

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JUAN VEGA)
Claimant)
V.)
LINEAGE LOGISTICS HOLDINGS LLC) AP-00-0469-196
Respondent) CS-00-0451-769
AND)
ACE AMERICAN INSURANCE CO.)
Insurance Carrier)

ORDER

The claimant, through Jeff Cooper, requested review of Administrative Law Judge (ALJ) Gary Jones' Award dated July 26, 2022. Christopher McCurdy appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on November 17, 2022.

RECORD AND STIPULATIONS

The Board considered the same record as the ALJ, consisting of: (1) IME report of David Hufford, M.D., dated February 25, 2021; (2) preliminary hearing transcript, held August 19, 2021; (3) regular hearing transcript, held April 5, 2022; (4) deposition transcript of Pedro Murati, M.D., taken April 12, 2022; (5) deposition transcript of Harold Hess, M.D., taken May 18, 2022; (6) deposition transcript of John Estivo, M.D., taken May 24, 2022; (7) deposition transcript of M. Camden Whitaker, M.D., taken June 28, 2022; (8) all exhibits attached to enumerated items 2-7; and (9) documents of record filed with the Division.

ISSUES

(1) Did the claimant's injury arise out of and in the course of his employment, including whether the work accident was the prevailing factor causing the injury, medical condition, need for treatment and resulting disability or impairment?

(2) What is the nature and extent of the claimant's disability?

(3) Is the claimant entitled to future medical treatment?

FINDINGS OF FACT

This case concerns an asserted back injury on May 2, 2020. However, the claimant, currently 37 years-old, had prior back issues. On July 29, 2011, the claimant had a back injury while working for Cargill. He received medical treatment, including injections, and was released with no restrictions.

John Estivo, M.D., a board-certified orthopedic surgeon, saw the claimant one time on July 27, 2012, for an independent medical evaluation (IME) related to the 2011 work injury. At the time, the claimant had mild lumbosacral muscle tenderness to touch, but no guarding. Straight leg testing was negative bilaterally. The claimant had normal muscle strength and symmetrical reflexes. An MRI dated November 17, 2011, showed a degenerative bulging disc, as well as degenerative facets, at L4-L5. Dr. Estivo opined the claimant had a temporary aggravation of preexisting degenerative disc disease, he did not need any medical treatment or work restrictions for the work injury, and he incurred no permanent impairment.

The claimant testified his condition improved and he kept working at Cargill. In 2013, he had another back injury. He underwent physical therapy and was released in January 2014, again without restrictions. The claimant continued working for Cargill for the next few years without any problems. Thereafter, he worked for a few different employers [Diamond Roofing, JBS (a beef plant) and Affiliated (a warehouse)], but denied having any back problems, difficulty performing his job duties, or receiving treatment during that time.

On January 1, 2020, the claimant began working for the respondent as a high reach operator, which included driving tall forklifts. On May 2, 2020, the claimant put all of his weight on his right foot and stepped up on a “regular” or “average”¹ step of unknown height on the forklift with his right leg when he felt something pop in his lower back. He experienced pain in his low back and down his right leg. He testified his back pain was different than what he experienced in 2011 and 2013. He testified the pain is continuous and radiates down his right leg, in addition to numbness and tingling in his right leg.

At the Regular Hearing, the claimant was asked if prior discovery deposition testimony regarding the cause of his accident was accurate. Specifically, the claimant was asked if he correctly testified he was injured stepping off a forklift. The claimant denied he was injured stepping off a forklift and testified he was injured stepping onto a forklift.

The claimant received medical treatment, including at Western Plains, but those records are not in evidence. The claimant had physical therapy. He also underwent a lumbar MRI on May 2, 2020, the results of which are explained below by various doctors.

¹ R.H. Trans. at 9-10.

On June 3, 2020, the claimant saw Camden Whitaker, M.D., a board-certified orthopedic spine surgeon, on referral from an unknown physician. The claimant reported severe back pain and pain going down the back of his right leg after stepping up onto a standing forklift. Past medical history revealed nothing about prior back injuries or treatment. Dr. Whitaker indicated his office always asks a patient about a history of back pain, and no history of back pain will be mentioned if the patient does not report prior back pain, and the claimant had no history of prior back issues. The doctor performed a physical examination, reviewed x-rays, and reviewed the 2020 lumbar MRI film and report which showed a degenerative disc at L4-L5 with a mild disc herniation. Dr. Whitaker diagnosed the claimant with a herniated lumbar disc, low back pain and L4-L5 degenerative disc protrusion after a work injury. The doctor suggested continued physical therapy and a transforaminal epidural steroid injection at L4-L5 on bilateral sides.

Dr. Whitaker responded to a letter dated June 10, 2020, from a senior claims specialist for the respondent who inquired about prevailing factor. The letter indicated the claimant was injured stepping about five or six inches off a forklift when he had low back pain. A member of the doctor's staff, "Julie," wrote on the letter the prevailing factor for the claimant's back condition and need for medical treatment was his degenerative disc disease. Dr. Whitaker signed the letter.

Dr. Whitaker testified degenerative disc disease will continue to degenerate over time, even absent symptoms or complaints, and it never stops or goes away. He agreed symptoms can wax and wane over time and stated a degenerative disc is "more of a setup" for the occurrence of a disc herniation.² Dr. Whitaker recommended additional medical treatment, including physical therapy and an epidural steroid injection.

Dr. Whitaker was asked the prevailing factor for the claimant's mild disc protrusion at L4-L5 and responded, "Well, I don't know what caused it. All I know is I thought that's where the pain was coming from. . . . I don't know what caused his degenerative disc disease."³ The doctor clarified the main pain generator was the degenerative discs, not the mild disc herniation. The doctor was asked if the work injury of May 2, 2020, was the prevailing factor for the claimant's degenerative disc disease and he responded, "That would be very hard to know[.]" before stating degenerative disc disease is a "wear-and-tear thing that's been going on for quite some time[.]"⁴ likely predating the work injury. Ultimately, Dr. Whitaker testified the prevailing factor for the claimant's low back condition was his degenerative disc disease, consistent with his signed response to the senior claims specialist.

² Whitaker Depo. at 12.

³ *Id.* at 15.

⁴ *Id.* at 16.

Dr. Whitaker testified his opinions were within a reasonable degree of medical probability.

At his attorney's request, the claimant saw Pedro Murati, M.D., on August 13, 2020, for an IME. Dr. Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, independent medical evaluations and pain medicine. The doctor reviewed medical records, took a history and performed a physical examination. Dr. Murati did not have or review any medical records or radiological films from the claimant's 2011 injury, but the claimant told him about a back injury from about 10 years earlier which resolved. The doctor testified the claimant performing heavy work following his 2011 back injury confirmed his prior symptoms resolved.

At the appointment with Dr. Murati, the claimant complained of low back pain radiating down his right lower extremity, occasional pain in his right testicle and difficulty sitting for extended periods, lifting heavy items and being intimate because of right testicle pain. Dr. Murati diagnosed the claimant with a low back sprain, imposed temporary restrictions and recommended additional medical treatment, including physical therapy, medications, medial branch blocks and possible surgery.

Dr. Murati opined the work accident was the prevailing factor in causing the claimant's condition, stating:

He was physically able to perform his job tasks without restrictions prior to this accident. There is no documentation that there was a preexisting back condition for which impairment was issued nor any evidence of prior restrictions applied to his lifting or bending due to a back condition. Moreover the vast majority of people his age have degenerated discs with no back complaints. To say that he has a preexisting back condition which produces impairment is speculative at best and not supported by medical science. Even if the etiology of his back condition was disc degeneration in nature there must have been on his date of injury enough anatomical change in his disc to begin to cause symptoms and a need to seek medical attention. An analogy here is that of a partially full glass of water. You can add little bits of water into a glass over time, but eventually the glass will become full and spill over. Once the water spills over, then action must be taken such [as] cleanup of the spilled water. The same applies here where the degenerative disc disease only became symptomatic when his accident caused significant structural anatomical change that produced symptoms and impairment. He has significant clinical findings that have given him diagnoses consistent with his described accident at work. Apparently, on this examinee's date of injury he sustained enough permanent structural change in the anatomy of his low back which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the accident at work.⁵

⁵ Murati Depo., Ex. 2 at 4.

On February 25, 2021, David Hufford, M.D., saw the claimant for a court-ordered IME. Dr. Hufford noted the claimant reported a singular event of stepping onto a forklift step that was less than 12" high, and feeling so much low back pain he screamed and jumped off in pain. The claimant complained of continuing low back pain with a right leg radicular component and pain radiating into his inguinal area, including the right testicle. The doctor reviewed medical records, including MRI reports dated November 17, 2011 and May 18, 2020, but not the actual MRI films, took a history and performed a physical examination. The claimant had tender paraspinal musculature without trigger points or guarding, normal strength and symmetrical reflexes. Straight leg raise testing was positive on the right and negative on the left. Dr. Hufford noted the 2020 MRI finding of a left-sided broad-based disc protrusion would be on the opposite side of right leg radiculopathy.

Dr. Hufford's impression was "Low back pain beginning during work activities without acute traumatic event."⁶ Dr. Hufford reiterated the claimant did "not describe any acute specific traumatic event in the conduct" of his work.⁷ The doctor recommended a series of injections and possible surgical consultation. Dr. Hufford stated:

The prevailing factor for his current low back pain is not the occupational activities in which he has been engaged. Stated differently, his occupational activities have not "worn out" his low back. The occupational activities have not caused lumbosacral neuritis nor advancement of the degenerative changes found particularly at L4-L5 which have increased in severity in a quantitative manner since his prior occupational injury while working at Cargill in what is, more probable than not, the usual and expected [increase] in these degenerative changes with the aging process.⁸

Regardless of causation, Dr. Hufford recommended a series of up to three epidural steroid injections, and, if unsuccessful, a surgical consultation.

At his attorney's request, Harold Hess, M.D., saw the claimant on June 21, 2021, for an IME. Dr. Hess, a retired board-certified neurosurgeon, is fellowship trained in spinal surgery. The doctor reviewed medical records, including the claimant's prior medical records. The doctor reviewed the lumbar MRI report dated November 17, 2011, which was interpreted as showing an L4-L5 disc bulge with a minimal midline protrusion and mild L4-L5 foraminal stenosis. Dr. Hess also reviewed images of a lumbar CT dated May 2, 2020, and lumbar MRI dated May 18, 2020. According to Dr. Hess, the lumbar CT showed a broad-based L4-L5 disc protrusion with bilateral foraminal stenosis. The 2020 lumbar MRI showed a broad-based L4-5 disc protrusion with moderate foraminal stenosis and a

⁶ Hufford Report (filed Mar. 11, 2021) at 2.

⁷ *Id.*

⁸ *Id.* at 2-3.

central L4-L5 disc herniation. Dr. Hess noted the 2011 MRI showed a minimal protrusion at L4-L5 and mild stenosis, whereas the 2020 MRI showed a central disc protrusion, or a herniation, and moderate stenosis at L4-L5.

Dr. Hess noted the claimant complained of low back pain radiating into his right buttock and right testicle, with numbness of the right buttock. Dr. Hess' physical examination showed the claimant had subjectively decreased pinprick and light touch perception in a right L4 distribution. Straight leg testing on the right was positive and produced low back pain, but testing was negative on the left. The claimant had low back tenderness and tightness.

Dr. Hess noted the claimant had a remote history of low back pain from 2011 through 2014, and the claimant reported being pain free after such symptoms abated, at least until the injury of May 2, 2020. Dr. Hess' impression was the claimant was suffering from a right lumbar radiculopathy. The doctor recommended additional medical treatment, including a possible L4-L5 laminotomy and discectomy.

Dr. Hess acknowledged the claimant has degenerative disc disease and degenerative disc disease can progress to a herniation in the absence of trauma. However, the doctor testified the claimant had a "structural change"⁹ to his lumbar spine from the work injury and stated, "It is my opinion, within a reasonable degree of medical certainty, that the work injury of 05/02/2020 is the prevailing factor in causing this patient's current medical condition and his current symptoms."¹⁰ Part of the doctor's reasoning was the timing of stepping onto the step corresponded to when the claimant's symptoms began. Dr. Hess discounted degenerative disc disease as the cause of the claimant's symptoms because the degenerative disc disease existed for years and the claimant only had pain suddenly after a work-related accidental injury. Dr. Hess acknowledged a person with a healthy back would be unlikely to develop a herniated disk from stepping up into a forklift, but reiterated the prevailing factor was still the stepping onto or off a forklift. The doctor also testified the claimant's right radicular leg pain and weakness was due to the moderate bilateral foraminal stenosis, which was different from the prior mild stenosis.

Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th ed., Dr. Hess assigned the claimant a 12% whole person impairment.

Dr. Estivo, who saw the claimant once in 2012, testified about causation regarding the 2020 injury, without examining the claimant again. Dr. Estivo reviewed the 2020 MRI report, but not the actual films, and noted further progression of the degenerative disc disease at L4-L5 following the 2011 MRI. The doctor did not find any evidence of a lesion

⁹ Hess Depo. at 7.

¹⁰ *Id.*, Ex. 2 at 2.

or change on the MRI he could attribute to the work accident. Dr. Estivo indicated a degenerative disc will never go away, will never improve, will wax and wane, and will gradually continue to bulge and protrude further and commonly herniate with time, even absent trauma.

Dr. Estivo testified stepping off or on a forklift would not be sufficient to cause a herniated disc. He attributed the changes between the 2011 and 2020 MRIs to “age, basically” and the “natural progression of the degenerative disc disease that has occurred over the nine years.”¹¹ Dr. Estivo opined the work accident was not the prevailing factor for any changes on the MRI or any new injury. Dr. Estivo acknowledged a herniation in 2020 would be a physical change over the 2011 MRI, which did not show a herniation. He agreed the 2011 MRI did not show moderate bilateral foraminal stenosis, which was another change shown on the 2020 MRI.

The claimant currently experiences lower left back pain, with pain down his right leg and in his right testicle. He currently works at NAPA Auto Parts as a cashier, a job not requiring heavy lifting.

The ALJ stated:

The Court finds that the Claimant's injury did not arise out of his employment with the Respondent because the work accident is not the prevailing factor causing the injury, medical condition and resulting disability.

The great weight of the medical evidence indicates that the work accident is not the prevailing factor. Drs. Estivo, Hufford and Whitaker agree on this point. As noted by ALJ Fuller, the three doctors are consistent and credible. Dr. Hufford performed his IME at the court's request.

The Claimant's preexisting degenerative disc disease is the prevailing factor. The evidence indicates that the Claimant's preexisting degenerative condition became symptomatic while he was stepping onto the forklift. But stepping onto the forklift was not the prevailing, or primary, factor for the Claimant's back problem.

The Claimant's accident consisted of taking a step of normal height. Dr. Hess agreed that this was not sufficient to cause a herniated disc in a normal person. Dr. Whitaker and Dr. Estivo said that it was highly unlikely that taking a step up would result in the Claimant's back problem.

The Court does not find the fact that Dr. Hess examined the MRI films particularly significant. It is better for a doctor to look at both the films and the radiologist's report. Dr. Whitaker did this. But in this case, Dr. Hess, who was hired by the Claimant, apparently interpreted the films in a way that is more favorable to the Claimant than the radiologist.

¹¹ Estivo Depo. at 12.

Nor is the fact that the Claimant worked for several years prior to 2020 without back complaints significant. Symptoms from degenerative disc disease wax and wane. Even though the Claimant was not having symptoms for several years before the 2020 work injury does not mean that the work injury is the prevailing factor for the Claimant's back problems.

The issues of nature and extent of disability and future medical benefits are moot.¹²

These proceedings followed.

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues he is entitled to a 12% whole body impairment based on Dr. Hess' rating. The claimant asserts Dr. Hess' opinion is more credible because he is the only spine specialist who reviewed both MRI reports. The respondent maintains the Award should be affirmed.

K.S.A. 44-501b(c) and K.S.A. 44-508(h) require the worker to prove the right to an award based on the whole record using a more probable than not probable burden of proof, but an employer must prove any affirmative defenses.¹³

In part, K.S.A. 44-508 states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall 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. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(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.

¹² ALJ Award at 7-8.

¹³ See *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015).

(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.

...

(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.

While the definition of prevailing factor has been viewed as providing “unhelpful circularity” by defining the operative term with a synonymous term, the primary factor presumably is “the most important one.”¹⁴ “[A]n injury is recoverable only if the work accident – and not a preexisting condition – is the primary factor in causing the injury and resulting impairment.”¹⁵ Proof of “prevailing factor” is not dependent on medical evidence alone, but is based on the entire record.¹⁶ Preexisting degenerative conditions can be the prevailing factor,¹⁷ but the presence of a preexisting condition does not always preclude compensability after an accident.¹⁸

¹⁴ See *Banks v. Spirit Aerosystems Inc.*, No. 120,335, 2020 WL 741567, at *3 (Kansas Court of Appeals unpublished opinion filed Feb. 14, 2020), *rev. denied* (Oct. 16, 2020).

¹⁵ See *Jennings v. T Rowe Pipe LLC*, No. 122,149, 2020 WL 6533123, at *8 (Kansas Court of Appeals unpublished opinion filed Nov. 6, 2020).

¹⁶ See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, at *5 (Kan. WCAB July 12, 2018).

¹⁷ See *Shook v. Waters True Value Hardware*, No. CS-00-0368-737, 2019 WL 6695514, at *5, fn. 14 (Kan. WCAB Nov. 19, 2019).

¹⁸ See *id.* at fn. 15.

There are statutory exceptions to what arises out of and in the course of employment, such as an injury caused by the natural aging process or by the normal activities of day-to-day living, as well as an accident or injury which arose from a neutral risk with no particular employment or personal character, or arose out of a risk personal to the worker, or arose either directly or indirectly from idiopathic causes.¹⁹

The Board carefully reviewed the record. The evidence is conflicting, but the greater weight of the credible evidence establishes the claimant's injury by accident did not arise out of and in the course of employment due to the prevailing factor requirement under K.S.A. 44-508(d) and K.S.A. 44-508(f)(2)(B)(ii).

Under the facts, Drs. Hess and Murati attribute the work accident as the prevailing factor, with Dr. Hess doing a better job of explaining his rationale. Essentially, the claimant had work injuries in 2011 and 2013. The claimant testified he was released from treatment without permanent restrictions and returned to his regular work. There are no medical records to counter the claimant's testimony his symptoms in 2011 and 2013 resolved, such as records showing ongoing complaints or treatment.²⁰ There are also no medical records showing the claimant's lumbar degenerative disc disease waxed and waned between 2013 and his 2020 work accident. If his condition was "waxing," it was insufficient to cause him to seek medical treatment, at least based on his testimony and the lack of medical records to the contrary.

Drs. Hufford, Whitaker and Estivo indicate the prevailing factor is not the work injury, but rather the claimant's preexisting and ongoing degenerative disc disease. There are some concerns about these opinions. For instance, Dr. Hufford denied the claimant had a singular accident, which is contrary to the evidence. Dr. Whitaker's testimony initially seemed inconclusive as to prevailing factor. Dr. Estivo provided a contemporary medical opinion without having examined the claimant for eight years. Nevertheless, these three physicians squarely attributed the claimant's injury and medical condition to his preexisting degenerative disc disease. Dr. Hufford was the court-ordered examiner and Dr. Whitaker was a medical examiner without bias. These opinions regarding prevailing factor are credible and adopted by the Board: the prevailing factor for the claimant's injury, medical condition and resulting disability or impairment is his preexisting degenerative disc disease, not the work accident. As such, the claimant's accidental work injury did not arise out of his employment based on K.S.A. 44-508(f)(2)(B)(ii). The case is not compensable.

Given the lack of compensability, the remaining issues of nature and extent of disability and future medical are moot.

¹⁹ See K.S.A. 44-508(f)(3)(A).

²⁰ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 197, 558 P.2d 146 (1976) ("Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.").

AWARD

WHEREFORE, the Board affirms the Award dated July 26, 2022.

IT IS SO ORDERED.

Dated this _____ day of December, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Jeff Cooper
Christopher McCurdy
Hon. Gary Jones