

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALEX SCHELL)
Claimant)
V.)
) AP-00-0461-191
CITY OF TOPEKA) CS-00-0444-211
Self-Insured Respondent)

ORDER

Claimant appealed the September 20, 2021, Award issued by Special Administrative Law Judge (SALJ) Duncan A. Whittier. The Board heard oral argument on January 6, 2022.

APPEARANCES

Roger D. Fincher appeared for Claimant. Samantha Benjamin-House appeared for Self-Insured Respondent. Due to a conflict, Board Member William G. Belden recused himself from this appeal. Accordingly, Mark Kolich was appointed as a Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the SALJ, consisting of the transcript of the Preliminary Hearing from October 15, 2019, with exhibits attached; transcript of Regular Hearing from October 22, 2020; Evidentiary Deposition of Daniel Zimmerman, M.D., from December 16, 2020, with exhibits attached; Joint stipulation of Medical records of Dr. Chris Fevurly, and the documents of record filed with the Division.

ISSUES

1. Did Claimant suffer an injury arising out of and in the course of his employment and Claimant's alleged accident the prevailing factor for causing the injury, need for medical treatment, and permanent disability?
2. Should temporary total disability be paid from June 27, 2019, through September 9, 2019?
3. What is the nature and extent of Claimant's disability?

4. Should Claimant's past medical bills be ordered paid as authorized medical?
5. Is Claimant entitled to future medical compensation?

FINDINGS OF FACT

The SALJ found Claimant failed to prove that he suffered a work-related injury to his right arm on June 27, 2019, but did prove he suffered temporary injuries to his groin, left shoulder, chest, ribs, and abdomen in the work accident. The SALJ determined Claimant is entitled to the payment of the authorized medical treatment he received on June 27 and June 28, 2019, at Stormont Vail for those injuries on those two dates, and to unauthorized medical expenses up to the \$500.00 maximum. The ALJ found Claimant is not entitled to either temporary total or permanent partial disability compensation or to an award for additional or future medical treatment.

This matter was before the Board on an appeal from a preliminary hearing in October 2019, at which time the Board affirmed ALJ Belden's determination that Claimant sustained abrasions and contusions to the chest and abdomen due to the work-related accident of June 27, 2019, but found Claimant did not sustain a low back injury and a right upper extremity due to his work accident with Respondent. ALJ Belden also found Claimant sustained injuries to the right upper extremity, consisting of the distal biceps tendon rupture Dr. Wilson repaired on account of an accident at home on June 29, 2019.

Claimant works for Respondent as a heavy equipment operator. On June 27, 2019, the pressure hose Claimant was operating to clean a sewer drain, malfunctioned. The malfunctioning hose struck Claimant in the left shoulder, across the chest, stomach, groin, front of his legs, and his right arm and back side. Claimant reported the accident to his employer and went to the emergency room.

The emergency room record shows Claimant reported pain in his chest, left arm, stomach, groin and thighs. Claimant was referred to the Work Care Clinic and sent home. Claimant went to the Work Care Clinic on June 28, 2019. Claimant was examined and found to have a superficial abrasion over the anterior left chest wall and bruising of the upper chest and into the left axilla. Claimant was released to return to regular duty.

On June 29, 2019, Claimant was lifting and pushing a 60-inch lawn mower deck on wheels across the shop floor of his home. Claimant heard a pop in his right arm with an immediate onset of pain and difficulty moving his right arm. The 60-inch mower weighs about 200 pounds. On the same day, Claimant posted on social media a picture of his injured right arm and stated the injury was caused when he lifted a heavy duty 60 inch mower.

Claimant did not return to work on July 1, 2019, due to his right bicep injury. Claimant applied for and received FMLA. Claimant was told by Shannon Langston, Respondent's HR Manager he could not receive FMLA for a work-related injury. Claimant told HR he was hurt at home, lifting a mower and confirmed it was not work related.

On July 3, 2019, Claimant had an MRI of the right upper extremity, which showed a distal bicep tendon tear.

On July, 9, 2019, Claimant underwent surgery to repair his torn right biceps tendon. He was released from treatment on September 9, 2019, and returned to work with no restrictions. Claimant was off work from June 27, 2019, to September 9, 2019.

Claimant continues to have some hand tingling and numbness in his right hand and soreness in his right forearm. He testified his left arm, left shoulder, chest area and back, all healed well.

The first reference connecting Claimant's right biceps injury to the June 27, 2019, work accident is Dr. Zimmerman's report of July 26, 2019. Claimant believes he told other doctors before July 26, 2019, he had developed problems in his right upper extremity prior to June 29, 2019. He does not know why there is no record of such complaints. Claimant believes the June 27 work accident is the cause of the damage to his body and the incident on June 29 aggravated those problems because he had moved mowers before with no problems. There is no record of this belief prior to July 26, 2019.

Dr. Daniel Zimmerman examined Claimant on July 26, 2019, at the request of his attorney. Claimant's complaints were pain and discomfort affecting the right elbow, lumbar spine and lumbar paraspinal musculature. Upon examination, Dr. Zimmerman opined Claimant sustained a right biceps tendon partial tear on June 27, 2019, which turned into a complete tear on June 29, 2019. Dr. Zimmerman diagnosed the biceps tendon tear and found Claimant to be temporarily and totally disabled for the performance of his work duties as a heavy equipment operator. He opined Claimant was going to require followup with Dr. Wilson regarding the right elbow since Claimant had undergone surgery on July 9, 2019. He opined Claimant has not had any treatment or diagnosis for the lumbar spine, and should have physical therapy for the management of the pain and discomfort if permitted by Dr. Wilson. He also recommended injections. Dr. Zimmerman found the prevailing factor for the right biceps tendon tear and acute left lumbar paraspinal myofasciitis to be the June 27, 2019, accident. Claimant was not at maximum medical improvement.

Dr. Zimmerman examined Claimant again, on June 19, 2020, at the request of his attorney. Claimant's chief complaint was right biceps and arm pain. Claimant reported having surgery 10 weeks prior and he reported right elbow pain with full extension. Dr. Zimmerman opined Claimant was status post surgical repair of the ruptured right biceps

tendon with range of motion restrictions at the right elbow. There was pain and discomfort in palpation about the right elbow and weakness in the right upper extremity at the elbow. He noted there was no written indication in the medical record from Stormont Vail that Claimant's right arm pain was related to the work incident on June 27, 2019, but he opined the prevailing factor was the June 27, 2019, work accident. He could not relate the torn bicep to Claimant lifting the 200 pound mower deck while at home on June 29, 2019, but more a combination of the two events. Dr. Zimmerman rated Claimant with a 7 percent permanent impairment the right upper extremity at the elbow in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition*, based on range of motion and weakness. He found Claimant to be at maximum medical improvement and did not believe Claimant was in need of any further treatment.

Dr. Chris Fevurly examined Claimant, on August 18, 2020, at Respondent's request. Claimant complained of numbness in the right flexor forearm, which improves with moving of the right hand. Claimant was not able to extend his right elbow and reported diminished pulling strength in the right elbow. Claimant reported an ache in the distal biceps anastomosis a few times a day, pain in the right elbow, flexor forearm pain when lifting in palm down fashion, and occasional swelling in the proximal forearm. Claimant reported a daily ache in his low back which occurred with prolonged standing for an hour or so. Claimant had returned to his regular job duties and his lawn mowing business by the time of this visit.

Upon examination, Dr. Fevurly opined the June 27, 2019, work accident resulted in contusions and bruising over the left anterior chest wall/shoulder and abdomen. He also noted a claim of chronic regional nonneurogenic low back pain due to this event. The June 29, 2019, non-work event resulted in an acute rupture of the right distal biceps and required surgery to repair the tendon. Dr. Fevurly noted none of the medical records from Claimant's treatment on June 27, 2019, and June 28, 2019, mentioned a right biceps injury or right arm pain. He found no evidence of injury to the lumbar area from the June 27, 2019, work event and therefore, no permanent partial impairment. His final rating for the June 27, 2019, event was 0 percent impairment. No restrictions and no future medical were required for the blunt force trauma to the left side of the torso.

PRINCIPLES OF LAW AND ANALYSIS

Claimant appeals arguing the Board should find he suffered injury arising out of and in the course of his employment, the work accident is the prevailing factor for his injuries and impairment, Claimant should be found entitled to temporary total disability from June 27, 2019, through September 9, 2019; Claimant should be found entitled to a functional impairment to the right upper extremity and past medical and future medical benefits.

Respondent argues the Board should affirm the ALJ finding that Claimant failed to sustain his burden of proving he sustained a compensable injury to his right upper extremity and therefore not entitled to the requested compensation. Respondent is not disputing there was an event on June 27, 2019, but there is a question as to whether or not the event was the prevailing factor causing the alleged injuries to the right bicep and back and the need for treatment.

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.

K.S.A. 44-508(f)(2) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a casual 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 and 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.

The preponderance of the evidence shows Claimant suffered only temporary injuries from his work-related accident of June 27, 2019, and no permanent injury or impairment. The right biceps injury was caused by Claimant moving a 200 pound mower at home two days after the accident. Claimant has failed to prove a link between the June 27, 2019, accident and his right biceps injury. Claimant, in his conversations with his employer and in social media posts, up until after July 9, 2019, stated the cause of his right biceps injury was due to moving his mower at home.

It is found and concluded Claimant did not suffer any permanent impairment as result of his June 27, 2019. Claimant has 0 percent permanent impairment.

K.S.A. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Claimant has not suffered any permanent impairment and no doctor has recommended future medical treatment, Claimant is not awarded future medical treatment. The SALJ's Award is affirmed in all particulars.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Special Administrative Law Judge Duncan A. Whittier dated September 20, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Roger D. Fincher, Attorney for Claimant
Samantha Benjamin-House, Attorney for Self-Insured Respondent
Duncan A. Whittier, Special Administrative Law Judge