BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LEE A. WEBB	)	
Claimant	)	
V.	)	AP-00-0461-424
	)	CS-00-0447-730
WAL-MART ASSOCIATES	)	
Respondent	)	AP-00-0461-425
AND	)	CS-00-0447-261
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

The claimant, a pro se litigant, requested review of Administrative Law Judge (ALJ) Pamela Fuller's Award dated September 22, 2021. Timothy Emerson appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on January 20, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of the regular hearing transcript dated May 5, 2021, the claimant's discovery deposition transcript dated February 24, 2020, and the documents of record filed with the Division.

ISSUES

The issues raised by the claimant are:

1. Did the claimant meet with personal injury by accident or repetitive trauma arising out of and in the course of his employment?

2. Did the claimant provide timely notice of the injury?

3. What was the claimant's average weekly wage?

4. Is the claimant entitled to temporary total disability benefits?

5. Is the claimant entitled to unauthorized medical treatment?

6. Is the claimant entitled to future medical treatment?

FINDINGS OF FACT

The claimant, 69 years old, graduated high school and obtained an Associate Degree in Auto Parts Management from a community college.

The claimant began working for the respondent in January of 2018. Prior to working for the respondent, he had not worked anywhere since the late 1990s and was receiving Social Security disability for either kidney or bladder issues.

The claimant alleges personal injury on September 22, 2018. He was working in the meat freezer when he felt a pain like something had dropped. The pain was in his hips and buttocks. At the time, he was unloading product and was beginning to squat down or bend over. When the pain hit him, he stood up. There were back braces available, so he put one on and walked around to loosen it up. The claimant was able to continue working. The claimant also alleges personal injury from repetitive trauma from lifting at work.

The claimant testified Brenda, his lead foreman, felt he should be working faster and reported it to the manager, Steve. The claimant described his conversation with Steve as follows:

> And when I got to the office, you know, [Steve] was saying, well, Lee, you know, when I hired you, you know, you were moving faster and you could do this and that, blah, blah. And he said, what happened to you, you know, and I told him, well, man, I - - at that time I was 65 years old, I said, man, I'm not as young as I used to be. I said, I can't keep up with them young folks like that, I said, and then besides that, my back is bothering me. He said, oh, well, I have back problems, too. He says, sometimes mine will go out and I will be off four or five weeks, you know. And, you know, well, hearing it coming from the guy that hired me, you know, I can't - - I'm not going to try to think for him what he said, you know, or whether he recorded it or not, I don't know, but he told me - - the last words when we got through - - it wasn't a long conversation, he told me, he says, well, just try to do a little bit more or be faster, something to that effect, and I went on doing my chores, continued to do this.[1]

The claimant did not remember when the conversation occurred, but believed it was after his accident. He then repeatedly testified it took place in August of 2018.[2] He said it was the only conversation he had with anyone about his back problems. The claimant complained of pain affecting his head, neck, shoulders, low back, arms, hands and lower extremities.

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[1] Claimant Discovery Depo. at 18-19.

[2] *Id.* at 20-21, 24, 37.

The claimant went to his primary care physician, Dr. Trinh, about his bladder. According to the claimant, Dr. Trinh referred him to a specialist for his back. He saw Dr. Moufarrij on one occasion, January 31, 2019, after having MRIs of his cervical and lumbar spine. The claimant returned to Dr. Trinh on February 22, 2019. According to the claimant, the doctor said she was waiting on reports from Dr. Moufarrij and attempting to set him up for physical therapy. He never returned to Dr. Trinh.

The claimant last worked for the respondent in late January or early February 2019. He testified the store he was working at closed. According to the claimant, he provided the manager with his restrictions before the store closed and was told he could not return until he was released. He testified the pain has gotten worse since leaving the respondent.

On January 10, 2020, the claimant saw Dr. Zimmerman at his then-attorney's request. According to the claimant, Dr. Zimmerman provided an impairment rating. Two attorneys represented the claimant at different times. Both attorneys withdrew representation.

At the regular hearing on May 5, 2021, the claimant, acting pro se, testified about the circumstances surrounding his accident on September 22, 2018:

> That day I was working in the meat cooler by myself unloading the pallets and filling the bins and doing normal things that I normally do. Now, the pallets when they come in they're generally -- I'm 6'3, 6'4 somewhere along like that -- the pallets were generally over my head and at the very top of the pallet there was small items that probably range from about 10 to 15 pounds maybe, but as you go down and get toward the middle it starts to get a little bit heavier. I got down to the bottom that date and just as I was going to -- to take a little box of chickens that's when the pain hit me. I had already complained after being called to the office about my work performance had already complained about my back was bothering and which it was and I was peeing a lot.
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> So that -- that morning September 22nd I felt that pain. No one was there, and I stood up and, you know, it hurt a little bit, and I went outside the door is where they kept the back braces and stuff like that and I put one on, and I messed around in there and it kind of went away so I went ahead on with work. My supervisor wasn't there that morning so when he did show up, which was about I think about the 3rd of October somewhere along like that. I mentioned to him again because he had told me in that meeting that he had had back problems too and that he sometimes would be off four, five weeks and told me to just work a little faster and try to get a little bit more done.[3]

[3] R.H. Trans. at 10-11.

The claimant also testified a doctor or medical professional told him he had degenerative disc disease and shrinking of the coccyx.

At the regular hearing, the claimant indicated he had specific evidence from physicians and a vocational expert, Paul Hardin, which he wanted considered in support of his claim. The ALJ informed the claimant he would need to take depositions to get medical evidence into the record, absent an agreement with the respondent to stipulate the reports into evidence. No agreement was made. The ALJ told the claimant she could not guide him through the process procedurally on how to take depositions, but he should contact the Ombudsman Unit at the Division of Workers Compensation. The claimant had the phone number for the unit. The claimant did not secure depositions of physicians or the vocational expert.

The ALJ found the claimant failed to provide any medical evidence to prove he sustained an injury arising out of and in the course of his employment, and failed to prove he sustained a permanent impairment. Due to these failures, the remaining issues before the Court were not addressed.

The claimant filed a document entitled "Remand" on November 2, 2021, and attached, for the first time, an OSHA log form dated 9/22/18. The respondent objected to the claimant's "Remand" on the bases of foundation, hearsay and relevance. The respondent further objected to any attachments submitted by the claimant as being without proper foundation. The respondent maintains the Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b states, in part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) 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.

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

(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.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(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.

(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 to 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.

. . .

(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.

. . .

(u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 44-519 states:

[N]o report of any examination of any employee by a health care provider, as provided for in the workers compensation act . . . shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

K.S.A. 44-523(a) states:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 44-555c(a) provides:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

K.A.R. 51-3-5a states, in part:

(a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not

> be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement.

"[P]ro se civil litigants are held to the same procedural standards as represented parties."[4] This rule has been extended to pro se workers compensation claimants.[5]

The Board's review is de novo and reviews an existing decision and agency record, but with independent findings of fact and conclusions of law.[6]

The ALJ's denial of benefits is based on the claimant not meeting his burden of proving various conditions upon which his right of compensation is dependent. The ALJ specifically noted: (1) the claimant failed to present medical evidence establishing he sustained injury arising out of and in the course of his employment; and (2) the claimant did not prove he sustained any permanent impairment of function. All other issues were found moot.

As an initial matter, medical evidence is not necessarily needed to prove the existence of an injury which arises out of and in the course of employment. An obvious example would be a worker getting a limb amputated due to a traumatic event. However, the evidence is not so plain in this case.

The claimant electronically filed various records with the Division of Workers Compensation through OSCAR (Online System for Claims Administration Research/Regulation) on June 10, 2021, including a report from Dr. Zimmerman and an assessment from vocational expert Paul Hardin. Simply filing documents through OSCAR is insufficient in terms of considering the documents as actual evidence.

K.S.A. 44-519 excludes opinions not supported by a health care provider's testimony. "The workers compensation system has been well served by requiring the opinions of experts to be based on testimony subject to cross-examination, and if this is to be changed, we believe the legislature should do so and not this court."[7] While K.S.A. 44-523(a) disfavors "technical rules of evidence," K.S.A. 44-519 is a specific legislative

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[4] *Wilson v. State*, 40 Kan. App. 2d 170, 178, 192 P.3d 1121 (2008); see also *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595, 730 P.2d 1109 (1986).

[5] See *Haney v. City of Lawrence*, No. CS-00-0097-315, 2021 WL 1270407 (Kan. WCAB Mar. 24, 2021).

[6] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[7] *Roberts v. J. C. Penney Co., Inc.*, 263 Kan. 270, 282, 949 P.2d 613 (1997); see also *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130-31, 764 P.2d 462 (1988), *rev. denied* 244 Kan. 736 (1989).

mandate that must be followed.[8] Based upon K.S.A. 44-519, *Roberts*, *Enloe* and K.A.R. 51-3-5a, Dr. Zimmerman's report and opinions are excluded from the evidence.

The claimant asserts he had back and hip pain when attempting to lift a box, or when squatting down before lifting a box, or he had back pain before and after September 22, 2018, through his last day worked, due to repetitive lifting. The respondent acknowledges the claimant is essentially arguing his case in the alternative, both as an accident and as repetitive trauma.[9] Precisely what the claimant is alleging is difficult to discern, but he testified he had back and hip pain when performing the work task of lifting boxes. This testimony is not refuted, and is assumed to be conclusive.[10] However, even if the Board were to find the claimant experienced symptoms of pain while at work from lifting boxes, or in the alternative, getting ready to lift a box, the inquiry does not end there. Such a finding alone would be insufficient for the Board to award the claimant benefits. The claimant is statutorily required to prove every condition upon which his right of workers compensation benefits depends. Many underlying conditions of proof are lacking.

As part of proving personal injury by accident or repetitive trauma arising out of and in the course of employment, a claimant must prove "personal injury or injury." The claimant did not present evidence he sustained a lesion or change to the physical structure of his body, as required by K.S.A. 44-508(f)(1). He testified to various pain complaints, which he says emanate from his spine. An onset of symptoms does not equate to a change in the physical structure of the body. A doctor would be better qualified to identify a lesion or change to the structure of the body, as well as diagnose the cause of an injury.

The claimant did not prove an accident was the prevailing factor in causing his injury, as required by K.S.A. 44-508(d), or an accident was the prevailing factor causing the injury, medical condition and resulting disability or impairment, as required by K.S.A. 44-508(f)(2)(B)(ii).

Moreover, the claimant did not prove injury by repetitive trauma demonstrated by diagnostic or clinical tests, as required by K.S.A. 44-508(e). The claimant did not prove repetitive trauma was the prevailing factor in causing injury, as required by K.S.A. 44-508(e), and did not prove repetitive trauma was the prevailing factor in causing both the medical condition and resulting disability or impairment, as required by K.S.A. 44-508(f)(2)(A)(iii).

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[8] *Id.* at 278.

[9] See Appellee's Argument Brief on Review at 7.

[10] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976) ("Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.").

No evidence was presented as to the claimant having a permanent injury or any degree of permanent impairment. An award of permanent disability benefits is contingent on proof of permanent impairment. The claimant did not properly present proof of medical or vocational expert opinions. A physician's report is not admissible as evidence (absent a stipulation), without the supporting testimony of the doctor. No physician testified.

The ALJ's decision is affirmed. The claimant did not meet his burden of proving he sustained personal injury by accident or repetitive trauma arising out of and in the course of his employment. The claimant did not prove the prevailing factor requirement. The claimant did not prove permanent impairment as a result of his employment.

The ALJ was correct in finding all other issues moot. The Board need not address notice, temporary total disability benefits, average weekly wage, unauthorized medical and future medical.

AWARD

WHEREFORE, the Board affirms the Award dated September 22, 2021, denying an award of compensation herein.

IT IS SO ORDERED.

Dated this _____ day of February, 2022.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Lee Webb
Timothy Emerson
Hon. Pamela Fuller