

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LOREN HILL)	
Claimant)	
V.)	
)	AP-00-0473-409
J-D TRUCKING, INC.)	CS-00-0467-365
Respondent)	
AND)	
)	
ACUITY A MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the January 24, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Michael L. Snider appeared for Claimant. Samantha Benjamin-House appeared for Respondent and its insurance carrier (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 January 24, 2023, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Was Claimant's August 5, 2021, motor vehicle accident the prevailing factor causing his neck and shoulder condition?
2. Did the ALJ err by not considering the causation opinion of Dr. George Flutter?
3. Did the ALJ err by considering a lack of medical records as meaning a lack of injury to Claimant's head and upper extremities?

FINDINGS OF FACT

Claimant worked for Respondent as a truck driver. On August 5, 2021, Claimant was involved in a motor vehicle accident while driving a semi-trailer truck around a curve. Claimant stated the truck's steering arm disconnected from the gearbox, causing him to lose control of the vehicle. Claimant's truck sustained extensive damage as a result of the accident.

Claimant testified he struck the left side of his head on the doorjamb during the accident. He further described:

Q. Okay. And were you having – what problems were you feeling at the time right after that accident?

A. Well, it hurt pretty good, I had a pretty good goose egg, and knot.

Q. What body parts were hurting you?

A. My foot, it started swelling real bad. I had some trouble there. Right in the middle of my chest – it was popping in and out. And then my neck was hurting down the lower portion of my neck and then across my shoulders.¹

Claimant went to the Mitchell County Hospital emergency department the following day with complaints of pain in his right foot and right ribs. Claimant testified he complained to hospital staff of the pain in his head, but no mention is made in the hospital's records of a head injury. Claimant eventually underwent treatment for fractures of the right foot and twelfth right rib.

Dr. Bryce Palmgren, orthopedic surgeon, began treating Claimant for his right foot injury in October 2021. Claimant testified he did not mention any neck or head injury to Dr. Palmgren prior to March 2022.

Claimant next treated with his primary care physician, Dr. Jason Cheney. Claimant testified he informed Dr. Cheney of the bump on his head and neck complaints. On February 14, 2022, Claimant submitted a note to Dr. Cheney stating, "I have swelling and Pain in my Left Temple and it moves up my Temple to the top of my head. [I]t started around noon on Sunday 2/13/2022 around 11:00 a.m."² Dr. Cheney's notes do not indicate complaints of head or neck injuries prior to February 2022. A brain MRI was conducted

¹ P.H. Trans. at 17-18.

² P.H. Trans., Resp. Ex. B3 at 64.

February 21, 2022, which was read to reveal a small right mastoid effusion. Claimant was treated with antibiotics.

Claimant testified he developed a sudden onset of neck and shoulder pain on March 27, 2022. Claimant could not say what triggered this event. Donald Boden, owner of Respondent, submitted an Affidavit which states, in part:

[Claimant] did not complain of any neck or head injuries associated with the motor vehicle accident of August 6, 2021. However, several months after the accident, [Claimant] advised that he had injuries to his head and neck when he was in jail around that time as he thought he was having a heart attack and began having seizures on the concrete floor.³

Claimant was seen at the Mitchell County Hospital emergency department on April 9, 2022, with complaints of redness and warmth in an area near his left elbow. He was diagnosed with cellulitis of the left arm, treated with antibiotics, and told to follow up with Dr. Cheney.

Dr. Cheney's notes from April 14, 2022, state:

The patient is a 45 year old male who presents to the practice today for a transition into care. The patient is transitioning into care from an emergency room and a summary of care was reviewed. Note for "Transition into care": pt was seen in the ER on Saturday for c/o thoracic back pain that radiates into his left shoulder and arm. He had noted redness to the left elbow region and was diagnosed with cellulitis. . . . He reports that the redness and swelling to the elbow have improved, but he is having severe pain from his thoracic spine, through his left shoulder and arm.⁴

Claimant underwent a cervical spine MRI without contrast on April 20, 2022, which was read to reveal multilevel diffuse degenerative disease, most marked at C6-7 causing severe central stenosis. Dr. Cheney referred Claimant to Dr. Matthew Henry, a neurosurgeon.

Dr. Henry, in a letter dated May 17, 2022, wrote:

[Claimant] is a very pleasant 45-year-old right-handed gentleman who was involved in a motor vehicle crash while at work where he wrecked his Cima on March 27, 2022. He has numbness in both hands and pain traveling down the left arm in the C7 more than C6 distribution and since developed a little bit of weakness in the left

³ P.H. Trans., Resp. Ex. B7 at 1-2.

⁴ P.H. Trans., Resp. Ex. B3 at 5.

hand and clumsiness. He is scheduled to start some physical therapy and this is not unreasonable. . . .

. . .

MRI reveals a huge disc herniation at C6-C7 causing spinal stenosis and severe foraminal obliteration on the left at C6-C7. He also does have a disc protrusion on the left at C3-C4 and C4-C5, which I have talked to him about and recommended conservative therapy for those. He does not have any obvious deltoid weakness at this point in time.⁵

Dr. Henry suggested Claimant undergo a C6-7 anterior cervical discectomy and fusion. Dr. Henry took Claimant off work pending surgery.

Dr. George Fluter examined Claimant at his counsel's request on July 20, 2022. Claimant provided a history of a motor vehicle accident occurring August 5, 2021, while working for Respondent. Dr. Fluter reviewed Claimant's available medical records and performed a physical examination. Dr. Fluter assessed Claimant:

1. Status post work-related motor vehicle accident; 08/05/21.
2. Right foot fracture; treated non-operatively.
3. Neck/upper back/upper extremity pain/dysesthesia.
4. Multilevel cervical discopathy.
5. Probable left upper extremity radiculitis.
6. Right-sided rib fractures; treated conservatively.⁶

Dr. Fluter provided his causation opinion:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [Claimant's] current condition and the reported work-related motor vehicle accident occurring on 08/05/21.

Dr. Henry's report dated 05/17/22 erroneously indicates that [Claimant] was driving a Cima and had the injury on 03/27/22; however, he was driving a semi-truck and the accident occurred on 08/05/21.⁷

⁵ P.H. Trans., Cl. Ex. 3 at 17.

⁶ P.H. Trans., Cl. Ex. 2 at 8.

⁷ *Id.*

Dr. Fluter recommended treatment in the form of medications, the use of a neck collar during periods of activity, and follow-up with Drs. Palmgren and Henry as clinically indicated.

The ALJ questioned Claimant directly during the preliminary hearing held January 24, 2023:

Q. Are you telling me that you woke up with neck and shoulder pain on March 27th?

A. Yes.

Q. All right. I'll be frank, I have some difficulty relating the neck and shoulder pain to this accident, because there's nothing in the emergency department records from the day after the accident of any injuries to the head, neck or shoulder. No mention of it. And I never see any mention of head, neck or shoulder until you're referred for an MRI in February of 2022, which is six months later. I have a hard time queuing those dots six months apart. Can you help me?⁸

Claimant explained he was told by the doctor some discomfort was to be expected following a motor vehicle accident and would likely go away. Without explanation, the ALJ found Claimant failed to establish the work accident was the prevailing factor causing his neck and shoulder injuries, medical condition, need for treatment, or resulting disability/impairment.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ's Order should be reversed and Dr. Henry be appointed authorized treating physician for his cervical and upper extremity conditions. Claimant contends the ALJ cited no competent medical evidence as a basis for finding against Dr. Fluter's opinions related to Claimant's cervical spine and upper extremities.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues "credible medical evidence is not required to rule contrary to the opinions of Dr. Fluter when there are major inconsistencies in the narrative of [Claimant's] head and neck symptomology."⁹

⁸ P.H. Trans. at 51-52.

⁹ Respondent's Brief (filed Feb. 16, 2023) at 1.

1. Was Claimant's August 5, 2021, motor vehicle accident the prevailing factor causing his neck and shoulder condition?

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

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

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The prevailing factor opinion provided by Dr. Fluter is uncontroverted. Normally, uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹⁰ In this case, however, the undersigned finds Dr. Fluter's prevailing factor opinion improbable or untrustworthy.

There are no documented neck or head complaints until six months after this accident. Dr. Fluter does not explain how a ruptured cervical disc would be asymptomatic for six months, or why the accident was the prevailing factor causing the herniated cervical disc. Claimant testified the neck symptoms started suddenly, and he could not explain why the symptoms started.

According to the Affidavit of Donnie Boden, Claimant did not complain of head and neck complaints. He also stated Claimant told him he suffered an injury to his head and neck while in jail. This statement is consistent with the timing of the onset of neck and head symptoms.

The undersigned finds Claimant failed to prove his work-related accident was the primary factor, in relation to any other factor, causing his neck and head condition.

¹⁰ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

2. Did the ALJ err by not considering the causation opinion of Dr. George Fluter?

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing where one of the parties alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to specific jurisdictional issues: accidental injury, injury arising out of and in the course of employment, timely notice and certain other defenses.

The ALJ's decision to disagree with Dr. Fluter is based upon the lack of evidence supporting a cervical spine injury resulting from the August 5, 2021, work-related accident and is within the scope of his authority.

This issue is not one included in K.S.A. 44-534a(a)(2). The undersigned is without jurisdiction to review this issue.

3. Did the ALJ err by considering a lack of medical records as meaning a lack of injury to Claimant's head and upper extremities?

K.S.A. 44-508(g) requires the ALJ to consider all relevant evidence submitted by the parties when determining prevailing factor. The lack of evidence supporting a contemporary injury to the head and neck arising from the August 5, 2021, work-related accident is relevant evidence.

This issue is not one included in K.S.A. 44-534a(a)(2). The undersigned is without jurisdiction to review this issue.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Bruce E. Moore, dated January 24, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2023.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Michael L. Snider, Attorney for Claimant
Samantha Benjamin-House, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge