

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

REBECCA TIMMONS)	
Claimant)	
V.)	
)	CS-00-0451-283
SUNSET HOME, INC.)	AP-00-0453-902
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF HOMES FOR THE)	
AGING INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Respondent appealed the October 22, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Jan Fisher appeared for Claimant. Michael Entz appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing July 16, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUE

Was Claimant's additional work hours and job duties the prevailing factor causing a repetitive trauma injury to Claimant's low back?

FINDINGS OF FACT

The ALJ ruled Claimant sustained her burden of proving her extended work hours due to the COVID-19 pandemic caused repetitive trauma to the lumbar spine. As a result, she developed a temporary injury of swelling of nerve roots and radiculopathy. The ALJ

found while Claimant had preexisting degenerative disc disease, the pandemic-related increased work activity was the prevailing factor causing the radiculopathy, need for medical treatment, and resulting temporary disability. Temporary total disability benefits were ordered paid at the rate of \$666.00 per week from May 12, 2020, until July 27, 2020.

Claimant began working for Respondent on September 21, 2018 as an LPN, staff charge nurse. In November 2018, Claimant started as Director of Assisted Living and continued in her position as staff nurse. Claimant was a full-time employee, working 40 hours per week. Respondent, a nursing home and assisted living facility, has 35 rooms. There are 17 residents on the assisted living side of the facility where Claimant worked. Claimant testified most of those residents are over 80 years old, some in their mid to late nineties. They are supposed to be able to take care of themselves for the most part, but do get assistance with bathing and other daily needs.

The facility has four floors and the assisted residents are spread over all four floors including three apartments in the basement. Before the pandemic, the staff nurse duties were to pass out medication, give treatments, collect labs and input doctor orders. Claimant took care of the billing, the insurance, the HCVS qualifications, assessments and anything to do with Medicare and Medicaid, along with her staff nursing duties. Claimant estimated 75 percent of her time in an 8 hour day was doing staff nurse duties and the other 25 percent was assistant director duties, which was paper work. Claimant's normal shift was seven a.m. to four p.m., serving breakfast and lunch.

Due to the COVID-19 pandemic in March, Respondent changed their staffing to only three full-time employees and one part-time employee on the premises at one time. There was one med-aide for the evening shift, one med-aide for the night shift, one staff nurse and the part-time person. Claimant provided full-time care for the residents during her shift, which included serving as the bath aid, giving two to three showers a day. Assisting with showers includes helping the resident undress, transferring the resident to the shower chair, bathing them, drying them and dressing them. There is a lot of bending and twisting. Claimant estimated there was about 20 pounds of lifting in bathing a resident. since it is assisting and not actually picking the resident up.

Due to the COVID-19 lockdown, the residents had to eat in their rooms, so food trays were delivered to their rooms by the staff. Claimant delivered two meals, breakfast and lunch, during her shift. She also picked up the empty trays when they were finished and took them back to the kitchen. To deliver food in the basement apartments, Claimant had to go up and down 20 cement steps because the elevator was no longer accessible due to the lockdown. Claimant also had to go up and down these stairs to provide medications and medical treatment.

Due to reduced staff, Claimant worked ten, and sometimes twelve hour shifts, with multiple days in a row without a day off.

After working longer hours, multiple days in a row and extra work, Claimant developed increased significant low back pain with leg pain, sciatica symptoms down her right side. Claimant described the sciatic pain as a shocking feeling running from the buttocks, down the back of the leg into the foot causing burning and tingling with every step taken. Claimant also developed numbness in her right leg which was a new symptom.

When Claimant woke up on May 12, she was not able to walk because her right leg was numb. Claimant notified her supervisor she was unable to work and she was seeking medical attention. Claimant sought treatment with her personal physician, Dr. Walker, on May 14, 2020. Claimant reported severe pain in her back with radiation. She was admitted to the hospital on May 15, 2020. An MRI done on May 15, 2020, showed at L5-S1 possible abutment of the transversing S1 nerve roots especially on the right. This finding correlates with any S1 radiculopathy. The MRI also showed moderate facet arthrosis and severe bilateral neural foraminal narrowing, which correlates with L5 radiculopathy, either side. On May 16, 2020, Claimant was diagnosed with nerve impingement and a bulging disc. Claimant was released from the hospital on May 18, 2020, with prednisone being prescribed and the recommendation of epidural injections if she did not get better.

On June 9, 2020, Dr. Walker, opined Claimant's excessive work caused the back problems. He opined this was chronic pain, but intermittent with exacerbation. He prescribed six weeks of physical therapy. This treatment improved Claimant's symptoms.

On June 22, 2020, Dr. Walker opined Claimant had a herniated disc and the increased work duties were the prevailing factor for this condition. He recommended she not work and should not lift. He felt this was a temporary condition.

Dr. James Weimar, a neurosurgeon with Abay Neuroscience Center, examined Claimant on July 13, 2020, at the request of Respondent. Dr. Weimar noted Claimant had an extensive history of chronic low back pain, including extensive conservative medical treatment. Dr. Weimar opined Claimant exacerbated a long-standing chronic underlying condition involving degenerative disc disease and back pain.

Dr. Lowry Jones examined Claimant on September 23, 2020 at the request of the Court. Claimant presented with lumbar spine and bilateral lower extremity pain. Claimant reported some improvement in her right leg pain, but continued to have numbness on the lateral side of the leg and some numbness into her big toe. Claimant reported pain in her lower back at L4-5, distal at L5-S1. She also reported right leg pain with numbness and no significant symptoms in the left leg. Claimant had no pain or discomfort in the right or left hips.

Dr. Jones opined within a reasonable degree of medical certainty Claimant's back and leg pain were primarily caused by her underlying degenerative disc disease and more

significantly her severe foraminal stenosis present at L5-S1 bilaterally. He found after Claimant received treatment, her leg pain decreased and she had full motor function, with no evidence of chronic nerve root irritation. He did find Claimant was treated for acute radiculopathy. This particular finding is consistent with increased repetitive activity, like increased work hours and activity. His opinion as to the cause of this acute radiculopathy is Claimant's preexisting disease process. He does not believe there are any new processes, specifically a new herniated disc, which caused the onset of Claimant's back and leg pain.

Dr. Jones recommended Claimant continue her exercise program and should she have a further onset of leg pain, she should be evaluated for additional epidural blocks, or more specifically, nerve root injections. He did not feel Claimant had a work related injury. The doctor noted Claimant is working full time without any difficulty and no restrictions are necessary.

In 2007, Claimant settled a worker's compensation claim for a 2005 injury to her low back. Dr. Stein, examined Claimant in 2006, and found she had a five percent permanent impairment to the body as a whole. He did not find any evidence of nerve compression or radiculopathy. Claimant was given permanent restrictions of: no lifting over 40 pounds but twice a day; lifting 30 pounds occasionally; and lifting only 15 pounds frequently. She was to change positions for at least 10 minutes after 90 minutes of walking, sitting or standing. Claimant did not share these restrictions with Respondent because her job with Respondent did not violate these restrictions.

Claimant does not recall having any prior numbness and tingling in her lower extremities. Claimant admits to prior back issues from falling down some stairs at home in 2017. On July 12, 2017, Claimant was diagnosed with low back pain after complaining of pain in the left and lower right lumbar spine, with radiation into the left foot. The pain was considered chronic, but intermittent with acute exacerbation. Claimant had an MRI of the lumbar spine on July 15, 2017, which revealed: straightening of the normal lumbar lordosis without significant central spinal or neural foraminal stenosis; multilevel degenerative disc disease and facet arthropathy; a L5-S1 broad-based disc bulge; facet arthropathy with moderate to marked left neural foraminal stenosis; and mild right neural foraminal stenosis. A CT of the lumbar spine was negative for fracture or subluxation but there were lumbar spine degenerative changes. Claimant did not miss any work for these prior back problems.

Claimant admits seeking chiropractic care for back and some neck complaints four or five times a month from 2007 to 2020. She also had right and left leg complaints.

As of July 16, 2020, Claimant's current problems are numbness that travels down the right side of her right leg, into her foot and into her big toe. If she is on her feet too long, she has to take a break, put ice on and then it goes away. Bending and twisting

continue to cause her pain and discomfort. Claimant's last day of work for Respondent was May 10, 2020. She told her supervisor she needed time off to rest. Claimant has been working with physical therapy to be able to return to work. Physical therapy has improved Claimant's low back pain and it is not as frequent.

PRINCIPLES OF LAW AND ANALYSIS

Respondent appeals, arguing there was no change in the physical structure of the body; the work activities solely aggravated a preexisting condition; and work activities were not the prevailing factor for Claimant's medical condition. Respondent argues the medical evidence shows the prevailing factor for Claimant's lumbar degenerative disease and foraminal stenosis is the preexistent process, which negates finding the alleged injury arose out of employment. Respondent contends the ALJ Order should be reversed.

Claimant argues the ALJ's Order should be affirmed. Claimant claims a series of injuries to her back and right lower extremity between September 21, 2018, and May 10, 2020, as a result of her work as an LPN with Respondent.

K.S.A. 2019 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. 2019 Supp. 44-508 (f)(1) states in part:

"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.

K.S.A. 44-508 (f)(2) states in part:

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 shall be deemed to arise out of employment only if:

(i) There is a casual 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 and impairment.

K.S.A. 2019 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.

This Board member agrees with the ALJ. Claimant suffered a new injury, the diagnosis of radiculopathy caused by nerve impingement and swelling of the nerve roots, which is a change in the physical structure. Claimant did suffer from preexisting multilevel degenerative conditions in the low back, but she was not previously diagnosed with nerve impingement and radiculopathy. Claimant worked for many years with intermittent medical treatment for her low back, until Claimant was required to work long hours many days in a row with increased work duties. As a result, Claimant developed acute radiculopathy requiring hospitalization and medical treatment. Claimant had severe numbness in her right leg and severe low back pain which rendered Claimant unable to work. Dr. Jones, the Court ordered neutral physician, found Claimant was treated for acute radiculopathy. This particular finding is consistent with increased repetitive activity, like increased work hours and activity. It is found and concluded Claimant developed radiculopathy from the swelling of the nerve roots, an injury, and the prevailing factor for this injury and need for medical treatment were the long work hours and increased work duties.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding, as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

¹ K.S.A. 2018 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Bruce E. Moore dated, October 22, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2021.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Jan Fisher, Attorney for Claimant
Michael Entz, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge