

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHAY MARTIN

Claimant

v.

GENESH INC.

Respondent

AP-00-0470-842

CS-00-0448-305

and

**TECHNOLOGY INSURANCE CO.
and ACCIDENT FUND GENERAL INS. CO.**

Insurance Carriers

AP-00-0470-843

CS-00-0450-709

ORDER

Claimant requests review of the September 26, 2022, preliminary Order issued by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Terry J. Torline appeared for Claimant. Kristina S. Mulvany appeared for Respondent and Technology Insurance Company. Matthew J. Schaefer appeared for Respondent and Accident Fund Insurance Company.

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 August 4, 2022, including Claimant's Exhibits 1-6; the testimony portion of the transcript of Preliminary Hearing via Telephone Conference Call, held August 4, 2020; the testimony portion of the transcript of Preliminary Hearing via Telephone Conference Call, held October 20, 2020; the testimony portion of the transcript of Preliminary Hearing, held May 3, 2022; the narrative report of Dr. Divelbiss, dated May 20, 2020, concerning his Court-ordered independent medical examination; the narrative report of Dr. Estivo, dated July 12, 2021, concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative files. The Board also reviewed the parties' briefs.

ISSUES

1. Is Claimant's bilateral carpal tunnel syndrome compensable directly from the October 17, 2018, accident?
2. Is Claimant's bilateral carpal tunnel syndrome compensable as the direct and natural consequence of his injury sustained from the October 17, 2018, accident?
3. Did Claimant sustain bilateral carpal tunnel syndrome by repetitive trauma arising out of and in the course of his employment with Respondent?

FINDINGS OF FACT

Claimant alleges he sustained personal injuries from an accident arising out of and in the course of his employment with Respondent on October 17, 2018. Respondent's workers compensation insurance carrier on October 17, 2018, was Technology Insurance. That matter was assigned Case No. CS-00-0448-305 by the Division. Claimant also alleged he sustained personal injuries from repetitive trauma from July 1, 2017, through April 17, 2020, arising out of and in the course of his employment with Respondent. Accident Fund assumed Respondent's risk on July 1, 2019. That matter was assigned Case No. CS-00-0450-709 by the Division. These matters were consolidated for litigation.

Claimant was employed by Respondent as a restaurant manager. Claimant worked fifty-five hours per week, and used his upper extremities repetitively in various job tasks. Claimant's medical history is notable for arthritis of both feet and a family history of rheumatoid arthritis. Claimant had a prior workers compensation claim in Oregon involving an unknown injury, but prior work-related injuries were otherwise denied.

On October 17, 2018, Claimant was assaulted by a co-worker. Claimant used his upper extremities to defend himself, and his right thumb was injured. Claimant noticed his right thumb was not working after the event, and the thumb was swollen the following day. Claimant was referred to an occupational medicine clinic for treatment devoted to the right thumb. At his deposition, Claimant testified his thumb was the only part of his body hurt in the accident.

Following an MRI confirming a tear of the ulnar collateral ligament at the MP joint of the right thumb, Claimant was referred to Dr. Gwyn for further treatment. Dr. Gwyn performed a surgical repair of the ligament tear. During his course of medical treatment, Claimant continued working for Respondent, and wore a splint on his right wrist. Claimant

testified he noticed pain at the top of his right hand while working and wearing the splint. Claimant testified he told Dr. Gwyn about the pain and was told it was due to using his right hand differently. Dr. Gwyn released Claimant from his care in March 2019, and at that time Claimant said his thumb was feeling pretty good.

Claimant testified in his deposition he continued working, and developed pain, numbness and tingling in both hands. Claimant also testified he experienced right shoulder pain and popping, and pain and tingling in the neck. Claimant returned to Dr. Gwyn on October 21, 2019. Dr. Gwyn's record documents reports of pain from the head to the right shoulder, extending down the arm to the hand and fingers. Dr. Gwyn's record also documents left arm pain from overcompensating, and stiffness of the right thumb. Dr. Gwyn thought changing the dynamics of the use of the right hand could contribute to pain in the shoulder and neck, but he could not say Claimant's shoulder or neck were injured on October 17, 2018. A course of occupational therapy was recommended, but it does not appear Claimant underwent additional treatment. During this time, Claimant continued working regular duty for Respondent.

Claimant was evaluated by Dr. Murati at his attorney's request on December 3, 2019. Claimant reported bilateral upper extremity and elbow pain, pain in the right shoulder to the neck, and pain in the left shoulder. Claimant's course of treatment with Dr. Gwyn was reviewed, and Dr. Murati noted Claimant was declared at maximum medical improvement on May 16, 2019. Physical examination was notable for no right thumb instability, positive carpal compression testing bilaterally, positive Tinel's at the right wrist, right wrist tenderness, and positive rotator cuff testing and Hawkin's bilaterally. Dr. Murati diagnosed post-open reduction internal fixation of the right thumb, bilateral carpal tunnel syndrome, right radial nerve entrapment, bilateral shoulder tear versus sprain, and myofascial pain syndrome of the right shoulder. Dr. Murati thought all of these conditions were caused by the October 17, 2018, accident. Additional treatment was recommended, but Dr. Murati also provided an impairment rating.

Claimant was evaluated by Dr. Strickland on January 27, 2020. Claimant reported pain radiating into the right shoulder, as well as pain involving the hands, neck and left elbow. Dr. Strickland diagnosed a right thumb injury, post-UCL repair by Dr. Gwyn. Dr. Strickland also diagnosed right shoulder pain with a possible rotator cuff tear, degenerative disc disease of the cervical spine, epicondylitis of the left elbow, and possible bilateral carpal tunnel syndrome, which Dr. Strickland did not believe related to the October 17, 2018, accident. Dr. Strickland issued an impairment rating for the right thumb.

It appears a prehearing settlement conference took place on February 3, 2020, and Dr. Divelbiss was appointed to perform a Court-ordered independent medical examination.

On April 28, 2020, Claimant filed his Application for Benefits in CS-00-0450-709.

Dr. Divelbiss evaluated Claimant on May 20, 2020. Claimant reported fluctuating, intermittent right upper extremity pain with activity. Some days Claimant felt pain in the upper extremity at the end of his shift, and other days he felt no pain. The location of the pain varied among the shoulder, elbow and forearm. Claimant also said the symptoms were present before the October 17, 2018, accident. Numbness and tingling of the right upper extremity were also noted, and Claimant could not state when the symptoms started.

Physical examination was notable for full range of motion of the right shoulder, elbow, wrist and hand. No swelling was noted. Tenderness was reported at the proximal biceps tendon and lateral epicondyle. No impingement signs and normal rotator cuff strength were present at the shoulder. Flexion compression test was negative at the right elbow. Tinel's and median nerve compression testing at the right wrist were negative. Dr. Divelbiss diagnosed right thumb MP ulnar collateral ligament tear, for which Claimant reached maximum medical improvement, caused by the October 17, 2018, accident. Dr. Divelbiss also diagnosed fluctuating, intermittent soft-tissue pain of the right upper extremity, and right hand numbness and tingling, which were unrelated to the October 17, 2018, accident.

Claimant sought additional treatment for the bilateral upper extremities and neck, and a preliminary hearing took place on October 20, 2020. Claimant testified he initially injured his right thumb in the work-related accident of October 17, 2018, and wore a splint on the right forearm while treating. Claimant continued to perform repetitive work for Respondent, and used his left hand more because of the splint. Claimant testified he developed problems with both upper extremities, both shoulders, and neck. Claimant testified his symptoms worsened as he continued working. ALJ Marchant ordered the parties to obtain a supplemental report from Dr. Divelbiss addressing whether Claimant's symptoms were the natural and probable consequence of the October 17, 2018, accident or Claimant's repetitive trauma claim. Dr. Divelbiss was unable to provide a supplemental report, and Dr. Estivo was appointed to perform a Court-ordered independent medical examination.

In December 2020, Claimant's employment with Respondent ended. Claimant began working as a manager for Wing Stop. Claimant's work requires repetitive use of both upper extremities.

Dr. Estivo evaluated Claimant on July 12, 2021. Claimant reported right shoulder pain, neck pain, and bilateral hand numbness after he sustained a work injury on October 17, 2018. Claimant described the pain as intermittent, dull and worse with lifting. Claimant also reported numbness and cramping. According to Claimant, he developed right arm pain running up to the shoulder and cervical spine after he was released by Dr. Gwyn, and gradually noticed left elbow and shoulder pain when compensating for the right arm. Claimant said his left arm symptoms resolved as he used the right arm normally. Claimant also confirmed he was working for Wing Stop.

Dr. Estivo performed an extensive review of Claimant's prior treatment records. Physical examination was notable for full range of motion of the cervical spine, with no tenderness to palpation. Orthopedic tests of both shoulders was unremarkable, but Claimant voiced generalized discomfort during range of motion testing of the right shoulder. Examination of both elbows was unremarkable, and Tinel's was negative. Examination of the right wrist revealed full strength, and intact sensation along the radial, median and ulnar distributions, negative provocative tests and full range of motion. Examination of the left wrist revealed full range of motion and negative provocative tests. X-rays were interpreted by Dr. Estivo as showing age-related degeneration of the cervical spine and right shoulder, as well as the CMC joints of both thumbs.

Dr. Estivo diagnosed post-repair surgery of the right thumb, which was related to the October 17, 2018, accident; unrelated degenerative changes of the cervical spine, right shoulder, and bilateral hands; unrelated subjective intermittent complaints of numbness of both hands; and unrelated generalized fluctuating pain of both upper extremities. Dr. Estivo stated it was possible Claimant experienced temporary discomfort to both upper extremities due to overcompensating for the right thumb, but that temporary discomfort would be resolved. Dr. Estivo also opined Claimant's repetitive work before and after the October 17, 2018, accident was not the prevailing factor causing the diagnoses he made. Dr. Estivo noted Claimant's subjective complaints did not correlate to the objective findings on examination. While Claimant may have experienced an aggravation of the preexisting degenerative condition of the cervical spine and upper extremities with increased activity, the complaints and degenerative were unrelated to the October 17, 2018, accident or repetitive job duties for Respondent. Dr. Estivo believed the prevailing factor for Claimant's symptoms were the age-related degenerative conditions of the cervical spine, right shoulder and bilateral hands.

ALJ Marchant issued the preliminary Order, dated August 31, 2021, following Dr. Estivo's Court-ordered examination. ALJ Marchant reviewed the opinions of Drs. Divelbiss and Estivo, as well as the arguments of counsel. After reviewing the evidence as a whole,

ALJ Marchant found the opinions of Dr. Estivo credible and supported by the evidence. ALJ Marchant concluded Claimant did not meet his burden of proving his cervical, right shoulder or bilateral hand complaints were the natural and probable consequence of the October 17, 2018, accident, the result of compensatory overuse related to the October 17, 2018, accident, or the result of repetitive job duties performed for Respondent. ALJ Marchant found Claimant's preexisting degenerative conditions were the prevailing factor causing his current complaints. Claimant's request for compensation was denied. The Order was not appealed to the Appeals Board.

On September 28, 2021, Claimant was evaluated by Dr. Melhorn at his counsel's request. Claimant reported the right thumb injury of October 17, 2018, as well as pain in both hands, right shoulder and neck. Claimant also reported left hand pain when he was using it more. Dr. Melhorn noted Claimant was working ten hours per day at Wing Stop, and used both of his hands. Claimant also reported his elbows were better, but he continued to have problems with both hands, forearms and right shoulder area. Examination revealed symptoms, but no neuropathic test signs during provocative testing. Claimant reported nonradicular pain during range of motion testing. Dr. Melhorn noted Claimant's symptoms were not classic for peripheral nerve entrapment. A nerve conduction test (NCT) was recommended. Dr. Melhorn stated if the NCT revealed peripheral nerve entrapment then association with altered tasks at work may be appropriate, but if the NCT was normal then Claimant's symptoms were not work-related.

On February 16, 2022, Claimant underwent an EMG/NCT study at Neurology Consultants of Kansas. The EMG study was interpreted as showing no myopathic potentials. The NCT was interpreted as showing medial latencies of the palmar SNAP, and indicating moderate bilateral median nerve entrapment, left greater than right. On March 4, 2022, Dr. Melhorn opined Claimant required additional treatment for carpal tunnel syndrome due to the EMG/NCT.

On May 3, 2022, a preliminary hearing was held before ALJ Marchant. Claimant sought a determination his bilateral carpal tunnel syndrome was compensable, authorization of Dr. Melhorn to treat, payment of Dr. Melhorn's bills and payment of temporary total or partial disability compensation. Claimant did not testify, and arguments of counsel were made.

On May 13, 2022, ALJ Marchant issued a preliminary Order. ALJ Marchant reviewed Dr. Melhorn's records, and the report of the EMG/NCT. Claimant's reported job duties at Wing Stop were also reviewed. ALJ Marchant found Dr. Melhorn did not address causation, and his opinion a diagnosis of peripheral nerve entrapment may create an

association between the condition and altered tasks did not undermine the credibility of Dr. Estivo's opinions. ALJ Marchant noted Claimant had not worked for Respondent since December 2020, the nerve conduction tests were not performed until February 2022, and Claimant continued to perform repetitive tasks for Wing Stop. ALJ Marchant concluded Claimant had not met his burden of proving his bilateral carpal tunnel was compensable under either claim. Claimant's requests for medical treatment and temporary total or partial disability was denied. Dr. Melhorn's bills were ordered paid under the unauthorized medical allowance. The preliminary Order was not appealed to the Appeals Board.

Claimant's counsel requested a supplemental report from Dr. Melhorn without reevaluation. On May 24, 2022, Dr. Melhorn issued a letter to Claimant's counsel stating, in full:

In response to your letter of May 19th, 2022, having reviewed the chart, it is my opinion, within a reasonable degree of medical certainty, that the traumatic event to the right thumb and subsequent surgery has aggravated his pre-existing right carpal tunnel. This would meet the legal threshold for the prevailing factor requirement for work compensability for the right carpal tunnel.¹

On August 4, 2022, the parties returned to ALJ Marchant for another preliminary hearing. Claimant sought authorization of Dr. Melhorn to treat Claimant's bilateral carpal tunnel syndrome and payment of Dr. Melhorn's bills. Respondent reiterated the denial of compensability. Claimant did not testify at the preliminary hearing, which consisted of arguments of counsel.

On September 26, 2022, ALJ Marchant issued the preliminary Order. The prior findings of fact and conclusions from the prior preliminary hearings were reviewed. ALJ Marchant maintained the prior finding Dr. Estivo's opinions were the most credible regarding Claimant's condition and cause. ALJ Marchant noted Dr. Melhorn's testing and diagnosis were made more than three years after the October 17, 2018, accident and more than a year after Claimant left Respondent's employment. ALJ Marchant concluded Claimant did not meet his burden of proving compensability under either claim, and the request for medical treatment was denied. Dr. Melhorn's bills were ordered paid as unauthorized medical. These review proceedings follow.

¹ P.H. Trans. (Aug. 4, 2022), Cl. Ex. 1.

PRINCIPLES OF LAW AND ANALYSIS

In his application for review, Claimant sought review of the determinations Claimant's bilateral carpal tunnel syndrome was not the natural and probable consequence of the October 17, 2018, accident, and Claimant's repetitive work for Respondent was not the prevailing factor causing his bilateral carpal tunnel syndrome. In his brief, however, Claimant only argues his bilateral carpal tunnel syndrome was either caused directly by, or the natural and probable consequence of, the October 17, 2018, accident. Respondent and its insurance carriers argue the preliminary Order was correct, and Claimant failed to prove compensability in either claim. The undersigned addresses both issues raised by Claimant in his application for review.

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.² The provisions of the Workers Compensation Act shall be applied impartially to all parties.³ 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.⁴

1. Claimant failed to prove he sustained bilateral carpal tunnel syndrome from repetitive trauma arising out of and in the course of his employment with Respondent from July 1, 2017, through April 17, 2020.

The Board first considers Claimant's argument his bilateral carpal tunnel syndrome was caused by repetitive trauma arising out of and in the course of his employment from July 1, 2017, through April 17, 2020. An injury by repetitive trauma shall be compensable only if employment exposes the worker to an increased risk of injury, the employment is the prevailing factor in causing the repetitive trauma and the repetitive trauma is the prevailing factor in causing the medical condition.⁵ Moreover, the repetitive nature of the injury must be demonstrated by diagnostic or clinical tests.⁶

² See K.S.A. 44-501b(a).

³ See *id.*

⁴ See K.S.A. 44-501b(c).

⁵ See K.S.A. 44-508(f)(2).

⁶ See K.S.A. 44-508(e).

It is undisputed Claimant's work for Respondent involved repetitive use of both upper extremities. It is also undisputed Claimant stopped working for Respondent and began working for Wing Stop in December 2020. Claimant's work at Wing Stop also requires repetitive use of both upper extremities. At issue is whether Claimant's repetitive work for Respondent from July 1, 2017, through April 17, 2020, was the prevailing factor causing his injury or medical condition.

While the medical experts differ on whether Claimant's bilateral carpal tunnel syndrome was caused by the October 17, 2018, accident or a cause unrelated to Claimant's employment, none of the medical experts believed Claimant's repetitive work for Respondent from July 1, 2017, through April 17, 2020, was the prevailing factor causing his bilateral carpal tunnel syndrome. Therefore, the conclusion Claimant failed to meet his burden of proving he sustained bilateral carpal tunnel syndrome from repetitive trauma arising out of and in the course of his employment with Respondent from July 1, 2017, through April 17, 2020, is affirmed.

2. Claimant failed to prove the accident of October 17, 2018, either was the prevailing factor causing bilateral carpal tunnel syndrome, or the bilateral carpal tunnel syndrome was the natural and probable consequence of the original right thumb injury of October 17, 2018.

The primary issue is whether Claimant met his burden of proving by a greater weight of the credible evidence his bilateral carpal tunnel syndrome either was caused by the October 17, 2018, accident or was the natural and probable consequence of the right thumb injury of October 17, 2018.

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

⁷ See K.S.A. 44-508(d).

⁸ See K.S.A. 44-508(d), (g).

preexisting condition or renders a preexisting condition symptomatic.⁹ Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹⁰ An injury that occurs as a result of the natural aging process is not considered to arise out of and in the course of employment.¹¹

Under the Secondary Injury Rule, an employee can receive compensation for all the natural consequences of an injury, including any new and distinct injury that is the direct and natural result of the primary injury.¹² The question of whether an injury is the direct and natural result of the primary injury is factually driven, and expert medical evidence can be determinative.¹³ The prevailing factor standard still applies to secondary injuries, and “all injuries, including secondary injuries, must be caused primarily by the work accident.”¹⁴

It is undisputed Claimant was involved in a work-related assault, resulting in an injury to the right thumb necessitating surgery by Dr. Gwyn. Claimant initially testified his right thumb was the only part of his body injured on October 17, 2018. There is no record Claimant reported symptoms of injuries to other parts of the body to the occupational medicine clinic. Claimant saw Dr. Gwyn on multiple occasions while treating for the thumb, and there is no record Dr. Gwyn was informed of bilateral upper extremity complaints until October 21, 2019, after Claimant was initially released from treatment. Dr. Gwyn was unable to relate Claimant’s symptoms to the October 17, 2018, accident. While Claimant refers to the clinical findings of Drs. Murati and Strickland in support of his position, Dr. Divelbiss, one of the Court-ordered physicians, found no clinical signs of carpal tunnel syndrome, and noted Claimant’s intermittent symptoms predated the accident. Similarly, Dr. Estivo, the second Court-ordered physician, found no clinical signs of carpal tunnel syndrome, and could only relate the right thumb injury to the October 17, 2018, accident.

⁹ See K.S.A. 44-508(f)(2).

¹⁰ See K.S.A. 44-508(f)(2)(B).

¹¹ See K.S.A. 44-508(f)(3)(A).

¹² See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 515, 154 P.3d 494 (2007).

¹³ See *id.* at 516.

¹⁴ *Perez v. National Beef Packing Co.*, 60 Kan. App. 2d 489, 498, 494 P.3d 268 (2021)(quoting *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 951, 379 P.2d 428 (2016)).

None of the physicians stated Claimant's bilateral carpal tunnel syndrome was the natural and probable consequence of the October 17, 2018, accident or thumb injury.

Claimant also relies on the opinions of Dr. Melhorn. Dr. Melhorn saw Claimant almost three years after the October 17, 2018, accident, and over a year after Claimant began working for another employer performing work requiring repetitive use of both forearms. Initially, Dr. Melhorn ordered an NCT, and stated if the NCT revealed peripheral nerve entrapment, then association with altered tasks at work may be appropriate. "May be" suggests a possibility, and not the level of probability required for an expert opinion.¹⁵ After reviewing the NCT, Dr. Melhorn stated the October 17, 2018, accident and surgery aggravated Claimant's preexisting right-sided carpal tunnel syndrome. Dr. Melhorn was silent to the left side. An injury is not compensable solely because it aggravated a preexisting condition.¹⁶

Having reviewed the record as a whole, the undersigned concludes Claimant did not meet his burden of proving his bilateral carpal tunnel syndrome was compensable. Claimant's description of his initial injuries and symptoms is contradictory, and the treating physician was unable to relate Claimant's other symptoms to the October 17, 2018, accident. Dr. Murati, who related Claimant's additional symptoms to the October 17, 2018, accident, was contradicted by Dr. Strickland. The Court-ordered physicians found no clinical evidence of carpal tunnel syndrome, and thought Claimant's symptoms were unrelated to the October 17, 2018, accident. Dr. Melhorn initially did not provide a causation opinion within any level of probability. At the most, Dr. Melhorn opined the October 17, 2018, accident and surgery aggravated a preexisting condition on the right side, which does not constitute a compensable injury, and was silent to the left side. The opinions of the Court-ordered physicians are the most credible of the medical evidence. Claimant failed to meet his burden of proving his bilateral carpal tunnel syndrome was either directly caused by the October 17, 2018, accident, or the natural and probable consequence of the right thumb injury sustained on October 17, 2018.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the preliminary Order issued by ALJ Ali Marchant, dated September 26, 2022, is affirmed.

¹⁵ See *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 318-20, 241 P.3d 75 (2010).

¹⁶ See K.S.A. 44-508(f)(2).

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CS-00-0450-709**

IT IS SO ORDERED.

Dated this _____ day of February, 2023.

**WILLIAM G. BELDEN
APPEALS BOARD MEMBER**

c: Via OSCAR

Terry J. Torline
Kristina S. Mulvany
Matthew J. Schaefer
Hon. Ali Marchant