

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AHMED ALMUHANDES)	
Claimant)	
V.)	
)	CS-00-0452-137
SPECTRUM BRANDS HOLDINGS, INC.)	AP-00-0455-524
Respondent)	
AND)	
)	
LIBERTY INSURANCE CORPORATION)	
Insurance Carrier)	

ORDER

Respondent appealed the December 8, 2020, preliminary hearing Order issued by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Michael Patton appeared for Claimant. John Pazell appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from November 4, 2020, with exhibits attached; Evidentiary Deposition of Ahmed AlmuhanDES (Claimant) from November 20, 2020, with exhibits attached; Evidentiary Deposition of Hugo Alonzo from December 1, 2020, with exhibits attached; Evidentiary Deposition of Timothy Wilke from December 1, 2020; Evidentiary Deposition of Charles Southern from December 1, 2020; and the documents of record filed with the Division.

ISSUE

Did Claimant sustain personal injury by accident arising out of and in the course of his employment with Respondent?

FINDINGS OF FACT

The ALJ found Claimant injured his back from lifting boxes while at work. Claimant suffered a severe onset of pain several hours into a work shift where Claimant repeatedly lifted boxes. The ALJ concluded it was reasonable an injury occurred in the course of Claimant's work of lifting boxes. Therefore, the ALJ found Claimant had a compensable injury and ordered Respondent and its insurance carrier to designate an authorized orthopedic specialist to evaluate the injury and provide any necessary treatment.

Claimant worked and continues to work as an equipment operator for Respondent. His job duties include driving an order picker, which is a piece of equipment similar to a fork lift. Claimant locates boxes needed to fulfill orders. He manually lifts boxes onto the order picker and then transports them to the dock to be put on pallets. The boxes Claimant lifted varied in size and in weight from very light to very heavy. Claimant testified he averaged making 16 to 18 picks an hour before June 12, 2020. A pick could be up to 70 boxes.

On June 12, 2020, while lifting boxes, Claimant started feeling pain in his right hip around 11:00 a.m. He did not relate the onset of pain to any specific incident or action. Claimant's pain increased as he continued to work. By 4:15 or 4:30 p.m., the pain was so severe, Claimant was unable to continue working and an ambulance had to be called. Claimant described the pain like being poked hard with a knife in his right buttocks area and down his right leg. Claimant had no pain when he started his shift at 5:00 a.m. He had not experienced any pain in his right hip prior to June 12, 2020.

Claimant was taken to Olathe Medical Center emergency room where he was treated and sent home after three or four hours. Diagnostic testing was done and Claimant was prescribed medication. Claimant was taken off work for a week by the emergency room doctor.

Claimant continued to have pain in his right hip area along with numbness and tingling in his thighs going all the way down to his feet.

After Claimant contacted Respondent's HR department, asking to be seen by their doctor, Claimant was sent to see Dr. Daniel Reeves on June 19, 2020. Claimant reported to Dr. Reeves: "At work 06/12/2020 I was doing my usual work lifting some boxes to put on the order picker which I drive to locations. Felt some pain which kept increasing until I could not make even one step"¹. Claimant described the pain as aching and constant. Claimant denied any problems with his back and lower extremity prior to June 12, 2020. Claimant reported his work duties included bending, lifting, twisting, pushing and pulling.

¹ P.H. Trans., Dr. Reeves' June 19, 2020, report at 1.

He could not recall an exact event at work on June 12 that triggered his pain, but when it became worse he called the EMS.

Dr. Reeves examined Claimant and diagnosed right hip pain and right lower extremity paresthesias. Testing showed everything was normal and Claimant was prescribed pain medication. Dr. Reeves opined due to the nature of Claimant's job, it was possible he strained his right hip/lower back, but with no specific incident to refer to, it is also possible it has nothing to do with his work activity. Claimant was allowed to return to regular duty and to return in a week for followup.

Claimant met with Dr. Reeves again on June 25, 2020, Claimant's main complaint at the time of this visit, was right hip pain. Claimant was working regular duty and tolerating it well.

Dr. Rodney Bishop examined Claimant on October 5, 2020, at Claimant's attorney's request. Claimant reported noticing pain in the lower lumbar area and deep right buttock on June 12, 2020, while lifting boxes. Claimant reported his pain was sufficiently intense for Claimant to be taken to the emergency room. Claimant's symptoms at the time of this evaluation were lumbar pain radiating into the right leg as if he were "stuck by a knife"; numbness in the right lateral thigh of the lower leg; and burning discomfort in the right foot including the toes. Claimant reported all of these symptoms began after June 12, 2020. Claimant had no history of low back symptoms.

Dr. Bishop diagnosed lumbar strain/sprain with lumbar radiculopathy. He determined the prevailing factor for the diagnosis and need for medical treatment is the lifting on June 12, 2020. Dr. Bishop opined it was more likely than not Claimant would benefit from additional evaluation of his injury, which might reasonably include imaging of the lumbar spine, particularly an MRI, and an orthopedic consultation.

Two of Respondent's employees, Charles Southern and Timothy Wilke, assisted Claimant on June 12, 2020. Claimant was unable to specify to either of them what caused his pain. Mr. Wilke testified about Claimant on June 12, 2020, stating:

"After that I asked him, "Well, do you know where it happened?" He said he didn't know where it happened. I said, "Was there any motion or any movement you did here at work that would cause such an injury to your pain?" He said, "No, I didn't do anything here at work that would cause the pain."²

² Wilkie Depo. 5-6.

Claimant also told Charlie Southern he did not know what caused the pain. Claimant told Mr. Southern the pain started at 11:00 that morning and got progressively worse.

Hugo Alonzo is the safety manager for Respondent and part of his job is to deal with employees who sustain work injuries. Mr. Alonzo was not on the premises when Claimant was taken to the emergency room on June 12, 2020.

Mr. Alonzo had a phone conversation with Claimant the following day, June 13, 2020. The call was to follow up to make sure Claimant was doing okay. He estimated the call took place between 10:30 and 11:00 a.m. He asked Claimant how he was doing, Claimant said much better, told him about all of the tests and the ER could find nothing wrong and to follow up with his family physician. Mr. Alonzo testified he asked Claimant what happened and Claimant said he couldn't recall and after the pain started, it just got worse and he let the lead know. Claimant told him the pain started around 11:00 a.m. on June 12.

Mr. Alonzo testified as follows:

Q. Now, could you explain the conversation regarding a personal condition versus a work condition?

A. Yes. Because he told me that the ER doctor told him to follow up with his personal doctor, I told him that if he feels that the condition or the incident that happened was personal that he will have to follow up with his personal doctor. Primary doctor. But if he feels that it's work-related or something that happened at work, I told him that he will have to go with a company doctor. And then he said, "Okay, I will go with my personal doctor." So I advised him to bring any paperwork, you know, that he gets from his doctor to the HR Department.

Q. So, just so we're clear, you laid out that if he felt it was a work condition he could go to an assigned work comp doctor, or if it was a personal condition that he could go treat on his own.

A. Yes, I did.³

The phone call lasted approximately five minutes. Mr. Alonzo was contacted about a week later by HR asking him to set up an appointment for Claimant with the company doctor. He set up the appointment and sent Claimant a text with the information.

Mr. Alonzo went on to testify:

³ Alonzo Depo. at 9.

Q. So Mr. AlmuhanDES notified you, or maybe he notified Sarah first, that he wanted to go to a workers' compensation doctor within the next week of his injury?

A. Yes.

Q. And that was because he believed that his injury occurred at work?

A. Yes, that is correct.⁴

Claimant recalls having the phone conversation with Mr. Alonzo and he was heavily medicated when Mr. Alonzo called him about his injury. Claimant was concerned it was not understood his injury was due to his work and it was not a personal medical condition. Claimant contacted Sarah Moore in the HR department within a week after his accident and asked to see Respondent's doctor.

English is not Claimant's first language and Claimant has difficulty hearing.

PRINCIPLES OF LAW AND ANALYSIS

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 states in part:

(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.

⁴ Alonzo Depo. at 14.

(2) An injury is compensable only if it arises out of and in the course of employment. 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.

Respondent appeals, arguing the Order should be reversed as Claimant never testified to a mechanism of injury or the injury merely occurred while he was at work. Respondent argues Claimant had not met his statutory burden of proof of accident and his claim should be denied.

Claimant argues the ALJ's Order should be affirmed, as the evidence shows symptoms occurred and developed at a specific time during a single work shift and met the statutory definition of having an accident arising out of and in the course of employment.

Claimant's primary job duty was lifting boxes of various sizes and weights. With a job like Claimant's, it is not uncommon to have intermittent episodes of back pain. Many employees like Claimant just work through it and it goes away. Claimant's back pain did not go away and became more severe as he continued working. While Claimant could not pinpoint a specific box he lifted causing the onset of the back pain, he could pinpoint the onset to a day and time frame. The mechanics of Claimant's injury is evident; lifting boxes.

Respondent emphasizes Claimant, at the time of his injury, was not specific about the injury being caused by work which discredits Claimant's later assertion it was work-related. Respondent did not become aware of Claimant's injury until the pain was so severe Claimant had to be taken by ambulance to the emergency room. English is Claimant's second language, he is in severe pain and then heavily medicated in the time immediately following his injury. Lack of clear communication immediately following Claimant's injury does not mean Claimant was not injured at work. Claimant remedied the lack of clarity within days of his injury, by confirming he was injured at work due to lifting boxes.

It is found and concluded Claimant's injury arose out of and in the course of his employment from repetitively lifting boxes. Claimant is entitled to workers compensation benefits.

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.⁵ Moreover, this review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(l)(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.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Kenneth J. Hursh, dated December 8, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2021.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Michael Patton, Attorney for Claimant
John Pazell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁵ K.S.A. 2020 Supp. 44-534a.