

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**ANTHONY CLARK** )  
Claimant )  
V. )  
**MOVING MILITIA LLC** ) CS-00-0456-371  
Respondent ) AP-00-0457-646  
AND )  
**VANLINER INSURANCE COMPANY** )  
Insurance Carrier )  
AND )  
**KANSAS WORKERS COMPENSATION FUND** )

**ORDER**

Respondent requests review of the April 22, 2021, preliminary Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

**APPEARANCES**

Donald Taylor appeared for Claimant. Stephen Doherty appeared for Respondent and its insurance carrier. Jennifer Ouellette appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held April 21, 2021, with exhibits and the documents of record filed with the Division.

**ISSUES**

1. Did Claimant's back injury arise out of and in the course of his employment, including whether his work activities were the prevailing factor causing his injury and need for medical treatment?

2. Did Claimant provide timely notice pursuant to K.S.A. 44-520?

**FINDINGS OF FACT**

Claimant is a 24 year old employee who has worked as a helper for Respondent since 2018. Claimant helped load and unload trucks for delivering furniture, appliances, bedding, carpeting and flooring, primarily for Nebraska Furniture Mart. Claimant had no prior back complaints of pain or injuries.

In November 2020, Claimant experienced stiffness and soreness in his left hip area. Claimant was already receiving chiropractic care for his neck, so he requested care from the chiropractor for his hip and low back area. The chiropractor performed an adjustment and recommended stretches for his hip and low back. Claimant engaged in stretching exercises while at work. Claimant was able to manage his pain and did not miss any work up through January 24, 2021. During this time, Claimant's pain fluctuated between constant, manageable and nonexistent.

Claimant worked through his hip and low back pain until Sunday, January 24, 2021, when his pain became intolerable, requiring him to stop working. Claimant reported moving appliances, including a refrigerator on January 23. After moving 40-50 boxes of laminated type floor tile the morning of January 24, Claimant's pain increased. By the 1:00 p.m. delivery stop, Claimant, for the first time, experienced numbness in his hip and into his left leg. The driver called and reported Claimant's condition to Respondent. Claimant was able to finish delivering smaller items (end tables) on the truck, but the appliances were re-scheduled for delivery due to Claimant's inability to assist in unloading them.

Claimant was not scheduled to work on the following Monday and Tuesday. On Wednesday, he told Tim Ward (owner/boss) he wasn't feeling any better and did not work. Claimant was cut (no work available) on Thursday and did not work. Because his condition had still not improved, Claimant was given Friday off. Claimant's condition deteriorated to the point he sought medical treatment on Saturday. His brother took him to the KU Medical Center ER. Claimant was at the ER from 10:00 p.m., until 5:30 a.m. on Sunday. After leaving the ER, Claimant called Mr. Ward and informed him he would be unable to work due to instructions from the ER physician. Claimant testified he contacted Mr. Ward regarding the ER appointment on January 30, 2021. Following the above time line, however, Claimant's phone call to Mr. Ward, would have been on Sunday, January 31.

Claimant was initially referred by Respondent to Prem Parmar, M.D. for medical treatment. Claimant met Dr. Parmar on February 8, 2021. Claimant presented with left buttock and left leg pain. Claimant reported "problems with his left hip and buttock since about Thanksgiving." Claimant reported approximately two weeks prior to this visit, he had a sudden increase in his left buttock pain radiating down to above his left ankle. He reported numbness and tingling in his left leg and calf. Dr. Parmar ordered an MRI which was performed on February 12, 2021. It revealed a left-sided L4-5 herniation. Dr. Parmar

kept Claimant off work and recommended a consultation with a spine surgeon. He opined: “It is my impression the prevailing factor is from his work related injury.”

Based on Dr. Parmar’s recommendation, Respondent referred Claimant to Adrian Jackson, M.D., for an independent medical evaluation (IME), which occurred on February 24, 2021. Claimant reported he had experienced some lower back pain in late November to early December 2020, but nothing like he has now nor similar in that his pain is now more localized into the left leg. On January 24, 2021, this heightened after a hard day of work to a severe level and bad enough where he was seen at KU Medical Center where hip x-rays were done.

Dr. Jackson reported:

This patient presents today for an IME on his lumbar spine with MRI findings consistent with moderate to severe nerve root impingement predominately on the left at L4-5 where he has a large left asymmetric HNP which correlates well with their history and to what we are seeing on their examination, including symptoms and neurological deficits into the left lower extremity. Based on the history provided today by this patient and after review of the available medical records, it is my opinion that a work related injury as outlined above in this report is the prevailing factor with regards to their current spine clinical condition.<sup>1</sup>

Dr. Jackson recommended conservative treatment including epidural steroid injections for the lumbar spine. Should conservative treatment fail, Dr. Jackson opined surgery would be considered an option (L4-5 decompression and discectomy).

At Respondent’s request, Claimant met with Alexander Bailey, M.D., on April 8, 2021, for an IME to determine causation. Claimant reported an onset of some back pain and stiffness in approximately the Thanksgiving time frame. On January 24, 2021, he noticed a significant increase in his low back and left leg pain. Claimant related his condition to an injury on the job and job exposure issue. Claimant denied any preexisting conditions in the lumbar spine. Dr. Bailey noted “the patient is very up front and seemingly honest about his clinical time frame and history.”

Dr. Bailey examined Claimant and found low back pain with radiculopathy due to a large disk herniation at L4-L5. Addressing causation, Dr. Bailey noted “We therefore have a clinical condition in progression . . . There seems to be a general progression . . . It worsens for unknown, specific reasons . . . MRI scan show a herniated disk and timing in dating this disk herniation is nearly impossible given this unique clinical file . . . One can

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<sup>1</sup> P.H. Trans., Cl. 1 at 2 (Dr. Jackson’s February 24, 2021, report at 2).

herniate a disk for any number of reasons but it appears to be something that has been in progression prior to 01/24/21.”<sup>2</sup>

Dr. Bailey opined the Claimant’s disk herniation was acute. He saw no evidence of degenerative conditions in the lumbar spine. Dr. Bailey did not believe Claimant injured his back, in isolation, on January 24, 2021. He did, however, opine Claimant’s injury was related to his moving activities.

He opined:

With the type of work and his very young age and the findings of an acute disk herniation at L4- L5, I do believe this is related to bending and lifting events that I believe can be tracked back and traced back to his employment history recently at Nebraska Furniture Mart as subcontractor at Moving Militia. It is a diagnosis in evolution and his work exposure has contributed to this patient’s acute disk herniation, in my opinion. Therefore, prevailing factor standards have not been met for 01/24/2021 in isolation, but I do believe that given the diagnosis in evolution, the prevailing factor standards for a work injury do relate to his work environment exposure.<sup>3</sup>

The ALJ found Claimant suffered and timely reported a work-related traumatic back injury on January 24, 2021. He also found Claimant requires additional medical treatment and has been temporarily and totally disabled since the accident date. Respondent was ordered to pay for medical treatment as directed by Dr. Jackson and temporary total disability benefits from January 24, 2021, until Claimant is released to return to work without restrictions, is returned to accommodated employment, or reaches maximum medical improvement.

Respondent argues the ALJ erred in finding a date of accident of January 24, 2021, as the evidence is clear Claimant sought medical treatment for his condition two months prior to that date. Respondent also argues the evidence establishes Claimant failed to give notice of a work-related injury within 20 days of receiving medical treatment as required by statute. Finally, Respondent argues the ALJ failed to make a finding of prevailing factor in the claim. Respondent requests the Board reverse the ALJ’s Order.

Claimant argues the Order should be affirmed.

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<sup>2</sup> P.H. Trans., Resp. Ex A at 5 (Dr. Bailey’s April 8, 2021, report at 5).

<sup>3</sup> *Id.* at 6.

The Kansas Workers Compensation Fund declined to submit a brief as it was impleaded into this case for the sole purpose of possible reimbursement should the claim be found non-compensable.

### PRINCIPLES OF LAW AND ANALYSIS

#### **1. Claimant's back injury arose out of and in the course of his employment and his work activities are the prevailing factor causing his injury and need for medical treatment.**

The primary issue is whether Claimant's personal injury by accident arose out of and in the course of his employment with Respondent. 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>4</sup> The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.<sup>5</sup>

Claimant denied any prior injuries or conditions, outside activities or intervening events causing or contributing to his injury. Respondent has not challenged Claimant's version of events or raised any credibility issues. Indeed, Dr. Bailey described Claimant as "up front and seemingly honest about his clinical time frame and history."

Claimant was evaluated by three physicians selected and authorized by Respondent. Claimant consistently reported a time line of events leading up to January 24, 2021. Specifically, Claimant's timeline is as follows:

- The onset of hip and low back stiffness and soreness began around the end of November 2020;
- Fluctuating pain levels, but manageable, with no loss of work through January 24, 2021;
- Sudden and significant increase in his back pain with the added symptom of numbness and tingling down to his left leg; and,
- Debilitating pain and discomfort resulting in his off work status since January 24.

All three physicians, in some form, opined Claimant's work activities are the prevailing factor in causing Claimant's medical condition and need for treatment. Dr. Parmar and Dr. Jackson identified January 24, 2021, as the date an acute injury occurred.

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<sup>4</sup> K.S.A. 2020 Supp. 44-508(d).

<sup>5</sup> K.S.A. 2020 Supp. 44-508(g).

Dr. Bailey opined, although unidentifiable, the acute injury had to be around the Thanksgiving onset of stiffness and soreness in the hip and low back.

On January 23 and 24, 2021, Claimant was engaged in his usual job activities—lifting and carrying items into customers' homes. It is undisputed Claimant's symptoms increased suddenly and became significantly worse while performing his job duties on January 24. It is also undisputed Claimant's pain, coupled with the new symptom of numbness and tingling in his left leg, rendered him unable to complete all of his job duties that day and unable to perform any job duties from that day to the present.

Dr. Parmar and Dr. Jackson both opined the January 24, 2021, event was the prevailing factor causing Claimant's medical condition and need for treatment. Both were aware of Claimant's history of his hip and low back pain beginning around the end of November 2020. Dr. Bailey agrees Claimant's job duties are the prevailing factor. He disagrees the activities on January 24 is the date of onset. Based on the record as a whole, Claimant proved he suffered a compensable injury arising out of and in the course of his employment with Respondent. Further, the work activities of January 24, 2021, are the prevailing factor causing Claimant's medical condition and need for medical treatment.

## **2. Claimant provided timely notice pursuant to K.S.A. 44-520.**

Notice of injury by accident can be given orally or in writing.<sup>6</sup> Notice of injury by accident is considered timely if Claimant provides notice to Respondent within 20 calendar days from the date of accident.<sup>7</sup> The notice requirement shall be waived if the injured worker proves the employer had actual knowledge of the injury.<sup>8</sup>

It is undisputed Claimant's pain became intolerable requiring him to stop working on January 24, 2021. The driver called and reported Claimant's condition to Respondent. Claimant's condition deteriorated to the point he sought medical treatment at his own expense, at the KU Medical Center on January 30. Claimant called and notified Respondent on January 31 he was not returning to work pursuant to recommendations from the KU Medical Center. Claimant was authorized to see Dr. Parmar on February 8, 2021. Respondent had notice of the accident on January 24, 2021, when the driver notified Mr. Ward of Claimant's inability to continue working. The heavy deliveries were re-scheduled. Claimant further provided additional notice to Mr. Ward on January 31, 2021, following his KU Medical Center appointment. All of these events took place within

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<sup>6</sup> K.S.A. 2020 Supp. 44-520.

<sup>7</sup> K.S.A. 2020 Supp. 44-520(a)(1)(A).

<sup>8</sup> K.S.A. 2020 Supp. 44-520(b).

20 days from the accident date. Respondent received timely notice within 20 days, as required by K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**CONCLUSIONS**

Claimant met his burden of proving he sustained personal injury from an accident arising out of and in the course of his employment on January 24, 2021. The prevailing factor for his medical condition and need for medical treatment is the work activities he performed on January 24, 2021. Timely notice was given to Respondent.

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Kenneth J. Hursh, dated April 22, 2021, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2021.

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CHRIS A. CLEMENTS  
BOARD MEMBER

c: Via OSCAR

Donald Taylor, Attorney for Claimant  
Stephen Doherty, Attorney for Respondent and its Insurance Carrier  
Jennifer Ouellette, Attorney for Kansas Workers Compensation Fund  
Kenneth J. Hursh, Administrative Law Judge

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<sup>9</sup> K.S.A. 2020 Supp. 44-534a.