

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

|                                     |   |                |
|-------------------------------------|---|----------------|
| <b>ROBERT DAVIS</b>                 | ) |                |
| Claimant                            | ) |                |
| V.                                  | ) |                |
|                                     | ) |                |
| <b>VT SPECIALIZED VEHICLES CORP</b> | ) | CS-00-0048-839 |
| Respondent                          | ) | AP-00-0457-342 |
| AND                                 | ) |                |
|                                     | ) |                |
| <b>TRAVELERS PROPERTY CASUALTY</b>  | ) |                |
| <b>CO OF AMERICA</b>                | ) |                |
| Insurance Carrier                   | ) |                |

**ORDER**

Claimant requests review of Administrative Law Judge (ALJ) Steven Roth's preliminary hearing Order dated April 2, 2021.

**APPEARANCES**

William Phalen appeared for Claimant. Christopher Crank appeared for Respondent.

**RECORD**

The record consists of the preliminary hearing transcript dated March 29, 2021, with all attached exhibits, including the deposition transcript of Rodney Bishop, M.D., dated February 3, 2021, with exhibits, together with the pleadings and the case file.

**ISSUE**

Are Claimant's right knee and low back conditions the natural and probable consequence of his original May 22, 2017, work accident?

**FINDINGS OF FACT**

On May 22, 2017, Claimant injured his left knee while working for Respondent as a welder. At the time, he was welding in a cramped, awkward position under a truck for approximately 45 minutes. After pulling himself out, he felt a snap and experienced sudden pain in his left knee. According to Claimant, he was unable to walk normally and sought medical attention the same day.

Several different physicians provided medical treatment initially. Claimant was ultimately referred to Kevin Mosier, M.D. Dr. Mosier performed a left arthroscopic partial medial meniscectomy with chondroplasty on August 17, 2017. Dr. Mosier released Claimant at maximum medical improvement (MMI) on January 12, 2018.

According to Claimant, he walked with an altered gait for two and a half years following his accident resulting in pain and symptoms in his right knee and low back. Claimant reported no prior injuries or problems to these areas before his accidental injury. Claimant sought authorized medical treatment for both knees.

On July 7, 2018, the ALJ appointed “the First Available Physician” at Dickson-Diveley Midwest Orthopedic Clinic to perform an independent medical evaluation (IME) to address Claimant’s bilateral knee complaints. On September 20, 2018, Claimant saw Steven Joyce, M.D. Claimant complained of bilateral knee pain. Dr. Joyce found the May 22, 2017 accidental injury was the prevailing factor for the medial meniscus tear and collateral ligament tear in the left knee. Regarding the right knee, Dr. Joyce diagnosed Claimant with marked medial compartment joint space loss and advanced degenerative arthritis. He opined the “work-related accident aggravated the pre-existing degenerative arthritis and anterior cruciate ligament deficiency which are part of the current medical condition.”<sup>1</sup>

In an addendum report to the ALJ dated April 3, 2019, Dr. Joyce recommended additional treatment for the right knee and stated, “The alleged work-related injury is not the prevailing factor for any associated treatment of the right knee.”<sup>2</sup> Dr. Joyce declined to offer opinions regarding the low back condition because he had not examined it.

Claimant came under the care of Andrew Palmisano, M.D., on August 1, 2019. Dr. Palmisano performed a left total knee arthroplasty on October 22, 2019. He released Claimant at MMI on March 12, 2020, without restrictions.

At Respondent’s request, Claimant saw Andrew Bailey, M.D., on January 13, 2020, for an IME. Claimant presented with low back pain, leg pain, numbness and tingling. The doctor noted Claimant had a “slightly waddling gait” and “an upright gait without signs of myelopathy.”<sup>3</sup> Among other diagnoses, Dr. Bailey assessed Claimant with low back pain with possible radiculitis versus radiculopathy. The doctor recommended additional treatment, including an MRI of the lumbar spine.

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<sup>1</sup> Joyce Report (filed Nov. 30, 2018) at 4.

<sup>2</sup> P.H. Trans. (Mar. 29, 2021), Ex. B1 at 1.

<sup>3</sup> *Id.*, Ex. B3 at 4.

On January 27, 2020, Claimant returned to Dr. Bailey. After reviewing the MRI, the doctor assessed advanced spondylosis and multilevel degenerative disk disease of the lumbar spine, and low back pain without dramatic findings of radiculopathy. Dr. Bailey stated:

This is a degenerative condition and would have occurred regardless of any specific work injury or treatment. In my opinion, the prevailing and predominant and primary factor in this patient's lumbar spinal condition is degenerative in nature. The multilevel nature of this degeneration points to this fact and the MRI scan is fairly clear showing advanced spondylosis. In my opinion, this is [a] personal medical condition and is unrelated to the patient's workers' compensation case injury or sequelae of injury. The diagnosis is related to generalized degenerative changes, body habitus, age, etc. The need for treatment is related to a personal medical condition and degenerative condition and not to the sequelae of a work injury. The reason for treatment would not stem and flow from a work injury or subsequent treatment.<sup>4</sup>

At his attorney's request, Claimant saw Steven Charapata, M.D., on June 24, 2020. He presented with significant right knee pain and low back pain with lumbar radiculopathy. Among other diagnoses, the doctor assessed right knee pain from overuse and low back pain with lumbar radiculopathy caused by altered body mechanics. Dr. Charapata recommended additional treatment and opined the prevailing factor for Claimant's complaints was the May 22, 2017, work accident, stating:

Prior to the injury of May 22, 2017, Mr. Davis was not having right knee pain and was not having back pain. It took a prolonged and markedly delayed period of time to provide Mr. Davis with appropriate treatment. During the course of this delay, Mr. Davis walked with a significant antalgic gait and altered body mechanics. This caused undue stress to the right knee with the development of significant right knee pain.

Mr. Davis also developed significant lumbar radiculopathy on the left side. Mr. Davis relates that he did have left leg pain and buttock pain after the injury, but he had such significant knee pain that he felt that pain was related to his knee and not his back. He does have MRI-confirmed herniated discs at L3-4 and L4-5 with an annular tear at L4-5. This explains his radicular symptoms.<sup>5</sup>

On October 20, 2020, Claimant saw Rodney Bishop, M.D., for a Court-ordered IME. Claimant presented with right knee pain and weakness, which he attributed to overuse from his left knee injury. He denied a direct injury to his right knee. Claimant also

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<sup>4</sup> *Id.*, Ex. B4 at 2.

<sup>5</sup> *Id.*, Ex. A1 at 4-5.

complained of lumbar pain, which occasionally radiated down his left leg. He believed his back symptoms stemmed from an altered gait related to his left knee injury. He denied a direct injury to his lumbar spine.

Citing medical literature, Dr. Bishop stated “there is no substantial scientific underpinning for assigning [Claimant’s] right knee injury and/or his lumbar spine injury to the episode in question on May 22, 2017 whereby his left knee was injured.”<sup>6</sup>

At his deposition on February 3, 2021, Dr. Bishop testified:

Q. Okay. So the basis of your opinion is that the medical literature that you cited finds that altered gait from one extremity wouldn’t cause injury to the other extremity; correct?

A. That’s correct.

...

Q. Your opinion is that Mr. Davis developed right knee pain as a coincidence during the time he was walking with an altered gait. Is that what you want the judge to believe, that it’s just a coincidence?

A. I don’t have an obligation to prove why he had right knee problems. My job is to determine if on a reasonable scientific basis that his left knee injury caused his right knee injury, and my answer is that the scientific consensus would be that it was unrelated to his left knee injury.

...

Q. And your testimony is, is that this training taught you that a injury to a left knee and an altered gait never ever result in injury to the right knee; correct?

A. To a reasonable degree of medical certainty, it does not contribute to an injury to the contralateral extremity.

...

Q. If I asked you that same series of questions about whether a injury to a left knee and walking with an altered gait could cause injury to the low back, would your responses be the same?

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<sup>6</sup> *Id.*, Ex. B5 at 8.

A. They would.<sup>7</sup>

The ALJ denied benefits finding there was insufficient evidence to prove Claimant's right knee and low back injuries were the natural and probable consequence of his original work injury. Claimant argues his right knee injury stems from compensatory overuse and his low back injury is from walking with an altered gait for more than two years. Respondent maintains the Order should be affirmed.

#### PRINCIPLES OF LAW

Under K.S.A. 44-501b and K.S.A. 44-508: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the Claimant has the burden of proof; and (3) the trier of fact shall consider the whole record.

K.S.A 44-508 states, in part:

(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.

(2) 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 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.

...

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<sup>7</sup> *Id.*, Ex. A2 at 13, 17, 18-19.

(g) "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.

### ANALYSIS

#### **1. Claimant's right knee and low back conditions are not the natural and probable consequence of his original May 22, 2017, work accident.**

The ALJ's decision is well-reasoned and is affirmed by this Board Member. Two Court-ordered physicians, Dr. Joyce and Dr. Bishop, opined the prevailing factor for Claimant's medical condition in his right knee was his preexisting degenerative arthritis. Dr. Joyce opined Claimant aggravated the preexisting degenerative arthritis. No physical changes were found by either physician in Claimant's right knee.

Regarding the low back, both Dr. Bishop and Respondent's chosen examiner, Dr. Bailey, opined the prevailing factor in Claimant's medical condition and need for treatment was not Claimant's altered gait. Dr. Joyce did not offer opinions regarding Claimant's low back condition, because he did not examine it. This Board Member shares the ALJ's frustration with Dr. Bishop in refusing to offer any opinion regarding the causation of Claimant's low back complaints. This does not, however, affect his unwavering opinion Claimant's altered gait was not the cause of his low back condition. Dr. Bailey shared this opinion and offered in great detail what he believed was the cause of Claimant's low back condition.

The opinions of Dr. Charapata, Claimant's chosen examiner, are less credible than the two Court-ordered physicians. Dr. Charapata opined Claimant's medical condition and need for treatment for the right knee and low back are the result of his altered gait over the extended period of time he received authorized care for his left knee. In so doing, he fails to discuss the existence of the preexisting degenerative changes in the right knee and back or any explanation why the altered gait is the primary factor rather than the preexisting degenerative changes.

### CONCLUSION

Claimant failed to prove his right knee and low back injuries are the natural and probable consequence of his original May 22, 2017, work accident. The opinions of Dr. Joyce, Dr. Bishop and Dr. Bailey are found to be more credible than those of Dr. Charapata. The cause of Claimant's medical condition and need for treatment in the right knee and low back are the preexisting degenerative changes and not due to an altered gait.

WHEREFORE, the Board affirms the April 2, 2021, Order.<sup>8</sup>

**IT IS SO ORDERED.**

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

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HONORABLE CHRIS A. CLEMENTS  
BOARD MEMBER

Electronic copies via OSCAR:

William Phalen  
Christopher Crank  
Hon. Steven Roth

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<sup>8</sup> 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. 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(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.