

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOYCE DELATORRE)	
Claimant)	
V.)	
)	AP-00-0463-400
RESERS FINE FOODS)	CS-00-0069-797
Respondent)	
AND)	
)	
SENTRY CASUALTY CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the January 27, 2022, Award issued by Administrative Law Judge (ALJ) Bruce Moore. The Board heard oral argument on May 12, 2022.

APPEARANCES

Roger D. Fincher appeared for Claimant. David P. Mosh appeared for Respondent and its insurance carrier (Respondent). Due to a conflict, Board Member Rebecca Sanders recused herself from this appeal. Thomas D. Arnhold 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 ALJ, consisting of the transcript of the regular hearing held July 11, 2019; the transcript of the preliminary hearing held January 24, 2018; the transcript of the evidentiary deposition of Joyce M. Delatorre from December 19, 2019; the transcript of the evidentiary deposition of William O. Hopkins, M.D., from March 19, 2020, with exhibits attached; the transcript of the deposition of Joseph F. Galate, M.D., from March 25, 2020, with exhibits attached; the transcript of the deposition of Daniel D. Zimmerman, M.D., from April 1, 2020, with exhibits attached; the transcript of the evidentiary deposition of James P. Halloran, M.D., with exhibits attached; the transcript of the deposition of Dee Lowe from June 30, 2020, with exhibits attached; the transcript of the evidentiary deposition of Karen Terrill from March 18, 2020, with exhibits attached; the transcript of the deposition of Terry L. Cordray from April 30, 2020, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Did Claimant suffer a work-related injury by repetitive trauma arising out of and in the course of her employment; if so, is the repetitive trauma the prevailing factor causing Claimant's injury, need for medical treatment, and resulting disability?
2. What is the date of injury by repetitive trauma?
3. What is the nature and extent of Claimant's disability?
4. Is Claimant entitled to unauthorized and future medical treatment?

FINDINGS OF FACT

Claimant was 51 years of age on October 28, 2016, when she began working for Respondent through Pinnacle, a temporary employment agency. Claimant was hired as a direct employee of Respondent on November 30, 2016. Claimant was hired as a load inspector in the distribution center, where she inspected every pallet for accuracy prior to shipment. Claimant testified it was her responsibility to remedy any problems, including unwrapping, wrapping, and restocking pallets, and she described constant bending, lifting, kneeling, and walking on concrete floors in performing her duties. Dee Lowe, a human resources manager at Respondent, testified the load inspector merely notifies the lead person, who then corrects any problems.

On February 16, 2017, Claimant received her first written warning from Respondent:

Since starting on 11/30/16, [Claimant] has missed work on 1/6/17, 1/9/17, 1/10/17 and 2/13/17; left early on 12/26/16 and 1/22/17; and was late on 1/22/17. These absences are considered excessive and violations of company policies: "You are expected to arrive for work on time and ready to start work at the beginning of your scheduled shift. You are also expected to complete your shift as scheduled."¹

Respondent provided a goal of Claimant having no attendance issues for 90 days. Claimant next missed work on March 28, 2017, March 31, 2017, and April 1, 2017. Claimant provided a letter to Respondent on April 2, 2017, stating she was seen at SCL Health on March 31, 2017, and was excused from work until April 2, 2017. The letter does not indicate the reason for Claimant's visit to SCL Health.

On May 25, 2017, Claimant received her second written warning from Respondent:

¹ Lowe Depo., Ex. C at 1.

Since [Claimant's] first written warning she has not worked her scheduled shifts on: 3/28, 3/31, 4/1, 5/2 and 5/23/17. Additionally, she has been late on 3/26, 4/28, 5/1, 5/7, 5/14, and 5/22/17. (Four of these times were approximately one to two hours late.) These absences and tardies are considered excessive and violations of company policies: "You are expected to arrive for work on time and ready to start work at the beginning of your scheduled shift."²

On June 8, 2017, Claimant received her final written warning:

Since her last written warning on 5/25/17, [Claimant] called in and did not worked [sic] her scheduled shifts on 6/4, 6/5 and 6/6/17. Her absences continue to be excessive and violations of company policies: "You are expected to arrive for work on time and ready to start work at the beginning of your scheduled shift. You are also expected to complete your shift as scheduled."³

Claimant completed an incident report on June 18, 2017, informing Respondent of the onset of left knee pain approximately five days prior. Claimant reported she "did not fall or injure [her] knee/leg in any way that [she was] aware."⁴ Claimant requested to see a doctor and was referred to Dr. Dale Garrett for evaluation and treatment.

Dr. Garrett placed Claimant on temporary work restrictions on July 11, 2017, for her work-related injury by repetitive trauma. Dr. Garrett diagnosed Claimant with a left hamstring strain and ordered physical therapy. Claimant did not report any back pain or problems to Dr. Garrett. On July 14, 2017, Claimant was offered and accepted placement on "temporary modified light duty."⁵

On August 11, 2017, Claimant filed an Application for Hearing with the Division, alleging an injury to her "low back with pain radiating down left leg" with dates of a "series each and every day worked from November 2016 to present."⁶

Dr. Daniel Zimmerman examined Claimant, at her counsel's request, on August 24, 2017. Claimant's chief complaint was pain and discomfort of the left leg. Dr. Zimmerman reviewed Claimant's medical records, history, and performed a full physical examination, including Claimant's back. Dr. Zimmerman concluded Claimant sustained a left knee

² *Id.* at 3.

³ *Id.* at 4.

⁴ Lowe Depo., Ex. D at 1.

⁵ Lowe Depo., Ex. E.

⁶ E-1 filed Aug. 11, 2017.

strain/sprain affecting the left hamstring musculature as a result of repetitive work duties performed at Respondent. He recommended Claimant obtain an MRI of her left knee and referral to an orthopedist, in addition to assigning temporary work restrictions.

Dr. Zimmerman reported Claimant's lumbosacral spine examination was negative. He testified, "The only finding that indirectly is relevant for the lumbosacral spine is the rather marked atrophy of the thigh on the left side compared to the right side."⁷ Claimant's right thigh circumference measured 18 inches, compared with a 16.5 inch circumference of the left thigh. Otherwise, Dr. Zimmerman found no indication of a back injury. Claimant did not report any pain or discomfort related to her low back to Dr. Zimmerman, nor did she report radicular symptoms affecting her lower extremities.

On September 29, 2017, Dr. Garrett found Claimant to be at maximum medical improvement (MMI) as her hamstring injury had resolved, and released her to regular work duties.

Dr. James Halloran, an orthopedic surgeon specializing in knee, foot, and ankle surgery, examined Claimant at Respondent's request on November 8, 2017. Claimant complained of left knee pain without a mechanism of injury other than repetitive movement and lifting while working. Claimant denied any back pain. Dr. Halloran noted pain against resisted knee flexion, which correlated with previous records with the hamstring strain. Dr. Halloran reviewed Claimant's history, medical records, and performed a physical examination. Dr. Halloran suspected a possible meniscus tear and ordered an MRI.

The MRI of Claimant's left knee, conducted December 14, 2017, showed no meniscal or ligament tears and no significant Baker's cyst. The MRI did reveal "[p]rominent subchondral cysts along both sides of the medial compartment, likely related to chronic repetitive trauma."⁸ Dr. Halloran reviewed the MRI results, noting subchondral cysts are due to degenerative changes and usually take years to develop. Dr. Halloran concluded Claimant suffers from a degenerative condition not caused by work activity and needs no further medical treatment. He found Claimant to be at MMI for her left knee.

Claimant sought, and was granted, FMLA leave for unrelated migraine headaches from January 7, 2018, through February 2, 2018. Claimant returned to work on February 2, 2018, with no restrictions.

Claimant worked her regular duties until February 11, 2018, when she informed her supervisor her lunch break would go over her allotted 30 minutes. Claimant was reminded

⁷ Zimmerman Depo. at 8.

⁸ Halloran Depo., Ex. 4 at 2.

an unauthorized longer lunch break would count against her. Claimant took a lunch break lasting 1.5 hours to pay car insurance. Claimant called in and did not go to work on February 12 or 13.

Respondent issued a Separation Notice on February 16, 2018, effective February 13, 2018:

[Claimant] was on a final warning for attendance prior to a leave of absence. She returned to work on 2/2/18. On 2/4/18 she called in stating she would be 30 minutes late and reported for work 55 minutes late. On 2/11/18, as she was leaving for her 30 minute meal period, she told her supervisor she would be late returning. She was reminded that it would be counted against her attendance. She left did not return for 1½ hours. These absences/tardies are considered excessive and violations of company policies . . .⁹

Following a preliminary hearing, Claimant was referred to Dr. Joseph Galate for a Court-ordered independent medical evaluation on February 26, 2018. Claimant complained of left knee pain radiating down her left lower leg, with numbness and tingling in her left lower leg and toes. Dr. Galate noted 0 percent back pain. Claimant indicated her symptoms began 9 to 10 months prior to the examination, and 100 percent of her pain was located in her leg. After a review of Claimant's records and performing a physical examination, Dr. Galate concluded:

Based on the information provided to me at this time, I see no clear cut evidence of a prevailing factor in regards to her left knee as it related to her employment at [Respondent]. [Claimant] does appear to have some mild pre-existing degenerative changes to her knee including a subchondral cyst that was noted back on September 16, 2017 and December 14, 2017. Patient denies any subjective complaints with catching, locking, or swelling in her left knee and that she occasionally gets numbness and tingling down the back of her leg into her foot that started several months after her initial injury.

Therefore, I cannot say beyond a reasonable amount of medical certainty that her employment was the prevailing factor in the patient developing left knee issues.¹⁰

Dr. Galate provided some treatment recommendations, including diagnostic/therapeutic injections in the left knee. Dr. Galate explained successful moderation of pain from the injections would indicate Claimant's problem lies in her knee. Should injections be unsuccessful in moderating Claimant's pain, Dr. Galate recommended an MRI of the lumbar spine and nerve testing to rule out L5-S1 radiculopathy. Dr. Galate

⁹ Lowe Depo., Ex. H at 1.

¹⁰ Galate Depo., Ex. 2 at 5.

testified he did not think Claimant's problem was work-related, even if radiculopathy was established.

Dr. William Hopkins examined Claimant on August 27, 2018, at her counsel's request. Claimant complained of progressive left knee and leg pain, with numbness and tingling in her left leg to the toes. She did not complain of back pain. Dr. Hopkins reviewed Claimant's history and medical records, including the Application for Hearing filed August 11, 2017. He performed a physical examination, beginning with Claimant's lumbar spine, noting "lumbar motion in rotation, extension and her flexion was associated with pain extending into her left leg to the thigh to the calf."¹¹ He further noted Claimant "had slight visible diminution in size"¹² of her left thigh, with the left measuring 41.5 centimeters and the right measuring 42 centimeters. This translates to 16.3 inches and 16.5 inches, respectively.

Dr. Hopkins concluded:

In summary, based on the information I have available to me, as given to me by [Claimant] and her medical records and her physical examination, I believe that [Claimant] has had a repetitive injury in a series beginning November 2016 to the present, to her lumbar spine as the major component for her left knee and leg pain with radiculopathy. This injury is the direct and prevailing factor for her current medical condition, need for treatment and disability.¹³

Dr. Hopkins did not believe Claimant had a left knee injury or disability on his examination. Nevertheless, he suggested Claimant be considered for a steroid injection in her left knee to attempt to reduce her pain but otherwise found her at MMI regarding her left knee. Dr. Hopkins recommended Claimant obtain an MRI of her lumbar spine and an evaluation by a pain management physician. Dr. Hopkins provided permanent restrictions limiting Claimant to sedentary work activities.

In an addendum report dated November 29, 2018, Dr. Hopkins indicated Claimant has symptoms of a lumbar disc herniation at an unspecified level and provided an impairment rating. Using the *AMA Guides*,¹⁴ Dr. Hopkins determined Claimant sustained 8 percent permanent partial disability of her lumbar spine as a result of repetitive duties

¹¹ Hopkins Depo., Ex. 2 at 6.

¹² *Id.*

¹³ *Id.* at 7.

¹⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

during her employment. He did not specify which level of Claimant's lumbar spine was impaired.

Karen Terrill, vocational expert, interviewed Claimant on March 18 and 19, 2019, at her counsel's request. Ms. Terrill generated a list of 11 unduplicated tasks Claimant performed in the five years preceding the injury by repetitive trauma date. Ms. Terrill reviewed the work restrictions provided by Dr. Hopkins and concluded Claimant could earn approximately \$354.81 per week. Dr. Hopkins reviewed the task list generated by Ms. Terrill and determined Claimant could no longer perform 9 of 10 tasks, for a 90 percent task loss. It is unclear why Dr. Hopkins only referred to 10 tasks on Ms. Terrill's list.

Terry Cordray, vocational expert, interviewed Claimant at Respondent's request and produced a report dated April 27, 2020. Mr. Cordray identified 12 unduplicated tasks Claimant performed in the five-year period prior to the injury by repetitive trauma date. Mr. Cordray opined Claimant would not have any wage loss if she returned to work, even considering the restrictions imposed by Dr. Hopkins.

The ALJ found Claimant failed to sustain her burden of proving an injury to her back arising out of and in the course of her employment or that her work activities were the prevailing factor causing her back complaints. The ALJ determined Claimant established a repetitive use injury to her left hamstring, which was treated and for which no evidence of permanent impairment was presented. The ALJ found Claimant was terminated for cause and is unable to establish a wage loss attributable to her work injury, and she has failed to prove her entitlement to future medical benefits related to the hamstring injury. Further, the ALJ determined the date of injury is July 11, 2017, pursuant to K.S.A. 44-508(e)(2), and Claimant provided timely notice of her claimed repetitive use injuries.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues she sustained personal injury by repetitive trauma arising out of and in the course of her employment when she suffered a lumbar disc herniation. Claimant contends she provided proper notice and is entitled to permanent total disability benefits, or alternatively, work disability or partial permanent disability benefits. Claimant argues she is entitled to unauthorized medical expenses and has shown the need for future medical care.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues no credible evidence exists of a work-related personal injury to Claimant's lumbar spine by repetitive trauma, nor was timely notice of any lumbar injury provided. Respondent argues Claimant has a zero percent functional impairment and did not prove a sufficient wage loss for establishing a work disability award. Further, Respondent argues Claimant is not entitled to future medical treatment and notes Claimant previously stipulated to having already received unauthorized medical expenses.

K.S.A. 2017 Supp. 44-501b(c) states:

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.

K.S.A. 2017 Supp. 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. 2017 Supp. 44-508(e) states, in part:

(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.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

K.S.A. 2017 Supp. 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.

1. Did Claimant suffer a work-related injury by repetitive trauma arising out of and in the course of her employment; if so, is the repetitive trauma the prevailing factor causing Claimant's injury, need for medical treatment, and resulting disability?

Claimant alleges she suffered a left knee injury and a lumbar disc herniation as the result of her injury by repetitive trauma arising out of and in the course of her employment with Respondent. As the result, Claimant contends she is entitled to permanent total disability. The ALJ found Claimant suffered only a hamstring injury on the left side, which had fully resolved.

Claimant reported an injury to her left knee on June 18, 2017, informing Respondent of the onset five days prior. Claimant did not experience a sudden onset of pain from an acute event consistent with an accident. It is undisputed Claimant performed repetitive activities at work. Claimant alleges her symptoms developed progressively each working day. Respondent sent Claimant to Dr. Garrett, who diagnosed a left hamstring strain on July 11, 2017. Claimant did not report any back pain or problems to Dr. Garrett.

Claimant was examined by Dr. Zimmerman on August 24, 2017. Her complaints were pain and discomfort of the left leg. Dr. Zimmerman found no indication of a back injury. Dr. Zimmerman diagnosed a left knee strain/sprain affecting the left hamstring musculature from work-related repetitive activities.

Claimant was examined by Dr. Halloran on November 8, 2017. Claimant denied back pain and complained only of left knee pain.

Dr. Galate performed a Court-ordered examination of Claimant on February 26, 2018. Claimant complained of left knee pain radiating down her left lower leg, with numbness and tingling in her left lower leg and toes. Claimant did not complain of back pain to Dr. Galate.

Through November 8, 2017, Claimant reported no history of back pain, work-related or otherwise. Claimant's last day of work with Respondent was February 11, 2018. At no time while Claimant worked for Respondent did she complain of back pain or make a claim for a work-related back injury. It was not until Claimant was examined by Dr. Hopkins on August 27, 2018, did a physician diagnose a work-related back injury.

There is no documentation in the record of work-related back pain while Claimant was working for Respondent. The first notation of work-related low back pain was over six months after Claimant stopped working for Respondent. Dr. Hopkins diagnosed a herniated lumbar disc, but did or could not identify the level of herniation. The Board finds the weight of the evidence shows Claimant failed to prove a work-related back injury due

to repetitive trauma arising out of and in the course of her employment with Respondent.

The Board agrees with the ALJ's conclusion Claimant suffered a hamstring injury as the result of work-related repetitive trauma. Both Drs. Garrett and Halloran identified examination findings consistent with a hamstring injury.

The Board finds the evidence insufficient to prove Claimant's work activities are the prevailing factor causing her back complaints. The ALJ's findings and conclusions claimant failed to prove she sustained a compensable back injury are affirmed.

2. What is the date of injury by repetitive trauma?

Claimant raised this issue in her Application for Review to the Board. However, it is a non-issue. Claimant alleges a date of injury by repetitive trauma of July 11, 2017. The ALJ found the date of injury by repetitive trauma to be July 11, 2017. There is nothing for the Board to address. The ALJ's finding is affirmed.

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

No physician provided evidence Claimant suffered a functional impairment as the result of her hamstring injury. Claimant failed to meet the burden of proving she suffers any permanent disability resulting from her work-related hamstring injury. The ALJ's conclusion Claimant failed to prove entitlement to an award of permanent partial disability is affirmed.

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

K.S.A. 2017 Supp. 44-510h(b)(2) states:

Without application or approval, an employee may consult a healthcare provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such healthcare provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

While the ALJ noted this as an issue in the Award, he failed to comment on Claimant's entitlement to unauthorized medical expenses. The Board finds Claimant is entitled to up to \$500, less amounts previously paid, in unauthorized medical expenses, if used for the purpose of examination, diagnosis or treatment, and not to obtain a functional impairment rating.

K.S.A. 2017 Supp. 44-510h(e) states, in part:

It is presumed that the employer's obligation to provide [medical benefits] 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. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2017 Supp. 44-525(a) states:

Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

There is no evidence in the record suggesting Claimant will require future medical treatment related to her hamstring injury. The Board agrees with the ALJ's conclusion Claimant failed to meet the burden of proving entitlement to future medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce Moore dated January 27, 2022, is modified to award unauthorized medical expenses pursuant to K.S.A. 44-510h(b)(2). In all other respects, the Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Roger D. Fincher, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier
Hon. Bruce Moore, Administrative Law Judge