

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

|                                      |   |                |
|--------------------------------------|---|----------------|
| <b>RYAN GREER</b>                    | ) |                |
| Claimant                             | ) |                |
| V.                                   | ) |                |
|                                      | ) | AP-00-0472-645 |
| <b>AGCO CORP.</b>                    | ) | CS-00-0469-741 |
| Respondent                           | ) |                |
| AND                                  | ) |                |
|                                      | ) |                |
| <b>ZURICH AMERICAN INSURANCE CO.</b> | ) |                |
| Insurance Carrier                    | ) |                |

**ORDER**

Respondent and its insurance carrier (Respondent) request review of the December 6, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

**APPEARANCES**

Robert R. Lee appeared for Claimant. Dallas L. Rakestraw appeared for Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held October 18, 2022, with exhibit attached; the transcript of the evidentiary deposition of Ryan Greer from September 14, 2022; the transcript of the evidentiary deposition of Maria Aleman from October 31, 2022, with exhibits attached; the transcript of the evidentiary deposition of Thomas Hawk from October 31, 2022, with exhibits attached; and the documents of record filed with the Division.

**ISSUE**

Did Claimant sustain his burden of proving he suffered a work-related accident?

FINDINGS OF FACT

Claimant initially began working for Respondent through Express Personnel as a forklift driver. On August 1, 2022, Claimant was hired directly by Respondent as a material handler. In this position, machine parts are pulled and prepped to be sent to other plants. Parts tubs are filled and put onto pallets or stack bins, then placed onto a tram with flatbed trailers for transfer to another facility.

Claimant testified he felt immediate sharp pain in his low back while lifting a parts tub onto a trailer on August 2, 2022, his first full day as a permanent employee. Claimant described:

Q. Okay. Now, you lift this part basket. Were you able to put it down, were you able to get it on the trailer?

A. So my first attempt from where it was located, which it was on the pallet, I got it off onto the ground and then from there I lifted it up onto the trailer.

Q. So you took it off a pallet?

A. Yes.

Q. When did you experience the pain?

A. Right away. Right when – (Indicating) – I lifted it up and had used I guess my tippy toes, if you will, to get on there, that's when it hit me.<sup>1</sup>

Claimant stated the incident occurred approximately 15 minutes prior to the end of his shift. Claimant was with a coworker at the time of the incident, but could not recall his name. Claimant clocked out and went home. Claimant woke the following day in pain, but he went to work and worked his entire shift. Claimant stated he informed his coworker of the incident. Claimant further testified he informed his supervisor later that day of the incident and was told to have someone help lift if something is too heavy.

Unrelated to the incident, Claimant did not return to work for a time because Respondent required secondary identification documentation. When Claimant produced this documentation, he returned to work for two days. Claimant stated he could not perform the job duty to which he was assigned and stopped working.

Thomas Hawk has worked in Respondent's materials department for 14 years and was Claimant's crew chief on August 2, 2022. Mr. Hawk testified he was not aware

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<sup>1</sup> Claimant's Depo. at 21-22.

Claimant sustained any injury until Claimant had not been on the job for a few weeks. Mr. Hawk further testified all lifting of tubs onto the trailers is done by forklift. No one manually loads parts tubs onto the trailers. Mr. Hawk noted that at times certain tubs are manually taken to a pallet, and the tubs on pallets are wrapped and/or banded for transport. The pallets are then loaded onto the trailers via forklift. Mr. Hawk explained the pallets are wrapped to secure them for transport. Any unwrapped pallet or parts tub unsecured on the trailer would not be transported.

Maria Aleman was Claimant's supervisor on August 2, 2022. Ms. Aleman testified the parts tubs are filled manually before they are loaded onto the trailers with a forklift. Ms. Aleman stated the parts tubs are too heavy to be lifted manually. She testified:

Q. The materials that are loaded onto this tram or wagon –

A. Mm-hmm. (Witness motioned head up and down.)

Q. – how are they put on there?

A. By a forklift.

Q. Now, does anybody ever lift up and put things on these trams?

A. No, sir.

Q. Why not?

A. Because we always tell everybody to buddy lift inside of the plant and then outside is forklift only because they're too heavy.

Q. So is there anybody that lifts things up and puts them on these trams?

A. No, sir.<sup>2</sup>

Ms. Aleman saw Claimant on August 2, 2022, for only the first 45 minutes of his shift. Neither she, nor Mr. Hawk, were present at the time of the incident. Neither Ms. Aleman, nor Mr. Hawk, were aware of Claimant having low back pain or having permanent restrictions prior to working for respondent. Claimant passed his pre-employment physical prior to August 2, 2022.

When Claimant informed Respondent he could not perform his work due to his condition, he was referred to Ascension Via Christi Occupational Health on September 1, 2022. Dr. Larry Wilkinson examined Claimant and determined Claimant had radicular low

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<sup>2</sup> Aleman Depo. at 6-7.

back pain. Dr. Wilkinson's notes indicate Claimant "admitted to frequent back pain, prior epidural injections for back pain and a spasm one month ago."<sup>3</sup> Dr. Wilkinson recommended an MRI be obtained and provided work restrictions. Respondent did not accommodate Claimant's restrictions.

Admitted into evidence are records from September 2012, when Claimant was evaluated by Dr. Sandra Barrett for low back pain with radiation into the lower extremity. An EMG and MRI were conducted. Dr. Barrett concluded Claimant sustained "low back pain with continental hypoplastic changes and with findings consistent with Scheuermann disease."<sup>4</sup>

Claimant testified he continues to have sharp pain and muscle spasms in his low back and left groin. Claimant has not worked anywhere since his last day worked at Respondent.

The ALJ found:

The court is preliminarily satisfied that claimant had a lifting event, although the date he suffered the event is not clear, he was sent to Dr. Wilkinson September 1<sup>st</sup> and given restrictions.

Because of the claimant's history as revealed by Dr. Barrett, whose report from 2012 is an exhibit the court is not convinced that the need for treatment is causally related to the accident. Dr. Wilkinson ordered further testing, but it does not appear that respondent authorized it.

To resolve this question the court requests an IME from Dr. Hufford for the purpose of determining his opinion on a diagnosis, prevailing factor opinion and treatment recommendations if any.<sup>5</sup>

The ALJ ordered Respondent to pay four weeks of back temporary total disability benefits (TTD) based on the preliminary average weekly wage of \$800 per week, and pay TTD beginning December 6, 2022, until the report is received from Dr. Hufford.

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<sup>3</sup> P.H. Trans., Cl. Ex. 1 at 2.

<sup>4</sup> Aleman Depo., Resp. Ex. 8 at 1.

<sup>5</sup> ALJ Order at 2.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant failed to prove he suffered a work-related accident. Respondent requests the Board reverse the ALJ's Order and deny workers compensation benefits.

Claimant contends the ALJ's Order should be affirmed. Claimant argues Respondent presented no evidence an injury did not occur, and he is entitled to medical care and TTD.

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.<sup>6</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>7</sup>

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.

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

(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.

. . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

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<sup>6</sup> See K.S.A. 44-501b(a).

<sup>7</sup> See *id.*

(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.

Dr. Barrett’s records show Claimant suffered a preexisting low back condition. The ALJ placed enough weight in Dr. Barrett’s records to state he was not convinced the need for treatment was causally related to the accident. The undersigned finds Claimant failed to prove the August 2, 2022, work-related accident is the prevailing factor causing his need for medical treatment because the record supports a history of preexisting multilevel degenerative disease.

It is puzzling how the ALJ could find Claimant failed to prove the need for treatment is causally related to the accident, and go ahead and order Respondent to pay temporary total disability benefits. The accident must be the prevailing factor causing the injury, medical condition, and resulting disability. (In this case, temporary total disability.) The undersigned finds Claimant failed to meet the burden of proving entitlement to TTD benefits because he did not prove he sustained a compensable injury. The ALJ’s award of TTD is vacated.

Regarding the ALJ’s order of an IME, the Board has ruled that a judge has the power and authority to request an IME to obtain pertinent information for determining the issues in a claim. Accordingly, the judge did not exceed his jurisdiction in requesting the IME from Dr. Hufford. Therefore, the propriety of the IME order is not subject to review at this stage of the claim.<sup>8</sup> The appeal of the IME order is dismissed.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Thomas Klein dated December 6, 2022, is vacated relating to the order for Respondent to pay TTD. The Board does not have jurisdiction to review the ALJ’s order for an IME, and that portion of the appeal is dismissed.

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<sup>8</sup> See *Bland v. City of Topeka*, No. 1,007,272, 2003 WL 21396799 (Kan. WCAB May 13, 2003).

**IT IS SO ORDERED.**

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

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**SETH G. VALERIUS  
BOARD MEMBER**

c: Via OSCAR

Robert R. Lee, Attorney for Claimant  
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier  
Hon. Thomas Klein, Administrative Law Judge