

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARILYN MENELEE)	
Claimant)	
V.)	
)	AP-00-0462-005
AMAZON.COM.KSDC, LLC)	CS-00-0005-779
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the October 25, 2021, Award issued by Administrative Law Judge (ALJ) Julie A.N. Sample. The Board heard oral argument on February 24, 2022.

APPEARANCES

John O'Connor appeared for Claimant. James Biggs appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing from August 11, 2021; Evidentiary Deposition of Daniel Zimmerman, M.D., taken September 8, 2021, with exhibits attached; Evidentiary Deposition of Chris D. Fevurly, M.D., taken September 9, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Did Claimant meet with personal injury by accident on November 15, 2017, arising out of and in the course of her employment?
2. Did Claimant give proper notice?

3. Was Claimant's November 15, 2017, accident the prevailing factor in the causing the injury, medical condition, the need for medical treatment and resulting disability or impairment?

4. Is Claimant entitled to unauthorized and future medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as a forklift and cherry picker operator. A cherry picker is a vehicle like machine with a platform where you can stand and the platform goes up and down. On November 15, 2017, Claimant was struck by a turrett truck being operated by another employee. Claimant was hit from behind and she felt a jolt. She was holding on tightly to the platform with her left arm and her neck snapped back. Claimant felt immediate pain in her left arm.

Claimant reported the accident to the personal assistant of the lead worker, with Steve, another warehouse lead present. After the accident, two safety employees and a trainer also discussed the incident with Claimant. On the day of the accident, a security video of the accident was viewed by the senior office manager, Eric, and Scott, who licenses the machines. Claimant filled out two written statements for Respondent.

When Claimant reported the accident, she reported pain in her neck, left shoulder, left arm and she had a headache. Claimant felt she could continue to work despite her pain, so she finished the workday. Claimant continued to work her regular job duties without any absences from work. Claimant continued to have pain in her neck, left arm, and shoulder and to have headaches.

Claimant did not seek any medical treatment until February 14, 2018, when she went to the emergency room with shortness of breath, and it was discovered the heart valve she had put in 20 years ago needed to be replaced. Claimant had heart surgery on February 19, 2018, to replace an aortic valve.

Claimant testified she told her cardiologist, Dr. Hector Rodriguez, about her shoulder, neck and arm pain. Claimant told him she had been in an accident.

Claimant met with Dr. Frank P. Holladay on July 11, 2018, due to a referral from her heart doctor, Dr. Rodriguez, and presented with neck, arm, lower back, and left shoulder pain extending into her hands and fingers. Claimant wrote on her patient history form the pain has been present since her open heart surgery on February 19, 2018. Dr. Holladay diagnosed radiculopathy of the cervical region and spinal stenosis of the cervical region. He recommended an MRI and/or cervical myelogram. On October 14, 2019, Dr. Holladay performed an anterior cervical microdiscectomy and fusion at the C5-C6 level surgery for Claimant.

Claimant was referred to Dr. Lowry Jones by Dr. Holladay. On April 15, 2019, Claimant had arthroscopic left shoulder surgery, performed by Dr. Jones, which consisted of a debridement of the labrum, a biceps tenotomy, debridements of the biceps stump and rotator cuff, an acromioplasty and distal clavicle excision.

On March 6, 2020, Claimant had left cubital release and carpal tunnel release surgeries.

Claimant is on medical leave from Amazon for her cardiac condition. Claimant denies any prior neck, left shoulder or left arm problems. Claimant continues to have problems with her neck. She has pain and tightness, which produce headaches. She continues to have pain in her left arm, but was told to give it more time to heal from the carpal tunnel surgery. She also continues to have limitations in her left shoulder.

The first time Claimant talked with Respondent's HR department about her injuries and treatment for her left shoulder and neck was eight months after accident, June 2018. This request was made when Claimant's employer contacted her. No further request was made to Respondent to pay for medical treatment of her neck or left shoulder.

Dr. Chris Fevurly examined Claimant on August 3, 2020, at Respondent's request. Claimant complained of occasional left shoulder discomfort, cramping in her left wrist with attempted lifting of objects with her left hand, occasional weakness in her left hand and headaches. She denied neck pain.

Dr. Fevurly opined Claimant has left shoulder impingement and rotator cuff tendinopathy with proximal biceps tendonitis; cervical disc disease and S/P 2 level artificial disc replacement surgery; left ulnar neuritis and left carpal tunnel syndrome; open heart surgery with redo bovine valve replacement; and left knee arthroscopy on June 10, 2020, for partial meniscectomy.

Dr. Fevurly opined the prevailing factor for the left shoulder condition, the cervical spine condition, the left ulnar neuritis, the left carpal tunnel syndrome and the left knee condition could not be the November 15, 2017, work event. He opined these conditions were related to Claimant's age and overall health. Dr. Fevurly noted Claimant continued to work full duty for 10 weeks after the work event and the mechanism of injury would not be expected to have resulted in structural injury to any of the body parts requiring surgical intervention. He found the work event may have caused a minor sprain or strain of the cervical spine and left shoulder, but did not result in structural change. Dr. Fevurly found Claimant would need surgery for these body parts regardless of the event on November 15, 2017. He noted it was 10 months after the work event before Claimant had any treatment for the shoulder, neck and upper extremities.

Dr. Fevurly opined Claimant did not have any permanent impairment to any body part due to the November 15, 2017, work event. He recommended no restrictions and no future medical treatment.

Dr. Daniel Zimmerman examined Claimant on April 30, 2021, at her attorney's request. Claimant reported pain and discomfort affecting the cervical spine and left shoulder, and pain in both hands. Dr. Zimmerman noted this pain began after an accident at work on November 15, 2017.

Dr. Zimmerman examined Claimant and found she sustained injuries affecting the cervical spine, left shoulder, and developed entrapment neuropathies affecting the left upper extremity at the left elbow and left wrist due to her work accident on November 15, 2017. Dr. Zimmerman noted there was a delay in the treatment for these areas in relation to the date of the accident. Dr. Zimmerman opined the November 15, 2017, accident was the prevailing factor for Claimant's injuries to her cervical spine, left shoulder and left upper extremity, need for medical treatment and resulting disability or impairment.

Dr. Zimmerman provided a combined impairment rating of 20 percent to the body as a whole under the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition*: 11% impairment to the whole body for the cervical spine due to surgery at C5-6; 12% impairment to the left upper extremity at the left shoulder for rotator cuff tear with a distal clavicle excision; 6% impairment to the left upper extremity at the wrist for carpal tunnel syndrome; 2% impairment to the left upper extremity at the elbow for cubital tunnel syndrome; the left upper extremity impairments were combined for a 19% impairment or 11% impairment to the body as a whole.

Using the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*, Dr. Zimmerman found a 31% impairment to the body as a whole. He found a 15% impairment to the body as a whole for the cervical spine; 15% impairment to the left upper extremity at the left shoulder; 10% impairment to the left upper extremity at the elbow for cubital tunnel syndrome; 10% impairment to the left upper extremity at the wrist for carpal tunnel syndrome. Combining the left upper extremity impairment for a 32% impairment or 19% impairment to the body as a whole.

Dr. Zimmerman did a *Johnson*¹ analysis and found the 31 percent impairment to the body as whole more accurately and comprehensively represents Claimant's impairment. Dr. Zimmerman opined he used competent medical evidence, his training, background, and experience to issue this rating.

¹ *Johnson v. U.S. Food Service*, 312 Kan. 597, 478 P.3d 776 (2021).

Dr. Zimmerman found Claimant to be at maximum medical improvement. He recommended future medical treatment.

The ALJ found Claimant sustained personal injury by accident arising out of and in the course of Claimant's employment on November 15, 2017. The ALJ found proper and timely notice of injury. The ALJ found the accident to be the prevailing factor in Claimant's neck and shoulder condition. The ALJ was not persuaded the left elbow and wrist were injured in the accident, and therefore the neck and shoulder condition were the only compensable injuries resulting in impairment under the prevailing factor standard. The ALJ awarded Claimant a 17 percent functional impairment to the body as a whole for the neck and shoulder injuries and based on the opinions of Dr. Zimmerman under the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition*. Claimant was awarded \$500 of unauthorized medical and entitled to future medical for the neck and shoulder.

Respondent appealed arguing Claimant failed to timely report she suffered injury on or about November 15, 2017, and there is no medical evidence of Claimant's condition after the accident or before February 14, 2018, when Claimant sought treatment for her heart condition.

Claimant argues she thought her injuries would get better on their own, so she did not seek medical treatment directly after the accident, but she did report the accident to Respondent. When her injuries did not improve, she sought treatment, which was at the same time she learned of her heart condition. Claimant argues the ALJ's Award should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2017 Supp. 44-508 states in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. . . .

(2)(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.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(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.

(h) "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. 44-520 states:

(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, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not

designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

Respondent argues Claimant did not provide proper notice of the injury or incident on November 15, 2017. On November 15, 2017, Claimant told two employees about her accident on November 15, 2017, which included a lead person. Claimant completed two statements about the accident at the request of Respondent. It is found and concluded Respondent had actual notice of the accident and proper notice was provided.

It is difficult to comprehend the accident of November 15, 2017, accident was the prevailing factor for Claimant's cervical, left shoulder and left upper extremity injuries. Claimant continued to work for 10 weeks after the accident without seeking medical treatment, missing work and or restricting her work activity. It should be noted Claimant stopped work 10 weeks after the accident due to a severe heart condition, Claimant sought no medical treatment for any of her alleged injuries until 10 months after the November 15, 2017, accident and being off work for seven months. Claimant did not ask Respondent medical treatment for her injuries until June 2018 in a telephone call placed by Respondent to Claimant about her current health status. When Respondent failed to provide any medical treatment for injuries to her left shoulder or cervical spine, no other request was made nor was request made for reimbursement of any medical expenses incurred to treat these injuries. The accident of November 15, 2017, is too remote in time to be the prevailing factor for Claimant's need for medical treatment and resulting disability and impairment for Claimant's injuries to her cervical spine, left shoulder and left upper extremity. It is found and concluded Claimant's injuries to her cervical spine, left shoulder and left upper extremity did not arise out of and in the course of Claimant's employment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Julie A.N. Sample dated October 25, 2021, is reversed. The request for compensation is denied.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

John O'Connor, Attorney for Claimant
James Biggs, Attorney for Respondent and its Insurance Carrier
Hon. Julie A.N. Sample, Administrative Law Judge