

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>SHIRLEY HECHT-ASHER</b>	)	
Claimant	)	
V.	)	
	)	
<b>EATSTREET, INC.</b>	)	AP-00-0473-825
Respondent	)	CS-00-0463-125
AND	)	
	)	
<b>TRAVELERS INDEMNITY COMPANY</b>	)	
<b>OF AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

The claimant, through Bruce Brumley, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary hearing Order dated February 20, 2023. Austin Enns appeared for the 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: (1) the preliminary hearing transcript, held February 8, 2023; (2) all exhibits uploaded and admitted under HE-00-0077-287; (3) documents of record filed with the Division; and (4) the parties' briefs.

**ISSUES**

1. Was the claimant's asserted injury of December 7, 2021, the prevailing factor for her current right knee symptoms?
2. May the Board address the constitutionality of K.S.A. 44-508(f)(2)?

**FINDINGS OF FACT**

This case involves a claim for a right knee injury incurred when the claimant was working for the respondent on December 7, 2021.

The claimant had prior right knee problems. On December 5, 2018, she sustained a work-related patellar fracture from having her right knee strike an icy sidewalk while working for a different employer. Right knee radiographs showed minimal osteophyte

formation, small joint effusion and subluxation of the patella. Additional x-rays were done in January and February 2019, again showing a patellar fracture, but without displacement, along with degenerative changes. The claimant also had a right knee MRI on March 11, 2019, which was read to show a patellar fracture, moderate denudation and thinning of the articular surface with joint space narrowing and osteophyte formation.

On May 30, 2019, the claimant underwent arthroscopic surgery by Benedict Figuerres, M.D., for right knee patellar and lateral tibial plateau chondroplasties with anterior partial synovectomy and a lateral meniscectomy with report of a tear. The surgical report noted chondromalacia of the medial femoral condyle. The claimant was released to half days of work in August 2019, with a full release in September 2019.

On June 3, 2020, Daniel Zimmerman, M.D., examined the claimant, who reported ongoing pain and discomfort of her right knee, among other complaints. Dr. Zimmerman noted the claimant was unable to run or squat, and stooping caused a painful popping sensation in her right knee. The claimant reported being able to stand for 30 minutes and walk less than one block before pain caused her to want to be off her feet.

On July 14, 2020, Eden Wheeler, M.D., examined the claimant. Dr. Wheeler noted the claimant reported daily grinding and a painful popping in her right knee, with intermittent daily pain underneath the patella and laterally. Dr. Wheeler did not note initial crepitus with range of motion, but recorded an audible and palpable “pop.” Dr. Wheeler’s impression was intermittent right knee pain and crepitus with a history of right patellar fracture, degenerative joint disease and a history of right knee surgery.

The claimant settled her prior right knee claim on February 16, 2021.

At the preliminary hearing, the claimant denied any progression or worsening of her right knee symptoms between August 2019 and December 6, 2021, and testified she felt her knee was “in really good shape.”<sup>1</sup>

On December 7, 2021, the claimant was delivering a food order for the respondent. She fell while walking on a customer’s leaf-covered sidewalk and directly struck her right knee on the customer’s step. The claimant immediately had a sharp pain and sat for a bit. She returned to her car and eventually had a friend pick her up because she was unable to drive.

At a former attorney’s request, the claimant saw Dr. Zimmerman on January 17, 2022, for an independent medical examination (IME). The claimant presented with

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<sup>1</sup> P.H. Trans. (Feb. 8, 2023) at 16.

complaints of persistent pain and discomfort affecting the right knee, with a popping sound when extended.

Dr. Zimmerman stated, "The prevailing factor for the right knee acute capsulitis, rule out a meniscal or ligament injury, is the accident that occurred on December 7, 2021."<sup>2</sup> The doctor recommended additional medical treatment, to include anti-inflammatory medication, quarterly office visits, injections, an MRI, physical therapy and referral to an orthopedist. Dr. Zimmerman did not mention his prior report dated June 3, 2020.

At the respondent's request, the claimant saw Michael Azzam, M.D., on March 23, 2022, for an IME. The claimant reported a catching and popping sensation in the anterior aspect of her knee around the patella when going from a seated to standing position or up and down steps. Dr. Azzam diagnosed the claimant with a right knee contusion and osteoarthritis. The doctor stated:

The prevailing factor of her current symptoms is right knee osteoarthritis, which is a degenerative condition and is not the result of her fall from 12/7/2021. Posttraumatic osteoarthritis would not occur in less than a 4 month time period from her fall on the anterior aspect of her right knee to now, and arthritic changes were previously documented in her medical records in 2019-2020. The claimant previously complained of pain in her right thigh and around/underneath her patella in an independent medical examination from 07/14/2020.<sup>3</sup>

Dr. Azzam opined the claimant could return to full duty without restrictions and she did not require additional medical treatment.

On June 27, 2022, the claimant saw Lowry Jones, M.D., for a court-ordered IME. The doctor noted the claimant admitted to having anterior knee pain, calf pain and thigh pain following her injury in 2018, and he noted the medical records supported ongoing significant knee pain. The doctor ordered right knee x-rays, which showed moderately advanced patellofemoral arthritis. He indicated an MRI might be warranted. Dr. Jones concluded he was unable to determine whether the claimant sustained a new injury to the patellofemoral joint without the arthroscopic findings from 2019.

On September 27, 2022, Dr. Jones issued an addendum report after reviewing additional medical records. The doctor's report stated:

Her diagnosis is that of advanced patellofemoral arthritis, following a contusion on 12/7/2021. She had preexistent patella fracture from an injury in 2018, and findings

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<sup>2</sup> *Id.*, Cl. Ex. A.1 at 4.

<sup>3</sup> *Id.*, Resp. Ex. B.1 at 4.

from arthroscopy of grade III chondromalacia. The natural progression from a patella fracture with known grade III chondromalacia of the patella at the time in 2018 would be an expected progression to grade IV chondromalacia and significant patellofemoral arthritis. She has this finding now, and I believe that the prevailing cause for her findings of advanced patellofemoral arthritis is the original injury in 2018. I believe that the injury in 2021 aggravated her preexistent disease process and has made her more symptomatic but the prevailing cause for the pathology noted on x-ray, involving the advanced arthritis of the patellofemoral joint was the injury in 2018.<sup>4</sup>

Dr. Jones recommended additional treatment, but stated, “I believe that the prevailing cause for her present knee pain, is the injury of 2018 and the subsequent natural expected progression of patellofemoral arthritis.”<sup>5</sup>

The claimant testified she continues to have pain in her right knee and indicated it “grinds and pops a lot.”<sup>6</sup> She has difficulty walking and is unable to put any pressure on her right knee.

The ALJ stated:

Dr[.] Jones provides his independent medical opinion (Amendment to Independent Medical Evaluation 6-27-22) finding that “I believe the prevailing cause of her present knee pain, is the injury of 2018 and the subsequent natural expected progression of patellofemoral arthritis.” His opinion follows his review of additional records relating to the prior knee injury of 2018.

Under the heading Diagnosis, Dr. Jones states “she had pre-existent patella fracture from an injury in 2018, and findings from arthroscopy of grade III chondromalacia. The natural progression from a patella fracture with known grade III chondromalacia of the patella at the time in 2018 would be an expected progression to grade IV chondromalacia and significant patellofemoral arthritis. She has this finding now, and I believe that the prevailing cause for her findings of advanced patellofemoral arthritis is the original injury in 2018. I believe that the injury in 2021 aggravated her pre-existing disease process and has made her more symptomatic but the prevailing cause for the pathology noted on x-ray, involving the advanced arthritis of the patellofemoral joint was the injury in 2018.”

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<sup>4</sup> *Id.*, Resp. Ex. B.3 at 1.

<sup>5</sup> *Id.*, Resp. Ex. B.3 at 2.

<sup>6</sup> *Id.* at 17.

Claimant's preliminary hearing requests for additional medical treatment are considered and denied.

### **PRINCIPLES OF LAW AND ANALYSIS**

The claimant argues she suffered a new injury to her right knee, including a new structural change. The claimant also raises constitutional issues, specifically K.S.A. 44-508(f)(2) as it relates to unconstitutional limitations on triggering events, precipitating factors, solely aggravating events, accelerating events, and solely exacerbating events. The respondent maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.<sup>7</sup> The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>8</sup> The provisions of the Workers Compensation Act are applied impartially to all parties.<sup>9</sup> 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.<sup>10</sup> The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.<sup>11</sup>

The Board's review of an order is de novo on the record.<sup>12</sup> A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.<sup>13</sup> On de novo review, the Board makes its own factual findings.<sup>14</sup>

K.S.A. 44-508 states, in pertinent part:

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<sup>7</sup> See K.S.A. 44-501b(b).

<sup>8</sup> See K.S.A. 44-501b(a).

<sup>9</sup> See *id.*

<sup>10</sup> See K.S.A. 44-501b(c).

<sup>11</sup> See *id.*

<sup>12</sup> See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>13</sup> See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

<sup>14</sup> 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).

(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 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.

...

(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.

(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.

...

(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.

...

(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.

Proof of “prevailing factor” is not dependent on medical evidence alone.<sup>15</sup> Preexisting degenerative conditions can be the prevailing factor,<sup>16</sup> but the presence of a preexisting condition does not always preclude compensability after an accident.<sup>17</sup>

**1. The claimant did not prove the 2021 accident was the prevailing factor in causing her injury, medical condition, and resulting disability.**

The claimant sustained symptoms of a right knee injury on December 7, 2021. While the undersigned could spend effort determining whether there was more than a sole aggravation of a preexisting condition, the linchpin concerns prevailing factor.

Under *Le*,<sup>18</sup> the claimant must prove her injury is more than a sole aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic. In addition, the claimant must prove her accident arose out of her employment. Doing so requires she prove the accident was the prevailing factor in causing her injury, and medical condition.

The medical evidence is rather straightforward. While Dr. Zimmerman attributes the prevailing factor to the 2021 accident, his report makes no mention of the claimant’s prior similar injury which resulted in surgery. Both Dr. Azzam and Dr. Jones, the court-ordered and neutral examiner, attributed the prevailing factor to the prior injury in 2018. The undersigned concludes the prevailing factor in causing the claimant’s injury and medical condition was the 2018 accident. This is not simply a matter of two experts versus one, but also a matter of the quality of the evidence.

**2. The Board may not address the constitutionality of K.S.A. 44-508(f)(2).**

The claimant’s brief indicates this issue was asserted to avoid a future waiver. The Board lacks the authority to rule on the constitutionality of any statute.<sup>19</sup> The Board further lacks jurisdictional authority to review this issue from an appeal of a preliminary hearing under K.S.A. 44-534a.

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<sup>15</sup> See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, at \*5 (Kan. WCAB July 12, 2018).

<sup>16</sup> See *Shook v. Waters True Value Hardware*, No. CS-00-0368-737, 2019 WL 6695514, at \*5, fn. 14 (Kan. WCAB Nov. 19, 2019).

<sup>17</sup> See *id.* at fn. 15.

<sup>18</sup> See *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571, *rev. denied* 301 Kan. 1046 (2015).

<sup>19</sup> See *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

**WHEREFORE**, the undersigned Board Member affirms the Order dated February 20, 2023.

**IT IS SO ORDERED.**

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

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JOHN F. CARPINELLI  
BOARD MEMBER

c: (via OSCAR)  
Bruce Brumley  
Austin Enns  
Hon. David Bogdan