

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|---------------------------------|---|----------------|
| AUDELIA TALAVERA |) | |
| Claimant |) | |
| |) | |
| V. |) | |
| |) | |
| BOB'S SUPER SAVER INC. |) | CS-00-0450-082 |
| Respondent |) | AP-00-0457-217 |
| |) | |
| AND |) | |
| |) | |
| MARKEL AMERICAN INS. CO. |) | |
| Insurance Carrier |) | |

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 29, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) David J. Bogdan. Stanley R. Ausemus of Emporia, Kansas, appeared for Audelia Talavera.¹ Ryan D. Wertz of Overland Park, Kansas, appeared for respondent.

The ALJ found Ms. Talavera met her burden of proving she was exposed to SARS-CoV-2 and contracted coronavirus disease 2019 (COVID) as a result of authorized medical treatment provided by a physical therapist as a result of her work-related injury.

The record on appeal is the same as considered by the ALJ and consists of the transcript of the March 24, 2021, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues Ms. Talavera failed to sustain her burden of proving her COVID infection arose out of and in the course of her employment. Respondent maintains any occupational disease must arise out of and in the course of employment and must be contracted while actually performing the services of the employer.

¹ Mr. Ausemus submitted a brief on behalf of Ms. Talavera on April 22, 2021. He then filed a Notice of Withdrawal and Notice of Attorney's Lien on May 6, 2021. Ms. Talavera's current counsel is Michael Helbert.

Ms. Talavera contends the ALJ's Order should be affirmed, arguing it is not her obligation to show she contracted COVID while performing services for her employer because being medically treated for a workers compensation injury is a covered event.

The issue for the Board's review is: did the ALJ err in determining Ms. Talavera's COVID infection was work-related?

FINDINGS OF FACT

Ms. Talavera sustained a compensable right shoulder injury while working for respondent. She received authorized physical therapy in October 2020 as part of her medical treatment. Ms. Talavera explained the physical therapy consisted of massages of the right upper extremity by the therapist. Both Ms. Talavera and the therapist wore masks during the sessions.

Ms. Talavera attended physical therapy on October 26, 2020. On October 29, 2020, Ms. Talavera received a call informing her the physical therapist tested positive for COVID. She also received a call from the Lyon County Health Department suggesting she should quarantine. By November 7, 2020, Ms. Talavera felt ill and went to the emergency room for COVID testing, the result of which was positive. She received treatment at the hospital before her release to the care and treatment of Dr. Tovar, her personal physician.

Dr. Tovar initially saw Ms. Talavera on November 18, 2020, for follow-up related to COVID, headaches, and dizziness. Over the next few days, Dr. Tovar suspected Ms. Talavera's dizziness was due to hypertension and changed her medication in an attempt to resolve her symptoms. He noted Ms. Talavera was formally released from quarantine on November 28, 2020, and her COVID infection had resolved by December 7, 2020. Dr. Tovar further noted Ms. Talavera's dizziness was improving and released Ms. Talavera to return to work with her preexisting work restrictions on December 14, 2020.

Ms. Talavera testified she had little contact with others prior to October 26, 2020. She initially stated she lived alone, but later changed her testimony to state she lived with her former husband. Her former husband worked outside the home. Ms. Talavera did not know whether he had been tested for COVID, and she could not say what he does during his day, aside from going to work. Ms. Talavera indicated her activities included working part-time at respondent and attending physical therapy. She also testified to pumping gasoline for her vehicle and depositing checks at the bank. Ms. Talavera stated she adhered to COVID guidelines, including wearing a mask and social distancing as needed. Ms. Talavera did not know of any coworkers or customers who had tested positive for COVID, other than the spouse of one coworker.

Ms. Talavera stated she suffers headaches and back pain due to contracting COVID. She testified she had no issues with headaches before becoming sick with the virus.

Ms. Talavera treated with Dr. Pat Do for her occupational shoulder injury. In a letter dated January 22, 2021, his partner, Dr. David Hufford, supplied the following:

You have asked me to provide my opinion regarding the likelihood that she acquired the Corona virus from the physical therapist by possible direct exposure. . . . The Corona virus has become ubiquitous in our environment. There is no precise means to tell how an individual acquired the virus. While there certainly may have been direct exposure from her physical therapist, the presumption that this was a unique exposure that led to her own positive test and any subsequent illness cannot be made in a more probable than not manner. . . . The likelihood that the actual source of her exposure can be identified is negligible. . . . It is my opinion that it can not be proven within a reasonable degree of medical probability that her exposure to Corona virus occurred from direct contact with the physical therapist with whom she was working regarding treatment for the occupational injury.²

Dr. Pedro Murati examined Ms. Talavera on February 18, 2021, at her counsel's request. Dr. Murati took a history from Ms. Talavera and reviewed available medical records, noting Ms. Talavera had a history of headaches and dizziness in 2013 and 2016. Dr. Murati performed a physical examination. In addition to discussing Ms. Talavera's right shoulder condition, he diagnosed Ms. Talavera with post COVID headaches. Dr. Murati recommended Ms. Talavera receive better chronic pain management for her headaches. He further wrote:

There is significant preexisting dizziness and headaches. If the preexisting medical documentation provided is the entirety of this examinee's medical treatment regarding her dizziness and headaches, then the lack of continuing complaints and treatment coincide with her statements that her preexisting dizziness and headaches condition was stable. . . . [I]t is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the multiple repetitive traumas at work. Her employment has exposed her to an increased risk that she would not have had if unemployed.³

² P.H. Trans., Resp. Ex. B.4 at 1.

³ P.H. Trans., Cl. Ex. A.1 at 5-6.

PRINCIPLES OF LAW

K.S.A. 2019 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. 2019 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.

"When a primary injury under the workmen's compensation act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury."⁴

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ 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.⁶

ANALYSIS AND CONCLUSION

There are no cases addressing the compensability of contracting COVID from authorized medical treatment. The undersigned views exposure to the COVID virus during the course of medical treatment as analogous to an injury resulting from malpractice. But for the medical treatment required by the work-related accident, a claimant would not be exposed to injury, disease, or infection related to the treatment. Generally, injuries

⁴ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 199, 547 P.2d 751 (1976).

⁵ 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).

⁶ K.S.A. 2019 Supp. 44-555c(j).

suffered from the effects of authorized medical treatment are compensable in Kansas.⁷ Disability resulting from medical treatment for compensable injuries is also compensable.⁸

In *Roberts v. Krupka*, a case of disability resulting from medical malpractice, the Supreme Court of Kansas stated:

We conclude the district court was too restrictive in its statutory interpretation. The on-the-job injury was the cause of plaintiff being exposed to the risk of malpractice. As we held in *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 1, 547 P.2d 751 (1976):

“When a primary injury under the workmen's compensation act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.”

Granted, *Chinn* involves an employee who had injured a knee and his resultant limping gait created a back problem. No additional negligent acts by third parties were involved. We do not believe the result in *Chinn* should be different if a negligent diagnosis had been made and the permanent back injury could have been avoided by early medical intervention, or if it had been made worse by a negligent surgical procedure. In any of these three *Chinn* scenarios, the initial job-caused injury set the causation ball rolling which resulted in the additional permanent injury.⁹

The evidence supports the ALJ's finding Ms. Talavera was exposed to COVID during physical therapy. Ms. Talavera was notified directly by the physical therapy provider about the exposure on October 29, 2020. The exposure was confirmed in a letter dated December 18, 2020, by the county health department. Ms. Talavera became symptomatic on November 4, 2020, and tested positive for the virus on November 7, 2020. There is no evidence Ms. Talavera was exposed to COVID from another source.

Based upon the timing of the sequence of events prior to Ms. Talavera's positive COVID test, the undersigned agrees with the ALJ it is more probable than not Ms. Talavera

⁷ See *Painter v. Kaw Valley Framing Components*, No. 1,046,376, 2011 WL 7012244 (Kan. WCAB Dec. 16, 2011).

⁸ See *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990); *Duncan v. Davidson Construction Co.*, 170 Kan. 520, 227 P.2d 95 (1951); and *Quinones v. MBPXL Corp.*, 10 Kan. App. 2d 284, 697 P.2d 891 (1985).

⁹ *Roberts, supra*, at 441-42.

was exposed to COVID during a physical therapy session related to treatment for her work-related injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member the Order of Administrative Law Judge David J. Bogdan dated March 29, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Michael Helbert, Attorney for Ms. Talavera
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge