

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>GEORGETTE BASS</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0473-797
<b>KANSAS MASONIC HOME</b>	)	CS-00-0457-070
Respondent	)	
AND	)	
	)	
<b>ACCIDENT FUND GENERAL INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (Respondent) requested review of the February 9, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

**APPEARANCES**

Phillip B. Slape appeared for Claimant. William L. Townsley, III, 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 February 8, 2023, with exhibits attached, and the documents of record filed with the Division.

**ISSUE**

What is the prevailing factor causing Claimant's right shoulder injury?

**FINDINGS OF FACT**

Claimant worked for Respondent as a cook for approximately 25 years. On March 16, 2021, Claimant slipped on a wet floor and fell into a split-like posture before falling forward. Claimant reported immediate pain in her knees and low back.

Claimant's medical history is complex and includes previous work-related injuries. While working for Respondent in 2010, Claimant sustained injury to her right knee, left shoulder, and right wrist. This ultimately resulted in Claimant undergoing a total right knee replacement in 2018. Claimant continued to experience discomfort after surgery and was eventually provided a pain management physician, Dr. Baoluan Nguyen. After continued treatment, Dr. Nguyen determined Claimant sustained a failed right knee arthroplasty in November 2020. Claimant continued her prescribed narcotic medication, though she complained of constant, throbbing, aching pain.

After the fall on March 16, 2021, Claimant could not ambulate, and Sedgwick County EMS was dispatched. EMS reported Claimant complained of knee and low back pain. Claimant further informed EMS of her right knee replacement and requested transport to Ascension Via Christi St. Francis hospital. X-rays obtained of Claimant's knees and pelvis revealed a fracture involving the lateral tibial plateau of Claimant's left knee. No evidence of acute abnormality was found in Claimant's right knee or pelvis. CT scans performed of Claimant's pelvis and low back revealed no acute pelvic abnormality and no acute osseous abnormality in the lumbar spine. Claimant was treated and released with instructions to contact her workers compensation physician. No mention of Claimant's right shoulder is found in these records.

On March 19, 2021, Claimant was seen at Via Christi Occupational Medicine by Vonda Wigal, APRN. Claimant complained of severe pain in her left leg:

[Claimant] comes in today with a knee immobilizer on her left leg complaining of severe pain. She has had a right total knee replacement and that knee is not causing her any pain from this injury but she does go to pain management for chronic pain of her right knee and she is on hydrocodone every 4 hours. She also has type II diabetes. She complains of severe pain of her left leg.<sup>1</sup>

Claimant attended a telehealth appointment with Dr. Nguyen, also on March 19, 2021. Dr. Nguyen noted Claimant had fallen at work and broken her left knee. He encouraged Claimant to follow up with the appropriate provider as he could not treat her left knee complaints. There is no mention of right shoulder complaints in the records from March 19, 2021.

The Application for Benefits (E-1) filed with the Division on March 24, 2021, indicates Claimant slipped and fell on a wet floor on March 16, 2021. Claimant listed her injuries as "[l]eft knee, right knee, lower back, [right] arm and more."<sup>2</sup>

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<sup>1</sup> P.H. Trans., Resp. Ex. R-1 (HE-00-0077-847) at 30.

<sup>2</sup> P.H. Trans., Cl. Ex. D.

Claimant was seen by Dr. John Babb, orthopedic surgeon, on March 26, 2021, and she was provided work restrictions relative to her left knee. Dr. Babb ordered a left lower extremity MRI, performed April 5, 2021. Claimant returned to Dr. Babb on April 7, 2021:

The patient returns today for follow up left knee. There has been no changes in the current symptoms. . . . There has been no change in the character or location of the problem. There are no new symptoms or accompaniments. . . .

She continues to complain about right knee pain as well since the fall. . . . We are not authorized to treat the right knee.<sup>3</sup>

Dr. Babb noted the MRI revealed a medial meniscus tear, a left tibial spine avulsion fracture, a lateral tibial plateau fracture, a torn ACL, and an MCL sprain. Dr. Babb recommended left knee surgery for ACL reconstruction and meniscus treatment, opting to treat the fracture conservatively. Dr. Babb did not record any complaints related to Claimant's right shoulder.

Dr. Nguyen saw Claimant on April 15, 2021. Dr. Nguyen increased Claimant's Norco prescription based on her complaints of ongoing right knee pain. Dr. Nguyen further recorded Claimant's left knee complaints and upcoming surgery. He did not record any right shoulder complaints.

Claimant was seen by Dr. Richa Sharma, her primary care physician, for preoperative clearance on May 4, 2021. Dr. Sharma did not record any right shoulder complaints. Claimant returned to Dr. Babb on May 17, 2021, and it was noted the fracture had good healing. Dr. Babb reported complaints of bilateral knee pain at this visit.

On May 18, 2021, Dr. George Fluter examined Claimant at her counsel's request. Dr. Fluter reviewed Claimant's history and available medical records. Claimant complained of pain in her right knee, right hand, right upper back, right shoulder, and left knee. Dr. Fluter performed a physical examination and provided an assessment:

1. Status post work-related injury; on or about 03/16/21.
2. Left knee pain.
3. Left knee internal derangement.
4. Right knee pain.
5. Right hand/upper extremity pain.
6. Back pain.<sup>4</sup>

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<sup>3</sup> P.H. Trans., Resp. Ex. R-1 at 43.

<sup>4</sup> P.H. Trans., Cl. Ex. C at 10.

Dr. Flutter determined Claimant's work accident was the prevailing factor causing Claimant's injuries and need for medical treatment. Dr. Flutter recommended work restrictions and additional medical treatment, including imaging studies of Claimant's right shoulder, elbow, wrist, and hand.

Following a preliminary hearing and subsequent status conference, Dr. Vito Carabetta was appointed by the ALJ to provide an independent medical evaluation (IME). Dr. Carabetta performed the IME on February 23, 2022, at which time he reviewed approximately 900 pages of medical records and Claimant's provided history. He conducted a physical examination and provided the following impressions:

1. Status-post left ACL reconstruction
2. Right knee mediolateral laxity
3. History of right total knee arthroplasty
4. Severe right knee sprain
5. Chronic low back pain
6. Right shoulder pain<sup>5</sup>

Dr. Carabetta determined Claimant's right shoulder "had been devoid of any previous symptomatology. This appears to be a relatively simple condition that clearly has the alleged injury of March 16, 2021 as the prevailing factor."<sup>6</sup>

Treatment of Claimant's right shoulder was authorized by the ALJ on May 5, 2022. Dr. Brennan Lucas was authorized to provide treatment. An MRI of Claimant's right shoulder was obtained and demonstrated a rotator cuff tear. Dr. Lucas recommended surgery on August 15, 2022.

Dr. Lucas' notes indicate he received a letter from Respondent's counsel, dated August 16, 2022, requesting a causation opinion related to Claimant's right shoulder. Dr. Lucas wrote:

Counsel has concerns regarding the cause of her right shoulder complaints and prevailing factor. I have received several medical records along with a letter. These records include the emergency room records from Ascension Via Christi St. Francis, records from Ascension Via Christi occupational health, ICT pain management, Mid-America orthopedics, AMG Via Christi internal medicine, and Advanced Pain Management Associates.

After a thorough review of the history and previous medical records, it would be hard to determine that the prevailing factor for [Claimant's] right shoulder complaints is the injury that occurred in March 2020 or 2021. She reported to us that this

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<sup>5</sup> P.H. Trans., Cl. Ex. A at 4.

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

occurred in 2020 but the medical records indicate that this is 2021. Nevertheless, she did have multiple visits following her injury where she did not report any shoulder pain whatsoever and only described knee pain. . . . Although distracting injuries can make it difficult to recognize injuries to other body parts, she did not report any right shoulder complaints until almost 2 months later during an independent medical evaluation.

Although there is no question that [Claimant] has a right shoulder rotator cuff tear, as do 15% and 60% of the normal population and can be asymptomatic, I do not believe that the prevailing factor for her right shoulder rotator cuff tear is the work injury that occurred in March 2020 or 2021 based upon the information I have available to me.<sup>7</sup>

Dr. Carabetta's deposition was taken August 23, 2022. Dr. Carabetta testified physicians are careful to treat only authorized areas to avoid insurance coverage denial. Dr. Carabetta noted a patient may discuss an area of pain and a physician not report it for this reason. Dr. Carabetta also stated areas with the greatest degree of pain are usually the ones addressed in an emergency room situation, and questions about other areas are limited. Regarding Claimant's right shoulder, Dr. Carabetta testified:

[I]t's fair and appropriate given the mechanism of the injury to have someone look at her right shoulder. At the moment, we don't know what's wrong with it, but if she does have a partial rotator cuff tear, the mechanism [of injury] itself would have been enough for something to have occurred. And I don't think that it's a situation where you can look at other factors as being the cause; this would most likely be implicated as the source. But at the moment, we don't know what we're dealing with.<sup>8</sup>

When asked about the lack of references in the initial two months of medical records about right shoulder pain, Dr. Carabetta responded:

[T]he area that has the greatest degree of pain usually is the one that jumps to the forefront, and questions about other areas are quite limited.<sup>9</sup>

The ALJ found the prevailing factor causing Claimant's right shoulder injury and need for treatment is the work accident of March 16, 2021. The ALJ explained there is no record of any prior right shoulder complaints by Claimant. He continued:

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<sup>7</sup> P.H. Trans., Resp. Ex. R-2 (HE-00-0077-847) at 4.

<sup>8</sup> P.H. Trans., Cl. Ex. B at 35.

<sup>9</sup> *Id.* at 34.

While there is nothing in the medical records about right shoulder complaints until the Claimant saw Dr. Flutter two months after the accident, the Court does not find this fatal to the Claimant's right shoulder claim. As noted by Dr. Carabetta, some of the lack of complaints may be explained by lack of authorization to examine the shoulder and some by the Claimant having other injuries that dominated her symptom complaints.

Dr. Lucas was not furnished with all of the Claimant's medical records when he issued his prevailing factor opinion. The Court finds that significant.<sup>10</sup>

The ALJ authorized Dr. Lucas to provide necessary treatment to Claimant's right shoulder, including surgery. The ALJ also reinstated temporary total disability benefits until Claimant was released to return to work, offered accommodated work within her restrictions, or reached maximum medical improvement.

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

Respondent argues Claimant failed to sustain her burden of proving she suffered a right shoulder injury arising out of and in the course of her employment. Further, Respondent maintains the testimony and report of Dr. Carabetta is based upon speculation and conjecture, and his opinion fails to provide substantial competent evidence to support Claimant's claim.

Claimant asks the Board to affirm the ALJ's Order.

K.S.A. 2020 Supp. 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. 2020 Supp. 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. 2020 Supp. 44-508(f) states, in part:

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

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<sup>10</sup> ALJ Order (Feb. 9, 2023) at 3.

- (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. 2020 Supp. 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.

There are two prevailing factor opinions in the record. Dr. Lucas did not believe Claimant's March 16, 2021, accident was the prevailing factor causing her rotator cuff tear and need for treatment.

Dr. Carabetta testified believed the March 16, 2021, accident was the prevailing factor causing Claimant's need for treatment. Dr. Carabetta was examined extensively about the absence of right shoulder complaints for the first two months of treatment after the accident. Dr. Carabetta continued to maintain the March 16, 2021, accident was the prevailing factor causing Claimant's shoulder pain.

The undersigned finds significant Dr. Carabetta's testimony, where he stated the mechanism [of injury] itself would have been enough to cause the shoulder symptoms, and one cannot look at other factors as being the cause, as the March 16, 2021, work-related accident would most likely be implicated as the source. The undersigned gives more weight to the opinions of Dr. Carabetta.

The undersigned agrees with the ALJ's conclusion the March 16, 2021, work accident is the prevailing factor for Claimant's right shoulder injury and current need for treatment to her right shoulder.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Gary K. Jones, dated February 9, 2023, is affirmed.

**IT IS SO ORDERED.**

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

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**SETH G. VALERIUS  
BOARD MEMBER**

c: Via OSCAR

Phillip B. Slape, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Hon. Gary K. Jones, Administrative Law Judge