

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**STEVEN DILLON** )  
Claimant )  
V. )  
 ) AP-00-0472-376  
**CITY OF WICHITA** ) CS-00-0456-925  
Self-Insured Respondent )

**ORDER**

Claimant appealed the November 23, 2022, Award issued by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on April 13, 2023.

**APPEARANCES**

Jeff Cooper appeared for Claimant. Edward Heath Jr. appeared for self-insured Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Court-ordered independent medical examination report of Thomas Frimpong, D.O., dated August 27, 2021; the transcript of Regular Hearing from April 18, 2022; the Regular Hearing by Deposition of Steven Dillon taken May 9, 2022; Evidentiary Deposition of Pedro A. Murati, M.D. taken May 18, 2022, with exhibits attached; Evidentiary Deposition of John P. Estivo, D.O., taken June 21, 2022, with exhibits attached, and the documents of record filed with the Division. The Board reviewed the briefs filed by the parties.

**ISSUES**

1. What is the nature and extent of Claimant’s disability caused by the August 10, 2020, accident?
2. Is Claimant entitled to future medical treatment?

**FINDINGS OF FACT**

Claimant worked for Respondent performing street maintenance for 12 or 13 years. Claimant testified the job involves all forms of street maintenance, such as asphalt,

concrete, fence repair, pothole repair, and snow removal. These tasks can be physical in nature and the job requires a lot of bending, twisting, and lifting.

On August 10, 2020, Claimant was working with a crew in Old Town, where three or four posts in a rod iron fence had loosened. The concrete holding the posts needed to be chipped out and replaced with new concrete. Claimant and the crew he was working with had to unload and carry twenty-five to thirty bags of Quikrete weighing 80 pounds apiece. A Tommy lift was used to help with the lifting, but each bag had to be pulled out onto the lift. While Claimant was pulling and lifting a bag, he heard a pop in his low back.

Claimant experienced pain, numbness and tingling in his left leg and pain in his low back. Claimant testified the back pain is constant unless he is sitting. If he walks or stands for more than five or six minutes, the numbness starts. Claimant testified his left leg falls asleep. Claimant denied any back or leg problems before August 10, 2020. He had not missed any work and had no restrictions prior to August 10, 2020. Claimant had no problems during his preemployment physical.

An MRI of Claimant's lumbar spine was done on August 24, 2020, showing multilevel degenerative disc disease. There was advanced degenerative disc disease at L2-3 and L4-5 with bulging degenerative discs at both of those levels. There was also bilateral foraminal stenosis because of advanced degenerative changes in L2-3 and L4-5.

Dr. John P. Estivo examined on September 1, 2020, upon request of Respondent. Claimant's chief complaint was lumbar spine pain. There were no acute structural changes seen on the lumbar spine x-rays or lumbar spine MRI. Claimant had tenderness to palpation and discomfort through range of motion. Dr. Estivo diagnosed Claimant with lumbar spine strain and preexisting advanced age-related lumbar spine degenerative disc disease. He opined the preexisting advanced age-related lumbar spine degenerative disc disease is at multiple levels and results in neuroforaminal narrowing with potential nerve impingement. He opined the advanced lumbar spine degenerative disc disease is a preexisting age-related condition. Considering the mechanism of injury, Dr. Estivo opined it is reasonable Claimant experienced a lumbar strain on August 10, 2020, and the prevailing factor for the need for medical treatment for the lumbar strain would be the work accident on August 10, 2020. Claimant was not at maximum medical improvement, but was 75 percent improved with physical therapy.

Dr. Estivo noted Claimant reported a prior back injury in 2017 for which he made a complete recovery. He had no medical records to confirm this.

Dr. Estivo recommended another month of physical therapy, home exercise program and temporary restrictions of no lifting more than 25 pounds and no constant bending or twisting.

Claimant saw Dr. Estivo on September 15, 2020, reporting continued pain in the

lumbar spine. Claimant reported the low back pain was decreasing. Dr. Estivo recommended Claimant continue with physical therapy, home exercises and temporary restrictions. He advised Claimant the preexisting age-related degenerative disc disease would continue to contribute to the low back discomfort.

On September 29, 2020, when Claimant saw Dr. Estivo Claimant rated his pain at a 2 out of 10 on the pain scale and described it as intermittent. The pain was decreased with a position change and stretching exercises. There was no tenderness in the lumbar spine with palpation. There was discomfort in the lumbar spine with range of motion. Claimant was not experiencing any radiculopathy, as he had no lower extremity pain, numbness, or weakness. Claimant was at maximum medical improvement. Dr. Estivo did not recommend further medical treatment for the injury and or assign any permanent restrictions. Claimant was instructed to continue with his home exercises.

On July 12, 2021, Dr. Estivo provided an impairment rating of 2 percent to the body as a whole based on *The American Medical Association Guides to the Evaluation of Permanent Impairment, 6<sup>th</sup> Edition (The Guides)*.

Claimant had a second MRI on August 12, 2021, which revealed moderate to severe degenerative disease at L2-3 with a broad-based disc bulge producing mild central stenosis with mild to moderate bilateral foraminal stenosis. L4-5 shows moderate to severe degenerative disease of disc and facet joints with mild anterolisthesis of L4 which is not producing significant central canal stenosis. There was mild moderate bilateral foraminal stenosis.

Claimant had three epidural injections with Dr. Goentzel which was ordered by Dr. Hoppock, his primary care physician. The injections did not help. Claimant was not a candidate for ablation. Claimant also had six weeks of physical therapy, which provided nominal relief. Claimant described the pain as intermittent, which increased the longer he stands or walks. Claimant testified besides sitting, laying on his right or left side provides some relief. Claimant used to walk two miles a day before the accident. The injury has affected his ability to enjoy some of his hobbies, which included hunting and fishing.

Dr. Thomas Frimpong, Jr., a board-certified neurosurgeon examined Claimant on August 27, 2021, at the request of the Court. Claimant presented with low back pain and numbness affecting the lateral aspect of the left thigh above the knee with prolonged walking. Claimant denied lower extremity pain, tingling, or weakness. Claimant described the pain as intermittent.

Dr. Frimpong diagnosed Claimant with a lumbar spine strain, related to the work injury. He also diagnosed preexisting age-related lumbar degenerative disease, left lateral thigh numbness/probably meralgia paresthetica. These conditions were not related to the work injury.

Dr. Frimpong opined Claimant did not require medical treatment for the August 10, 2020, injury. He opined the prevailing factor for the need for medical and surgical attention is the Claimant's preexisting lumbar degenerative disease.

Dr. Frimpong determined Claimant was at maximum medical improvement for the work-related injury and assigned 2 percent body as a whole impairment under *The Guides*.

Dr. Frimpong recommended Claimant continue with home exercises to strengthen core muscles. Any additional medical treatment he would recommend would be treatment for the preexisting age-related degenerative disease.

Dr. Pedro Murati examined Claimant on December 6, 2021, at the request of his attorney. Claimant presented with low back pain radiating down the left leg causing numbness and tingling; numbness along the lateral part of the left thigh while walking and lying on his back; and bilateral hip discomfort. Dr. Murati found it significant Claimant was able to work for 13 years for Respondent with any significant injuries considering the physical nature of his work.

Dr. Murati diagnosed Claimant with lumbar radiculopathy and bilateral SI joint dysfunction. Dr. Murati opined the diagnoses are within all reasonable medical probability a direct result from the work-related injury on August 10, 2020. He opined it is beyond medical certainty Claimant will require further medical treatment because of the work injury, with yearly follow-ups for the low back, including but not limited to physical therapy, injections, radiological studies, anti-inflammatory and pain medications, and possible surgical intervention.

Under *The Guides* Dr. Murati assigned 16 percent body as a whole impairment (12 percent body as a whole for lumbar radiculopathy, 2 percent body as a whole for right SI dysfunction, 2 percent body as whole for left SI dysfunction). Dr. Murati used *The Guides* as a starting point and deviated when assessing all the damaged anatomical structures and were rated separately using *The Guides*. His reasoning was multiple injuries to a regional area resulted in higher percentage of disability and impairment more than a single injury. Dr. Murati considered the extent of interference of activities of daily living identified in the questionnaire Claimant filled out and the expected loss of ability known to be caused by the injuries suffered which will result in Claimant not being able to perform his job.

Dr. Murati opined the prevailing factor in the development of Claimant's conditions is the work accident. He testified degenerative disc disease is a condition, not a disease, and does not cause physical complaints. He also confirmed it can be considered a preexisting condition without any complaints or symptoms. Dr. Murati determined Claimant suffered an anatomical change in the low back, which caused the impairment.

The ALJ found Claimant met his burden of proving the August 10, 2020, work-related accident is the prevailing factor causing his lumbar spine strain, but failed to meet his burden of proving his August 10, 2020, work-related accident is the prevailing factor causing his lumbar spine degenerative changes, left leg meralgia paresthetica, lumbar radiculopathy, and bilateral SI joint dysfunction. The ALJ found the opinions of Dr. Frimpong and Dr. Estivo regarding Claimant's functional impairment to be the most credible and supported by the evidence. The ALJ found Claimant sustained 2 percent impairment to the body as a whole because of his August 10, 2020, work-related injuries. The Court found Claimant has not met his burden to proving it is more probable than not he will require future medical treatment related to the injury and the request for future medical treatment was denied.

### PRINCIPLES OF LAW AND ANALYSIS

Claimant appeals, arguing the work accident arose out of and in the course of his employment and is the prevailing factor causing his lumbar radiculopathy and bilateral SI joint dysfunction. Claimant argues the credible evidence establishes his work accident resulted in a physical change in the structure of his back and contends the Board should find Claimant sustained 16 percent body as a whole impairment. Claimant also asks for future medical treatment as recommended by Dr. Murati.

Respondent argues the Award should be affirmed.

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.

#### **1. The nature and extent of Claimant's disability due to the work accident is a lumbar strain resulting in 2 percent impairment to the body as a whole.**

K.S.A. 44-508 defines accident as follows:

(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.

K.S.A. 44-508 further provides, in relevant part:

(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.

Respondent does not dispute the August 10, 2020, accident is the prevailing factor for the lumbar strain. However, Respondent disputes the August 10, 2020, accident is prevailing factor for lumbar radiculopathy and SI joint dysfunction diagnosed by Dr. Murati.

In *Nam Le v. Armour Eckrich Meats*<sup>1</sup> the Court of Appeals discussed several Board decisions interpreting K.S.A. 44-508(f)(2): "An injury is not compensable solely because it aggravated, accelerates or exacerbate a preexisting condition or renders a preexisting condition symptomatic." In Board decisions analyzed and approved by the Court of Appeals, the change in physical structure of the body, are compensable, despite the claimant also having an aggravation of a preexisting condition."<sup>2</sup> The Court noted Board decisions tend "to show compensability where there is a demonstrated physical injury above and beyond an aggravation of a preexisting condition."<sup>3</sup> More recently in *Del Rel v.*

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<sup>1</sup> *Nam Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571(2015).

<sup>2</sup> *Id.* at \*195 (quoting *Allen v. Cleary Building Corp.* No. 1,063,145, 2014 WL 1758038 at 6-7 (Kan. WCAB Apr. 10, 2014)).

<sup>3</sup> *Id.* at \*196.

*Sam's Club*,<sup>4</sup> the Board stated: "The opinion of the Kansas Court of Appeals in *Le* makes clear that in order to prove a compensable claim, more than a sole aggravation must be proven, but the worker must also satisfy the prevailing factor requirement."<sup>5</sup>

Three doctors testified to the prevailing factor for Claimant's lumbar spine complaints including the SI joint dysfunction, lumbar radiculopathy and the lumbar strain. Two doctors, Dr. Estivo, who was the authorized treating physician, and Dr. Frimpong, who was ordered by the Court to examine Claimant, opined Claimant's accident of August 10, 2020, was the prevailing factor for the lumbar strain only. Dr. Murati was the only doctor who opined the accident of August 10, 2020, was the prevailing factor for not only the lumbar strain, but also the bilateral SI joint dysfunction, degenerative disc disease and lumbar radiculopathy. Dr. Murati references a change in Claimant's anatomical structure. However, there is no specific reference as to what the change is.

Two MRIs were done on Claimant's lumbar spine, one 14 days after the accident and the second on August 12, 2021. Neither of these MRIs showed any traumatic injury to Claimant's lumbar spine. Both MRIs showed significant degenerative disc disease.

After considering the evidence as whole, the Board finds the only injury arising out of and in the course of employment resulting from the August 10, 2020, accident is the lumbar strain. Two physicians, one of whom was Court ordered, opined the lumbar strain was the only injury caused by the August 10, 2020, accident. Two MRIs one done 14 days after the accident showed no traumatic injury to the lumbar spine, only degenerative disc disease. There is no evidence of an injury other than lumbar strain which was not a sole aggravation or exacerbation of preexisting condition.

Claimant cites two cases in support of his position the prevailing factor causing his degenerative disc disease, bilateral SI joint dysfunction and lumbar radiculopathy was caused by the August 10, 2020; accident, *Pierson v. City of Topeka*,<sup>6</sup> and *Gilpin v. Lanier Trucking*.<sup>7</sup> These two cases are distinguishable from the present case. Both of these cases had at least two medical opinions supporting the finding the prevailing factor for symptomatic and unstable spondylolisthesis and radiculopathy was the work accident. No such evidence exists here. Two doctors and two MRIs contradict the proposition the prevailing factor for bilateral SI joint dysfunction, degenerative disc disease and lumbar

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<sup>4</sup> *Del Real v. Sam's Club* Nos. 1,068,697 and 1,068,698, 2016 WL 6496898, at \*5 (Kan. WCAB Jul. 1, 2016).

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Pierson v. City of Topeka*, 2016 WL687726 366 P.3d 665 (unpublished Court of Appeals opinion filed Feb. 19, 2016).

<sup>7</sup> *Gilpin v. Lanier Trucking*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 19, 2012).

radiculopathy is the August 10, 2020, accident.

The only rating for the lumbar strain were from Dr. Estivo and Dr. Frimpong, 2 percent to the body as whole. Claimant's permanent functional impairment as a result of the August 10, 2020 accident is 2 percent to the body as whole.

**2. Claimant is not entitled to future medical treatment.**

K.S.A. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

None of the doctors, including Dr. Murati, recommended additional treatment for the lumbar strain. All of Dr. Murati's treatment recommendations were aimed at treating the degenerative disc disease, lumbar radiculopathy and the bilateral SI joint dysfunction which are not compensable injuries. For this reason, Claimant's request for future medical treatment is denied.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of ALJ Marchant, dated November 23, 2022, is affirmed.



**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Jeff Cooper, Attorney for Claimant  
Edward Heath Jr., Attorney for Self-Insured Respondent  
Hon. Ali N. Marchant, Administrative Law Judge