BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DELILAH L. GODFREY	)	
Claimant	)	
V.	)	
	)	
MEDICALODGES, INC.	)	AP-00-0458-745
Respondent	)	CS-00-0457-351
AND	)	
	)	
UNITED WISCONSIN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

The respondent, Medicalodges, Inc., and its insurance carrier, United Wisconsin Insurance Company, through Matthew Schaefer, request review of Administrative Law Judge Bruce Moore's preliminary hearing Order *Nunc Pro Tunc* dated June 17, 2021. Michael Snider appeared for the claimant.

RECORD AND STIPULATIONS

The record consists of the deposition transcript of Randall Hildebrand, M.D., dated May 12, 2021, with attached exhibits; the preliminary hearing transcript date June 17, 2021, with attached exhibits; the pleadings and the case file. Any stipulations are adopted.

ISSUE

Was the claimant's accident the prevailing factor for her medical condition requiring medical treatment?

FINDINGS OF FACT

The claimant worked for the respondent as a cook. On November 21, 2019, the claimant slipped and fell at work while taking the trash out, injuring her right ankle.

The claimant had prior right foot, ankle and leg problems. On May 25, 2018, she had a non-work-related fall. The claimant treated with Joshua Boone, D.P.M., who diagnosed her with a spontaneous rupture of flexor tendons in the right ankle and foot, a nondisplaced pilon fracture of the right tibia and flatfoot [pes planus] (acquired), right foot. On August 29, 2018, Dr. Boone performed a right posterior tibial tendon debridement and repair of flexor digitorum longus tendon, right lower extremity.

In a report dated November 19, 2018, Dr. Boone stated:

> -functionally she is doing well however she continues to have some weakness. I am concerned over time [her] repair may fail and she may end up with . . . flatfoot symptoms. At this point she is asymptomatic [and] functionally she is doing well. I recommend a lace-up ankle brace to wear with her tennis shoes and ideally she will be able to wear a walking boot or some type [of] high topped shoe with increased ankle support. I am concerned over time she may have a progressive flatfoot deformity that may cause symptoms. This point she is doing well and she can continue activities as tolerated . . . .[1]

Dr. Boone did not restrict the claimant's daily or work activity. Although Dr. Boone requested she follow-up with him in two months, the claimant did not return.

The claimant did not have any additional medical treatment until her November 21, 2019, accident. She went to the emergency room and was seen by Randall Hildebrand, M.D., a board-certified orthopedic surgeon who practices general orthopedics. Dr. Hildebrand stated the claimant had a "history of a posterior tibial tendon tear there before, as well as a posterior medial malleolar fracture, which had been treated surgically more than a year ago. She recovered from that and returned to work without difficulties, and now has a new injury after a fall at work."[2] X-rays performed on November 21, 2019, showed an oblique fracture of the claimant's distal tibial shaft and an apparently healed proximal fibula fracture. Dr. Hildebrand assessed the claimant with a distal tibial fracture with significant deformity. The doctor recommended urgent reduction and internal fixation, which was performed the same day. According to Dr. Hildebrand, the surgery corrected the 90 degree misalignment. Dr. Hildebrand's operative report stated:

> She had significant external rotation positioning of the lower extremity and primarily a long oblique fracture of the distal tibial shaft. There was a distal fibular fracture as well which was acute and then an old healed proximal fibular fracture, as well as a history of a posterior malleolus and medial malleolus fracture in the past as well.[3]

The claimant was discharged two days later and continued treatment with Dr. Hildebrand. On June 17, 2020, the doctor noted significant gait dysfunction, which he partially attributed to a slowly healing tibia fracture and demanding work. Dr. Hildebrand recommended physical therapy, "to address overall alignment issues which at least are

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[1] P.H. Trans., Cl. Ex. 1 at 62 and Resp. Ex. B-1 at 29.

[2] Hildebrand Depo., Ex. 2 at 1.

[3] *Id*., Ex. 2 at 3.

partly related to her fall and fracture."[4] At her last visit on February 9, 2021, Wade Babcock, PA-C, noted a significant valgus deformity with impingement and continued pain. He referred the claimant to Steven Howell, M.D., an ankle-foot specialist, for a second opinion, including surgical options. In the "Patient Health History" completed by the claimant in preparation for the second opinion, she noted prior hospitalizations for a broken right ankle in 2019 and a broken right leg in 2020.

On March 9, 2021, Dr. Howell evaluated the claimant. Dr. Howell's records indicate the claimant had posterior and medial malleous fractures predating the surgery performed on November 21, 2019. Dr. Howell's impression was the claimant had a "Tibial malunion, right ankle, with retained hardware and an anterior ankle sprain."[5] He stated:

> In November 2019, she suffered tibial shaft fracture, treated with an open reduction and internal fixation with long plate and screws. While it appears that the medial cortex was anatomically reduced, she has a severely valgus ankle that is causing severe problems with the planovalgus foot deformity. The foot itself is plantigrade subjected to increased valgus stressors due to the valgus orientation of her ankle. She is unable to work on her feet full time. There have been some questions as to whether this is work related, but certainly from what I am seeing if original tibial fracture was a work-related injury then this is absolutely work related. There is evidence of a previous fracture that happened at the proximal fibula apparently that predated her fracture in 2019. From what I see today, she would benefit by medial wedge distal tibial osteotomy to realign the ankle joint parallel to before. We may have to do a distal fibular osteotomy to allow for the ankle to be reduced into the correct position. We have to take out her plate and screws medially along her tibial shaft to do this.[6]

Dr. Hildebrand summarized Dr. Howell's commentary about the claimant having a "severely valgus ankle that is causing severe problems with the planovalgus foot deformity" as meaning a "very flat foot."[7] In an April 5, 2021 note, Dr. Hildebrand stated:

> I was asked by worker's comp to review notes regarding opinion that a flatfoot deformity was related to a tibial fracture malunion. I did review records which showed that she was initially seen by the foot ankle specialist in 2018 for a nondisplaced [pilon] fracture for which she presented about 6-8 weeks after her injury. She at that time was also noted to have a posterior tibial tendon rupture

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[4] *Id.*, Ex. 2 at 24; see also P.H. Trans., Cl. Ex. 1 at 27 and Resp. Ex. B-3 at 30.

[5] Hildebrand Depo., Ex. 4 at 1.

[6] *Id.* and P.H. Trans., Cl. Ex. 2 at 3.

[7] Hildebrand Depo. at 14.

> which was treated surgically. She had significant flat foot deformity at that point. I saw her then in December 2019 for an acute distal tibia fracture. This was [an] injury that occurred at work and after what seemed to be anatomic fixation of the fracture based on visualization and fluoroscopy, she was noted [to] have significant external rotation of the right lower extremity and a planovalgus foot. It seems clear that reviewing the records shows that she had a significant flatfoot deformity with posterior tibial dysfunction or tear more than 1 year prior to her worker's injury and in my opinion the prevailing factor for her resulted flat foot deformity and external rotation positioning is this pre-existing condition.[8]

On April 16, 2021, Dr. Howell performed realignment surgery, which involved removal of prior hardware, right tibial and fibular osteotomies, installation of new hardware, and Achilles tendon lengthening.

Dr. Hildebrand testified on May 12, 2021. The doctor testified Dr. Boone treated the claimant for a rupture to a flexor tendon, and it is possible to develop a flat foot from a ruptured flexor tendon. Dr. Hildebrand opined the claimant's flat foot did not result from her work injury. He testified:

> A. She has been documented to have a flat foot surgery one year before her work injury - - one and a half years before her work injury, and there was concern by the treating doctor at that point that she was progressing into, despite that surgery, progressing into more of a flat foot deformity.
>
> Q. Okay. So, in other words, do you believe the prevailing factor for the surgery recommended by Dr. Howell is the condition that preexisted the November 21st 2019, accident?
>
> A. Yes.[9]

Dr. Hildebrand testified Dr. Howell did not discuss the claimant's flat foot symptoms noted by Dr. Boone in 2018. Dr. Hildebrand stated the claimant, on account of her work-related fracture, had an external rotation of her right foot of about 90 degrees when he first saw her in the emergency room on November 21, 2019, to the extent her "ankle was almost essentially dangling off of her leg."[10] The doctor testified the claimant likely did not have a flat foot due to his November 2019 surgery or the possibility of improper healing thereafter. Instead, Dr. Hildebrand attributed the claimant's flat foot to her prior tendon injury which resulted in surgery in 2018.

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[8] *Id.*, Ex. 2 at 48; see also P.H. Trans., Resp. Ex. B-3 at 50.

[9] Hildebrand Depo. at 15-16.

[10] *Id*. at 22.

Dr. Hildebrand testified:

> A. There's no evidence that the fracture repair didn't hold up. So if [it] didn't hold up, yes, that can be the cause. But x-rays and clinical examinations don't suggest that. This is - - this is a soft tissue problem, in my opinion, in her case and could - - could it have been a soft tissue injury in addition to the fracture that contributed to this, yes.
>
> Q. Okay.
>
> A. But clearly it was already flat before - - getting flat before. So, the fracture, in my opinion, is not the prevailing factor for the development of the severe flat foot deformity.[11]

In his Order, the ALJ cited the above testimony and stated:

> The court finds that Dr. Howell's opinions, that the work accident is the prevailing factor causing the need for additional surgery, are more persuasive than those of Dr. Hildebrand. Dr. Hildebrand speculates as to what Dr. Howell knew or may have known about Claimant's previous medical history. He also concedes that Claimant may have suffered a soft tissue injury in the November 21, 2019 accident, in addition to her fractured bones, and that such a soft tissue injury could have contributed to the need for Dr. Howell's surgery. (citation omitted)
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> Medical expenses incurred in connection with Dr. Howell's care and treatment are to be paid as authorized medical expenses.

The respondent argues the work accident is not the prevailing factor for Dr. Howell's recommended treatment and Dr. Hildebrand is more credible because Dr. Howell knew nothing about the claimant's 2018 injury and treatment before rendering his opinion. The claimant maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.[12] A claimant must prove his or her right to an award based on the whole record under a "more probably true than not true" standard.[13]

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[11] *Id*. at 33.

[12] See 44-501b(b).

[13] See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

K.S.A. 44-508 states, in part:

(d) "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.

. . .

(f)(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.

. . .

(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.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury that occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury that arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury that arose out of a risk personal to the worker; or

(iv) accident or injury that arose either directly or indirectly from idiopathic causes.

. . .

> (g) "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.

The undersigned Board Member concludes the claimant's work accident dated November 21, 2019, is the prevailing factor in her medical condition. The prevailing factor for the claimant's medical condition is not her 2018 injury and/or Dr. Boone's concern the claimant might develop a flatfoot condition or symptoms. Dr. Howell, who is described in Dr. Hildebrand's records as an ankle and foot specialist, quite plainly links the claimant's medical condition to her accident dated November 21, 2019. Dr. Howell used the unequivocal phrase, "absolutely work related." Any concern Dr. Howell was unaware of the claimant's prior medical history, including a previous surgery, is misplaced. Dr. Howell's records mention a prior fracture and surgery, as well as containing Dr. Hildebrand's surgical record which mentioned the preexisting condition.

It is difficult for the undersigned Board Member to conclude the claimant's misalignment of her right ankle, removal of old hardware, and implantation of new hardware in connection with right tibial and fibular osteotomies was on account of a preexisting flat foot. While Dr. Hildebrand testified the claimant's medical condition is not related to the surgery he performed or any misalignment during the healing period thereafter, Dr. Howell stated the claimant's ankle still needed to be aligned. Dr. Howell performed additional surgery, including removal of the prior hardware, and installation of new hardware to realign the claimant's ankle. Dr. Howell opined the claimant's ankle was out of alignment due to the 2019 work accident. The undersigned Board Member agrees with Dr. Howell.

WHEREFORE, the Board affirms the *Nunc Pro Tunc* Order dated June 17, 2021.

IT IS SO ORDERED.

Dated this _____ day of August, 2021.

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JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Michael Snider
Matthew Schaefer
Hon. Bruce Moore