

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>GERALD TAYLOR</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0469-773
<b>SUTHER FEEDS, INC.</b>	)	CS-00-0453-928
Respondent	)	
AND	)	
	)	
<b>AMERICAN INTERSTATE INS. CO.</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested review of the August 11, 2022, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 8, 2022.

**APPEARANCES**

Bradley Avery appeared for Claimant. Terry Torline appeared for Respondent and its insurance carrier (Respondent). Kathryn Gonzales appeared for the Kansas Workers Compensation Fund (Fund).

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held March 23, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Gerald Taylor from April 16, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Gerald Taylor from April 18, 2022; the transcript of the Evidentiary Deposition of Pedro A. Murati, M.D., from October 26, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Pedro A. Murati, M.D., from March 9, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of Heidi J. Smith, D.O., from May 3, 2022, with exhibits attached; the transcript of the Evidentiary Deposition of John P. Estivo, D.O., from May 17, 2022, with exhibits attached; and the documents of record filed with the Division.

**ISSUES**

The issues for the Board's review are:

1. Did Claimant's alleged accident arise out of and in the course of his employment?
2. Is the alleged accident the prevailing factor causing Claimant's alleged injury, need for medical treatment and resulting disability or impairment?
3. Is Respondent liable for the emergency room bill arising from the accident?

**FINDINGS OF FACT**

Claimant worked for Respondent beginning June 8, 2020, transporting and delivering cattle feed. Claimant was required to maintain a commercial driver's license (CDL) and drove a semi-trailer truck. At times he unloaded his truck and moved feed, requiring frequent lifting of 50 pounds.

At approximately 6:00 a.m. on September 17, 2020, Claimant was driving his truck and trailer east on highway K-16 when he was involved in a single-vehicle accident. Claimant failed to negotiate a curve and drove off the roadway, hit an embankment, and drove through a fence before coming to a stop in a field. Claimant stated he was wearing his seat belt and shoulder harness at the time of the accident.

Claimant's truck was equipped with a dash camera, and a portion of the video is admitted into evidence. The dash camera video confirms Claimant drove straight into a field and missed the right turn. It is impossible, from the video, to determine why Claimant failed to negotiate the turn. He was close to hitting a large sign with an arrow pointing right when he started yelling "oh no" several times.

Prior to the accident which is the subject of this claim, Claimant was involved in an accident while operating a riding lawn mower at his home on July 24, 2020. Claimant explained his lawn mower began to tip while driving up an incline, and he rolled off the mower to avoid getting caught beneath it. Claimant described landing on his left shoulder and rolling onto his right shoulder. Claimant went to the emergency room for right shoulder complaints the following morning. X-rays revealed no fracture or malalignment of the right shoulder. Claimant was provided medication and a sling, and told to follow up with his personal physician.

At his initial deposition, Claimant denied injuring his right shoulder on July 24, 2020, and insisted it was his left shoulder. Later, Claimant stated he was confused and meant only he had landed on his left shoulder, not the right shoulder.

Claimant was seen by his chiropractor, Dr. Michael Frank, in August 2020, and he reported an injury to the right shoulder after a lawn mower incident. Claimant testified he went to Dr. Frank for adjustments to his back and only mentioned his right shoulder because it was injured. Dr. Frank's notes are not in the record; however, the review of Claimant's records as noted by Dr. John Estivo were admitted without objection. Claimant returned to Dr. Frank on September 3 and 21, 2020, where he reported right shoulder pain with movement and an episode of passing out from high blood sugar.

Paul Miller, an employee of Respondent, submitted an affidavit indicating Claimant stated, prior to September 17, 2020, he injured his right shoulder after the lawn mower event. Mr. Miller attested:

. . . [Claimant] had notified me that after injuring his right shoulder when he rolled his lawn mower, he had difficulty using his right arm to get into the cab of his truck. [Claimant] explained that he typically used his right arm to grab the grab bar on the cab of his truck to pull himself up so that he could use his left arm to open the door and enter the cab. However, after he had injured his right shoulder when he rolled his lawn mower, he had difficulty using his right arm to pull himself up to get in his truck.<sup>1</sup>

Claimant denied saying he had trouble climbing into his truck prior to September 17, 2020.

Claimant stated he hit his head during the accident on September 17, 2020. Claimant initially testified he struck his head on the dash of his truck and lost consciousness until the truck stopped moving, though he recalled leaving his truck and approaching a police officer afterward. Claimant informed Dr. Pedro Murati he hit his head on the overhead storage compartment, located above both seats, and regained consciousness when contacted by EMS. Claimant later testified he recalled striking his head on the overhead storage compartment and driving through the fence before losing consciousness.

Claimant was transported to Community Hospital Onaga Emergency Department on September 17, 2020. Hospital records reviewed by Drs. Murati and Estivo indicate EMS was called when Claimant displayed confusion after the accident. He was confused, agitated, and thirsty while at the hospital. Claimant's blood glucose level was recorded at 771, and he was admitted overnight to treat his elevated blood sugar. Claimant was discharged the following day with a diagnosis of "status post motor vehicle accident likely secondary to elevated blood sugar."<sup>2</sup> Claimant was advised to follow up with his primary physician for uncontrolled diabetes.

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<sup>1</sup> R.H. Trans., Resp. Ex. B at 1-2.

<sup>2</sup> Estivo Depo., Ex. 2 at 2.

Kansas Highway Patrol Trooper A. Seufert reported, "After working the collision, I went to the Onaga Hospital to speak with the driver [Claimant]. [Claimant] was unable to carry on a conversation or answer simple questions about what happened in the collision."<sup>3</sup>

Claimant testified he complained of right shoulder pain to EMS after the incident, and again at the hospital, though no documentation of these complaints were found by any of the testifying physicians.

Elevated blood sugar levels disqualified Claimant from subsequently driving a commercial vehicle. On September 22, 2020, Dr. Matthew Gatlin examined Claimant for elevated blood sugar. Claimant provided a history of the vehicle accident and denied complaints of the upper and lower extremities, neck, or back.

Claimant underwent a Department of Transportation physical on September 24, 2020, to reinstate his CDL certification. Claimant denied having ever passed out, headaches, dizziness, limited use of extremities, neck or back problems, or bone, muscle, joint, or nerve problems. Claimant was determined to have poorly controlled diabetes and directed to return in 5 to 6 weeks for a follow-up before recertification would be considered. Respondent terminated Claimant's employment on October 12, 2020, as he could not perform his job without a valid CDL.

Orthopedic surgeon Dr. Heidi Smith was authorized to treat Claimant for his right shoulder complaints. On October 1, 2020, Claimant's first visit, he denied any history of injury to his right shoulder prior to the accident of September 17, 2020. Dr. Smith testified Claimant displayed obvious symptoms of a rotator cuff tear upon examination. An MRI of Claimant's right shoulder was conducted October 5, 2020, and revealed torn supraspinatus and infraspinatus tendons retracted to the level of the glenoid, and mild atrophy. Dr. Smith testified the muscle atrophy "can occur rather rapidly after an acute rotator cuff tear, usually in a matter of months, sometimes even six months."<sup>4</sup>

Claimant continued conservative treatment with Dr. Smith until he was considered at maximum medical improvement on April 19, 2021, and released with no permanent restrictions. Dr. Smith explained Claimant could only undergo conservative treatment due to his uncontrolled diabetes. Claimant is not a surgical candidate because diabetes increases risk of infection and can restrict blood flow to healing tissues. Dr. Smith suggested Claimant may require additional treatment.

Dr. Smith opined the prevailing factor causing Claimant's right shoulder injury was the vehicle accident of September 17, 2020. Dr. Smith was unaware Claimant experienced

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<sup>3</sup> Claimant's Depo. (Apr. 16, 2021), Ex. 2 at 5.

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

a lawn mower incident in July 2020. Dr. Smith testified the mechanics of the lawn mower incident as described to her could result in the type of injury sustained by Claimant. She said her prevailing factor opinion would change if the lawn mower accident happened as described to her.

Dr. Murati, a board certified physiatrist, examined Claimant at his counsel's request on June 28, 2021. Claimant's chief complaints were headaches, right shoulder pain radiating down the right arm, neck stiffness, and limited range of motion of the right shoulder. Dr. Murati took a history from Claimant, including mention of an incident involving a lawn mower in July 2020 where he bruised his right shoulder. Claimant denied any previous significant injuries to his head, right shoulder, and neck prior to September 17, 2020.

After a review of Claimant's available medical records and a physical examination, Dr. Murati determined Claimant sustained occipital neuralgia with headaches, right rotator cuff tear versus sprain with probable labral involvement, and myofascial pain syndrome of the right shoulder girdle extending into the cervical paraspinals. Dr. Murati found the prevailing factor for Claimant's conditions to be the accident of September 17, 2020. Dr. Murati recommended permanent work restrictions and noted Claimant would require additional medical care.

Using the *AMA Guides*,<sup>5</sup> Dr. Murati opined Claimant sustained 15 percent impairment of function to the whole body as a result of the vehicle accident. He attributed 2 percent whole body impairment to myofascial pain, which he described as essentially an overuse injury to the neck caused by problems in the shoulder. Dr. Murati testified he began with the *AMA Guides* as a starting point but did not strictly adhere to it, stating the *AMA Guides* is not based on medical science.

Dr. Murati was later provided a copy of the dash camera video of the accident and testified his opinions remained unchanged.

Dr. Estivo, a board certified orthopedic surgeon, examined Claimant at Respondent's request on October 15, 2021. Claimant denied any complaints other than those involving his right shoulder. Dr. Estivo reviewed Claimant's medical records, history, and performed a physical examination. He diagnosed Claimant with a preexisting massive, retracted, atrophied rotator cuff tear to the right shoulder and preexisting uncontrolled diabetes.

Dr. Estivo testified Claimant's blood sugar level after the accident at 771 was extremely high, with normal less than 140. Elevated glucose levels produce symptoms of confusion, dizziness, disorientation, extreme thirst, and headaches. Dr. Estivo noted that

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

blood sugar levels over 600 can produce a diabetic coma in some individuals, and one with a level of 771 would not be able to drive a vehicle safely.

Dr. Estivo opined Claimant's motor vehicle accident was caused by his elevated blood sugar as he was very likely on the verge of losing consciousness before leaving the roadway. He noted the complaints Claimant provided at the emergency room afterward were consistent with symptoms of elevated glucose levels, and Claimant was held overnight in the hospital due to a diabetic emergency situation. Dr. Estivo further opined the prevailing factor causing Claimant's right shoulder injury was the July 2020 lawn mower incident and not the motor vehicle accident. Dr. Estivo determined Claimant suffered no permanent impairment and does not require future medical care related to the motor vehicle accident.

The ALJ found while Claimant suffered an accident arising out of and in the course of his employment, his medical conditions arose out of a preexisting condition and he did not suffer a compensable personal injury by accident on September 17, 2020. The ALJ did not find Claimant credible and determined the September 17, 2020, accident was not the prevailing factor causing Claimant's injuries and need for medical treatment, and Claimant suffered no permanent impairment of function as a result of the accident. Further, Claimant failed to establish his entitlement to future medical care. The ALJ noted all expenses for assessment, other than the September 17, 2020, Onaga Hospital bill, were in excess of the amount of compensation to which Claimant is entitled; therefore, Respondent may apply for reimbursement from the Fund.

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

Claimant argues the ALJ's Award should be reversed. Claimant contends he injured his shoulder in the September 17, 2020, accident, and the accident was the prevailing factor causing his condition.

Respondent argues Claimant failed to prove his accident arose out of and in the course of his employment, and Respondent is entitled to full reimbursement from the Fund. Respondent maintains the ALJ's Award should be affirmed in all other respects.

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.

### **1. Did Claimant's alleged accident arise out of and in the course of his employment?**

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.

(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.

(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.

(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.

The Board agrees with the ALJ's finding Claimant suffered an incident during the course of his employment, and the risk of a motor vehicle accident is one of the conditions under which the work was performed. The dash cam video provides irrefutable evidence Claimant drove his truck off the road.

**2. Is the alleged accident the prevailing factor causing Claimant's alleged injury, need for medical treatment and resulting disability or impairment?**

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

(2)(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.

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.

Whether Claimant suffered an injury arising out of his employment is a different issue. To successfully prove Claimant suffered an injury from an accident arising out of employment, Claimant must prove the accident was the prevailing factor causing the injury. The ALJ found Claimant did not suffer an injury arising out of the accident, writing:

The record before the court fails to establish that Taylor suffered personal injury by accident on September 17, 2020. He was a restrained driver in a truck that drove off the road. He neither complained of injury nor exhibited any sign of injury to the EMS personnel on scene, or the emergency room staff. He was hospitalized for critically high blood sugar, which was not caused by the accident, but was perceived to be at least partially responsible for the accident. He was not hospitalized for any injury suffered in the accident. While Taylor later complained of right shoulder pain that he attributed to the September 17, 2020 accident, he has very little credibility. He consistently denied the July 24, 2020 injury to his right shoulder to Dr. Smith,

minimized it to Dr. Murati and Dr. Estivo, and denied it in his deposition. When confronted with medical records documenting the right shoulder injury and continuing complaints, Taylor persisted in either denying or minimizing the injury.<sup>6</sup>

The ALJ, three times in his Award, questioned Claimant's credibility, and went as far as writing:

. . . While Taylor later complained of right shoulder pain that he attributed to the September 17, 2020 accident, he has very little credibility. He consistently denied the July 24, 2020 injury to his right shoulder to Dr. Smith, minimized it to Dr. Murati and Dr. Estivo, and denied it in his deposition. When confronted with medical records documenting the right shoulder injury and continuing complaints, Taylor persisted in either denying or minimizing the injury.

Taylor's right shoulder pain from July 24, 2020 persisted through his appointment with Dr. Frank on September 3, 2020, and was interfering with his ability to perform his job, as he related to co-worker Paul Miller. Taylor's refusal to acknowledge the July 24, 2020 injury to his right shoulder undermines his credibility. Taylor's subsequent representations relative to regaining his commercial driving privileges, in which he denied ever having passed out, or having any limitations regarding use of his upper extremities, further undermine that credibility and suggest that Taylor will say anything to recover benefits.<sup>7</sup>

Claimant reported a prior right shoulder injury to his personal chiropractor. Dr. Smith treated Claimant for his alleged shoulder injury. Claimant did not tell Dr. Smith about the lawn mower accident, which occurred only two months prior to his work-related accident. Dr. Smith testified the mechanics of the lawn mower incident as described to her could result in the type of injury sustained by Claimant and, if true, would change her prevailing factor opinion.

Dr. Estivo further testified the prevailing factor causing Claimant's right shoulder injury was the July 2020 lawn mower incident, and not the motor vehicle accident.

Only Dr. Murati, in his report dated June 28, 2021, gave the opinion Claimant's work-related accident was the prevailing factor causing his need for treatment. The Board finds Dr. Murati's opinions hard to adopt. In his report, Dr. Murati wrote:

He is not a young person but I have no reason to believe he was not in his usual and general state of health prior to this injury. His hobbies are not known as a direct

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<sup>6</sup> ALJ Award at 9-10.

<sup>7</sup> *Id.*

cause for his current diagnoses. He denies use of tobacco products. He has no significant pre-existing injuries that would be related to his current diagnoses.<sup>8</sup>

Claimant had significant shoulder complaints related to the lawn mower incident. Dr. Murati's failure to acknowledge the preexisting injury to Claimant's shoulder casts a shadow over the credibility of his prevailing factor opinion.

The Board finds the opinions of Dr. Estivo the most credible because he had an accurate understanding of Claimant's right shoulder injury. Based upon the opinions of Drs. Smith and Estivo, the Board finds the weight of the evidence supports a finding Claimant failed to prove the prevailing factor causing his disability and need for medical treatment is his work-related accident. The Board agrees with and adopts the findings of the ALJ on this issue. Claimant has failed to prove he suffered an injury by accident arising out of the work-related accident.

### **3. Is Respondent liable for the emergency room bill arising from the accident?**

When an employee sustains a compensable injury, it shall be the duty of the employer to provide such medical treatment as may be reasonably necessary to cure and relieve the employee from the effects of the injury.<sup>9</sup>

The ALJ allowed payment of the emergency room bill, but denied the hospital bills related to treatment of a preexisting shoulder condition and other conditions not related to the accident, stating:

Notwithstanding its denial of liability for the right shoulder injury, Suther Feeds provided medical care for the right shoulder, at an aggregate expense of \$17,861.20, and paid Temporary Total Disability (TTD) benefits for 23 weeks at the rate of \$687.00 per week, for an aggregate payment of \$15,801.00. All of those expenses, except the September 17, 2020 Community Hospital Onaga Emergency Department bill, for assessment immediately following the accident, were for the unrelated and pre-existing shoulder injury and were thus "in excess of the amount of compensation [to which] the employee is entitled."<sup>10</sup>

The Board disagrees. We have found Claimant's September 17, 2020, accident was not the prevailing factor causing Claimant's shoulder condition and did not result in an injury arising out of Claimant's employment. The employer is liable for medical treatment to cure or relieve the effects of a compensable injury under K.S.A. 44-510h(a) and 44-501b(b).

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<sup>8</sup> Murati Depo., Ex. 2 at 5.

<sup>9</sup> K.S.A. 44-510h(a).

<sup>10</sup> ALJ Award at 13.

The words "medical treatment" do not appear in K.S.A. 44-508(f)(2)(B). If Claimant did not sustain a compensable injury, the Board has no basis for awarding benefits, including medical treatment.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of ALJ Bruce E. Moore, dated August 11, 2022, is reversed on the ALJ’s finding the emergency room bill is compensable and affirmed in all other respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2023.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Bradley Avery, Attorney for Claimant  
Terry Torline, Attorney for Respondent and its Insurance Carrier  
Kathryn Gonzales, Attorney for Kansas Workers Compensation Fund  
Hon. Bruce E. Moore, Administrative Law Judge