury by repetitive trauma?

FINDINGS OF FACT

At the April 4, 2018, preliminary hearing, Mr. Ojeda claimed four dates of injury: November 13, 2014; March 25, 2015; March 30, 2017; and a repetitive injury each and every working day.

Mr. Ojeda began working for respondent on October 30, 1978, in maintenance, a labor intensive position involving heavy equipment. On November 13, 2014, Mr. Ojeda sustained an injury to his left knee while lifting a 70 pound plate. Mr. Ojeda was eventually treated by Dr. James Lairmore, resulting in surgery in January 2015. This surgery was unsuccessful in alleviating Mr. Ojeda's left knee pain, and he was subsequently provided three injections, the last of which was administered on June 25, 2015. Mr. Ojeda did not have any work restrictions after 2015 until following the March 2017 incident.

On March 25, 2015, Mr. Ojeda was ascending some steps when his left knee gave out, and he fell. He was unable to continue working that day as a result of the pain. Mr. Ojeda reported the incident to respondent. Mr. Ojeda saw Dr. Lairmore the following day and was informed he needed a knee replacement.

Mr. Ojeda's left knee again gave out on March 30, 2017, causing him to fall and injure his low back. Mr. Ojeda testified the pain in his low back was like a pinched nerve. Mr. Ojeda was referred to the company physician, where he reported left knee pain and pain in his mid to low back. By April 6, 2017, Mr. Ojeda reported continued pain in his low back, which had begun to radiate into his right thigh. Mr. Ojeda already had pain on the left side from his knee injury and body positioning for his job.

Prior to March 30, 2017, the only area Mr. Ojeda had pain was in his left knee. After March 30, 2017, he had pain in both sides of his back and down into his thighs along with the left knee pain.

Mr. Ojeda acknowledges having back pain treated with medication and injections between 2008 and 2010. Mr. Ojeda had periodic back pain from March 2015 to March 30, 2017, but it was not like what he experienced after March 30, 2017. The pain in Mr. Ojeda's low back after March 30, 2017, was like a pinched nerve and went into both lower extremities.⁵ Mr. Ojeda did not receive any treatment for his back between 2010 and 2017. Mr. Ojeda's job required him to have the ability to lift 50 pounds.

⁵ See P.H. Trans. (Apr. 4, 2018) at 34.

According to Mr. Ojeda, he has had constant left knee pain and frequent giving away of the left knee since November 2014.

Mr. Ojeda met with Dr. Pedro Murati on April 19, 2017, who attributed Mr. Ojeda's low back pain to his antalgic gait. Dr. Murati opined Mr. Ojeda sustained three accidents resulting in bilateral knee pain, low back pain, and bilateral hip pain. The report notes three dates of accident: November 13, 2014, March 25, 2015, and March 30, 2017. Dr. Murati concluded the prevailing factor in the development of Mr. Ojeda's complaints are the accidents at work.

On June 16, 2017, Mr. Ojeda met with Dr. Christopher Kain, who found Mr. Ojeda to have left knee pain, low back pain, muscle wasting and atrophy of the left lower leg, and a herniated nucleus pulposus on the right at L2-3. Dr. Kain determined Mr. Ojeda's lumbar disc herniation was a result of Mr. Ojeda's on-the-job injury. It was noted Mr. Ojeda had a history of chronic low back pain with exacerbation and significant degenerative changes at L5-S1.

Mr. Ojeda met with Dr. Chris Fevurly on two occasions, and the doctor opined Mr. Ojeda had preexisting osteoarthritis and degenerative joint disease in his left knee prior to March 2015. Mr. Ojeda has had severe and progressive low back pain at least since 2008. Dr. Fevurly opined the work events in 2015 and 2017 causing his knee to buckle were the consequence of his chronic degenerative arthritis. Further, Dr. Fevurly found the additional symptoms in Mr. Ojeda's left knee and low back after the two events were the natural and probable consequence of the underlying and preexisting chronic condition of his left knee and low back prior to March 2015.

Mr. Ojeda was evaluated by Dr. Terrence Pratt on February 13, 2018, at the request of the court. Mr. Ojeda presented with complaints of left knee and low back discomfort and right lateral thigh symptoms. Mr. Ojeda reported his left knee symptoms started in November 2014 while he was working. Mr. Ojeda's low back pain was intermittent with burning on the right. Dr. Pratt noted Mr. Ojeda reported a history of at least nine years prior to 2014 of lumbosacral involvement radiating posteriorly on the right side to the lower extremity.

Dr. Pratt reviewed Mr. Ojeda's available medical records and performed a physical examination, finding Mr. Ojeda reported a work-related event in November 2014 with the left knee, and continued to have symptoms following an arthroscopic procedure. Then in March 2015, Mr. Ojeda had an incident aggravating the left knee symptoms. In March 2017, he aggravated the left knee and low back in another work-related event.

Dr. Pratt testified Mr. Ojeda's knee gave out due to degeneration of the knee. He stated the prevailing factor for any giveaway in the left knee or potential knee replacement

would be preexisting underlying osteoarthritis, and not the November 2014, March 2015, or March 2017 work events. Dr. Pratt testified:

Q. In other words, it would be your opinion that more probably than not Mr. Ojeda's knee would be – would have been giving away or he would have a sensation of his knee giving away had he never suffered the November, 2014 event; true?

A. That's correct.⁶

Dr. Pratt found although Mr. Ojeda had prior lumbosacral involvement, a right disc abnormality at L2-3 was noted after the 2017 event and not before. Dr. Pratt recommended treatment, such as epidural injections, for the lumbar spine at L2-3. Dr. Pratt agreed all his opinions and conclusions provided in his reports remained unchanged at the time of his deposition.

Mr. Ojeda continues to work for respondent but is now a lead man/supervisor. He no longer performs heavy work and remains on the first floor of the premises.

This claim was previously before the Board. On October 21, 2019, a single Board Member determined:

This Board member finds Dr. Pratt's opinion the most credible because he evaluated Claimant at the request of the Court. It is found and concluded that Claimant suffered a new injury to his low back due to the March 30, 2017, accident.

...

Claimant has a history of his left knee going way after it was injured in 2014. The fall that caused Claimant's back injury was due to Claimant's left knee giving way. Claimant's low back injury was the natural and probable consequence that flowed from the left knee injury, specifically the left knee giving way. It is found and concluded that Claimant's back injury is the natural and probable consequence of the initial left knee injury that occurred in November 2014. Therefore, Respondent American Mining Corporation is liable for the compensation related to Claimant's back injury.⁷

⁶ Pratt Depo. at 29.

⁷ Ojeda, *supra*, at 6-7.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(d) states:

"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.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(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.

(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 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.

(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.

K.S.A. 2019 Supp. 44-534a(a) states, in part:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.

K.S.A. 2019 Supp. 44-551(l)(1) states, in part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2019 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

1. Does the Board have jurisdiction to review respondent and American Mining's appeal?

The order being appealed was the result of a preliminary hearing held pursuant to K.S.A. 44-534a and on respondent's motion to terminate medical treatment. The Board can review preliminary hearing orders in which an ALJ has exceeded his or her jurisdiction.¹⁰ Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 2015 Supp. 44-534a, which are:

1. Whether the employee suffered an accident, repetitive trauma or resulting injury,
2. Whether the injury arose out of and in the course of the employee's employment,
3. Whether notice is given, or
4. Whether certain defenses apply, shall be considered jurisdictional, and subject to review by the Board.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.¹¹

For an accidental injury to arise out of Mr. Ojeda's employment, the accident must be the prevailing factor causing the injury, medical condition, and resulting disability or impairment. The Board has jurisdiction to determine the issue of whether Mr. Ojeda's accident was the prevailing factor causing his need for medical treatment.

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ K.S.A. 2019 Supp. 44-555c(j).

¹⁰ K.S.A. 2019 Supp. 44-551(l)(2)(A).

¹¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

2. Did Mr. Ojeda meet his burden of proving a compensable knee injury occurring on March 25, 2015? What is the prevailing factor causing Mr. Ojeda's back injury, need for medical treatment, and disability?

On March 25, 2015, Mr. Ojeda's left knee gave out causing him to fall. Dr. Pratt opined the giveaway of the left knee was secondary to advanced degenerative joint disease, not a work-related event. The ALJ adopted the opinions of Dr. Pratt and found Mr. Ojeda's condition related to osteoarthritis and not compensable. The undersigned agrees.

Mr. Ojeda filed an Amended Application for Hearing alleging a single traumatic injury on March 25, 2015. The application added the new injury to the initial November 13, 2014, injury by accident. Later the application was again amended to allege repetitive trauma involving three separate incidents. In either an injury by repetitive trauma or injury by accident, Mr. Ojeda must prove a causal connection between the conditions under which the work is required to be performed and the resulting accident. The cause of the resulting accident was a non-compensable preexisting condition, not the conditions under which the work was performed.

Based on the opinions of Dr. Pratt, the undersigned finds the March 25, 2015, injury involving Mr. Ojeda's left knee giving out was caused by preexisting degenerative joint disease, not his work. The low back injury caused by the preexisting left knee condition is also not a work-related accident.

3. Did Mr. Ojeda meet his burden of proving he sustained a knee injury by repetitive trauma?

In order for Mr. Ojeda to prove injury by repetitive trauma, he must show his employment exposed him to a higher risk or hazard than he would have experienced in his daily life, that the risk was the prevailing factor in causing the repetitive trauma, and the repetitive trauma is the prevailing factor causing his medical condition. The risk for Mr. Ojeda was his degenerative knee condition, not his work environment.

Mr. Ojeda has failed to prove the prevailing factor causing his left knee condition. The undersigned finds Mr. Ojeda's left knee condition is related to preexisting degenerative joint disease, not the conditions of his employment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member the Order of Administrative Law Judge Thomas Klein dated November 3, 2020, is affirmed with regard to the denial of compensation related to the left knee injury. The order for

compensation for the low back is reversed and Mr. Ojeda's request for benefits is denied.

IT IS SO ORDERED.

Dated this _____ day of April, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Melinda G. Young, Attorney for Mr. Ojeda
Ronald J. Laskowski, Attorney for Respondent and American Mining
Vincent A. Burnett, Attorney for Respondent and Travelers
Kim R. Martens, Attorney for Respondent and Rockwood
Hon. Thomas Klein, Administrative Law Judge