BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARTIN SANCHEZ
Claimant

v.

AP-00-0461-948
CITY OF DODGE CITY CS-00-0309-870
Respondent

and

CHARTER OAK FIRE INSURANCE and
KANSAS MUNICIPAL INS. TRUST
Insurance Carriers

ORDER

Claimant requested review of the October 21, 2021, Award issued by Administrative Law Judge (ALJ) Pamela J. Fuller. The Appeals Board heard oral argument on February 24, 2022.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. Dallas J. Rakestraw and Brock Baxter appeared for Respondent and Insurance Carriers.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing, held July 8, 2021; the transcript of Regular Hearing by Deposition, taken July 28, 2021; the transcript of Evidentiary Deposition of George G. Fluter, M.D., taken July 26, 2021, including Exhibits 1-2; the transcript of Evidentiary Deposition of Martin Sanchez, taken February 5, 2020, including Exhibit 2, but excluding Exhibit 1, after sustaining Respondent's objection; the narrative reports of Terrence Pratt, M.D., dated November 8, 2019, and March 13, 2020, concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Did Claimant sustain personal injury from an accident arising out of and in the course of his employment with Respondent?

2. What is the nature and extent of Claimant's disability?

3. Is Claimant entitled to an award of unauthorized and future medical?

FINDINGS OF FACT

Claimant was employed by Respondent as a patrol officer with the Dodge City Police Department. The station where Claimant worked had a gym with free weights. Respondent did not require police officers to exercise, or to use the gym in the police station. Respondent did not organize or supervise activities at the gym. Police officers were allowed to exercise at the station gym when they are off-duty, or while on-duty during their lunch hour. If a police officer exercised over the lunch hour, Respondent provided an additional fifteen minutes to allow time to change clothes. If an emergency call occurred during the lunch hour, the police officer was expected to resume working and respond to the call. Because police officers remained on call during lunch, their lunch breaks were paid.

In the summer or fall of 2015, Claimant was informed Respondent intended to require police officers to undergo physical fitness testing in 2017. Claimant understood he would be expected to lift 180-90 pounds by bench press, run a certain period of time and perform other physical exercises. Deadlifts were not part of the physical fitness test. Respondent did not provide instructions on how to pass the testing, and did not provide trainers. Respondent did not advise Claimant of the ramifications of failing the physical fitness testing. If he failed, Claimant believed it would come up in evaluations, and could result in some form of discipline. Claimant did not elaborate on the discipline he feared.

On September 7, 2015, Claimant was at the station gym exercising over his paid lunch hour. Claimant was encouraged, but not required, by Respondent to exercise for his benefit and to prepare for the physical fitness test. Claimant's supervisor did not instruct Claimant to lift weights.[1] Claimant lifted weights with a fellow police officer who happened to be one of the individuals administering the physical fitness test. Respondent did not instruct Claimant to exercise with anyone. Claimant was performing deadlifts.

While performing a deadlift, Claimant felt a sudden onset of pain in his low back. Claimant later experienced bilateral radicular symptoms. Claimant reported the incident

[1] *See* R.H. Trans., by Depo. Cl., at 7, 17-19; *see also* Sanchez Depo. at 14-15.

and his low back pain to his supervisor. Claimant completed his workout and resumed his work as a patrol officer.

Claimant's symptoms worsened over the following two weeks. Claimant received medical treatment on his own from Dr. Moffitt and Dr. Henry. Dr. Henry recommended surgery, which Claimant did not undergo. Claimant underwent epidural steroid injections. Dr. Henry released Claimant to return to work without restrictions effective May 12, 2018. Claimant continued working and occasionally experienced flare-ups of low back pain. When Claimant experienced flare-ups, he saw Dr. Moffitt for treatment and took hydrocodone.

While Claimant was receiving medical treatment, he experienced a worsening of symptoms while engaging in a training exercise on February 12, 2018. The February 12, 2018, incident is not the subject of this claim. It appears Claimant saw Dr. Trotter for conservative treatment, underwent an MRI scan, and was referred to Dr. Henry.

Claimant sustained a prior injury while working for a prior employer in 2012. Claimant characterized the injury as involving the lower leg and ankle. Dr. Fluter's report indicated Claimant pulled low back muscles. Claimant also disputed Dr. Moffitt's record of prior intermittent low back pain. Claimant testified he saw a chiropractor for low back pain in his youth.

Claimant no longer works for Respondent. Claimant currently works as an enforcement agent for the State of Kansas, and works for Ford County on a part-time basis performing maintenance. Claimant reported intermittent low back pain he rated as 1-3 out of 10 in intensity. Claimant also reported radicular symptoms running down his left leg. Standing for more than thirty to forty minutes, or sitting several hours, causes pain. Claimant is not seeing a health care provider for his condition, and occasionally takes over-the-counter pain medication for his symptoms.

Dr. Pratt performed a Court-ordered independent medical examination of Claimant on November 8, 2019. Dr. Pratt noted a history of low back pain and bilateral radiculopathy following the September 7, 2015, accident, and low back pain after the February 12, 2018, event. Dr. Pratt noted Claimant was performing a deadlift of 300 pounds on September 7, 2015. Claimant denied prior injuries, and indicated he was performing his normal job duties. Examination was notable for positive straight-leg raise on the left. Dr. Pratt reviewed the radiologist's report of the March 9, 2018, MRI stating Claimant had a protrusion at L3-4 and a herniation at L4-5. Dr. Pratt diagnosed a low back injury, with events occurring in 2015, and 2018. Dr. Pratt recommended Claimant see a specialist for further treatment. Dr. Pratt indicated he needed to review additional medical records before providing a causation opinion.

Dr. Pratt was provided the additional medical records he requested, including additional medical records concerning the prior low back injury. On March 13, 2020, Dr. Pratt issued a report stating Claimant's condition before 2015, was low back pain without radiculopathy. Dr. Pratt opined the prevailing factor causing Claimant's current medical condition and need for treatment was the September 7, 2015, accident, and the February 12, 2018, event was an aggravation.

Claimant was evaluated by Dr. Fluter at his counsel's request on January 18, 2021. Dr. Fluter reviewed Claimant's medical records. Dr. Fluter reviewed Claimant's medical history and the history of the September 7, 2015, injury and the February 12, 2018, injury. Claimant reported low back pain with numbness into the left thigh. Claimant rated his pain as 0-1 out of 10, increasing to 3-4 out of 10 at times. Examination was notable for functional strength, normal gait, symmetric reflexes and tenderness to palpation of the lumbar spine and paraspinous muscles. Dr. Fluter diagnosed low back pain, a lumbosacral strain/sprain and discopathy at L3-4 and L4-5. Based on his review of the MRI scans, Dr. Fluter thought Claimant sustained mild stenosis in 2015, and severe stenosis following the February 12, 2018, accident. Dr. Fluter thought both accidents were the prevailing factor causing his medical condition and resulting impairment. Dr. Fluter recommended future medical treatment.

With regard to functional impairment, Dr. Fluter rated Claimant's impairment at 3% of the body as a whole under the *Guides to the Evaluation of Permanent Impairment, Sixth Edition* (AMA *Guides*). Dr. Fluter also rated Claimant's functional impairment at 5% of the body as a whole under the *Guides to the Evaluation of Permanent Impairment, Fourth Edition*. After initially consulting the AMA *Guides* as a starting point, Dr. Fluter believed Claimant's true impairment was 5% of the body as a whole, because the *Guides to the Evaluation of Permanent Impairment, Fourth Edition*, produced a higher rating.

Following the regular hearing, ALJ Fuller issued the Award. ALJ Fuller found Claimant was engaged in voluntary recreational activity because exercising was encouraged, but not mandated; the physical fitness test would not take place for eighteen months; and Claimant would not have been terminated if he failed the test. ALJ Fuller concluded Claimant failed to prove he sustained a low back injury from an accident arising out of and in the course of his employment with Respondent. The issues of nature and extent and medical were not addressed. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the conclusion Claimant did not sustain personal injury from an accident arising out of and in the course of his employment with Respondent was erroneous. Claimant maintains the accident arose out of and in the course of his employment with Respondent because he was encouraged to exercise to pass physical

fitness testing mandated by Respondent, and Claimant was on a paid break when he sustained his injury. Respondent argues the denial was correct because Claimant was engaged in voluntary recreational activity when he was injured.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[2] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[3] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[4]

The primary issue is whether Claimant's personal injury by accident arose out of and in the course of his employment with Respondent. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.[5] The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[6] An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.[7] Furthermore, "arising out of and in the course of employment" shall not be construed to include accidents or injuries arising out of neutral risks with no particular employment or personal character, or out of personal risks.[8]

Here, it is undisputed Claimant sustained a sudden onset of low back pain, followed by bilateral radicular symptoms, while he was lifting weights during his paid lunch break. Claimant testified the symptoms he experienced after the event were different from before, and Dr. Pratt related Claimant's medical condition to the September 7, 2015, event. Dr. Fluter also related Claimant's mild spinal stenosis to the September 7, 2015, event. Claimant met his burden of proving the September 7, 2015, event occurred, and was the prevailing factor causing his medical condition and need for medical treatment. The issue

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[2] *See* K.S.A. 44-501b(a).

[3] *See id*.

[4] *See* K.S.A. 44-501b(c).

[5] *See* K.S.A. 44-508(d).

[6] *See* K.S.A. 44-508(d),(g).

[7] *See* K.S.A. 44-508(f)(2).

[8] *See* K.S.A. 44-508(f)(3)(A).

is whether the alleged accident and resulting injuries were the product of an employment-related risk, or the product of noncompensable voluntary recreational activity.

The Court of Appeals addressed the compensability of injuries sustained by a firefighter while playing tennis as part of his physical fitness regime. In *McIntosh v. City of Wichita*, the employee sustained injuries while playing tennis about a mile away in a public park during his discretionary time. The employee was not instructed to play tennis by the employer, although the employer had a physical fitness requirement and designated times and activities for physical fitness. The employee was on call while playing tennis, and expected to respond to emergencies.[9] The Court ruled the employee's injuries were not compensable, because playing tennis was unrelated to the employee's work as a firefighter and because he was not instructed by the employer to play tennis.[10]

The Appeals Board also addressed the compensability of injuries sustained by a firefighter while exercising. In *Habig v. City of Topeka*, the employee was lifting weights during his free time at the fire station, using equipment partially provided by the employer. The employee was subject to call for emergencies while he exercised. The employee was not required by the employer to lift weights. The employee was not aware of a physical fitness requirement, and firefighters were not penalized for not exercising.[11] Writing for the Appeals Board, a single member analyzed K.S.A. 2011 Supp. 44-508, in light of the instruction from *Bergstrom v. Spears Mfg. Co.*,[12] to apply statutes as written. The Appeals Board found the employee was not engaged in work duties when he was lifting weights, and the employer did not require the employee to lift weights.[13] The Appeals Board concluded the employee's accident and injuries did not arise out of and in the course of employment.[14]

This case is similar to *Habig*. Claimant was allowed to exercise at a gym provided by Respondent during his paid lunch break. Claimant's normal work as a patrol officer did not involve weightlifting. Respondent encouraged Claimant to exercise, but did not instruct him to do so. Respondent provided, but did not mandate, a time or a place for Claimant

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[9] *See McIntosh v. City of Wichita*, No. 90,921, 2004 WL 720217, at *1 (Kansas Court of Appeals unpublished opinion filed Apr. 2, 2004).

[10] *See id*. at *2.

[11] *See Habig v. City of Topeka*, No. 1,059,916, 2012 WL 6101122, at *1-2 (Kan. WCAB Nov. 20, 2012).

[12] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[13] *See Habig*, 2012 WL 6101122, at *6.

[14] *See id*.

to work out if he chose. Although Claimant suggests failing the physical fitness test would negatively affect his employment, Claimant did not describe how his employment would be affected. There is no evidence Respondent advised Claimant his employment would be in jeopardy if he failed the test. Deadlifts were not part of the physical fitness test.

Claimant was not engaged in work duties, or acting under Respondent's instructions, when he was lifting weights. The accident of September 7, 2015, and the resulting injuries, were the result of a personal risk assumed by Claimant unconnected to his work for Respondent. Therefore, the accident and injuries of September 7, 2015, did not arise out of and in the course of his employment with Respondent.

Because Claimant did not meet his burden of proving he sustained personal injury from an accident arising out of and in the course of his employment with Respondent on September 7, 2015, the issues of nature and extent, unauthorized medical and future medical are moot and are not addressed by the Board.

AWARD

WHEREFORE it is the finding, decision and order of the Appeals Board the Award issued by ALJ Pamela J. Fuller, dated October 21, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)
Stanley R. Ausemus
Dallas J. Rakestraw
Brock Baxter
Hon. Pamela J. Fuller

DISSENT

The undersigned respectfully dissents from the majority. The majority identified the issue as whether the alleged accident and resulting injuries were the product of an employment-related risk, or the product of noncompensable voluntary recreational activity. The majority found Claimant's injury was the result of a personal risk assumed by Claimant unconnected to his work for Respondent.

Citing the relevant law, the majority wrote:

> To be compensable, an accident must 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, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence. An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Furthermore, "arising out of and in the course of employment" shall not be construed to include accidents or injuries arising out of neutral risks with no particular employment or personal character, or out of personal risks. (Citations omitted)

The majority relies on *Habig v. City of Topeka* as precedent for affirming the ALJ decision. In *Habig*, there was no evidence of a mandate for physical testing.

In this claim, the accident was identifiable by time and place of occurrence, produced symptoms at the time of the injury and occurred during a single work shift. The lifting accident was the prevailing factor causing Claimant's injury.

Facts distinguishing this case from *Habig* include:

- Respondent required officers to undergo physical fitness testing, including the ability to lift 180-90 pounds by bench press.

- Respondent accommodated and encouraged the gym activity by providing and an additional fifteen minutes for lunch, to allow time to change clothes.

In *Thomas v. Proctor & Gamble MFG, Co.*, the Kansas Supreme Court found compensable a case in which the claimant was injured when she fell off a small truck during her unpaid lunch break, writing:

> The play in which the plaintiff was injured had become a settled custom, with the knowledge and indeed the express approval of the foreman in charge of the department, and without the objection on the part of any one, the court is of the opinion that her injury may be regarded, not only as having occurred in the course of her employment, but as having arisen out of it.[15]

In *Hizey v. MCI,*[16] the Court of Appeals found compensable a claim in which the claimant was injured when she participated in a dance contest as part of an employer sponsored incentive program. The Court of Appals found the claimant "was on duty at the time of her injury and was participating in an event that, although voluntary, was scheduled and planned by the employer. Further, just as the City in *Flower* benefitted from firefighters maintaining regular physical activity, MCI benefitted from activities which motivated and energized its sales force."[17]

In *Flower v. City of Junction City*, the Board found compensable a claim in which a firefighter was playing volleyball during a scheduled fitness period, writing:

> Based upon the preceding points, the Appeals Board finds K.S.A. 44-508(f) does not bar workers compensation benefits in this case. Claimant's injury did not occur during a recreational or social event but during a regularly scheduled time for physical fitness. Even if claimant's action of playing volleyball during the scheduled time for physical fitness was recreational, the Appeals Board nevertheless finds K.S.A. 44-508(f) does not bar workers compensation benefits because claimant's injury occurred while he was performing tasks related to his normal job duties. Claimant's daily work schedule included an entry at 1300 hours for physical fitness. Claimant, as well as half of the other firefighters on duty that day, chose to participate in an activity, in this case volleyball, on their employer's premises to achieve this physical fitness. The Chief of the fire department knew this activity went on, did not consider it horseplay and realized the importance of having physically fit firefighters. Claimant concedes that neither he nor any other firefighter was required to participate in physical fitness activities during the hour scheduled for physical fitness. The firefighters could use this hour as free time as long as they did not leave the premises. Nevertheless, the Appeals Board finds by scheduling a specific time for physical fitness, the fire department impliedly required participation in physical fitness activities and furthermore benefitted by having firefighters in the type of physical condition necessary to respond to emergency situations. The

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[15] See *Thomas v. Proctor & Gamble Mfg. Co.*, 104 Kan.432, 179 P.372 (1919) *rev. denied*, Apr. 17, 1919

[16] *See Hizey v. MCI,* 39 Kan. App. 2d 609, 616, 181 P.3d 583, (2008) *rev. denied* Sept. 24, 2008.

[17] *Id.* at 616.

> Appeals Board therefore finds claimant's injury arose out of land in the course of his employment with respondent.[18]

The Court of Appeals affirmed the Board decision:

> ... claimant's daily work schedule for 1300 hours listed "[p]hysical fitness, provided gym and work schedule allow it." Claimant was playing volleyball in an adjacent building and was still on duty, subject to call if a fire occurred. Claimant was engaged in an allowed activity while on duty when he was injured; this injury arose out of his employment. Unquestionably, there was substantial competent evidence to support the Board's finding that claimant's injury arose out of and in the course of his employment.[19]

As in *Flower*, the Claimant in this case was engaged in an encouraged and allowed activity while on duty when he was injured. Neither Claimant nor any other employee was required to participate in physical fitness activities. Claimant was on respondent's property at the time of the injury. Respondent knew employees were using the gym equipment. Respondent impliedly required participation in physical fitness activities by mandating a physical fitness requirement and benefitted by having officers in the physical condition necessary to respond to emergency situations.

The undersigned would reverse the ALJ award and remand for a determination of benefits due.

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SETH G. VALERIUS
BOARD MEMBER

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[18] *See Flower v. City of Junction City*, No. 189,684, 1998 WL 100183, at* 4 (Kan. WCAB Feb. 19, 1998).

[19] *See Flower v. City of Junction City*, No. 80,801 (Kansas Court of Appeals unpublished opinion filed Mar. 12, 1999)