

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ZENAIDA CASTRO)	
Claimant)	
V.)	
)	AP-00-0471-036
TIME OUT SPORTS BAR & RESTAURANT, INC)	CS-00-0461-895
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appealed the September 23, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K Jones.

APPEARANCES

Jordan Massey appeared for Claimant. William Townsley appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the documents of record filed with the Division and the following:

1. Siena Medical Clinic Records;
2. Centura Health Records;
3. Kansas Orthopaedic Center medical records;
4. Dr. Morrow prevailing factor opinion;
5. Medical Records of Guillermo E. Garcia, M.D.;
6. Travelers Insurance Company, Work Comp Notes.
7. Preliminary hearing via deposition of Zenaida Castro held March 17, 2022;
8. Court-ordered independent medical evaluation of Vito J. Carabetta, M.D.,

- June 22, 2022;
9. Evidentiary Deposition of Lee Galeetos taken August 8, 2022;
10. Preliminary Hearing held September 21, 2022.

ISSUE

Did Claimant sustain personal injury by accident arising out of and in the course of her employment with Respondent on April 17, 2021, including was the accident the prevailing factor causing Claimant's medical condition and need for treatment?

FINDINGS OF FACT

Claimant injured her right knee in January 2021 when she slipped and fell on the ice/snow. It was a non-work related injury. She sought treatment on February 16 with Dr. Guillermo Garcia at Siena Medical Clinic. Claimant saw Dr. Garcia on three occasions, with her treatment concluding on March 17, 2021. Dr. Garcia's records do not reflect Claimant experienced swelling in her knee during this time. He provided conservative treatment, which included x-rays, medication and an injection. Dr. Garcia recommended use of a sleeve and a brace. Claimant testified Dr. Garcia ordered her to stay off work for 15 days. Following the injection and the time off work, Claimant testified she was "perfect."¹ Dr. Garcia released her without restrictions. Claimant testified, "He released me because he told me I was fine and I was feeling fine."²

Claimant was a cook for Respondent for fifteen years. Her job duties included cooking, prepping, and cleaning. On April 17, 2021, Claimant slipped and fell, injuring her right knee. Claimant reported her accident to Respondent. The accident was witnessed by her co-workers. Gloria, a co-worker, confirmed the fall to Respondent.

Claimant saw Dr. Garcia for her injury on June 22, 2021. Claimant reported swelling, pain and catching or a locking sensation in her knee. X-rays were ordered and revealed no acute fractures or dislocations. Dr. Garcia's diagnosed a possible tear of the medial meniscus and ordered an MRI. Claimant was prescribed Meloxicam and was instructed to return following the MRI, which was performed on July 22, 2021. It revealed a full thickness tear of the posterior horn of the medial meniscus and mild osteoarthritis of the medial compartment of the knee joint. On August 10, 2021, Dr. Garcia recommended surgery.

¹ Claimant's Depo. At 22.

² *Id.* at 22.

Respondent referred Claimant to Shawn R. Morrow, D.O., for an evaluation on September 9, 2021. Dr. Morrow shared Dr. Garcia's diagnosis and recommendation for surgery to repair her knee. Surgery was scheduled, but not authorized by Respondent. On November 1, 2021, Dr. Morrow opined the accident on April 17, 2021 was the prevailing factor causing Claimant's medical condition and need for treatment.

Claimant was referred to Vito J. Carabetta, M.D., on June 22, 2022 for a Court-ordered independent medical evaluation. He obtained the history directly from Claimant in her native Spanish language. Dr. Carabetta, noting approximately 200 pages of medical records were "carefully reviewed," opined the April work injury was the prevailing factor in Claimant's medical condition and need for treatment.

Prior to the injury of April 14, 2021, there was no discussion of requiring an MRI scan, as no internal derangement issues were suspected. Everything changed following the incident on April 14, 2021. She has had ongoing complaints thereafter, and documentation of the internal derangement is indeed evident on the MRI scan. Therefore, the accident at work of April 14, 2021 would under the circumstances clearly be the prevailing factor.³

Dr. Carabetta agreed with the surgery recommended by Dr. Garcia and Dr. Morrow and stated physical therapy would need to follow.

Respondent is a bar/restaurant. Lee Galeetos is the owner/operator. Respondent has been in business since 2001. She employees 12 to 13 employees. Ms. Galeetos is of Korean descent and does not speak Spanish. Claimant speaks Spanish primarily. A Korean interpreter was not present for Ms. Galeetos deposition. However, her daughter, Angelina Galeetos, was present for the deposition and intervened multiple times to assist her mother with questions and answers throughout the deposition. Ms. Galeetos testified she and Claimant had difficulty communicating:

Q. And -- and some of the arguments -- and I understand that she speaks primarily Spanish, is that right?

A. Yes.

Q. And I understand you're of Korean descent, is that right?

A. Yes.

Q. And do you speak Spanish at all?

³ Carabetta IME Report (June 22, 2022) at 3.

A. No, sir.

Q. Okay. And I understand that sometimes the two of you didn't always understand or didn't communicate well with one another?

A. Yes.⁴

Ms. Galeetos testified Ruben Martinez was a cook who assisted her in communicating with Claimant:

A. I have a Spanish, you know, man cooking, but they not here now, they went to Mexico, and one of them quit, so when Zenaida working that time, yes, I had another Spanish, you know, person cooking.

MS. ANGELINA GALEETOS: Mom, they wanted to know --

A. So that person not supervisor, but I need a language something, and he translate to Zenaida.⁵

There was a delay between Claimant's slip and fall on April 17 and her seeking treatment with Dr. Garcia on July 22. Claimant testified she was waiting for a report or paper from Respondent to begin treatment. She requested it repeatedly from Ms. Galeetos, but it was not provided. When it was finally received, she immediately sought treatment with Dr. Garcia. Ms. Galeetos' version for the delay is different. She denies Claimant ever told her she was experiencing pain and wanted medical treatment. Ms. Galeetos testified Claimant did not ask to see a doctor until June. When Ms. Galeetos found out Claimant wanted treatment, she gave Claimant the claim form to complete.

Claimant quit working for Respondent on July 25, 2021. Claimant testified she could not bear the pain and Ms. Galeetos told her she could not return to work unless she was able to perform her job at 100%. Ms. Galeetos testified Claimant came to her house on July 25 and asked for two weeks off pursuant to doctor's orders. Claimant did not return to work after the two weeks.

The Administrative Law Judge granted Claimant's request for benefits:

Dr. Morrow, the doctor selected by the Respondent, signed a letter from the Claimant's attorney on November 29, 2021, saying that the April accident is the prevailing factor for the Claimant's injury for which treatment is sought.

⁴ Galeetos Depo at 9.

⁵ *Id.* at 16.

Dr. Vito Carabetta, who performed an IME at the Court's request, also found the April injury at work the prevailing factor. Dr. Carabetta noted that the Claimant had a prior injury but she had returned to work, was walking at her usual rapid pace and was symptom free prior to the April work injury. Dr. Carabetta states that the Claimant requires surgery.

The Respondent has presented no medical opinion stating the April fall at work is not the prevailing factor for the Claimant's current need for treatment.

The Respondent questions the Claimant's injury because the Claimant did not return to Dr. Garcia until June. The Claimant explained that the Respondent did not have a written accident report form for her to complete until sometime after the accident. Although the Claimant could have gone to Dr. Garcia at her own expense, the Court does not find the Claimant's failure to do that sufficiently suspicious to deny her claim. There is no evidence of any intervening injury between April and June. Likewise, although there are discrepancies between the testimony of the Claimant and Ms. Galeetos about several issues, the Court does not find these discrepancies sufficient to deny the claim.⁶

Respondent argues Claimant is not credible and failed to sustain her burden of proving she sustained a knee injury arising out of and in the course of her employment. Respondent believes Claimant provided conflicting statements throughout the process resulting in inaccurate reports and conclusions from the physicians. Claimant requests the Board affirm the ALJ's September 23, 2022 Order.

PRINCIPLES OF LAW AND ANALYSIS

Claimant proved the April accident was the prevailing factor causing her medical condition and need for medical treatment.

To be compensable, an accident must be identifiable by time and place of occurrence, produce symptoms at the time of an injury and occur during a single work shift.⁷ The accident must be the prevailing factor in causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁸ An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁹

⁶ ALJ Award (Sept. 21, 2022) at 2.

⁷ See K.S.A. 44-508(d).

⁸ See K.S.A. 44-508(d) and K.S.A. 44-508(g).

⁹ See K.S.A. 44-501(f)(2).

The parties do not dispute Claimant was injured in January 2021, for which she received conservative treatment and was released from treatment without restrictions. She slipped and fell while in the course of her employment on April 17, 2021. Respondent was aware Claimant slipped and fell. Claimant has a torn meniscus needing surgical repair. The issue is do the events, specifically the communications between the parties between April 17 and the diagnosis of a torn meniscus, render Claimant's claim non-compensable? The undersigned Board Member finds they do not.

The ALJ found the discrepancies between the parties were insufficient to deny Claimant's request for benefits. This Board Member agrees. Due to the language barriers, communication between the parties is, and has always been, average at best. Ms. Galeetos testified she had a bilingual cook in the kitchen to assist in communicating with Claimant and her co-workers.

It is unclear what medical records were provided to Dr. Morrow, but he was chosen by Respondent to evaluate Claimant. Respondent was responsible to provide him with the medical records they deemed relevant and necessary for him to provide his opinions. Dr. Carabetta carefully reviewed 200 pages of medical records and was able to communicate with Claimant in Spanish. A review of his analysis clearly shows his opinions were not based solely on Claimant's version of the events.

The undersigned Board Member agrees with the ALJ. Respondent's argument Claimant's testimony is so unreliable it renders her version of the events and the opinions of the physicians not credible is considered and rejected. Claimant met her burden of proving by the greater weight of the evidence the torn meniscus in her right knee and need for treatment arose out of and in the course of her employment when she slipped and fell on April 17, 2021 and was the prevailing factor for Claimant's medical condition and need for treatment. The preliminary Order for benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the preliminary Order issued by Administrative Law Judge Gary K Jones, dated September 23, 2022, is affirmed.

IT IS SO ORDERED.

Dated this 5th day of December, 2022.

ZENAIDA CASTRO

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CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Jordan Massey, Attorney for Claimant
William Townsley, Attorney for Respondent and its Insurance Carrier
Hon. Gary K Jones, Administrative Law Judge