

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JAMES VILMER** )  
Claimant )  
V. )  
**OMAHA TRACK, INC.** ) AP-00-0461-158  
Respondent ) CS-00-0447-898  
AND )  
**PREVISOR INSURANCE COMPANY** )  
Insurance Carrier )

**ORDER**

Claimant, through William Phalen, requests review of Administrative Law Judge (ALJ) Steven Roth's preliminary hearing Order dated September 8, 2021. Bruce Levine appeared for Respondent and its Insurance Carrier (Respondent).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the deposition transcript of C. Craig Satterlee, M.D., taken May 13, 2021, with exhibit; the preliminary hearing transcript, dated August 27, 2021, with exhibits; and the documents of record filed with the Division.

**ISSUE**

Was Claimant's accident the prevailing factor causing his medical condition and need for medical treatment?

**FINDINGS OF FACT**

On March 31, 2015, Claimant injured his left shoulder while working for Peerless Products. He was seen and treated conservatively by various physicians, and evaluated by J. Clinton Walker, M.D. and Edward J. Prostic, M.D. In March 2016, Dr. Prostic assigned Claimant a 10% functional impairment to his left upper extremity for weakness and crepitus in his shoulder. Claimant settled his claim in September 2016. According to Claimant, he fully recovered and was 100%.

In October 2019, Claimant began working for Respondent as a carman helper. On November 11, 2019, his left shoulder “popped” and he experienced immediate pain while lifting and carrying a brake beam, weighing between 150 and 175 pounds, with a coworker. Claimant was terminated later that day and sought medical treatment at his own expense. A CT scan dated December 13, 2019, showed acromioclavicular joint arthritis and no full thickness rotator cuff tendon tear.

At his attorney’s request, Claimant saw Pedro Murati, M.D., on January 28, 2020, for an independent medical examination (IME). The doctor took a history, reviewed medical records and performed a physical examination. He noted Claimant denied any prior left shoulder injuries, and the 2019 CT scan was within normal limits.

Dr. Murati diagnosed Claimant with left rotator cuff sprain versus tear, cervical radiculopathy expressing itself as shoulder pain, and myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals. The doctor imposed temporary work restrictions and recommended additional treatment.

Dr. Murati opined the work accident was the prevailing factor for Claimant’s condition, stating: “[Claimant] has significant clinical findings that have given him diagnoses consistent with his described accident at work. Apparently, on this examinee’s date of injury he sustained enough permanent structural change in the anatomy of his left shoulder which caused pain necessitating treatment.”<sup>1</sup>

At Respondent’s request, J. Clinton Walker, M.D., performed an IME on April 2, 2020. The doctor took a history, reviewed medical records and performed a physical examination. He noted while Claimant denied any prior left shoulder symptoms, injuries or work comp claims, he actually evaluated Claimant in 2015 for work-related left shoulder symptoms.

Dr. Walker assessed Claimant with left shoulder pain and left scapulothoracic crepitus. He stated, “I do not find any evidence that [Claimant] sustained any injury to his left shoulder or cervical spine as a result of his work at [Respondent].”<sup>2</sup>

Following a review of additional medical records provided by Claimant’s attorney, Dr. Murati authored an addendum report dated June 9, 2020. His review of the additional medical records did not change his opinions. Dr. Murati opined the medical records proved Claimant’s condition was stable and no further treatment was needed at the time of his injury.

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<sup>1</sup> Murati Report (dated Jan. 28, 2020) at 4.

<sup>2</sup> P.H. Trans., Resp. Ex. B2 at 5.

Following a review of additional medical records, Dr. Walker authored an email on July 2, 2020, stating the additional medical records “do not show any sign of a structural injury that [Claimant] could have sustained as part of his work” and “they do not change my previous opinion in any way.”<sup>3</sup>

On November 2, 2020, Claimant saw C. Craig Satterlee, M.D., a board-certified orthopedic surgeon, for a Court-ordered IME. The doctor noted the only objective finding was left shoulder acromioclavicular joint arthritic change, which was not present on the 2015 MRI, but clearly seen on the 2019 CT scan. He diagnosed Claimant with left acromioclavicular joint osteoarthritis and recommended an acromioclavicular joint cortisone injection. Dr. Satterlee opined Claimant’s left shoulder injury was an aggravation of his preexisting condition and stated the preexisting acromioclavicular joint arthritis “is the prevailing cause of his need for further medical treatment.”<sup>4</sup>

Dr. Satterlee’s deposition was taken on May 13, 2021. Direct examination by Claimant’s attorney focused on cytokines. Dr. Satterlee explained cytokines as follows:

- Q. And, Doctor, in the initial phase after an injury has occurred, does the body release inflammatory cytokines in response to the injury?
- A. It sure can. Cytokines, yes.
- Q. Cytokines. And then what are cytokines?
- A. They’re a biochemical substance that causes an inflammatory response in response to an injury. It’s part of the early phase of the healing process.
- Q. And can the release of those cytokines, can they sometimes actually make the condition worse?
- A. In certain shoulder conditions, yes.
- Q. And that traumatic event or injury that occurred on November 20<sup>th</sup> [sic], the claimant, Mr. Vilmer, has reported to you that he’s had continuous pain since that event; is that correct?
- A. Yes.
- Q. And would you describe the release of those cytokines as a physiological change in the body?

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<sup>3</sup> *Id.*, Resp. Ex. B3.

<sup>4</sup> *Id.*, Cl. Ex. A2 at 3.

- A. As a result of an injury, yeah.
- Q. And in situations where the pain is being caused by these cytokines, is the treatment necessary to relieve that pain the treatment that you've recommended here?
- A. Yes.
- Q. And, Doctor, would you agree with me that the cause of -- let me ask it this way: The prevailing factor in causing those inflammatory cytokines to be released would in fact be the lifting event that occurred on or about November 11, 2019; correct?
- A. Yeah, I think he injured his acromioclavicular joint.
- Q. And the prevailing factor for the need for treating those inflammatory cytokines would be the treatment that you've recommended; is that correct?
- A. The treatment for his condition would be the sequence of things that I mentioned at the end of the IME.
- Q. Right. So, Doctor, I know this may be splitting hairs, but, I mean, we use terms like aggravations of preexisting conditions, but in reality the injury to the joint and the painful condition that's being felt is the physiological change in his body that has occurred in the initial phase of the body's response to that injury; is that a fair statement?
- A. Well, I think as outlined in my note that he had pain from his acromioclavicular joint. He obviously had some preexisting arthritis at that joint, but this event caused that then to become painful for him or symptomatic at that point in time.
- Q. So it's not like this event caused him to have more arthritis; correct?
- A. Correct.
- Q. This traumatic event in that joint caused the release of these inflammatory cytokines that now make that joint painful; correct?
- A. I think that's a fair statement.<sup>5</sup>

Further:

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<sup>5</sup> Satterlee Depo. at 6-8.

- Q. You were asked if the release of cytokines can be related to an injury and cause inflammation. And I wrote down that you said -- well, you were asked if that could make a shoulder injury worse, and I wrote down that you said in certain conditions. Do you recall saying that?
- A. Well, I guess my interpretation was would it make the pain worse. Cytokines would cause the inflammation and cause the pain. It wouldn't make the injury worse. It would make it hurt.
- Q. Okay. It would make an existing condition hurt but it wouldn't cause the condition; would that be fair?
- A. Yeah, I think the condition would elicit the cytokines which would then hurt and cause inflammatory pain.<sup>6</sup>

Dr. Satterlee, in support of his prevailing factor opinion, stated:

- Q. Okay. In your review of the records and images, did you see any evidence of injury to the ligaments next to the bones around the AC joint?
- A. Well, he had pain with palpation, and in looking at the CAT scan they don't show the ligaments quite as well as an MRI would, but you can clearly see on the CAT scan from 2019 that he does have significant narrowing of that joint and then what's called subchondral sclerosis where the bones have been rubbing each other consistent with the arthritis. And on one view he even has a little cyst in the bone. So you can't see the ligaments, per se, it's more like a judgment of what would have happened.
- Q. And the things you just mentioned that are reflected in the 2019 CT scan, are those all chronic conditions?
- A. They would be more -- yes, they would probably be more chronic and preexisting conditions.
- Q. Okay. And just so we're clear, when you say preexisting, you mean predating November 9<sup>th</sup>, 2019; correct?
- A. Right. Because the CAT scan was about a month after the injury, and they would have taken more than a month to have formed those changes.
- Q. On page 3 of your report, at the top of page 3, you note that your records review included an MRI of the left shoulder taken April 23<sup>rd</sup>, 2020. Do you see that on page 3 of your report?

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<sup>6</sup> *Id.* at 14-15.

- A. Yes.
- Q. Okay. And is that MRI from April 23rd, 2020, something that you utilized in evaluating Mr. Vilmer and arriving at the conclusions that you've issued in your report?
- A. Yes, that and the CAT scan.
- Q. Yes. Sure. I didn't mean just the MRI, but I'm suggesting that the April 23rd, 2020, MRI is one thing that you utilized and relied on in forming your opinions?
- A. Yes.
- Q. Did the April 23rd, 2020, MRI show evidence of a ligament tear?
- A. There is a cystic change in the end of the bone and there is some bulging of the ligaments at the AC joint. I'm actually looking at it right now.
- Q. Okay. And did the April 23rd, 2020, MRI reveal evidence of any ligament tear?
- A. Not -- there could be -- there could be stretching of the ligament around the joint, but it's not completely torn.
- Q. The last answer you gave, Dr. Satterlee, is that speculation or an answer that in your opinion is to within a reasonable degree of medical certainty?
- A. Well, the ligaments would naturally be stressed at that point in time, even associated with the arthritis at the AC joint.
- Q. Okay. And if that were the case, there would be no way to tell the source of the stress?
- A. Not that far down the line from the injury.<sup>7</sup>

Notwithstanding the discussion of cytokines, Dr. Satterlee remained steadfast in his opinion regarding the prevailing factor for Claimant's injury and need for medical treatment is the preexisting acromioclavicular joint arthritis.

- Q. Okay. And so following your meeting with Mr. Vilmer, taking a history from him, performing a physical examination and then reviewing medical records

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<sup>7</sup> *Id.* at 12-14.

and images, was your diagnosis with respect to his left shoulder left acromioclavicular joint osteoarthritis?

A. Yes.

Q. That's the opinion that's listed on page 3 of your report. Is that still your opinion today at this deposition?

A. Yes.

Q. Then you also indicated that the left acromioclavicular joint arthritis that you identified is an aggravation of a preexisting condition Mr. Vilmer had before November 9<sup>th</sup>, 2019. Is that still your opinion today?

A. Yes.

Q. And then with respect to prevailing factor of the diagnosed injury that you made and the need for treatment, you wrote that the preexisting acromioclavicular joint arthritis is the prevailing factor in Mr. Vilmer's need for any further treatment of his left shoulder. Is that still your opinion today at the deposition?

A. Yes.

Q. Okay. So you issued the November 3rd, 2020, report, and from then until now your opinions have remained the same; correct?

A. Correct.<sup>8</sup>

In his Order, the ALJ stated:

Determining prevailing factor is not easy in this case. It might be easy if one could just accept Dr. Murati's findings which found early on both this sprain v. tear injury and attached prevailing factor in favor of the work injury. But as much respect as the Court has for Dr. Murati, the Court deemed a more independent review was needed; hence, Dr. Satterlee was retained.

At the risk of too much repetition, Dr. Satterlee found arthritis was predominate and put prevailing factor on the arthritis. Later, Dr. Satterlee was presented with the cytokine concept and was asked a series of extremely skillful questions. He agreed that if cytokines were deemed to be an injury all by themselves, the cytokines would be the prevailing factor. With this Court's ruling about cytokines and injuries under the Act, the only way Claimant can now win as

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<sup>8</sup> *Id.* at 18-19.

to prevailing factor with Dr. Satterlee is for Satterlee to find prevailing factor in the newly “could be”(in Satterlee’s mind) stretching of the tendons/ligaments over that of the arthritis. A search of the record does not find Dr. Satterlee making such a finding.

This is evident in the way Dr. Satterlee can be questioned at length on cytokines during direct examination and found cytokines the prevailing factor; under cross examination, he still maintained his opinion on prevailing factor being the arthritis, and this has not changed. The November 2019 work injury was the prevailing factor for the activation of cytokines; but between the cytokine activity affecting an aggravation of the arthritis and the cytokine activity affecting the stretched tendon/ligaments, according to Dr. Satterlee, the prevailing factor remains with arthritis.

The Court finds Dr. Satterlee’s opinions on the question of prevailing factor to be persuasive.

Claimant argues he has met his burden of proving the incident of November 11, 2019, is the prevailing factor in causing his injury and need for medical treatment. Claimant also argues he is entitled to treatment for his myofascial pain syndrome based on Dr. Murati’s recommendations. Respondent maintains the Order should be affirmed.

#### **PRINCIPLES OF LAW AND ANALYSIS**

**Claimant did not prove his accident was the prevailing factor causing his medical condition and need for medical treatment.**

To be compensable, an accident must be identifiable by time and place of occurrence, produce symptoms at the time of an injury and occur during a single work shift.<sup>9</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>10</sup> An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.<sup>11</sup>

The undersigned Board Member affirms the ALJ’s decision. The Court-ordered physician, Dr. Satterlee, indicated Claimant’s accident was not the prevailing factor causing Claimant’s medical condition and need for medical treatment. The prevailing factor is the

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<sup>9</sup> K.S.A. 44-508(d).

<sup>10</sup> K.S.A. 44-508(d) and K.S.A. 44-508(g).

<sup>11</sup> K.S.A. 44-501(f)(2).



preexisting acromioclavicular joint arthritis in Claimant's left shoulder. Dr. Satterlee opined Claimant experienced an aggravation of his preexisting condition. Dr. Walker had the benefit of examining Claimant in conjunction with the 2015 injury to Claimant's left shoulder and after the injury before the Board. Dr. Walker opined Claimant did not sustain any injury to his left shoulder or cervical spine as a result of his work with Respondent.

Claimant argues his injury (lifting the beam) was a traumatic event causing the release of inflammatory cytokines into his left shoulder. In addition, the cytokines are causing pain in Claimant's left shoulder which require medical treatment. Claimant's argument is rejected. Cytokines are merely a part of the pain process. Dr. Satterlee testified cytokines would make the existing condition hurt, but it would not cause the underlying condition. In short, cytokines "wouldn't make the injury worse. It would make it hurt."<sup>12</sup> Dr. Satterlee also opined the lifting incident on November 2019 did not cause more arthritis in Claimant's left shoulder, it rendered it symptomatic.

The greater weight of the credible evidence establishes Claimant's accident was not the prevailing factor in causing his medical condition and need for medical treatment.

**WHEREFORE**, the Board affirms the September 8, 2021, Order issued by the ALJ.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day November, 2021.

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CHRIS A. CLEMENTS  
BOARD MEMBER

c: (via OSCAR)  
William Phalen  
Bruce Levine  
Hon. Steven Roth

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<sup>12</sup> Satterlee Depo. at 15.