

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JALIS BULLOCK

Claimant

v.

SEDGWICK COUNTY, KANSAS

Self-Insured Respondent

AP-00-0469-292

CS-00-0458-674

ORDER

Claimant requests review of the Order, dated July 19, 2022, issued by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Jonathan E. Voegeli appeared for Claimant. William L. Townsley, III, appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held May 17, 2022, including Claimant's Exhibits 1-4, 6-19; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant sustain an occupational disease arising out of and in the course of her employment with Respondent?

FINDINGS OF FACT

Claimant worked for Respondent as a firefighter from October 31, 2016, through May 31, 2021. Claimant attended the firefighting academy from October 31, 2016, through January 21, 2017, and worked as a firefighter from January 22, 2017, through May 31, 2021. Claimant testified she worked 10,647.74 hours total as a firefighter, or 3,871.91 hours per year on average. Respondent's attendance records indicate Claimant worked 11,127.74 hours total.

While attending the academy, Claimant received training necessitating exposure to fire, smoke and soot. Claimant was also tasked with removing spent flammable materials used in her training. Claimant testified she got dirty during her training, but was unable to take a shower at the end of the day.

After completing her training at the academy, Claimant was assigned to a station where she worked as a firefighter. The station where Claimant was assigned housed fire trucks and engines emitting diesel fumes inside the station. Claimant testified she was exposed to those fumes. Claimant also testified the fumes created diesel particulate collecting in the ice in the station's ice machine, which Claimant consumed. As a firefighter, Claimant was exposed to smoke and soot, as well as other chemicals at fire and vehicle wreck scenes. Claimant was also exposed to chemicals during training sessions. Claimant also testified the protective gear she used became dirty and contaminated with chemicals, which produced additional exposure when Claimant wore her gear. Claimant was not provided back-up gear to wear when her primary gear was dirty. Claimant was required to respond to emergency calls at night, and wore her protective gear while sleeping.

On October 9, 2019, Claimant was diagnosed with breast cancer, following a biopsy, and was referred to Dr. Page, an oncologist, for treatment. Dr. Page diagnosed invasive ductal carcinoma, Grade 2, Stage 1A, in the upper quadrant of the right breast. Dr. Page noted Claimant was under 40 years of age, a nonsmoker who occasionally consumed alcohol, with no family history of breast cancer. Genetic testing did not reveal markers predisposing Claimant to developing breast cancer. Ultimately, Claimant underwent a bilateral total mastectomy and reconstruction on April 30, 2020, and underwent chemotherapy from December 4, 2019, through November 19, 2020. As of May 20, 2021, Claimant had completed chemotherapy, displayed no evidence of recurrent disease, and was scheduled to return periodically for observation.

There is no record in Dr. Page's initial treatment records Claimant's work as a firefighter was discussed as a potential cause of Claimant's condition. While undergoing treatment, Claimant conducted research on her own on the connection between breast cancer and chemical exposure as a firefighter. Copies of reports and records Claimant obtained from her research were admitted as exhibits at the preliminary hearing. ALJ Marchant provided an extensive review of the exhibits in the Order dated July 19, 2022, which is incorporated herein as if fully set forth. Claimant also testified her research indicated the disruption of circadian rhythms could lead to the development of cancer.

According to the research materials submitted by Claimant, 4% of breast cancer diagnoses occur in patients under the age of 40.¹ The literature Claimant obtained

¹ See P.H. Trans. (May 17, 2022), Cl. Ex. 10.

confirmed a higher risk of breast cancer among women working as nurses, teachers, librarians, radiological technicians, laboratory technicians, factory workers and others working with chemical solvents, but the prevalence of cancer among female first responders, including firefighters, required additional research.² According to the article entitled, "Firefighters and Breast Cancer," while an elevated risk of breast cancer may appear present among female firefighters, the number of women in the published studies were too low to draw reliable conclusions.³ Additional data, including blood and urine samples, were being gathered to assess exposure levels.⁴

Claimant confirmed while she was working for Respondent, five of the 140-150 firefighters working for Respondent were women. To Claimant's knowledge, none of the female firefighters developed breast cancer. Claimant testified one male firefighter at her station who had worked as a firefighter for twenty years was diagnosed with cancer. Claimant also testified two other male firefighters who worked for Respondent for at least ten years were diagnosed with cancer, but not breast cancer.

Dr. Page was provided documents and reports, although it is not clear which documents and reports were provided. Dr. Page issued a letter, dated January 2, 2020, stating his review of the literature indicated an increased risk of breast cancer for firefighters exposed to inhalants.⁵ Dr. Page noted Claimant was a young, otherwise healthy person. Dr. Page opined, "this very well could be related to her work."⁶ At preliminary hearing, Claimant acknowledged no one told her specifically her breast cancer was caused by one or more causative agents mentioned in the literature she gathered. Claimant did not follow up with Dr. Page on his letter.

Claimant notified Respondent of her cancer diagnosis and the results of her research, and sought workers compensation benefits. Claimant believed her cancer was caused by exposure to diesel particulate in the ice and diesel fumes at the station, her exposure to smoke and soot particles during her training and work, occupational exposure to polycyclic aromatic hydrocarbons, exposure to light at night, and disruption of her

² See P.H. Trans. (May 17, 2022), Cl. Ex. 11, 12, 13.

³ See *id.*, Cl. Ex. 14.

⁴ See *id.*

⁵ See *id.*, Cl. Ex. 6.

⁶ See *id.*

circadian rhythm from night-shift work.⁷ Respondent denied Claimant's request for workers compensation benefits.

Claimant currently works as an EMT for St. Francis Medical Center. Claimant denied engaging in other hobbies or activities exposing her to chemicals or smoke.

Claimant sought payment of Dr. Page's bills under workers compensation. In her Amended Application for Benefits, Claimant alleged she developed breast cancer as an occupational disease from exposure to contaminants, with a date of disablement of October 9, 2019. Following the preliminary hearing, ALJ Marchant issued the Order dated July 19, 2022. After reviewing the record, ALJ Marchant concluded Claimant proved she was exposed to smoke and inhalants as a firefighter, and the literature suggested some degree of a special risk of cancer from Claimant's work. ALJ Marchant also concluded, however, Claimant did not prove her occupational exposure to smoke and inhalants caused her breast cancer under a more-likely-true-than-not analysis, and Dr. Page's causation opinion was speculative. The request for workers compensation benefits was denied. These proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the preliminary Order is erroneous because the evidence proved Claimant's occupational exposure to smoke and diesel fumes caused her breast cancer. In contrast, Respondent argues the preliminary Order is correct, because the opinion of Dr. Page constituted *post hoc, ergo propter hoc* reasoning, which is insufficient to establish medical causation. Neither party contests the conclusions Claimant proved her work as a firefighter created a particular risk of exposure to smoke and inhalants, or her work as a firefighter entailed some degree of special risk of developing cancer.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.⁸ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁹ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.¹⁰

⁷ See *id.*, Cl. Ex. 1.

⁸ See K.S.A. 44-501b(a).

⁹ See *id.*

¹⁰ See K.S.A. 44-501b(c).

“Occupational disease” shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. “Nature of the employment” means the employment the employee is engaged in creates an increased hazard of disease in excess of the hazard of disease in general due to a special employment-related risk. Ordinary diseases of life and conditions to which the general public may be exposed outside of the particular employment are not compensable.¹¹

The occupational disease statute does not refer to the prevailing factor requirement contained in K.S.A. 44-508(f).¹² When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.¹³ Therefore, Claimant need not prove occupational exposure to smoke and diesel fumes was the prevailing factor causing her breast cancer, but Claimant must establish the disease more likely than not resulted from the nature of her employment as a firefighter. While medical evidence may not always be necessary to establish causation, the Appeals Board previously declined to treat an employee’s lay opinion as sufficient evidence on the complex medical issue of the cause of the employee’s cancer.¹⁴

In this case, Claimant’s treatment records are silent on her occupational smoke or chemical exposures or the cause of her breast cancer. The records concerning Claimant’s research indicate a causal relationship between work as a firefighter and cancer may be possible, but additional research and data is necessary to establish a causal relationship within a reasonable probability. As in *Risher*, Claimant’s lay opinion on the cause of her breast cancer is not sufficient evidence on the complex issue of causation alone.

At issue is whether Dr. Page’s opinion is sufficient competent evidence on causation. In his letter dated January 2, 2020, Dr. Page states occupational exposure to inhalants “very well could be related to her work.”¹⁵ Dr. Page indicates he reviewed literature in reaching this conclusion, but does not state which literature he consulted. There is no indication Dr. Page reviewed test reports or other evidence of the types of

¹¹ See K.S.A. 44-5a01(b).

¹² See *id.*; see also *Beard v. Wolf Creek Nuclear Operating Corp.*, AP-00-0443-585, CS-00-0017-874, 2019 WL 4253361, at *10 (Kan. WCAB Aug. 27, 2019).

¹³ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

¹⁴ See *Risher v. Eaton Corp.*, No. 192,945, 2013 WL 6920094, at *4 (Kan. WCAB Dec. 24, 2013).

¹⁵ See P.H. Trans. (May 17, 2022), Cl. Ex. 6.

inhalants Claimant was exposed to, or was apprised of the quantity or length of exposure. Dr. Page has not testified or explained the basis for his opinion.

An expert must have a factual basis for his or her opinions to separate them from mere speculation. An expert must confine his or her opinions to certainties or probabilities, and not possibilities. To be reasonably probable, a conclusion must be more likely than not. A physician's opinion a plaintiff's symptoms followed exposure, and must therefore be due to it, or *post hoc, ergo propter hoc*, is not competent evidence, absent other supporting facts, data or tests.¹⁶ When the salient question in a workers compensation case is the cause of a medical condition, the maxim of *post hoc, ergo propter hoc* is not competent evidence of causation.¹⁷

Having considered the record, the undersigned concludes Dr. Page's causation opinion is an example of *post hoc, ergo propter hoc*. There is no evidence Dr. Page was aware of the kinds of inhalants Claimant was exposed, the length of exposure or whether Claimant's protective equipment ameliorated her exposure. Dr. Page did not state which literature he reviewed. More importantly, Dr. Page did not state Claimant's exposure to inhalants caused her breast cancer within any degree of probability. Instead, Dr. Page indicates exposure to inhalants could possibly cause her condition. Under *Christenson* and *Kuxhausen*, Dr. Page's opinion is not competent expert opinion evidence on causation. ALJ Marchant's conclusion Claimant did not prove causation is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Ali Marchant, dated July 19, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2023.

APPEALS BOARD MEMBER

c: Via OSCAR
Jonathan E. Voegeli
William L. Townsley, III
Hon. Ali Marchant

¹⁶ See *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 318-20, 241 P.3d 75 (2010).

¹⁷ See *Christenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 461, 263 P.3d 821 (2011), *rev. denied* 294 Kan. 943 (2012).