

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MELISSA MORALES
Claimant

v.

STATE OF KANSAS
Respondent

AP-00-0471-562
CS-00-0456-636

and

STATE SELF INSURANCE FUND
Insurance Carrier

ORDER

Respondent requests review of the October 19, 2022, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

George H. Pearson, III, appeared for Claimant. Nathan D. Burghart appeared for Respondent and the State Self Insurance Fund.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held May 5, 2022; the unmarked exhibits downloaded into OSCAR admitted into evidence at the Preliminary Hearing, which are the records from Cotton O'Neil Workcare, Kansas City Orthopedic Alliance, Stormont Vail MRI, Lowry Jones, M.D., portions of the transcript of Videoconference Discovery Deposition of Melissa Morales taken October 26, 2021, used for impeachment purposes, and the transcript of Evidentiary Deposition of Melissa Morales taken February 11, 2022, including Exhibits 1-18; the narrative reports of Dr. Jones, dated August 5, 2021, June 29, 2022, and August 22, 2022, concerning his Court-ordered independent medical examinations of Claimant; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant meet her burden of proving by a greater weight of the credible evidence she sustained personal injuries from an accident arising out of and in the course of her employment with Respondent on August 7, 2020?

FINDINGS OF FACT

Claimant worked as a Correctional Juvenile Officer, Level 1, at the Kansas Juvenile Correctional Complex. Claimant watched over and guarded juvenile inmates. Claimant was provided boots she described as combat boots, which she was required to wear as part of her work uniform.

Claimant testified on August 7, 2020, she was performing her usual work and was going down stairs. The steps were covered with rubber. As Claimant was going down the stairs, a loose piece of rubber caught on Claimant's left foot, causing Claimant to slip. Claimant could not recall missing a step. As a result, Claimant testified she hyperextended and inwardly rotated her leg, and she felt an immediate onset of pain in the left buttocks and hip running down the left leg to her ankle. Claimant also felt low back pain. Claimant testified an inmate was in the area, but not on the steps, and Claimant did not know if the inmate saw the event. The inmate did not testify.

Claimant called her supervisor and reported what happened to her. According to Claimant, the supervisor pulled a loose piece of rubber off one of the steps, and indicated to Claimant she was not the first person who had a problem with the steps. The supervisor did not testify. Claimant completed an accident report.

The claim was initially accepted as compensable, and Claimant commenced medical treatment at Cotton O'Neil Workcare. On August 13, 2020, Claimant reported left-sided foot pain and left leg pain running to her hip. Claimant said she was going down stairs at work, her left foot stepped on a piece of plastic, and her leg went out from under her and to the left. Claimant reported problems navigating stairs and walking. Claimant was diagnosed with a left knee sprain of the lateral collateral ligament, a strain/sprain of the left ankle and left foot pain. A course of physical therapy was recommended and Claimant was placed on restricted duty. The August 7, 2020, accident was deemed the prevailing factor causing Claimant's injuries.

Claimant's course of treatment was delayed due to a COVID hospitalization, but ultimately did not prove helpful. On February 24, 2021, Claimant underwent an MRI scan of the left hip, left knee and left ankle. The left hip MRI revealed a paralabral cyst presumptive for a labral tear. The left knee MRI was unremarkable. The left ankle MRI revealed a ganglion or synovial cyst, signs of synovitis or inflammatory arthritis and signal

changes consistent with mild tibialis posterior tenosynovitis. Claimant was referred to an orthopedic specialist and her light duty restrictions continued. Again, the provider believed the prevailing factor causing Claimant's medical condition was the August 7, 2020, accident.

Dr. Jones performed a Court-ordered independent medical examination of Claimant on August 5, 2021. Dr. Jones recorded complaints of left-sided lower extremity pain, and an accident occurring when Claimant's foot caught on steps, causing her to slip and her leg to extend out to the side and to turn inward. Examination was notable for low back pain, tenderness at the left SI joint and a positive straight-leg test. Pain was noted during rotation testing of the left hip, and tenderness was present at the anterior iliopectoral insertion and trochanter. Range of motion testing of the left knee was good with no significant pain. Swelling was noted at the left ankle, with tenderness, burning pain and numbness to the toes, and limited range of motion. The MRI scans were reviewed. Dr. Jones diagnosed a significant hyperabduction injury to the left hip with a labral tear by MRI, no significant pathology of the left knee, a lateral cyst and ganglion around the posterior tibialis tendon of the left ankle and low back pain. Dr. Jones recommended referrals to hip and foot/ankle specialists, and a referral to a physiatrist for the low back. An EMG was recommended to confirm the cause of left lower extremity nerve pain. Dr. Jones confirmed his group would accept Claimant as a patient.

On October 26, 2021, Claimant testified in a discovery deposition taken via Zoom. Claimant was represented by counsel at the deposition. Among many subjects, Claimant testified she never used any name other than "Melissa Morales," including "Chavez." Claimant also denied being sued, having a family doctor, or seeing a physician regularly for preventative medical care. Claimant also denied injuring her back, left hip, left knee, left ankle or foot before August 7, 2020. Claimant testified she had not been to a zoo with her daughter for a long time due to her left lower extremity pain, and denied leaving Topeka since August 2020.

Claimant saw Dr. Wingerter, an orthopedist specializing in hips, on November 18, 2021. Dr. Wingerter noted a history of left hip pain following an accident at work in August 2020. According to Dr. Wingerter's note, Claimant's foot caught on plastic on stairs, causing her to slip and her leg to go out to her side in a hyperabduction extension and lateral rotation. Examination was notable for an antalgic gait, groin pain during anterior impingement testing, and pain and tenderness at the hip. The MRI of the hip was reviewed and interpreted as showing no discrete tear, but a paralabral cyst was present. Dr. Wingerter diagnosed a probable acetabular labral tear at the left hip, and ordered physical therapy.

On February 11, 2022, Claimant underwent a second deposition designated evidentiary. Claimant was confronted with multiple inaccuracies in her prior deposition testimony. First, Claimant was provided a copy of her Facebook page, which indicated she

used the name “Mel Chavez.” Claimant confirmed she used that name, and testified she thought the question about the use of other names was in the context of her work. Claimant also testified she used that name so her former significant other did not find her, and she started using “Mel Chavez” before August 7, 2020.

Second, Claimant was confronted with information indicating she was sued in Shawnee County District Court on several occasions in collections cases. Claimant conceded the information was correct. Claimant testified she did not understand the prior question also included collections cases.

Third, Claimant was confronted on her prior testimony denying prior left ankle or foot injuries. Claimant confirmed she received treatment at Stormont Vail for, among other things, a left ankle injury she suffered in 2016. Claimant also confirmed she had a primary care physician and received medical treatment at Lawrence Family Practice with her daughter. Claimant also confirmed she was seen at Lawrence Family Practice approximately one month before the August 2020, accident for bilateral foot pain.

Fourth, Claimant was confronted about her prior denial of leaving the city of Topeka since August 2020. Claimant confirmed she actually traveled to Oklahoma City, and went to the Oklahoma City Zoo with her daughter. Claimant also admitted she traveled to Florida and Las Vegas. Claimant also traveled to Kansas City to attend a concert and to St. Louis to visit her father. Claimant also traveled to Lawrence, and attended two K.U. basketball games. Claimant testified she answered inaccurately because she thought it was irrelevant. Claimant subsequently testified she was in pain while traveling and required accommodation.

Finally, Claimant was confronted about her prior testimony she could not wear high-heeled shoes on account of the injury. Claimant was given a photograph showing her seated and wearing high-heeled shoes, and Claimant testified she slipped the shoes on to pose for the photograph.

Claimant saw Dr. Badwey, an orthopedist specializing in feet and ankles, on February 16, 2022. Dr. Badwey recorded a history of an inversion injury to the left foot, and he noted Claimant was using a CAM walker boot. Examination was notable for swelling, reduced range of motion, and numbness and tingling of three toes at the left foot. Dr. Badwey diagnosed post-inversion injury of the left ankle and hindfoot, peroneal tendinitis and possible peroneal tendon tear of the left lower extremity, and bilateral contractures of the Achilles tendons. Dr. Badwey recommended an ASO brace and medication, and wanted Claimant to return in eight weeks.

On February 17, 2022, Claimant returned to Dr. Wingerter, who noted Claimant completed the physical therapy he ordered. Claimant’s symptoms persisted. Dr. Wingerter

recommended an intra-articular steroid injection of the left hip, with possible surgery depending on the outcome of the injection. Claimant was taken off work.

Further medical treatment and temporary total disability compensation was denied by Respondent. Claimant sought reinstatement of medical treatment and temporary total disability compensation, and Respondent sought a determination Claimant did not prove compensability based on her prior inaccurate testimony. A preliminary hearing was held on May 5, 2022. Claimant provided explanations for her prior inaccurate testimony as she provided in the evidentiary deposition. Claimant characterized her testimony in the first deposition as lazy. Claimant denied making up the accident or injuries, and indicated she either did not understand the meaning of some of the questions, or did not take some of the questioning seriously because she thought they were irrelevant.

Claimant testified the area where the accident occurred was monitored by Respondent with security cameras. The possibility security cameras recorded the accident was discussed, and a request for any recordings of the accident or accident scene at the time of the accident was made. Counsel for Respondent advised the Court and counsel he was not aware of any video recording, but agreed to confirm with Respondent whether a recording existed.

Following the preliminary hearing, ALJ Bogdan ordered Dr. Jones to reevaluate Claimant and to review additional records and the deposition transcripts. On June 29, 2022, Dr. Jones issued a report. Dr. Jones reviewed Claimant's treatment with Drs. Badwey and Wingerter, and confirmed he reviewed the deposition transcripts and additional medical records. Dr. Jones noted there was nothing indicating Claimant sustained prior left hip or low back injuries. Dr. Jones also stated Claimant's left ankle injury would routinely be caused by a traumatic inversion injury with a possible repetitive injury component, and the August 7, 2020, accident was more probably than not the prevailing cause of Claimant's conditions. Dr. Jones reiterated the recommendations of treatment for the left hip and ankle, and reiterated the physiatrist referral for the back, which he noted had not been completed. Work restrictions were imposed.

An addendum report was requested of Dr. Jones to confirm whether he reviewed a video recording. The video provided to Dr. Jones is not part of the record before the Board and was not provided to ALJ Bogdan. On August 22, 2022, Dr. Jones issued a report stating he reviewed a video provided by counsel when he prepared the June 29, 2022, report. Dr. Jones also stated he re-reviewed the video. Dr. Jones did not state the date, time or location of the video recording. According to Dr. Jones, the video depicted Claimant making a motion as she was getting up from behind a desk indicating she had an injury, and depicted Claimant going down stairs without evidence of an injury. Claimant was seen holding her left hip. Dr. Jones stated he did not see a significant hyperextension, hyperabduction or internal rotation injury on the video. Dr. Jones also stated he did not

believe the video showed evidence of an injury explaining the symptoms Claimant reported in her left ankle, knee or hip.

On October 19, 2022, ALJ Bogdan issued the Preliminary Hearing Order. ALJ Bogdan noted Dr. Jones initially found Claimant's left hip, left ankle and back injuries related to an accident occurring on August 7, 2020, but later found no evidence of an injury based on his review of a video. Claimant's inconsistent testimony was also noted. ALJ Bogdan concluded the reports of Dr. Jones supported finding the August 7, 2020, accident was the prevailing factor causing injuries to the left ankle, hip and low back, and Claimant's requests for medical treatment and temporary total disability compensation were granted. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Preliminary Hearing Order was erroneous because Claimant did not meet her burden of proving compensability. Respondent argues Claimant is not credible because of her multiple instances of knowingly inaccurate testimony. Claimant, however, argues the inaccuracies are immaterial to compensability, and the Preliminary Hearing Order was correctly decided.

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.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² 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.³ "Burden of proof" is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence such party's position on an issue is more probably true than not on the basis of the whole record.⁴

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.⁵ 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

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-508(h).

⁵ See K.S.A. 44-508(d).

consideration of all relevant evidence.⁶ 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.⁷

In this case, the medical evidence clearly establishes an acetabular labral tear at the left hip, and peroneal tendinitis with a possible ganglion of the left ankle. Dr. Jones also opined Claimant sustained a low back injury, which was not contradicted. Although the medical evidence indicates the August 7, 2020, accident was the prevailing factor causing those injuries, those opinions are premised on an accurate history of an accident. The issue is whether Claimant proved the August 7, 2020, accident occurred.

Claimant gave a consistent description of the August 7, 2020, accident in two depositions and one preliminary hearing. The history Claimant gave to multiple medical providers is also consistent. Claimant, however, also knowingly gave false testimony in several areas unrelated to the accident, which undermines her credibility. Regardless of the setting, giving testimony is a serious matter subject to penalty of law, and Claimant's explanations for her inaccurate testimony are wanting. Claimant acknowledged she was not truthful.

No other witnesses, such as Claimant's supervisor or the inmate at the accident scene, testified. Although a video of the accident or the accident scene may exist, the video is not part of the current record. Dr. Jones gave a partial description of the events in the video, but essential information, such as the date and time of the video, are unknown. Dr. Jones indicated initially he did not change his prior opinions after reviewing the video, but apparently did after re-reviewing the video. Claimant's credibility as a witness is questionable, but no other evidence directly refutes her testimony of the events of August 7, 2020. Therefore, by a slim margin, Claimant met her burden of proving compensability and the Preliminary Hearing Order should be affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Preliminary Hearing Order issued by ALJ David J. Bogdan, dated October 19, 2022, is affirmed.

IT IS SO ORDERED.

⁶ See K.S.A. 44-508(d),(g).

⁷ See K.S.A. 44-508(f)(2)(B).

MELISSA MORALES

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Dated this _____ day of February, 2023.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

George H. Pearson, III
Nathan D. Burghart
Hon. David J. Bogdan