**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **SEAN KLUTTS** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **JACK FOSTER COMPANY** | ) | AP-00-0470-650 |
| Respondent | ) | CS-00-0452-009 |
| AND | ) | |
| | ) | |
| **KANSAS BUILDERS INSURANCE GROUP** | ) | |
| Insurance Carrier | ) | |

# ORDER

The claimant, through Randy Stalcup, requested review of Administrative Law Judge (ALJ) Ali Marchant's Award dated September 15, 2022. Edward Heath, Jr., appeared for the respondent and its insurance company (respondent). The Board heard oral argument on January 26, 2023.

## RECORD AND STIPULATIONS

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

(1) court-ordered IME report of Jarron Tilghman, M.D., dated June 18, 2021;

(2) regular hearing transcript, held November 2, 2021;

(3) deposition transcript of Daniel Zimmerman, M.D., taken November 8, 2021, with exhibits 1-2;

(4) continuation of regular hearing via deposition of the claimant, taken November 24, 2021;

(5) deposition transcript of Jarron Tilghman, M.D., taken January 24, 2022, with exhibits 1-2;

(6) deposition transcript of David Gwyn, M.D., taken April 14, 2022, with exhibits 1-2;

(7) continuation of regular hearing via deposition transcript of William Moffet, taken April 18, 2022, with exhibit 1;

(8) continuation of regular hearing via deposition transcript of Bryan Shimkovitz, taken April 18, 2022, with exhibit 2;

(9) continuation of regular hearing via deposition transcript of Donald Prockish, taken April 18, 2022, with exhibit 3;

(10) continuation of regular hearing via deposition transcript of Karen Litzner, taken April 18, 2022, with exhibits 4-6, 8-10; and

(11) documents of record filed with the Division, including the parties' briefs.

## ISSUES

1. Did the claimant forfeit all benefits under the Workers Compensation Act, pursuant to K.S.A. 44-501(b)(1)(E), by refusing to submit to a post-accident chemical test at the respondent's request?

2. Did the claimant sustain personal injury by accident arising out of and in the course of his employment, including whether the accident was the prevailing factor causing his injury, medical condition, and disability or impairment?

3. What is the nature and extent of the claimant's disability?

4. Is the claimant entitled to unauthorized and future medical treatment?

## FINDINGS OF FACT

The claimant, 39 years old, began working for the respondent in February 2011 as an ironworker. He would help assemble beams and columns, weld, and use tools, such as spud wrenches, sledgehammers, grinders and chipping/hammer drills. This claim involves an alleged work accident, concerning the claimant's right wrist and upper extremity, on July 1 or July 2, 2020.

The claimant had prior right and left wrist problems. The claimant previously had a traumatic left upper extremity injury in 2012 or 2013, which required surgery by Pat Do, M.D., as part of a workers compensation claim against the respondent. The claimant later returned to Dr. Do for right wrist complaints. The doctor ordered two sets of right wrist x-rays, which were done on July 2 and July 18, 2019, and an MRI, which was done on July 13, 2019. The second set of x-rays showed degenerative changes and the MRI was read as showing a cortical irregularity of the scaphoid, narrowing of the radiocarpal joint with

degenerative changes more than expected for the claimant's age, and a possible scapholunate ligament injury.

On August 30, 2019, Dr. Do referred the claimant to David Gwyn, M.D., who is a board-certified orthopedic hand surgeon. The claimant reported pain on the radial side of his right wrist for two years. The claimant denied injury, but mentioned his symptoms started after playing volleyball. The doctor administered an injection and prescribed an anti-inflammatory drug.

On October 29, 2019, Dr. Gwyn performed right wrist surgery, specifically right anterior and posterior interosseous neurectomies. The doctor described the surgery as clipping small nerves affecting deep sensation in an effort to relieve pain. Dr. Gwyn restricted the claimant from lifting over five pounds and no use of push/pull/vibratory tools until a follow-up appointment. The claimant's diagnoses of right wrist post-traumatic arthritis and cartilage disorders were listed as not related to work. On November 27, 2019, the claimant complained of pain in his right wrist that radiated into his right shoulder. On January 6, 2020, Dr. Gwyn released the claimant with instructions to advance his activities as tolerated and to return as needed. Dr. Gywn and the claimant discussed the possibility of future surgery, including removal of wrist bones or a wrist fusion.

The claimant viewed his prior right upper extremity injury as related to his work and using a hammer drill, but he did not file a workers compensation claim. Instead, the claimant processed the medical bills through his health insurance.

The claimant testified the respondent did not modify his job duties after he was released by Dr. Gwyn. He denied the respondent tried to have him weld more and do less chipping and drilling.

The claimant testified he was working at the VA Center using a hammer drill to drill holes on or about July 1, 2020. The hammer drill weighs 15-20 pounds and requires both hands to operate it. The claimant used his right hand only to operate the drill because his left hand held onto a flimsy ladder. The claimant testified he struck a piece of rebar while drilling into a block wall, twisting his right arm. He heard a pop and had immediate pain. He continued working and testified he again struck rebar about 30 minutes later, causing increased arm pain. The claimant continued working and finished his shift. The claimant testified he reported the two events the next day to his foreman, Bryan Shimkovitz, who in turn alerted Donald Prockish, a co-owner and project manager for the respondent.

William "Bill" Moffet was the claimant's foreman on July 1, 2020. Mr. Moffet discussed what he knew about the incident with Mr. Prockish. Based on this discussion, Mr. Prockish prepared an accident report for Mr. Moffet, which Mr. Moffet signed. The accident report stated:

> Foreman's Description - Sean was working with foreman Bill Moffett [sic] on an inside erection on steel door jambs & misc steel headers. Bill had Sean welding and helping to position the steel. Bill was getting the steel ready for installation so Sean could weld it up and Bill could go to the next floor up to use the Hilti hammer drill to chip block for the next floor installation of steel. Without Bill's consent or direction, Sean went upstairs and started chipping the block with the hammer drill. Bill was trying to keep Sean on lighter work because Sean has had prior hand and wrist injuries dating several years back. When Bill heard the chipping vibration-he stopped his layout and went upstairs to see why Sean was chipping the block and Sean said it was hard on my wrists but I got it done. Bill said if it was hurting you, why didn't you stop? Sean said he just wanted to get it done so he could get out of there. Bill said Sean ran the hammer drill (2) minutes because [there] was not much chipping that needed to be done.[1]

Mr. Moffet testified Mr. Prockish told him to keep the claimant on lighter duty work to avoid hurting his right wrist. Mr. Moffet indicated he told the claimant he was not supposed to be operating a chipping hammer.

Mr. Shimkovitz was working as the claimant's foreman at Remington Middle School on July 2, 2020. Mr. Shimkovitz signed an accident report written by Mr. Prockish and based on what Mr. Shimkovitz told Mr. Prockish. The accident report stated the claimant worked at the school on July 2, but said nothing about any injury. Further, the claimant worked on July 6, and told Mr. Shimkovitz he wanted compensation for his elbows. Mr. Shimkovitz then alerted the office manager about the situation.

Mr. Prockish testified he specifically instructed the foremen to have the claimant primarily work on welding projects because of the claimant's prior wrist injuries. Mr. Prockish wrote an accident report on July 8, stating:

> 7-1-20 Wed. - Sean was working with foreman Bill Moffet on the Veteran's Administration Bldg #7. They were installing tube steel jambs and headers. Sean was welding on frames while Bill was laying out placement of steel & modifications of jambs to fit the openings. I stopped by to check on progress and was there for about 10 minutes checking on layout issues. I did not see any hammer drills being used by Sean or Bill Moffet when I was there. Sean did not mention any injuries or pains to me.
> 7-2-20 Thurs - The VA Bldg #7 project was completed on 7-1-20 so I sent Sean to Remington Middle School in Whitewater, KS to work for foreman Bryan Shimkovitz. Bryan put Sean to work welding on bar joist beef-up steel for the entire work day. There was no hammer drill activity needed or performed on that jobsite at all by any JFC personnel. I did not visit the Remington Middle School jobsite on Thurs 7-2-20 and just talked to Bryan about job progress and any materials or supplies he may need. Bryan did not say Sean had any complaints or injuries.

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[1] Cont. of R.H. by Depo. Trans. (Moffet), Resp. Ex. 1.

> 7-3-20 4th of July Holiday (Friday) No work by any JFC personnel
> 7-6-20 Monday - The office manager received a call from foreman Bryan Shimkovitz on the Remington Middle School jobsite about 8:30 AM to say Sean showed up at 7:00 AM and welded for about 1½ hrs and said to Bryan that his elbows hurt and that he really wanted compensation for his elbows. The office mgr informed me of Bryan's call about Sean and I called Bryan to send Sean to office to fill out an accident report.[2]

On July 6, 2020, the respondent had the claimant submit a post-accident urine drug screen. While at the testing facility, the claimant provided two urine samples. He was told the first sample was not warm enough and the second sample did not have enough urine to be tested. His final attempt was unsuccessful because of a "shy bladder."

At approximately 4:00 p.m., the claimant asked the sample collector if he could come back in the morning to complete testing because he needed to pick someone up. The collector told the claimant to call the respondent. The claimant testified his phone had no signal inside the building, so he stepped outside to make the call. He denied anyone told him he could not leave the building. The claimant called Karen Litzner, the respondent's office manager. According to the claimant, Ms. Litzner told him he could not come back for testing in the morning and asked if he had walked out of the facility. When he told her he had, she said, "oh, you messed up."[3] The claimant was then picked up by Mr. Prockish and returned to his vehicle. The claimant testified he and Mr. Prockish did not discuss anything apart from the weather. Mr. Prockish denied knowing any particulars of the testing when he picked up the claimant.

Ms. Litzner has been the respondent's office manager since 1996. Her job duties include, among other things, new employee orientation. Ms. Litzner testified new employees are given policies and procedures during the hiring process, including the company's drug policy and reporting accidents. She described her conversation with the claimant on July 6, 2020:

> I was talking with him about the fact of where was he, he was in the parking lot, I said, oh, no, you know, you left. You know, you're not supposed to leave, that has consequences. And I'm trying to think of what he said. I don't really recall it being a very long conversation. I do know that I did send Don to go pick him up.[4]

On July 6, 2020, at 4:24 pm, the respondent received an email from the collector ("Erica"), stating:

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[2] Cont. of R.H. by Depo. Trans. (Donald Prockish), Resp. Ex. 3.

[3] Cont. of R.H. by Depo. Trans. (Claimant) at 28.

[4] Cont. of R.H. by Depo. Trans. (Litzner) at 24-25.

> First attempt at 1:57pm- temperature out of range. <90. Second attempt at 2:41pm- QNS (very short sample). Third attempt at 3:56pm- Shy bladder. Donor was told 4 times that he could not leave the area and if he did it would be a refusal. Donor left without notice at about 4:10pm.[5]

The printed email has handwriting stating: (1) the claimant said he needed to go get his phone; (2) the claimant said he had to pick up his son; (3) the claimant wanted to go up front and wait for the respondent to pick him up; and (4) he was told to wait in the lab area, but left. Further, the document says the claimant was told four times he could not leave the lab area, and leaving would be considered a refusal.

The respondent's drug and alcohol testing rules were admitted at Ms. Litzner's deposition. Such rules do not comment on the consequences of a worker leaving the testing facility or after having provided inadequate urine samples.

The respondent terminated the claimant's employment on July 7, 2020, for refusing to submit to a post-accident chemical test. The claimant has not worked since.

The claimant filed an Application for Benefits alleging a right upper extremity injury, including injury to his head, right ear and associated body parts, from using a hammer drill on July 2, 2020.

At his attorney's request, the claimant saw Daniel Zimmerman, M.D., on January 8, 2021, for an independent medical examination (IME). Dr. Zimmerman was board certified as an independent medical examiner through 2014. The claimant complained of pain and discomfort affecting his right hand and wrist, as well as pain and discomfort affecting his right shoulder and right elbow. The claimant told Dr. Zimmerman his symptoms were due to repetitive work, such as using a hammer drill, and he was fired from his job due to his worsening symptoms and inability to perform job tasks. The doctor noted the claimant had a prior injury from operating a hammer drill, for which he saw Drs. Do and Gwyn in 2019. According to Dr. Zimmerman, Dr. Do stated the claimant's right wrist problems began four years earlier when a hammer drill got away from him. The medical records reviewed by Dr. Zimmerman concerning the claimant's right upper extremity all predated July 2020. The doctor acknowledged the claimant was diagnosed with right wrist osteoarthritis and a scapholunate injury at least one year before July 2020, and the claimant had right wrist surgery in October 2019. Dr. Zimmerman diagnosed the claimant with right shoulder impingement syndrome, right elbow lateral epicondylitis and osteoarthritis affecting the right wrist.

Using the AMA *Guides to the Evaluation of Permanent Impairment,* 6th edition (*Guides*, 6th ed.), Dr. Zimmerman assigned the claimant a combined 18% impairment to

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[5] *Id*., Resp. Ex. 10 at 2.

the right upper extremity. The doctor assigned a combined 42% impairment to the right upper extremity under the AMA *Guides to the Evaluation of Permanent Impairment,* 4th edition. Dr. Zimmerman testified the 42% figure provided a "fairer" rating.[6] Dr. Zimmerman also opined the claimant will require future medical treatment, such as medication and injections.

Dr. Zimmerman's report states, "The prevailing factor for the diagnoses and the impairment ratings . . . is the date of injury event that is indicated to have occurred on or about July 1, 2020 and also considering the history reported by Dr. Do due to injury that had occurred approximately four years earlier when Mr. Klutts had been using a hammer drill that got away from him."[7] Dr. Zimmerman testified the prevailing factor was both the 2020 injury and a right wrist injury from 2015.[8]

On June 18, 2021, for a court-ordered IME, the claimant saw Jarron Tilghman, M.D., who is board certified in physical medicine and rehabilitation, pain medicine and as an independent medical examiner. The claimant complained of pain to his right shoulder, arm, wrist, and neck. Dr. Tilghman diagnosed the claimant with chronic right shoulder, elbow and wrist pain, neuralgia and neuritis of the right hand and wrist, myofascial pain syndrome affecting the right upper limb, and primary osteoarthritis of the right wrist.

Dr. Tilghman's report states the claimant, following the work injury of July 2020, said he was evaluated by Drs. Do and Gywn, who performed surgery. This information is incorrect, as the treatment predated the July 2020 accident. Dr. Tilghman, in his report, correctly observed the medical records did not reflect surgery following the July 2020 injury. The doctor's report stated the claimant had a right wrist injury from using a hammer drill in 2015 and had injections, followed by surgery in 2019. Dr. Tilghman also stated the claimant's job required a great deal of hammer drilling and his condition worsened until being terminated from his employment on July 7, 2020.

Dr. Tilghman testified the claimant sought treatment with Dr. Do after the July 2020 work injury, but acknowledged medical records show the claimant last saw Dr. Do in 2019. Dr. Tilghman testified the MRI from July 2019 revealed arthritic changes of the right wrist, along with other irregularities. The doctor testified the claimant's current condition was secondary to a July 1, 2020, injury from using heavy equipment, while noting the claimant had a prior right wrist injury requiring treatment. Dr. Tilghman acknowledged he had no treatment records dated after any injury in July 2020.

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[6] Zimmerman Depo. at 15-16.

[7] *Id*., Ex. 2 at 9.

[8] See *id*. at 12-13, 27-28.

Using the *Guides*, 6th ed., Dr. Tilghman assigned the claimant a combined 39% right upper extremity impairment. Dr. Tilghman's report stated, "It can be said within a reasonable degree of medical certainty that the work-related accident on July 1, 2020 is [the] prevailing factor causing the claimant's injury, medical condition, and resulting disability and impairment."[9] The doctor opined the claimant will require future medical treatment, such as medications, injections and physical therapy.

At the respondent's request, the claimant returned to Dr. Gwyn on March 2, 2022. The claimant reported continued pain and decreased motion in his right wrist. The claimant's physical examination, in Dr. Gywn's opinion, was not significantly different than his previous examination. Dr. Gywn opined the claimant had right wrist osteoarthritis. Dr. Gwyn opined the claimant's July 2020 work accident was not the prevailing factor and testified, "I believe that his symptoms and my notes would indicate that his symptoms date at least back to . . . August of 2019 [and] he stated his symptoms had been present for two years prior to that."[10] Dr. Gwyn's report did not mention a July 2020 accident or an injury involving use of a hammer drill.

At his deposition in November 2021, the claimant testified the surgery in October 2019 did not relieve his condition and it remained the same thereafter: "[i]t didn't do a thing."[11] He testified he told the respondent "every day from 2013 up to now that my right wrist hurt and they just said walk it off."[12]

The claimant testified he has pain from his right wrist to his armpit and has difficulty holding things. He reported daily tingling and pain in his right elbow, which worsened over time, and daily pain and swelling in his right shoulder. The claimant does not take pain medication.

The ALJ ruled the claimant did not refuse to submit to a chemical test requested by the respondent. The ALJ further concluded the claimant was not entitled to an award because the claimant's right upper extremity complaints were due to his preexisting condition and the work accident was not the prevailing factor for his injuries. The ALJ wrote:

> Although there was some confusion regarding whether Claimant's alleged accident occurred on July 1 or July 2, 2020, the record supports a finding that it was on July 1, 2020. Claimant's testimony was consistent that he was working for

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[9] Tilghman Depo., Ex. 2 at 5.

[10] Gwyn Depo. at 17.

[11] Cont. of R.H. by Depo. Trans. (Claimant) at 61.

[12] *Id*. at 52.

Respondent on a job at the VA building using a hammer drill when he hit a piece of rebar, and it twisted his right wrist and arm. Additionally, even though there was testimony from Respondent that there was not a hammer drill being used that day on the VA job site, the written accident statement from Mr. Moffett [sic] specifically reflected that Claimant was using a hammer drill to chip block at the VA job site. The Court finds that Claimant has met his burden to prove that he met with personal injury by accident as alleged while working for Respondent on July 1, 2020.

However, the question of whether Claimant's accident is compensable requires a much closer analysis. There is no question that Claimant had preexisting right upper extremity injuries beginning in 2014 for which he later received medical treatment, including surgery, in the year before his July 2, 2020, accident. Thus, pursuant to K.S.A. 44-508(f)(2), Claimant must prove that his work accident did not solely aggravate, exacerbate, or accelerate his preexisting condition. He must also prove that his July 1, 2020, work-related injury is the prevailing factor causing his injuries.

In the present case, Claimant had surgery for post-traumatic osteoarthritis of the right wrist and a chronic tear of the right scapholunate ligament of the right wrist in October 2019 and was released from treatment approximately six months prior to his July 1, 2020, work-related accident. Claimant reported ongoing symptomatic complaints to Dr. Gwyn at the time he was released from treatment in early 2020 and testified that his condition in his right wrist is the same today as it was before the October 2019 surgery and that the October 2019 surgery did not improve his condition at all. Three physicians have each examined Claimant on one occasion since his January 1, 2020, accident and given their opinions with regard to the prevailing factor of Claimant's injuries: Dr. Daniel Zimmerman, who examined Claimant at Claimant's counsel's request, Dr. Jarron Tilghman, who performed a Court-ordered independent medical examination, and Dr. David Gwyn, who treated Claimant's right upper extremity before his July 1, 2020, accident and examined Claimant at Respondent's counsel's request.

Dr. Zimmerman diagnosed several conditions involving Claimant's right upper extremity, including right shoulder impingement syndrome, right elbow lateral epicondylitis, and residuals of osteoarthritis affecting the right wrist. Dr. Zimmerman opined that Claimant's July 2, 2020, work-related accident as well as his prior 2014 right wrist injury when he was using a hammer drill that got away from him were the prevailing factor causing his diagnosed conditions. Dr. Zimmerman also agreed that Claimant's osteoarthritis of the right wrist and right scapholunate injury both existed more than a year before his July 1, 2020, work-related accident and his right shoulder complaints existed several months before his July 1, 2020, work-related accident. Dr. Zimmerman never stated whether he believed Claimant's July 1, 2020, or 2014 accident was a more prominent factor in causing Claimant's current condition.

Dr. Tilghman stated that he believed that Claimant's July 1, 2020, work-related accident is the prevailing factor causing his diagnosed conditions. Although Dr. Tilghman is the Court-ordered independent medical examiner and thus is entitled to some deference, his opinions are only as credible as the history on which they are based. The Court lacks confidence in Dr. Tilghman's opinions in this case because it appears that Dr. Tilghman was confused about the history of Claimant's condition and his medical treatment. On more than one occasion within his report and during his testimony, Dr. Tilghman made comments that seem to indicate that he was under the misunderstanding that at least some of the medical treatment Claimant received from Dr. Do and Dr. Gwyn occurred after Claimant's July 1, 2020, work-related accident. However, Claimant only had three medical examinations after his July 1, 2020, accident, all of which were done for purposes of litigation rather than medical treatment. Claimant did not receive any medical treatment for his injuries after his July 1, 2020, accident.

Dr. Gwyn did not believe that Claimant's July 1, 2020, work-related accident is the prevailing factor causing his current injuries. Rather, Dr. Gwyn believed that Claimant's complaints, including his elbow and shoulder complaints, are all related to the preexisting osteoarthritis in his right wrist for which Claimant received medical treatment prior to his July 1, 2020, accident. Dr. Gwyn's only diagnosis when he examined him on March 2, 2022, was primary osteoarthritis of the right wrist.

The Court finds the opinions of Dr. Gwyn, as the only physician to examine Claimant both before and after his July 1, 2020, work-related accident, to be the most credible and supported by the evidence. Dr. Gwyn's opinions that Claimant's pre-existing condition is the prevailing factor causing his current complaints are consistent with Claimant's own testimony that his condition was not improved after his 2019 treatment and is the same today as it was then. This is further supported by the opinions of Dr. Zimmerman, Claimant's own hired physician, who believed that both Claimant's July 1, 2020, accident and his prior 2014 accident were the prevailing factor causing his complaints. Dr. Tilghman is the only physician to opine that only Claimant's July 1, 2020, work-related accident is the prevailing factor causing his current condition, and his opinions to that effect lack credibility and appear to be based on an inaccurate understanding of Claimant's history.

Based upon the foregoing, the Court finds that Claimant has not met his burden to prove that his July 1, 2020, work-related accident is the prevailing factor causing his injuries. Because Claimant has not proven that his injuries arose out of and in the course of his employment with Respondent, Claimant is not entitled to workers compensation benefits related to his July 1, 2020, accident.[13]

[13] ALJ Award at 23-24.

## PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[14] The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[15] The provisions of the Workers Compensation Act are applied impartially to all parties.[16] The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to compensation depends.[17] The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.[18]

The Board's review of an order is de novo on the record.[19] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[20] On de novo review, the Board makes its own factual findings.[21]

**1. The claimant did not refuse to submit to a post-accident chemical test at the respondent's request and did not forfeit all benefits under the Workers Compensation Act, pursuant to K.S.A. 44-501(b)(1)(E).**

An employee's refusal to submit to a chemical test at the employer's request results in forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.[22] A "refusal" requires an element of willfulness or intent.[23]

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

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

[16] See *id*.

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

[18] See *id*.

[19] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[20] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[21] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[22] See K.S.A. 44-501(b)(1)(E).

[23] *Neal v. Hy–Vee, Inc.* 277 Kan. 1, 16, 81 P.3d 425 (2003).

In *Byers*,[24] a worker provided a urine sample for drug testing, but the drug tester did not think the sample was adequate in terms of volume and temperature. The worker was told another sample was necessary, but left the testing facility, even when advised he might lose his job if he did not complete testing. The employer's human resources director testified the worker told him he would have refused to complete the testing; such evidence was disputed by the worker. The Court of Appeals found there was no refusal to provide a urine sample for drug testing, finding the worker provided a sample, and the plain language of the statute did not require providing an adequate sample.[25]

Here, the claimant gave an initial urine sample, which was rejected based on temperature. He drank four glasses of water and gave a second urine sample, which was rejected based on volume. The claimant's request for more water was denied. He was unable to provide a third sample due to a "shy bladder." This took place over two hours. The claimant inquired with the testing facility if he could leave and return for testing the next day, and was told to contact the respondent. He did not have a phone signal in the facility, so he went into the parking lot to call the respondent. The claimant called Ms. Litzner and was told he "messed up" for having left the facility. He denied the respondent told him in advance leaving the facility before testing was completed would be considered a test refusal. Documentation from the testing facility says the claimant was told leaving the facility would be considered a test refusal.

The claimant gave two urine samples and tried to give a third sample, whereas the worker in *Byers* provided only one sample. The worker in *Byers* was told leaving the testing facility without a completed sample could have employment consequences. A representative of the testing facility, who was not subject to cross-examination, indicated the claimant was told four times leaving the facility would be considered a test refusal. The claimant phoning the respondent from the facility parking lot does not imply a refusal to submit to testing. Based on *Byers*, the facts do not show the claimant refused to submit to a urine drug screen. The claimant, in fact, gave two samples. There was no test refusal.

**2. The claimant did not prove the accident was the prevailing factor causing his injury, medical condition, disability or impairment.**

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

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[24] *Byers v. Acme Foundry*, 53 Kan. App. 2d 485, 388 P.3d 621, *rev. denied* ___ Kan. ___ (2017).

[25] See *id.* at 490.

> 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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> . . .
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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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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.
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> . . .
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> (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.
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> (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.

The Board agrees with the ALJ that a traumatic event occurred at work as alleged by the claimant on July 1, 2020.

However, the Board also agrees the claimant did not prove the prevailing factor requirement for a compensable injury arising out of employment. The evidence shows the claimant had a prior right wrist injury on or about 2014 or 2015 requiring treatment,

including injections and surgery, in 2019. Drs. Gwyn and Do treated the claimant in 2019, and Dr. Gwyn released the claimant in 2019 without a clean bill of health. In January 2020, the claimant was limited to return to activities as tolerated and potential future wrist surgeries were discussed, including fusion. The claimant's testimony amplifies the significance of his preexisting condition. Specifically, the claimant testified his right wrist surgery did nothing to alleviate his condition. The claimant also testified he told the respondent, every day, his right wrist hurt from 2015 until the time of his separation of employment.

While the claimant told Dr. Zimmerman his injuries were due to repetitive use, he asserted a single accident date in his Application for Benefits. Dr. Zimmerman attributed the prevailing factor to be the July 2020 accident and a similar accident in 2015. There is no claim for an accident occurring in 2015. By definition, the prevailing factor concerns the primary factor. Dr. Zimmerman identifies two prevailing factors, not one prevailing factor. As noted by the ALJ, the claimant's own medical expert did not identify the 2020 accident as the prevailing factor.

The Board agrees with the ALJ concerning Dr. Tilghman's apparent confusion regarding the sequence of injury and treatment. Dr. Tilghman recorded the claimant's apparent recitation his treatment and surgery occurred after the 2020 injury. The doctor's report then indicated the claimant's treatment did not occur after the 2020 injury, but in 2019. Nevertheless, the doctor testified the claimant's treatment occurred after 2020, before cross-examination confirmed the bulk of treatment occurred in 2019.

The Board finds Dr. Gywn's opinion to be the most credible, as did the ALJ. Dr. Gywn, a treating doctor and surgeon, was in the unique position of having examined the claimant before and after the 2020 accident. Dr. Gwyn denied the 2020 accident was the prevailing factor in causing the claimant's injury, instead finding the claimant's condition was due to the claimant's preexisting osteoarthritis, which started as late as 2017, two years before 2019. The Board finds the claimant's preexisting condition of right wrist osteoarthritis is the prevailing factor in the claimant's injury, medical condition and resulting disability or impairment. Therefore, having failed to prove prevailing factor, the claimant did not prove his accidental injury arose out of the course of his employment.

All other issues are moot.

## AWARD

**WHEREFORE**, the Board affirms the Award dated September 15, 2022.

**IT IS SO ORDERED.**

Dated this _____ day of February, 2023.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: (via OSCAR)
Randy Stalcup
Edward Heath, Jr.
Hon. Ali Marchant