

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LANDON URBINA)	
Claimant)	
V.)	
)	AP-00-0459-013
CLEANTECH, INC.)	CS-00-0457-220
Respondent)	
AND)	
)	
KANSAS BUILDERS INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 6, 2021, preliminary hearing Order issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Brian D. Pistotnik appeared for Landon Urbina. Edward D. Heath, Jr., appeared for respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held June 8, 2021, with exhibits attached; the transcript of the Continuation of Regular Hearing¹ (Deposition of Landon Urbina) from June 9, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ appointed Dr. David Hufford to provide an opinion on treatment recommendations, prevailing factor, and appropriateness of treatment received to date. The ALJ ordered respondent to pay temporary total disability benefits at the appropriate rate from March 26, 2021, and continuing, pending the receipt of an independent medical

¹ This transcript was mislabeled, as there was no Regular Hearing.

evaluation (IME) from Dr. Hufford. The ALJ deferred the issues regarding bills and authorized treatment pending receipt of Dr. Hufford's IME.

Respondent argues Mr. Urbina failed to meet his burden of proving a compensable claim. Respondent requests the ALJ's Order be reversed.

Mr. Urbina contends the ALJ's Order should be affirmed. Mr. Urbina argues he met his burden of proving a work-related back injury, the prevailing factor of which is his work-related activities.

The issues for the Board's review are:

1. Did Mr. Urbina sustain an injury by repetitive trauma arising out of and in the course of his employment; if so, was injury by repetitive trauma the prevailing factor causing Mr. Urbina's condition and need for medical treatment?
2. Did Mr. Urbina provide timely notice to respondent?

FINDINGS OF FACT

Mr. Urbina worked for respondent for four years performing janitorial duties, including scrubbing floors, cleaning carpets, mopping, sweeping, and moving furniture. Mr. Urbina described moving machines weighing 60 to 80 pounds, used for cleaning carpets and scrubbing floors, several times per shift. Mr. Urbina worked full-time, with over 20 hours per week overtime. Mr. Urbina testified he was able to perform his full duties when he was hired, and he never had back problems prior to working for respondent.

In 2018, Mr. Urbina suffered a back injury while working for respondent. He was referred to New Medical Health Care (New Medical), where he was diagnosed with a lumbar strain. His treatment lasted less than two months before his release to full duty on February 9, 2018. Mr. Urbina testified he had a good recovery from this injury, with no further pain in his back following treatment.

Mr. Urbina began having back pain again in February 2021. Mr. Urbina attributed his pain to lifting the machines and performing his duties over long hours. Mr. Urbina's pain worsened over time. Mr. Urbina stated his coworker quit, and he had to perform his duties alone beginning in March 2021, including lifting the machines. Mr. Urbina indicated his pain was noticeably worse after working alone, and he reported his condition to respondent. On March 26, 2021, Mr. Urbina was lifting a bucket and felt needle-like pain in his low back. Mr. Urbina completed an accident report dated March 26, 2021, in which he states he reported his low back issue to a supervisor the second week of March 2021, but the supervisor did not report Mr. Urbina's injury to the office. Mr. Urbina then sent a

text to respondent's owner a week later, reporting harassment and the need for medical treatment.

Mr. Urbina was referred to Dr. Donna Bethel at New Medical on March 29, 2021. Mr. Urbina complained of back pain from a new work-related injury to his back. Mr. Urbina reported frequent back pain, with immediate worsening on March 26, 2021, after bending over and picking up something. Dr. Bethel performed a physical examination, concluding Mr. Urbina suffered a strain of his lumbar region. Dr. Bethel prescribed an NSAID and muscle relaxer and restricted Mr. Urbina to light duty with no bending or twisting. Dr. Bethel reported, "Work injury consistent [sic] with physical findings, but has recurrent back pain with previous injury."² Dr. Bethel directed Mr. Urbina to return in one week for follow up.

Mr. Urbina testified he spoke with a claims adjuster from the insurance carrier after reporting the injury on March 26, 2021. Mr. Urbina told the adjuster his "back pain is from [his] 2018 claim on [his] back and for three months it has gotten worse."³ Mr. Urbina's claim and additional medical care at New Medical were denied. Respondent failed to accommodate Mr. Urbina's restrictions.

Mr. Urbina then went to Molly Wiwi, APRN, FNP-C, for treatment. Nurse Wiwi ordered an MRI of Mr. Urbina's lumbar spine, which was performed on April 27, 2021. The MRI was read to reveal:

1. Normal alignment of the lumbar spine without acute or suspicious osseous abnormality.
2. Mild lower lumbar facet hypertrophy. There is disc degeneration with minimal disc bulging and small annular tear at L4-L5. There are no MR findings of high-grade canal, lateral recess or neural foraminal stenosis.⁴

Nurse Wiwi also referred Mr. Urbina to Dr. Rebecca Jordan of Jordan Chiropractic & Acupuncture on April 4, 2021. Mr. Urbina explained to Dr. Jordan he performed repetitive heavy lifting, bending, pushing, and pulling at work. Dr. Jordan opined:

It is my professional opinion that he developed acute low back pain, left sided sciatica, and left leg weakness from performing said duties. He is needing ongoing treatment to: decrease his pain, strengthen his core and strengthen his left leg. The

² P.H. Trans., Cl. Ex. 3 at 2.

³ Claimant Depo. at 33.

⁴ P.H. Trans., Cl. Ex. 4 at 1-2.

patient is unable to work from April 14, 2021 to present. He is not ready to return to work at this time.⁵

In a letter dated June 2, 2021, Dr. Jordan wrote:

I wanted to clarify that the prevailing factor for the need for treatment is the repetitive work duties at [respondent].⁶

Mr. Urbina has not worked since March 26, 2021. He testified he does not wish to return to work for respondent, should he be released without restrictions. However, he has not made a final decision.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 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. 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.

1. Did Mr. Urbina sustain an injury by repetitive trauma arising out of and in the course of his employment; if so, was injury by repetitive trauma the prevailing factor causing Mr. Urbina's condition and need for medical treatment?

K.S.A. 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.

⁵ P.H. Trans., Cl. Ex. 2 at 2.

⁶ *Id.* at 1.

(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.

K.S.A. 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.

Mr. Urbina’s testimony his symptoms worsened associated with increased work activities and hours, and a lifting incident on March 26, 2021, while working for respondent is uncontradicted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.⁷ The ALJ, by virtue of his Order, found Mr. Urbina credible.

Mr. Urbina’s testimony is consistent with the history given to Dr. Bethel on March 29, 2021, which resulted in additional medical treatment and work restrictions. The weight of the evidence supports a finding Mr. Urbina suffered an injury by repetitive trauma, up to and including a lifting injury on March 26, 2021.

Dr. Bethel believed the work injury to be consistent with Mr. Urbina’s physical findings made on March 29, 2021. Dr. Jordan wrote the prevailing factor for Mr. Urbina’s need for medical treatment was his work duties while working for respondent.

The undersigned finds Mr. Urbina’s injury by repetitive trauma through March 26, 2021, was the prevailing factor, in relation to any other factor, causing his low back symptoms and need for medical treatment.

⁷ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

2. Did Mr. Urbina provide timely notice to respondent?

K.S.A. 44-520 states, in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

Mr. Urbina testified he told his supervisor about his work-related back problems the second week of March 2021. He testified he completed an accident report on March 26, 2021. The accident report resulted in respondent referring Mr. Urbina to Dr. Bethel on March 29, 2021.

Mr. Urbina's injury or his injury by repetitive trauma date is March 26, 2021. The evidence of notice is uncontradicted. The undersigned finds Mr. Urbina met his burden of proving he provided notice of his injury by repetitive trauma in compliance with K.S.A. 44-520.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Thomas Klein dated July 6, 2021, is affirmed.

IT IS SO ORDERED.

LANDON URBINA

7

**AP-00-0459-013
CS-00-0457-220**

Dated this _____ day of September, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Brian D. Pistotnik, Attorney for Mr. Urbina
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge