

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AYANTU JAWWE)	
Claimant)	
V.)	
)	AP-00-0458-584
AMAZON.COM SERVICES, INC.)	CS-00-0452-332
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Ayanttu Jawwe requests review of the June 9, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Jason Iezzi initially appeared for Ms. Jawwe. Clayton Fielder appeared for respondent and its insurance carrier (respondent). An Order granting Mr. Iezzi leave to withdraw as attorney for Ms. Jawwe was issued by the ALJ on July 28, 2021.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held May 5, 2021, with exhibits attached, the transcript of the Evidentiary Deposition of Ayanttu Jawwe taken June 1, 2021, and the documents of record filed with the Division.

Neither party filed a brief.

ISSUES

The ALJ found Ms. Jawwe failed to prove her injuries arose out of and in the course of her employment. The ALJ determined:

There were too many inconsistencies, here, to find a preponderance of credible evidence for a work related injury or injuries. For that reason, the claimant's request is denied.¹

¹ ALJ Order (June 9, 2021) at 2.

In her Application for Review, Ms. Jawwe argues the ALJ's Order should be reversed because her work was the prevailing factor in causing her right elbow injury. Ms. Jawwe did not include the ALJ's finding related to the low back in her request for review.

The issues before the Board are: did Ms. Jawwe sustain an injury to her right elbow or low back arising out of and in the course of her employment, and if so, was the work-related incident the prevailing factor in causing her injury?

FINDINGS OF FACT

Ms. Jawwe worked for respondent since 2018, scanning, loading, and packing items into boxes before loading them on shelves. Ms. Jawwe testified a 25 to 30 pound box fell on her right hand on May 1, 2019, causing injury to her right shoulder, arm, and back. Ms. Jawwe reported to Amcare pursuant to respondent's policy and was provided over-the-counter pain medication. Ms. Jawwe returned to work her regular duties the same day.

Ms. Jawwe reported to Amcare several more times before going to her primary care physician when her pain became severe. She indicated no one at Amcare advised her to see the company doctor. Ms. Jawwe stated she developed low back pain around the same time the box fell on her hand, but she was never treated at Amcare for her low back. Ms. Jawwe testified she did not have problems with her right arm or low back prior to beginning work at respondent.

Ms. Jawwe reported an injury to respondent on March 1, 2020, and was sent to Dr. Dale Garrett for evaluation the following day. Ms. Jawwe's chief complaints were right hand, elbow, and low back pain. Ms. Jawwe reported:

At work, 7/15/19, 12:00pm, I was working in Amazon. I had no problem before I was hired to Amazon, so I got back pain and elbow to right hand almost from 2018 to now.²

Ms. Jawwe told Dr. Garrett her pain began approximately 15 months prior to the visit. Dr. Garrett reviewed Ms. Jawwe's work activities and performed a physical examination, concluding Ms. Jawwe suffered pain in her right elbow and lumbar spine. Dr. Garrett determined the prevailing factor in Ms. Jawwe's condition was not her job activities, and he allowed Ms. Jawwe to return to work her regular position without restrictions. Dr. Garrett advised Ms. Jawwe to continue treatment with her personal physician.

An MRI of Ms. Jawwe's right elbow, performed on March 19, 2020, showed mild common extensor origin tendinosis without tendon tearing.

² P.H. Trans., Resp. Ex. A at 1.

Ms. Jawwe received conservative treatment from her primary care physician, Dr. McDonald. When her condition did not improve, Dr. McDonald referred her to Dr. Hedgecock at Orthopedic Health of Kansas City. Dr. Hedgecock treated Ms. Jawwe for right lateral epicondylitis. Ms. Jawwe did not improve. Dr. Hedgecock then performed a right elbow lateral debridement and repair on June 1, 2020. Ms. Jawwe underwent physical therapy postoperatively.

Ms. Jawwe was evaluated by Dr. Anne Rosenthal at her counsel's request on March 3, 2021. This examination was conducted virtually due to the coronavirus pandemic. Ms. Jawwe complained of neck, back, and right elbow pain she attributed to repetitive lifting at work. Dr. Rosenthal reviewed Ms. Jawwe's available medical records, including those from Dr. McDonald. Dr. Rosenthal recorded:

Records from Dr. McDonald at Clay-Platte Family Medicine from 3/16/19 through 11/10/20 were reviewed. She was seen for her right elbow pain on 3/16/19 and her work at a warehouse was noted. A right lateral elbow injection was done on 3/29/19. On 5/30/19 she was seen for her lumbar spine pain that has been present for 1 month that began suddenly without a clear precipitating event. She had radiation down her right leg and she denied a work injury or another injury. Then on 6/21/19 it is noted that she has neck pain and back pain related to lifting at work. Several x-rays were done of her neck and lumbar spine, all of which were normal. He noted that her lumbar spine and right elbow issues were likely work related.³

After performing a physical evaluation, Dr. Rosenthal concluded the prevailing factor causing Ms. Jawwe's neck, back, and right elbow conditions was the activities performed at work. Dr. Rosenthal noted, "[In Ms. Jawwe's] first visit for back pain, it is noted that her back pain began suddenly without a precipitating event, but I believe that the documentation was due to language barrier."⁴ Dr. Rosenthal recommended temporary restrictions and an MRI of Ms. Jawwe's right elbow, cervical spine, and lumbar spine to guide further treatment.

Ms. Jawwe continues working for respondent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2018 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

³ P.H. Trans., Cl. Ex. 2 at 4.

⁴ *Id.* at 5.

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. 2018 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. 2018 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. 2018 Supp. 44-508(g) states:

"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.

K.S.A. 2018 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.

Ms. Jawwe alleges the repetitive nature of her employment through May 1, 2019, including an incident on that date where a box fell on her right arm, caused injury to her right upper extremity and low back. Ms. Jawwe alleges she has suffered pain before and since the injury. Ms. Jawwe's description of her injury is uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.⁵

In addition to Ms. Jawwe's testimony, the medical reports also support finding an injury by repetitive trauma to the right upper extremity. The medical notes reviewed by Dr. Rosenthal show Ms. Jawwe developed right elbow pain in the months proceeding May 1, 2019. The undersigned finds Ms. Jawwe has met the burden she suffered an injury by repetitive trauma to the right upper extremity as the result of her work with respondent.

With regard to the low back, the record is insufficient to prove the low back is related to Ms. Jawwe's work activities with respondent. In Dr. Rosenthal's review of prior records, she notes Ms. Jawwe denied the low back symptoms were related to work. Ms. Jawwe did not receive treatment for low back symptoms. The undersigned finds Ms. Jawwe failed to meet the burden of proving her work activity was the prevailing factor causing her low back complaints.

Dr. Rosenthal included Ms. Jawwe's neck complaints in her prevailing factor opinion. The neck complaints were not addressed by the ALJ in his Order. Neck involvement was not mentioned in the ALJ's statement of the issues, nor was it raised by Ms. Jawwe at the preliminary hearing. The Board generally will not address issues raised for the first time on appeal.⁶ As such, this issue will not be considered.

⁵ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁶ *Miller v. General Motors Corporation*, Nos. 1,048,350, 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013); *Tackett v. ABM Industries, Inc.*, No. 1,052,155, 2012 WL 5461461 (Kan. WCAB Oct. 1, 2012).

The undersigned finds the prevailing factor causing Ms. Jawwe's right upper extremity condition is her injury by repetitive trauma. More weight is given to the prevailing factor opinion of Dr. Rosenthal. With the exception of her prevailing factor related to the low back, Dr. Rosenthal's prevailing factor opinions are consistent with Ms. Jawwe's medical history.

Dr. Garrett's prevailing factor opinion is given less weight in relation to Ms. Jawwe's right upper extremity injury. Dr. Garrett is not an orthopedic surgeon, as is Dr. Rosenthal. Dr. Garrett seemed to discount Ms. Jawwe's right upper extremity complaints, even though there was an MRI documenting extensor origin tendinosis which resulted in surgery. Dr. Garrett did not say what caused Ms. Jawwe's documented right upper extremity condition. He simply wrote Ms. Jawwe's complaints were not work-related without explanation.

DECISION

WHEREFORE, it is the finding, decision, and order of the undersigned Board Member the Order of Administrative Law Judge Kenneth J. Hursh dated June 9, 2021, is reversed and remanded for a determination of Ms. Jawwe's request for additional medical treatment as it relates to her right upper extremity condition. The Order is affirmed related to the alleged low back injury.

IT IS SO ORDERED.

Dated this ____ day of August, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

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Clayton Fielder, Attorney for Respondent and its Insurance Carrier
Hon. Kenneth J. Hursh, Administrative Law Judge