

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN K. WILLIAMS)	
Claimant)	
V.)	
)	CS-00-0359-512
CITY OF TOPEKA)	AP-00-0457-065
Self-Insured Respondent)	

ORDER

Respondent appeals the March 15, 2021, preliminary hearing order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Bruce A. Brumley appeared for Claimant. Samantha Benjamin-House 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 transcript of Preliminary Hearing from January 18, 2019, with exhibits; the transcript of Preliminary Hearing from March 12, 2020, with exhibits; the transcript of Preliminary Hearing from October 16, 2020, with exhibits; Deposition of Joseph Sankoorikal, M.D., from June 5, 2020, with exhibits; Deposition of Pat Do, M.D., January 13, 2021, with exhibits, and the documents of record filed with the Division.

ISSUES

The issues on appeal are:

1. Is Claimant's right shoulder injury the natural and probable consequence of Claimant's compensable left shoulder injury?
2. Is Claimant's compensable left shoulder injury the prevailing factor causing Claimant's right shoulder injury?

FINDINGS OF FACT

The ALJ ruled Claimant's medical treatment should remain authorized, including treatment for Claimant's right shoulder. The ALJ again denied Respondent's motion to terminate medical treatment for Claimant's right shoulder. The evidence remains much the same as it was since the March 12, 2020, hearing. The ALJ found "the evidence does not support that a farming lifestyle is so reckless, egregious or wanton as to require Claimant to either stop or be faced with losing the medical care now being given, or will need to be given, to address this overuse injury to his right shoulder."¹

Two prior preliminary orders were issued by the ALJ on the issue of treatment for Claimant's right shoulder. On March 27, 2020, the ALJ ordered authorized medical treatment for Claimant's right shoulder. On October 26, 2020, Respondent filed a motion to terminate medical treatment for Claimant's right shoulder, and after a hearing, the ALJ denied Respondent's motion to terminate medical treatment. Neither of the ALJ's decisions were appealed.

On August 12, 2016, while employed for Respondent, Claimant injured his left shoulder while lifting jugs weighing 50 to 55 pounds. Claimant received medical treatment with Dr. Pro. Claimant was released from treatment on November 2, 2017, with permanent restrictions. Due to these permanent restrictions, Claimant was no longer able to perform his job with Respondent. Claimant had physical therapy and work hardening. Although his left arm is better and stronger, he still cannot raise it very much.

Claimant obtained a job as an equipment operator for the Kansas Department of Transportation (KDOT) in July 2018 near McDonald, Kansas, where Claimant currently resides. Claimant is able to perform all of the physical requirements of the KDOT job, which includes shoveling, operating machinery and corralling deer off the road. Claimant's job involves operations, training and delicate work. If finish work is performed on the highway, Claimant operates the road grader, a loader or a skid loader. The equipment Claimant presently operates is with a joy stick, or quick levers you move back and forth with your fingers.

Claimant now reports problems with his right shoulder. Claimant reported the right shoulder pain developed in 2019. He reports pain, fatigue, weakness and popping. Claimant testified this pain is not as intense as his left shoulder pain had been. He has right shoulder pain with activity, and over time the pain worsened. Claimant testified:

It is actually getting more intense in pain. And it doesn't take as long. It's when it started out, it was just the pain would be there after a full day's work. But now it

¹ ALJ Order (Mar. 15, 2021) at 11.

doesn't take near as long for that pain to start coming in there. And I, I know I do more with this shoulder to compensate with my -- for my other shoulder.²

When asked when these right shoulder issues started he testified:

I'm going to say about maybe a little over a year ago. We have -- my wife is a horticulturist. She wants to farm like her family does, but on a much smaller basis. So we are building like greenhouses and things like that for her and doing a -- just a lot of farm work with the animals and such things. So we work until late at night and just -- I, I would say about maybe a little over a year ago, we finally got things set up to where we could start building towards her farming stuff.³

Claimant testified he has mostly been using his right shoulder because his left shoulder gives out quickly. He testified he has always had left shoulder pain since his accident.

According to Claimant, he does less physical activity than he did in Topeka. He no longer participates in sports. He tended livestock until about a year ago, which involved carrying 50 pound bags of grain. Claimant is also a volunteer firefighter, for which he drives the truck. He has been a volunteer firefighter since July 2018 when he moved to McDonald. His gear weighs approximately 20 pounds. He also smokes meat. Despite all of these activities, Claimant does not recall any specific injury to his right shoulder and it was always good until after his left shoulder injury. Claimant testified he has primarily been using his right shoulder out of fear of hurting his left shoulder. If he uses his left shoulder, it gets weak and he has pain. Claimant continues to work full duty. Claimant denies any new injuries to his right shoulder.

Claimant met with Dr. Rodney Bishop on January 9, 2018, at his attorney's request, with complaints of pain in the left shoulder. Claimant reported being unable to use the left shoulder without pain. He also had pain in the right lateral epicondyle, which improved with physical therapy and was the result of repetitive lifting and contributed to the development of right lateral epicondylitis. Dr. Bishop opined the prevailing factor in the left shoulder and right elbow injuries was the work activities for Respondent.

Claimant met with Dr. Joseph Sankoorikal on December 9, 2019, at his attorney's request. Claimant presented with left shoulder pain. Claimant reported right shoulder pain due to overcompensating for the left shoulder. Dr. Sankoorikal diagnosed left shoulder arthroscopy with arthroscopic biceps tenodesis and subacromial decompression; right shoulder pain; and history of carpal tunnel syndrome on the left side. Claimant reported he started noticing right shoulder pain while getting physical therapy and post-surgical

² P.H. Trans. (Mar. 12, 2020) at 12.

³ *Id.* at 13.

treatment. Dr. Sankoorikal opined it was more likely Claimant was overcompensating the right side for the left shoulder, and the right shoulder pain could be due to repetitious activities and overuse and/or compensation.

Claimant met with Dr. Pat Do on June 25, 2020, as a result of a Court order, for the purpose of providing treatment recommendations. Claimant presented with chief complaints of right shoulder pain and neck pain. Claimant reported his symptoms started gradually over a year ago. Claimant described the pain as moderate, at an 8 out of 10 and as sharp, throbbing and aching. Claimant reported although the symptoms come and go they are getting worse and have made gripping, lifting and reaching overhead difficult. He also reported stiffness, weakness and giving way. Claimant denied any prior injuries or problems with his right shoulder. Claimant reported the right shoulder problems are due to overcompensating for his left shoulder injury. Claimant did not say anything about his activities outside of his work or the particular tasks of his full-time job.

Dr. Do examined Claimant and diagnosed bursitis of the right shoulder and impingement of the right shoulder. He could not rule out rotator cuff tearing. Dr. Do explained to Claimant the neck pain was not a separate injury, but myofascial and referred from the shoulders. Dr. Do ordered physical therapy, an MRI of the right shoulder and assigned work restrictions.

On September 2, 2020, Dr. Do wrote, after reviewing the July 24, 2020, MRI of the right shoulder, it is within a reasonable degree of medical probability the August 12, 2016, work injury involving the left shoulder is not the prevailing factor for Claimant's right shoulder pain and need for treatment. Dr. Do testified the activities Claimant testified to performing in his March 12, 2020, preliminary hearing could have caused the findings in the MRI in a dominant arm. He testified as long as Claimant continues with the activities, he can expect his symptoms to get worse.

Claimant returned to Dr. Do on December 17, 2020, with continued pain in the right shoulder and neck despite 15 weeks of physical therapy. The pain limits Claimant's daily activity and disrupts his sleep. He denied any new injury. Dr. Do determined Claimant continues to have bursitis and impingement of the right shoulder, bicipital tendonitis, labral tearing and possible rotator cuff tear. Dr. Do administered a cortiosteroid injection. Claimant was allowed to work with no restrictions.

Dr. Do testified:

A. Yeah. In the sense that I don't know the law, but just pretend with me his work injury is August 12, 2016 to the left shoulder, and he did not have a successful outcome for the left shoulder, had continued symptomatology in the left shoulder. So, had to overuse the right shoulder over a long period of time, started having the right shoulder pain in 2019, so, maybe two to three years after his work injury 2016. The activities of him being a machine operator, which is, generally speaking,

joysticks below shoulder level, that's not very weighted for his current need for right shoulder problems in that particular regard of working the machine, for instance, his job activities itself. And this is where I don't know the law, and I'll leave it to you and the Judge and Sam, but if he has to in his off time work on a greenhouse, help his wife out, work on a farm, and now because his left shoulder is not great, he's using his head to balance the post, and now having to overuse the right arm on activities outside his job for many hours, but that's because of the left shoulder over many years, if that makes it part of the compensability, then, I don't know – I'll leave that up to you guys, but the job itself, it's not weighted that much, in my opinion, no more than 30 percent probably, or maybe even 20 percent, but if you're going to ask me, hey all of that farmwork, all that greenhouse work, can that cause his right shoulder pain, then that gets weighted as well, so then if you want to add the farm activities and greenhouse activities along with the work activities, now, I think you could make an argument that's now at 51 percent or so, and the natural and probable consequences of aging is 49 percent. So, if that works in the law, I don't know.

Q. That answers --

A. If you're asking me the job component only, then I'd say I'm not digging it for compensability, but if you can add his working -- and I think that's what you're trying to say is farm activities along with the work adding more than 51 percent, I think you could make that argument.

Q. Yeah. The Claimant's position is the farm activity and everything that happened when he went back to activities is a natural and probable consequence of the original accident. You answered my question.

Have the responses you've given both on direct and cross been expressed within a reasonable degree of medical certainty unless you stated otherwise?

A. Yes.

...

Q. (By Ms. Benjamin-House) Dr. Do, let me go down this vein a little bit. If you have an individual who has an injury involving his shoulder, and you fast-forward five years, are you saying that all complaints the individual has in the other arm are going to be related to the prior shoulder injury five years before like in this case?

A. No.

...

Q. (By Ms. Benjamin-House) So, with an individual who was performing the farming work that this guy's doing with his dominant arm, are you testifying that those tasks in isolation would not cause the findings of the MRI?

A. Sam, are you saying his --

Q. -- farming.

A. -- farming activities can cause some of the findings on the MRI?

Q. I'm saying that if the slate is clean, and this individual came to you with the right shoulder complaints that he had, and he described performing all of the activities that he testified to in the preliminary hearing in March of 2020, which is the testimony you had, and you have the MRI that this guy has that you've seen, do you believe that you would find the prevailing factor for the right shoulder complaints are related to the activities he performed on the farm, and building all of those large play items, et cetera?

A. Yes, I do.

Q. Okay. If this individual -- or because this individual is 53 years old, and this is his dominant arm, do you also believe that one of the factors that goes into the findings of the MRI is his age?

A. Yes.

Q. So, we have age. We have farming activities in great detail. We have a left shoulder injury which is his nondominant arm per testimony of the Claimant himself and all of the medical providers to date in 2016. We have the individual working full time as a heavy equipment operator for the State of Kansas. With the understanding of what that job would be based upon the Claimant's testimony because what was read to you today is only the job tasks he had once he received a different job sometime in, I believe, early 2020 which would have not been when the symptoms started in the right shoulder. You have all of those factors. I assume that you would also have possible genetics?

A. Yes.

Q. So, we've got five factors, okay. Age, farming activities that we described in great detail, the 2016 left shoulder nondominant injury, the full duty work as a heavy equipment operator for the State of Kansas as he's not worked for the City of Topeka since 2017, and then we have genetics. Is there one factor in that five that you believe is the prevailing factor for the right shoulder complaints that you are treating currently?

A. I do.

Q. What is that?

A. His farming activities.⁴

⁴ Do Depo. at 29-35.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the ALJ erred in finding Claimant's right shoulder injury arose out of and in the course of his employment with Respondent and the ALJ exceeded his jurisdiction by granting benefits, including medical treatment for Claimant's right shoulder. Respondent requests the Board reverse the ALJ's Order and deny compensation and medical treatment for the right shoulder.

Claimant argues the ALJ's Order should be affirmed. Claimant has proven the right shoulder is a compensable injury three times. The burden of proof is on Respondent to prove benefits should be terminated for the right shoulder. Claimant's right shoulder injury is the natural and probable consequence of Claimant's left shoulder injury.

For an injury to be compensable it must arise out of and in the course of employment.⁵ There must be "a causal connection between the conditions under which the work is required to be performed and the resulting accident and the accident is the prevailing factor causing the injury medical condition and resulting disability and impairment."⁶

Prevailing factor "as it relates to the term "factor" means the primary factor in relation to any other factor."⁷

Claimant has a compensable left shoulder injury. The issue is whether Claimant's right shoulder injury is a secondary injury or the natural and probable consequence of Claimant's compensable left shoulder injury.

The secondary injury rule is "injured employees are also entitled to compensation for any secondary injuries that are natural and probable result of the primary injury."⁸

In 2011, statutory amendments added the prevailing factor analysis in determining whether an injury arose out and in the course of employment. The Kansas Court of Appeals, in *Buchanan v. JM Staffing*, held "all injuries including secondary injuries must be

⁵ K.S.A. 2016 Supp. 44-508(f)(2).

⁶ K.S.A. 2016 Supp. 44-508(f)(2)(B)(i)(ii).

⁷ K.S.A. 2016 Supp. 44-508(g)

⁸ *Buchanan v. JM Staffing LLC* 52 Kan. App. 2d 943, 950 379 P.3d 428 (2016) citing *Casco v. Armour Swift-Eckrich*, 283 Kan. 508,515-16, 154 P.3d 494 (2007); *Jackson v. Stevens Well Service*, 208 Kan. 637,643,493 p.2d 264 (1972).

caused primarily by the work accident.”⁹

The primary issue in this case is whether medical treatment for Claimant’s right shoulder should be terminated in the event Claimant’s left shoulder injury is not the prevailing factor for Claimant’s right shoulder complaints.

Claimant has a compensable left shoulder injury. Despite having medical treatment for his left shoulder injury, Claimant continued to have pain and other symptoms in his left shoulder. Claimant was assigned permanent restrictions for his left shoulder injury and was unable to continue in his job with Respondent.

Due to his left shoulder injury Claimant favored his left side. Despite being right hand dominant, Claimant used his right upper extremity including his right shoulder more than he did before his left shoulder injury. Claimant became employed in 2017 as an equipment operator where he operated equipment with a joy stick. Claimant continued in his less than sedentary activities in his personal time. These activities include building a greenhouse, feeding livestock, being a volunteer fire fighter, smoking meat and erecting a play set. However, Claimant does less than he did before his injury. He no longer participates in sports. In order to perform these activities, Claimant relied much more on his right side due to his left shoulder injury and gradually developed symptoms in his right shoulder like pain, fatigue and weakness.

The medical evidence acknowledges Claimant is overcompensating for his left shoulder by using right side more. However the evidence as to whether Claimant’s left shoulder injury is the prevailing factor, is at best, murky and equivocal.

There is no evidence Claimant had symptoms or injury to his right shoulder prior to his left shoulder injury. It is clear Claimant is favoring his left shoulder due to his injury and is using his right side more. As a result, Claimant developed an injury to his right shoulder which requires treatment. There is no evidence of an intervening accident causing his right shoulder injury. Claimant is overusing his right shoulder to protect his left shoulder, resulting in injury to his right shoulder. Claimant was overusing his right shoulder to pursue personal activities which are meaningful and useful. As the ALJ stated in his decision, “the evidence does not support that a farming lifestyles is so reckless, egregious or wanton as to require Claimant to either stop or be faced with losing the medical care now being given, or will need to be given, to address this overuse injury to his right shoulder.”¹⁰

It is concluded Claimant’s left shoulder injury is the prevailing factor for Claimant’s right shoulder overuse injury. Claimant is entitled to authorized medical care to cure and relieve the effects of the left shoulder injury and the secondary injury to the right shoulder

⁹ *Id.* at 951

¹⁰ ALJ Order (Mar. 15, 2021) at 11.

due to overuse. The ALJ's order is affirmed.

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.¹¹ 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, 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 Steven M. Roth, dated March 15, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Bruce A. Brumley, Attorney for Claimant
Samantha Benjamin-House, Attorney for Self-Insured Respondent
Steven M. Roth, Administrative Law Judge

¹¹ K.S.A. 2020 Supp. 44-534a.