BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

YUSIMI CABEZA	)	
Claimant	)	
V.	)	
	)	
CARGILL MEAT SOLUTIONS CORP.	)	AP-00-0464-622
Respondent	)	CS-00-0443-726
AND	)	
	)	
OLD REPUBLIC INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

The claimant, through Stanley Ausemus, requested review of Administrative Law Judge (ALJ) Pamela Fuller's Award dated March 28, 2022. D. Shane Bangerter appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on July 21, 2022. Because of a conflict, Mark Kolich was appointed Board Member Pro Tem in place of Chris Clements.

This is the second time the Board has reviewed this matter. In a preliminary order dated January 6, 2021, the ALJ found the claimant failed to prove her meniscal tears were the result of her work activities. The claimant appealed, and in an order dated March 3, 2021, a single Board Member affirmed the ALJ's ruling.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of: (1) deposition transcript of the claimant, taken June 1, 2020; (2) evidentiary deposition transcript of Terrence Pratt, M.D., with exhibits, taken November 9, 2020; (3) preliminary hearing transcript, with exhibits, held January 5, 2021; (4) stipulation, dated August 5, 2021, regarding medical records; (5) regular hearing transcript, held December 7, 2021; (6) regular hearing by deposition transcript, taken December 7, 2021; (7) stipulation, dated February 3, 2022, regarding temporary total disability and admission of medical records appended to the preliminary hearing transcript; and (8) all documents of record filed with the Division.

ISSUES

1. Did the claimant's injuries arise out of and in the course of her employment, including whether her work activities were the prevailing factor causing her injuries, need for medical treatment and impairment?

2. If found compensable, is the claimant entitled to temporary total disability (TTD) benefits from July 29, 2019 to November 10, 2021, future medical benefits and unauthorized medical benefits?

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

FINDINGS OF FACT

The claimant, a Spanish-speaking individual who required a translator, began working for the respondent in 2014. She trimmed hanging beef carcasses with a knife. On April 18, 2019, her position changed. Her new job involved cleaning. The claimant testified she cleaned floors with a mop, requiring her to constantly move side-to-side, squat and ascend and descend ladders. She also used a wheelbarrow to move cow ears every hour and testified the wheelbarrow "weighed a lot."[1] She denied any prior knee problems.

According to the claimant, after starting her cleaning position, she began having knee problems. On April 29, 2019, she notified her supervisor she was having work-related knee pain, but did not request medical treatment. On May 4, 2019, the claimant's left knee locked up after standing up from a seated position. She saw the company nurse who noted limping, crepitus, tenderness and mild swelling to the posterior and anterior knee, with full range of motion. The claimant continued to work and her symptoms worsened.

That same day, the claimant sought treatment with R.C. Trotter, M.D. A left knee MRI showed a cleavage tear of the medial meniscus, a small nondisplaced horizontal cleavage tear of the lateral meniscus, and an inflamed ruptured Baker's cyst. On May 13, 2019, Dr. Trotter placed sedentary restrictions on the claimant and stated:

> Patient has medial and lateral tears of the meniscus. Patient also has a ruptured Baker's cyst. Given the mechanism of injury could presume the rupture of Baker's cyst was cause[d] by the motion of standing from seated position. The meniscal tears do not appear to be consistent with just standing up. These may be an incidental finding.[2]

---

[1] P.H. Trans. at 7.

[2] *Id*., Trotter Records at 2.

On June 26, 2019, the claimant had a right knee MRI which showed a small undersurface tear of the medial meniscus and trace fluid signal with the posterior fibers of the ACL, which could be the result of a prior injury or a small ganglion cyst.

At the respondent's request, claimant saw David Hufford, M.D., for an independent medical examination (IME). Like all the doctors, he took a history, performed a physical examination and reviewed the claimant's MRIs. The claimant told Dr. Hufford she pushed a cart and a wheelbarrow, navigated stairs and used a squeegee. She said her left knee locked up when getting up from a seated position on May 4, 2019. Dr. Hufford stated:

> Ms. Cabeza has not incurred an injury to either knee from her occupational activities. It is unexplained why she should have bilateral meniscal tears which may be degenerative in nature or the result of a non-reported non-occupational injury. The simple act of getting up from a sitting position is not unique to her occupational activities. Her work has not exposed her to an inordinate risk for knee injury. Her work has not caused degenerative joint disease. There is no reason to believe that she incurred a meniscal tear in the left knee by simply getting up from a sitting position even though she was at work when this occurred. There is nothing about her described work activities that should have caused a meniscal tear in the left knee from repetitive activities in the absence of a slip, twist, fall or some other element of torsion that did not occur based on her history that I carefully elicited in regard to this issue. Likewise, there is nothing about her occupational activities nor alteration of gait that has caused a direct injury to the right knee including the meniscal tear that has been documented. The prevailing factor for her current bilateral knee pain is not the occupational activities in which she was engaged.[3]

According to the claimant, the respondent released her from their employment on July 29, 2019, because it had no work available within her restrictions.

At her attorney's request, the claimant saw George Fluter, M.D., for an IME. The claimant told Dr. Fluter she had to carry a basket full of waste up a ladder and dump the contents of the basket into another container. She said her left knee locked up when arising from a seated position at work. Dr. Fluter assessed bilateral knee pain, internal derangement and medial meniscus tears. The doctor imposed temporary work restrictions and recommended additional medical treatment. Dr. Fluter stated:

> Based upon the available information, more likely than not, there is a causal/contributory relationship between [the claimant's] condition and work-related activities and injury . . . . The prevailing factor for the condition and the need for medical evaluation/treatment is the work-related activities and injury.[4]

---

[3] *Id*., Hufford Report at 2.

[4] *Id*., Fluter Report at 6.

The claimant saw Terrence Pratt, M.D., for a court-ordered IME. The claimant told Dr. Pratt she used a squeegee and ascended and descended stairs with a bucket of paper. She said her left knee locked up when getting up from a seated position on May 4, 2019. The claimant complained of continuous tightness, pain and weakness involving her left knee, which locked up with no giveaway. She also had pain in her right knee when standing and a sensation of giveaway or weakness, which was not as severe as her left knee. The doctor diagnosed left knee medial and lateral meniscus tears with probable rupture of the Baker's cyst, and right knee discomfort with findings suggesting a medial meniscus tear and findings that could suggest a pre-existing ACL injury or an intra-articular ganglion. Dr. Pratt noted no medical records mentioned a twisting injury and the claimant did not testify to a twisting injury. According to the doctor, the claimant's short duration of working the cleaning job made it less likely she sustained injury by repetitive trauma. Dr. Pratt stated:

> There was no significant evidence of a major twisting or weightbearing injury. Kneeling, squatting or twisting was not reported. She reports developing symptoms 11 days after initiating alternative job tasks and then changing positions from sitting to standing and noting involvement of the left knee. There was no specific injury for the involvement of the right knee. There is no significant evidence that the structural findings on the MRI assessment of the knees relates to her reported vocational related activities with the activities as the prevailing factor for the involvement. It is probable with her reports of symptoms that she had a sprain/strain of the left knee, and subsequently right knee in relationship to her reported activities. It is also probable that she aggravated underlying involvement of the knees. It is also probable that she developed a rupture of a Baker's cyst in early May 2019.[5]

Dr. Pratt did not recommend any medical treatment for the claimant's knees because her work activities were not the prevailing factor.

At the time of her deposition on June 1, 2020, the claimant was not working and had not worked anywhere since July 29, 2019. She continued to experience constant pain and discomfort in her knees, left worse than right.

Dr. Pratt testified on November 9, 2020, after reviewing the claimant's deposition transcript and job description. The doctor stated the claimant's description of events at her deposition differed from what she told him during the court-ordered IME. Dr. Pratt testified the claimant never described any twisting event and agreed the 11 days the claimant worked in her new position would not have been enough for her to have suffered any kind of repetitive trauma injury to either knee.

---

[5] *Id*., Pratt Report at 5.

In March 2021, the claimant underwent left knee surgery. The surgery was paid by Medicaid. Following surgery, the claimant was released with no restrictions. According to the claimant, a doctor recommended right knee surgery.

On April 15, 2021, Dr. Fluter issued a rating report without reexamining the claimant. Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed., Dr. Fluter assigned the claimant a combined 9% whole person impairment. The doctor assigned an 8% whole person impairment using the AMA *Guides to the Evaluation of Permanent Impairment*, 4th ed. Dr. Fluter stated, "Due to [the claimant's] ongoing pain, dysesthesia, and dysfunction resulting from the work-related injury, it is my opinion that the impairment rating calculated under the Sixth Edition of the *Guides* better represented her degree of functional impairment (total whole person impairment of 9%)."[6]

The claimant currently works at Wal-Mart. She continues to have constant pain in her knees. She takes over-the-counter pain medication on bad days.

The ALJ stated:

> 1. The claimant did not meet with personal injury by accident or repetitive trauma arising out of and in the course of her employment. The claimant's request for an award of benefits, should be and the same is hereby denied.
>
> Dr. Fluter was given a history of work activities that required negotiating ladders and stairs multiple times a day. The claimant described lifting a basket full of waste, climb a ladder and empty to contents, stating the basket was braced on her knees. He found if the history provided was accurate, there was no other obvious causes for the changes that were present. The prevailing factor for her condition and need for treatment was her work related activities.
>
> Dr. Hufford said there was nothing about the claimant's described work activities that should have caused a meniscal tear in the left knee from repetitive activities in the absence of a slip, twist, fall or some other element of torsion that did not occur based on her history. There was nothing about her occupational activities nor alteration of gait that caused a direct injury to the right knee including the meniscal tear that has been documented. The prevailing factor for her bilateral knee pain was not the occupational activities in which she was engaged.
>
> Dr. Pratt stated that the court would need to find there was major twisting, kneeling in combination with heavy activities in order to find the work activities were the prevailing factor for the claimant's injuries. The job description didn't identify any significant lifting activities nor the history he was given. It is probable with her reports of symptoms that she had a sprain/strain of the left knee and subsequently right knee in relationship to her reported activities. It is also probable that she aggravated

[6] Stipulation (filed Aug. 4, 2021) at 11.

underlying involvement of the knees and that she developed a rupture of a Baker's cyst in early May 2019. If the claimant's work activities as was described in her deposition are accurate, then her torn meniscus could be related to her work activities. In all the medical he reviewed, there wasn't any indication the claimant injured her knee in a twisting event. The 11 days as her new position that she may have rarely gone up stairs was not enough to cause a repetitive trauma injury to either knee.

The record as a whole was considered. The claimant's history of injury was different in reports to physicians and in her deposition. The job description provided by the claimant was markedly different than the job description provided by the respondent. Both Dr. Hufford and Dr. Pratt determined the prevailing factor for the claimant's injuries was not her work activities. Dr. Fluter said he as assuming the accuracy of history, there was no other obvious causes for the changes, and the prevailing factor was her work activities. It was indicated by Dr. Hufford and Dr. Pratt that there would need to be a slip, twist, fall or some other element of torsion or major twisting, kneeling in combination with heavy activities to cause her injuries. None of those were reported, although the history is questionable.

Even considering the claimant's variations in history, there was no indication of a slip, twist, fall or major twisting, kneeling in combination with heavy activities. The claimant has failed to prove that her injury arose out of and in the course of her employment and failed to prove the prevailing factor for her conditions is her work activities based on the opinions of Dr. Pratt and Dr. Hufford. They are found to be credible and their findings are similar and will be utilized.

2,3, & 4. Based on the ruling as to Issue No. 1, the remaining issues need not be addressed.[7]

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues her work activities were the prevailing factor causing her injuries. The claimant argues she is entitled to TTD benefits from July 29, 2019 to November 10, 2021, and an award of 9% impairment to the body as a whole for permanent partial disability benefits. The respondent maintains the Award should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment.[8] The burden of proof is on the claimant. To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[9]

---

[7] ALJ Award at 8-9.

[8] K.S.A. 44-501b(b).

[9] K.S.A. 44-501b(c).

K.S.A. 44-508 provides, in pertinent 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.

. . .

(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 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.

. . .

(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.

Board review of a judge's order is de novo on the record.[10] A de novo hearing is a decision of the matter anew, giving no deference to the judge's findings and conclusions.[11]

The Board affirms the ALJ's ruling. The ALJ found the claimant's history of injury to be questionable and varied. This concern is borne out in Dr. Pratt's testimony showing the history she provided to him varied from her testimony. More importantly, the greater weight of the credible medical evidence establishes the claimant did not meet her burden of proof. Drs. Hufford and Pratt opined the claimant's work activities were not the prevailing factor in causing her injuries. Both Drs. Hufford and Pratt indicated a slip, twist, fall, torsion, or major twisting and/or kneeling in combination with heavy lifting would be needed to cause the claimant's injuries. The ALJ noted the record contained no such events were reported. Dr. Pratt observed the short duration of the claimant's work in the cleaning position (11 days) was less likely to cause repetitive injury as compared to a longer period of time. In short, the claimant did not meet her burden of proving personal injury by repetitive trauma arising out of and in the course of her employment, including not proving the work activities or accident to be the prevailing factor in her injury. The ALJ's denial of compensation is affirmed. All other issues are moot.

AWARD

WHEREFORE, the Board affirms the judge's Award.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Stanley Ausemus
D. Shane Bangerter
Administrative Law Judge

[10] See K.S.A. 44-555c(a).

[11] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 317, 14 P.3d 1099 (2000).