

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JOSHUA MCGUIRE</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0467-894
<b>WALMART ASSOCIATES, INC.</b>	)	CS-00-0463-151
Respondent	)	
AND	)	
	)	
<b>AIU INSURANCE CO. (NATIONAL UNION</b>	)	
<b>FIRE OF PITTS PA)</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the May 31, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample.

**APPEARANCES**

Bruce Alan Brumley appeared for Claimant. Michael Kauphusman and Rachel A. Rioux appeared for Respondent and its insurance carrier (Respondent).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held May 25, 2022, with exhibits attached; the transcript of the Telephonic Evidentiary Deposition of Daniel D. Zimmerman, M.D., from April 27, 2022, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

The issues for the Board's review are:

1. What is the prevailing factor causing Claimant's condition and need for medical treatment?

2. Is Claimant entitled to temporary total disability benefits (TTD) and medical treatment?
3. Did the ALJ comply with the strict construction doctrine of established case law?
4. What is the legal meaning of the word “solely” as it relates to K.S.A. 44-508(f)?
5. Is K.S.A. 44-508(f) constitutional?

### FINDINGS OF FACT

Claimant slipped on ice or slush while walking into work on January 2, 2022. Claimant testified:

So I originally was going into work, to work the shift. And as I was walking into the employee entrance at the time, due to COVID, I had noticed that the floor was slushy and kind of icy.

And as I was walking, I was trying to be careful. I did have left – pain in my left leg due to I had hernia surgery, and I had seen the hernia doctor two times and he said it was just scar tissue, that it would resolve over time. So I was favoring my right leg at the time, limping a little bit.

And as I was walking, I – my left leg had swooped out from under me. And as I tried to catch myself I twisted, and I felt a pop and heard a pop in my left hip, and then another pop coming back in. And then I quickly lowered myself to the ground in a span of, like, three seconds, I would say.

And the pain of when my leg swooped out was – was very intense, and then it amplified even more during when I heard the pop and felt it. And after that, I could not get back up on my two legs and do anything. And they then proceeded to call an ambulance to take me off to the hospital.<sup>1</sup>

Two of Claimant’s coworkers witnessed the event. Both explained Claimant did not fall to the ground, but rather lowered himself to the ground while keeping weight off his leg. Both agreed Claimant at times limped while at work, including on the date of the accident.

In 2019, Claimant complained of left hip pain while playing high school football. X-rays were taken, and Claimant was told to take over-the-counter pain medication while practicing.

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<sup>1</sup> P.H. Trans. at 7-8.

Before the work-related incident, on May 24, 2021, Claimant suffered pain on the left side of his groin and sought medical treatment. He was diagnosed with an inguinal hernia. Claimant reported carrying and stocking heavy items at work and training for the Air Force by running and bodyweight workouts. He underwent a laparoscopic left inguinal hernia repair on July 1, 2021. Claimant later underwent physical therapy, but continued to have complaints of left-sided groin pain. A sonogram taken on December 20, 2021, revealed no recurrence of the hernia.

On December 26, 2021, Claimant went to St. John's Hospital with pain at the surgery site and pain with ambulation. Claimant indicated he had been running 2 to 3 miles per day since the July 2021 surgery, in preparation for Air Force boot camp, but could no longer due to pain. Claimant was diagnosed with muscle sprain/strain in what appeared to be the psoas and iliopsoas groups of the left leg. The hernia repair site was stable. Claimant was told to treat conservatively and follow-up with primary care.

Immediately after the incident on January 2, 2022, Claimant was taken via ambulance to the emergency department at The University of Kansas Health System. Diagnostic images indicated:

Expansile lytic lesion extending from the left femoral neck to the subtrochanteric region as described. Leading considerations would be an aneurysmal bone cyst or chondromyxoid fibroma. There is a suspected mildly impacted left femoral neck fracture. No dislocation.<sup>2</sup>

Dr. Kyle Sweeney surgically repaired a pathologic fracture of the neck of Claimant's left femur on January 4, 2022, with instructions for Claimant to remain nonweightbearing for 12 weeks. In his operative report, Dr. Sweeney noted Claimant sustained a left proximal femur fracture through a suspected unicameral bone cyst. His postoperative diagnosis was a pathologic fracture of neck of the left femur.

On January 5, 2022, Respondent's case manager asked Dr. Sweeney to identify whether the January 2, 2022, incident was the prevailing factor for Claimant's diagnosis, work restrictions, need for medical care and/or any disability or impairment. Dr. Sweeney replied in an email:

It is not. The cyst is the prevailing factor. You can forward that opinion along with the information that I don't do worker's comp evals. If he needs one at some point it would have to come from elsewhere.<sup>3</sup>

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<sup>2</sup> P.H. Trans., Resp. Ex. 1 at 39.

<sup>3</sup> *Id.* at 3.

Dr. Daniel Zimmerman evaluated Claimant at his counsel's request on January 19, 2022. Dr. Zimmerman was provided medical records dating from January 2, 2022. He reviewed Claimant's history, the available medical records, and performed a physical examination. Dr. Zimmerman found Claimant sustained a pathologic fracture of the left femur due to a fall occurring at work on January 2, 2022, and the prevailing factor for the fracture was the claimed accident. Dr. Zimmerman determined Claimant's current treatment program was appropriate.

Dr. Zimmerman agreed a pathologic bone fracture occurs without adequate trauma and is caused by a preexistent pathological bone lesion. Dr. Zimmerman also agreed Claimant's cyst (or lesion) preexisted the events of January 2, 2022. Dr. Zimmerman noted the fracture occurred at the point of the lesion, and this area was more susceptible to fracture due to the lesion. He testified:

Q. Would you agree that this fracture could have been caused if he had twisted wrong getting out of bed in the morning that day?

A. Yes.

Q. Would you agree that a fracture would not have occurred as a result of the January 22, 2022 [*sic*], if claimant had not had this bone cyst or femoral lesion?

A. I think that's fair.<sup>4</sup>

Dr. Zimmerman further stated although the fractured area may have been predisposed to injury, the result of the incident was an additional structural change to Claimant's condition. Dr. Zimmerman opined the prevailing factor causing Claimant's femoral fracture was the falling motion occurring January 2, 2022.

Claimant has not worked since January 2, 2022. At the time of the preliminary hearing, he was undergoing physical therapy.

The ALJ found Claimant sustained an accident on January 2, 2022. However, the ALJ determined the accident was not the prevailing factor causing Claimant's condition, but rather the cyst or lesion located at the fracture site.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant argues he suffered a new injury as a result of the fall on January 2, 2022, and the fall was the prevailing factor in causing his current symptoms, injury, need for treatment, and disability.

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<sup>4</sup> Zimmerman Depo. at 30.

Respondent argues the weight of the credible evidence demonstrates the alleged work accident is not the prevailing factor causing Claimant's current medical condition and need for treatment. Respondent maintains the ALJ's Order should be affirmed.

K.S.A. 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. 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. 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.

K.S.A. 44-508(f) states, in part:

(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.

...

(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.

The Board found accidental injuries resulting in a new physical finding or a change in the physical structure of the body are compensable, despite the claimant also having an aggravation of a preexisting condition.<sup>5</sup> Several prior Board decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not "solely" cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.<sup>6</sup>
- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.<sup>7</sup>
- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated, or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.<sup>8</sup>
- An accident did not solely aggravate, accelerate, or exacerbate the claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in the claimant's medial meniscus.<sup>9</sup>
- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.<sup>10</sup>

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<sup>5</sup> See *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

<sup>6</sup> See *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

<sup>7</sup> See *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

<sup>8</sup> See *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

<sup>9</sup> See *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

<sup>10</sup> See *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

It is undisputed the cyst predisposed Claimant's femur to fracture at the same location injured in this accident. Claimant is not making a claim for an injury or aggravation of the cyst. The claim is for a broken femur. The accident caused the fracture to occur when it did. The physical injury above and beyond a sole aggravation of the cyst is the broken femur.

Dr. Sweeney's prevailing factor opinion is given little weight. He stated in his email he does not do workers compensation evaluations. He also provided no explanation of the basis of his opinion, even though he was asked to provide medical rationale for his opinion by Lizzy Jones, the nurse case manager for Respondent.<sup>11</sup>

Dr. Zimmerman provided a better explanation for his prevailing factor opinion. Dr. Zimmerman showed an understanding of the prevailing factor issue and identified the fracture as being new and distinct from the cyst.

The undersigned finds Claimant met the burden of proving the accident was the prevailing factor or primary factor, in relation to any other factors, causing his injury.

All other issues are moot.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Julie A.N. Sample dated May 31, 2022, is reversed and remanded for a determination of Claimant's request for TTD, medical treatment, and payment of medical expenses.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2022.

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SETH G. VALERIUS  
BOARD MEMBER

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<sup>11</sup> P.H. Trans., Resp. Ex. 1 at 2.

c: Via OSCAR

Bruce Alan Brumley, Attorney for Claimant  
Michael Kauphusman, Attorney for Respondent and its Insurance Carrier  
Rachel A. Rioux, Attorney for Respondent and its Insurance Carrier  
Hon. Julie A.N. Sample, Administrative Law Judge