BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN NELSON	)	
Claimant	)	
V.	)	
	)	
NANO LLC	)	AP-00-0472-082
Respondent	)	CS-00-0470-162
AND	)	
	)	
MIDVALE INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, pro se, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's preliminary hearing Order dated November 3, 2022. Kevin Johnson appeared for the insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the:

(1) Preliminary hearing transcript, held November 2, 2022, with documents uploaded into the OSCAR (Online System for Claims Administration Research/Regulation) "Case Record" by the ALJ's legal assistant on September 20, 2022 (66 pages), October 19, 2022 (12 pages), October 27, 2022 (20 pages), and November 2, 2022 (13 pages);

(2) claimant's documentation requesting review by the Board;

(3) claimant's briefs (Part 1 and Part 3) uploaded into OSCAR on November 29, 2022;

(4) additional information from the claimant uploaded into OSCAR's "Appeal Record" on December 6, 2022; and

(5) documents of record filed with the Division.

The Board did not consider:

(1) pages 2, 4, 13 and 15 of the claimant's brief (Part 1);

(2) the claimant's brief (Part 2) titled "New Information" uploaded into OSCAR's "Appeal Record" on November 29, 2022;

(3) pages 10-15, 17- 26, 30-35, 41, 42, 44-55, 56-62, 64-67, 68, 72-82, 84-88, and 93-111 of the claimant's brief (Part 3); and

(4) pages 2-13, filed as "additional information" from the claimant, which was uploaded into OSCAR on December 6, 2022.

The excluded documents were not considered by the Board because K.S.A. 44-555c(a) states, "The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." In other words, the Board will only consider evidence submitted to the ALJ, not new or additional evidence which was never presented to the ALJ in the first instance.

ISSUE

Whether the claimant contracted COVID-19 (a/k/a COVID, coronavirus) arising out of and in the course of his employment?

FINDINGS OF FACT

The claimant, currently aged 72, owns the respondent, a janitorial service. One of his customers was a medical clinic, Centra Care.

Between September 11 and September 13, 2021, the claimant stated he only left his residence to get groceries at Walmart and Price Chopper on September 11, for a Moderna vaccination appointment at Walmart on September 12, and a doctor's appointment on September 13 at 1:45 p.m.

According to the claimant, around 9:00 p.m., on September 13, he opened the back door to Centra Care and inhaled a terribly bad chemical smell coming from the hallway. The claimant indicated he worked in an enclosed space at Centra Care until 11:00 p.m., and was the only person there during such time.

The claimant testified he was exposed to COVID on September 13 while working at Centra Care and inhaling bad-smelling air. He also testified his exposure occurred on or about September 11-13. He stated his exposure was to coronavirus hanging in the air from infected people, from coronavirus coming from an open biohazard container (the lid was not closed), and poor ventilation at Centra Care. A hand-drawn map of Centra Care contains the claimant's handwritten statement the main sources of coronavirus were the customer's restroom, biohazard containers, an open drain in the custodial room and the

restroom where lab tests are done. According to the publication *Science*, onset of symptoms occurs one to four days following exposure.

On September 14, the claimant was hospitalized. According to the claimant, he remained in the hospital until September 20. On September 25, he was readmitted to the hospital for shortness of breath. These medical records are not in evidence. The claimant had a biopsy of a right inguinal lymph node on October 13. A discharge summary dated October 14 noted the claimant had been exposed to COVID on September 13.[1]

The claimant stated Aaditya Verma, D.O., said COVID attacked his lung in two places.

The claimant provided many documents for the ALJ's consideration, such as handwritten documentation of health conditions, articles concerning COVID from *Nature, Science, Nature Nanotechnology*, and *Chemical & Engineering News*.

The claimant currently experiences, among other things, blood clots, heart failure, lung disease, acute respiratory distress syndrome (ARDS), shortness of breath, fatigue and lymph node cancer. He attributes these maladies to the alleged COVID exposure.

The ALJ denied benefits, finding no proof the claimant ever had COVID, no evidence how the claimant may have contracted COVID, and concluded the claimant's theories as to contracting COVID were speculative and not persuasive. The ALJ stated, "The record failed to prove by a preponderance of credible evidence the claimant contracted COVID, contracted it as [a] single traumatic workplace event, or as an occupational disease, or requires medical treatment for effects of COVID."[2]

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues he contracted COVID while at work. The insurance carrier maintains the Order should be affirmed, asserting the claimant's theories as to contracting COVID are speculative.

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.[3] The Workers Compensation Act should be liberally construed only for the

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[1] See "Additional Information for E-3 filed by Pro Se" uploaded into OSCAR's "Case Record" on September 20, 2022, at 40.

[2] ALJ Order at 3.

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

purpose of bringing employers and employees within the provisions of the Act.[4] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[5] 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.[6] To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[7]

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

> (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.
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> (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.
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> . . .
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> (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.
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> (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.

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[4] See K.S.A. 44-501b(a).

[5] See *id*.

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

[7] See *id*.

(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.

. . .

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(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.

“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 as occupational diseases.[8]

The record is unclear if the claimant is alleging injury from a single accident, injury by repetitive trauma or injury from an occupational disease. However, based on the record presented to the ALJ and considered by the Board on appeal, the claimant failed to prove he sustained a compensable injury.

The claimant failed to prove he actually contracted COVID while working for the respondent. No medical records indicate the cause of the claimant's COVID infection, or show he was infected at Centra Care. Rather, the claimant argues he must have contracted COVID while working, because he inhaled bad-smelling air at Centra Care. Essentially, the claimant's argument is based on *post hoc, ergo propter hoc*: the symptoms follow the alleged exposure; therefore they must be due to it. In workers compensation cases, the maxim of *post hoc, ergo propter hoc* is not competent evidence of causation.[9] In the absence of competent evidence establishing the cause of the claimant's COVID infection, the claimant failed to prove he sustained a compensable injury. Therefore, the request for workers compensation benefits must be denied.

A hospital discharge summary from October 14 stated the claimant was exposed to COVID on September 13, but without any mention of a work-related link. The only evidence the claimant's work was the prevailing factor in developing COVID is his testimony. As noted by the ALJ, the claimant's theories as to getting COVID are speculative and not persuasive.

With respect to an occupational disease, the claimant failed to prove the nature of his employment created an increased risk or a special employment-related risk of a COVID infection. The claimant suspects he was exposed to airborne particles of COVID left in Centra Care from people infected with COVID. This theory is speculative. The record does not establish a special employment-related risk associated with the respondent.

The claimant failed to prove work-related exposure to COVID or actually contracting COVID arising out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as

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[8] K.S.A. 44-5a01(b); see also *Casey v. Dillon Companies, Inc.*, 34 Kan. App. 2d 66, 72-73, 114 P.3d 182 (2005).

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

permitted by K.S.A. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the Board affirms the Order dated November 3, 2022.

IT IS SO ORDERED.

Dated this _____ day of January, 2023.

_____
JOHN F. CARPINELLI
BOARD MEMBER

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