

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>SHEILA DERRINGER</b>	)	
Claimant	)	
V.	)	
	)	
<b>MARTEN TRANSPORT, LTD</b>	)	CS-00-0451-839
Respondent	)	AP-00-0455-893
AND	)	
	)	
<b>INDEMNITY INSURANCE CO. OF NORTH AMERICA)</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the January 8, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample.

**APPEARANCES**

Jeff K. Cooper appeared for Claimant. Kip A. Kubin appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopts the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from December 2, 2020, with exhibits attached; Continuation of Preliminary Hearing by Deposition from December 9, 2020; Deposition of Ryan Lauck, D.C., from November 18, 2020, with exhibits attached, and the documents of record filed with the Division.

**ISSUES**

The issues on appeal are:

1. Did Claimant sustain an accidental injury arising out of and in the course of her employment on or about November 5, 2019?
2. Is the alleged accident of November 5, 2019, the prevailing factor causing the Claimant's current medical condition, need for medical treatment and disability?

**FINDINGS OF FACT**

The ALJ ruled Claimant met her burden of proving her accident arose out of and in the course of her employment with Respondent and her accident was the prevailing factor in causing Claimant's injury, medical condition, and resulting disability or impairment. Respondent and its insurance carrier were ordered to provide a list of two orthopedic physicians from which Claimant could select one to direct her care.

Claimant worked as a hostler for Marten Transport, where she moved semi-trucks from Respondent's location to a bakery, approximately 7 miles away. On November 5, 2019, Claimant was completing her pre-trip routine on a truck. Claimant attempted to lower a grill guard on the front of the truck. To lower the grill guard, Claimant attempted to pull up on the grill guard twice, once with her back to the truck and another facing the truck. The grill guard was stuck. Another employee assisted Claimant in getting the grill guard lowered.

When Claimant pulled up on the grill guard she felt excruciating pain in her lower back. A video taken by Respondent during this incident shows Claimant placing her hand on her low back. Despite the report of pain, Claimant completed her pre-trip routine, like cleaning the passenger side mirror and putting washer fluid in the truck, which required Claimant to close the hood of the truck.

Claimant reported the accident to Respondent on November 5, 2019. When Claimant asked to see a doctor, she was told by Respondent to see her own doctor and she went to her chiropractor, Dr. Ryan Lauck, on November 7, 2019.

Claimant was contacted by Respondent on November 23 and was told her workers compensation claim was denied. Claimant continues to have back pain and rates it at a 7 or 8 pain level on a pain scale of 1 to 10 with 10 being the worst pain. Claimant denies prior low back problems.

Claimant saw Dr. Ryan Lauck on November 7, 2019, and reported complaints of, left lower thoracic, right lower thoracic, right lumbar, and left lumbar pain. It was noted in Dr. Lauck's records these complaints were from October 30, 2019. Claimant has no explanation as to why the October 30 date is in Dr. Lauck's records. According to Claimant, she sought treatment after developing pain due to the incident of November 5, 2019. Dr. Lauck noted Claimant's mechanism of injury occurred after lifting an object at work. Claimant described the pain as constant, sharp, stabbing and pulling to the right and radiating from the back to the right thigh. Claimant reported the pain being easily aggravated and eased by nothing.

Claimant continued to see Dr. Lauck for several more sessions on November 11, 2019; November 13, 2019; November 15, 2019; November 18, 2019; November 21, 2019; and November 23, 2019. Dr. Lauck took Claimant off work for three weeks. Claimant's last visit was November 26, 2019, where lumbar decompression therapy was attempted, but Claimant was unable to complete the treatment due to severe spasms of the low back.

According to Dr. Lauck, Claimant was not responding to chiropractic treatment. Dr. Lauck opined Claimant's condition was more severe and differed from Claimant's prior conditions he had treated. Dr. Lauck recommended Claimant get an MRI of the lumbar spine and seek additional evaluation and/or treatment because Claimant's condition indicated nerve root irritation from possible bulging discs, herniated discs, or torn muscles.

Dr. Lauck first saw Claimant on September 11, 2015. He saw Claimant six times over a two-year period. He testified when someone comes for treatment, he treats the neck, mid-back and low back on every occasion and in Claimant's case he normally treated the whole body. He testified there are no records of Claimant's visits from August 2018 to October 2019, as there was a system crash and the records could not be recovered. He does recall in October 2019, Claimant sought treatment for low back pain. Claimant received three chiropractic treatments and the symptoms resolved. According to Dr. Lauck, Claimant's low back symptoms in November 2019 were much more severe than in October and required different type of treatment.

Claimant had an MRI on June 4, 2020, which showed disc degeneration at the L3-L4 and L5-S1 and central disc bulge at L4-L5.

Dr. Howard Aks evaluated Claimant on August 31, 2020, at her attorney's request. Claimant presented with low back pain radiating into her right thigh to the knee. Claimant reported injury to her low back while attempting to pull a grid guard off a semi-truck. She felt immediate pain in the lower back and the pain radiated down the right thigh to her knee. Claimant reported her pain continued to increase.

Dr. Aks diagnosed Claimant with possible right lumbar radiculitis, probable right facet syndrome and myofascial pain. He opined Claimant sustained an injury to her low back on November 5, 2019, and the prevailing factor for the injury was the work accident on November 5, 2019. Claimant was not at maximum medical improvement and she requires further treatment. He recommended epidural injections, mild narcotic medication and physical therapy for core strengthening exercises. If this treatment did not benefit Claimant, he recommended diagnostic medial branch blocks to determine how much of her pain was due to facet syndrome. If Claimant had no relief from the blocks for the duration of the local anesthetic, Dr. Aks recommended radio frequency ablation treatment.

Dr. Alexander Bailey evaluated Claimant on October 29, 2020, at Respondent's request. Claimant complained of pain directly over her buttocks and SI joint with occasional aching pain in her legs. Claimant reported this pain limits her sleeping, sitting and standing. She reported worsening pain with sneezing, lifting, bending, standing, sitting and lying down. Claimant reported being able to walk one block, stand for 6-15 minutes, sit for 16-30 minutes and sleep 3-4 hours. Claimant reported her current pain level is a 6 out of 10; at its worst, 9 out of 10 and at its least 4 out of 10.

Dr. Bailey examined Claimant and diagnosed clinical evidence of SI joint dysfunction right-sided and generalized degenerative changes lumbar spine multilevel, non-correlated to the patient's purported mechanism of injury.

Dr. Bailey viewed the video from November 5, 2019. He opined it showed a minor mechanism of injury, with no significant force applied in attempting to maneuver the grill. Claimant was seen pulling upward a mechanism of injury, Dr. Bailey believed is inconsistent with a spinal injury. After attempting to maneuver the grill, Claimant appears to be moving fluidly and without significant restriction or guarding. Dr. Bailey concluded the incident on November 5, 2019, was not the prevailing factor for Claimant's current low back complaints.

Claimant continues to have pain she attributes to the incident on November 5, 2019. Claimant wants the treatment recommended by Dr. Aks. Claimant testified she can't get comfortable and has to get up slowly to walk. She has trouble sleeping and is unable to play with her grandchildren. Claimant testified her pain is located generally in the same area then it started back on November 5.

#### **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(f)(2) states:

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

....

(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.

Respondent appeals, arguing the ALJ Order should be reversed because Claimant’s accidental injury did not arise out of and in the course of Claimant’s employment based on the evidence.

Claimant argues the ALJ’s Order should be affirmed.

Prior to November 5, 2019, Claimant was treated for occasional back pain, easily resolved by intermittent chiropractic treatment. However, after attempting to maneuver a guard grill off a semi-type truck, Claimant developed low back pain radiating into her right leg. This pain could not be resolved with chiropractic treatment. Almost a year later, Claimant’s low back pain has not resolved and requires treatment.

Respondent and their medical expert point out Claimant’s actions on November 5, 2019, are not likely to cause Claimant’s low back complaints and Claimant displayed no pain behaviors immediately following the incident.

This Board member agrees with the ALJ’s observations:

The video shows that Claimant attempted several times to move the grill. In her testimony, and her presentation to physicians, she consistently points to this event as the onset of her more significant and new low back complaints. All people are different and the toll that any given maneuver takes on any given person can be different. Without more discussion and explanation Dr. Bailey’s dismissal of this maneuver--this accident--being the prevailing factor is difficult to accept.<sup>1</sup>

It is found and concluded Claimant suffered an injury to her low back arising out and in the course of Claimant’s employment with Respondent and Claimant is entitled to workers compensation benefits.

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<sup>1</sup> ALJ Order (Jun. 8, 2021) at 5-6.

By statute, the above findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing Order has been 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 Administrative Law Judge Julie A.N. Sample dated January 8, 2021, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2021.

\_\_\_\_\_  
HONORABLE REBECCA SANDERS  
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier  
Julie A.N. Sample, Administrative Law Judge

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<sup>2</sup> K.S.A. 2020 Supp. 44-534a.