

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

| | | |
|------------------------------------|---|----------------|
| JOHN JOHNSTON |) | |
| Claimant |) | |
| V. |) | |
| |) | |
| XPO LOGISTICS FREIGHT, INC |) | AP-00-0459-257 |
| Respondent |) | CS-00-0454-536 |
| AND |) | |
| |) | |
| INDEMNITY INSURANCE COMPANY |) | |
| OF NORTH AMERICA |) | |
| Insurance Carrier |) | |

ORDER

The respondent, XPO Logistics Freight, Inc., and its insurance carrier, Indemnity Insurance Company of North America (respondent), through Samantha Benjamin-House, request review of Administrative Law Judge (ALJ) Bruce Moore’s preliminary hearing Order dated July 22, 2021. Michael Snider appeared for the claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript dated July 22, 2021, with attached exhibits, and the case file.

ISSUES

1. Did the claimant sustain personal injury by accident arising out of and in the course of his employment, including whether the accident was the prevailing factor causing his injury, medical condition and disability?
2. Is claimant entitled to reimbursement of unauthorized medical expenses?

FINDINGS OF FACT

The claimant loaded, unloaded and drove trucks for the respondent. On August 25, 2020, the claimant was washing his truck’s windshield with a squeegee weighing three or four pounds. The claimant testified he “reached up, and looked up, and the bugs were really bad that time of year, and [he] put a considerable amount of pressure on the

squeegee to get the bugs off, and something popped in [his] neck.”¹ He had immediate neck pain and dizziness, in addition to tingling in his hands. The claimant testified his neck felt fine until using the squeegee. He denied having numbness in his hands prior to this incident. Similarly, he denied having prior neck pain of a similar nature.

The next day, the claimant began treating with Kelly Yoxall, M.D., for neck pain and intermittent dizziness. The claimant reported “washing his truck windshield when he looked up and felt something pop in his neck.”² He was eventually referred for an MRI of his cervical spine, which showed multilevel degenerative changes, worse at C5-6. Dr. Yoxall diagnosed claimant with cervicgia and benign paroxysmal vertigo, right ear. The doctor provided work restrictions and recommended a referral to a specialist. Dr. Yoxall stated, “The cause of this problem is related to work activities.”³

On September 10, 2020, the claimant saw Cayle Goertzen, M.D., his primary care provider, for dizziness. The claimant reported “straining neck, getting dizzy, [and] falling off the back of a semi while cleaning” a semi-truck windshield.⁴ Dr. Goertzen diagnosed him with benign paroxysmal positional vertigo, right ear, and recommended a home maneuver for vertigo.

The claimant returned to Dr. Goertzen on September 29, 2020, for neck pain and dizziness. The doctor declined to provide treatment, noting the symptoms were related to an injury at work.

At the respondent’s request, the claimant saw Matthew Henry, M.D. , on December 30, 2020. The doctor noted the claimant’s symptoms of neck pain and hand numbness in a C6 distribution began on August 25, 2020, when he was reaching up to clean his windshield. Dr. Henry wrote an MRI revealed stenosis at C5-6 due to disc protrusion and kyphosis. Dr. Henry stated, “Although the mechanism of injury would not be consistent with the prevailing factor because it represents everyday activities, I would recommend a C5-C6 anterior cervical diskectomy and fusion, which would most likely have to go through his primary insurance.”⁵

¹ P.H. Trans. at 12.

² *Id.*, Cl. Ex. 1 at 1.

³ *Id.*, Cl. Ex. 1 at 2.

⁴ *Id.*, Resp. Ex. B2 at 9.

⁵ *Id.*, Cl. Ex. 2 and Resp. Ex. B1.

At his attorney's request, the claimant saw George Fluter, M.D., on January 20, 2021. The claimant complained of pain in his neck/upper back and dysesthesias in his hands. According to the claimant's history to Dr. Fluter, he was using the squeegee with force when he felt his neck pop. Dr. Fluter diagnosed the claimant with: (1) status post work-related injury; (2) neck/upper back pain; (3) cervicothoracic strain/sprain; and (4) dizziness/vertigo. The doctor issued temporary work restrictions and recommended additional treatment, including medication, imaging studies, diagnostic testing and referrals to an otolaryngologist and a neurosurgeon. Dr. Fluter attributed the claimant's condition to the August 25, 2020, work injury and stated, "The prevailing factor for the injury and the need for medical evaluation/treatment is the reported work-related injury occurring on that date."⁶

The claimant testified he told all medical professionals his neck popped when he was using the squeegee.

The claimant received chiropractic adjustments to his neck prior to January 2020, to "keep everything lined up good, lined up straight."⁷ He received an adjustment from Casey Vidricksen, D.C., two months before his accident for a stiff and sore neck, and again four days prior to his accident.

On the record, Judge Moore stated using a squeegee on the windshield of a semi-truck requires pushing hard and is not an activity of daily living.⁸ The judge ruled:

[T]he court finds that Claimant has sustained his burden of proof and has established personal injury, by accident, arising out of and in the course of his employment with Respondent. These findings are subject to review if additional evidence comes to light.

Claimant is entitled to conservative medical care. By August 3, 2021, at 5:00 p.m., Respondent will provide to Claimant's counsel the names of two qualified physicians from which Claimant may designate an authorized treating physician. If no list of two is provided by the date and time specified, Dr. Henry will be designated as the authorized treat[ing] physician.

Unauthorized medical expenses of \$500.00 are to be reimbursed to counsel.⁹

⁶ *Id.*, Cl. Ex. 3 at 5.

⁷ *Id.* at 33.

⁸ See *id.* at 39.

⁹ ALJ's Order at 1.

On appeal, the respondent argues the claimant's injury did not arise out of and in the course of his employment. The respondent contends the claimant's accident, at most, only aggravated or accelerated his preexisting degenerative disk disease. The respondent argues the claimant alleged inconsistent mechanisms of injury, did not prove prevailing factor requirement, his injury was due to natural aging or an activity of day-to-day living, and he did not prove a lesion or physical change to his body. The claimant maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

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

(d) . . . The accident must be the prevailing factor in causing the injury. . . .

(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.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury that occurred as a result of the natural aging process or by the normal activities of day-to-day living[.]

Appellate courts have interpreted “arising out of” and “in the course of” employment.¹⁰ Kansas looks at the context of what a worker was doing when he or she was injured. *Bryant*,¹¹ a pre-May 15, 2011 case, states an injury arises out of employment when the activity resulting in injury is connected to, inherent in, or in the overall context of performing work. Reaching for a tool belt and bending to weld, while working, were work activities and not just normal activities of day-to-day living. Cases following the May 15, 2011, change in the law follow the same reasoning.¹²

The plain language of K.S.A. 44-508(f)(2)(B)(i) states an injury by accident arises out of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. Cleaning the truck windshield was a required task and demonstrates the causal connection between the necessary work and the claimant’s resulting accident. The activity was connected to and inherent in doing his job. The context of what he was doing was related to his work. Even if the claimant used a squeegee away from work, “If an employee performs an action or activity outside of work, an injury resulting from the same activity may still be compensable when the employee does the same activity in connection with work.”¹³

The respondent argues the claimant only told Dr. Fluter he applied force to the squeegee when injured. Further, the respondent points out other medical records do not state the claimant used force when applying a squeegee or scrubbing, only stating the claimant was looking up or extending his arms when his neck popped. Whether the claimant told all doctors he was using some force to clean the window with a squeegee is of little consequence. Using a squeegee inherently requires some application of force. The mechanism of injury, as relayed to the doctors by the claimant, is more consistent than inconsistent. The claimant told all of the doctors he was performing a work task when injured. Impliedly, Judge Moore believed the claimant’s testimony regarding how he was hurt and the onset of symptoms.

¹⁰ See *Fishman v. U.S.D.* 229, No. 118,327, 2018 WL 3485612, at *4 (Kansas Court of Appeals unpublished opinion filed July 20, 2018); see also *Tran v. Figueroa*, No. 119,799, 2020 WL 1973953, at *4 (Kansas Court of Appeals unpublished opinion filed Apr. 24, 2020).

¹¹ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011).

¹² See *Munoz v. Southwest Medical Center*, No. 121,024, 2020 WL 1313794, at *5 (Kansas Court of Appeals unpublished opinion filed Mar. 20, 2020); *Netherland v. Midwest Homestead of Olathe Operations LLC*, No. 119,873, 2019 WL 4383374 (Kansas Court of Appeals unpublished opinion filed Sept. 13, 2019); *Johnson v. Stormont Vail Healthcare Inc.*, 57 Kan. App. 2d. 44, 445 P.3d 1183 (2019), *rev. denied* February 25, 2020; *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 140, 343 P.3d 114 (2015).

¹³ *Eder v. Hendrick Toyota*, No. 114,824, 2016 WL 7324454, at *6 (Kansas Court of Appeals unpublished opinion filed Dec. 16, 2016).

Dr. Henry's understanding of prevailing factor is unclear. Dr. Henry suggests the claimant cannot prove prevailing factor because washing a windshield is an activity of day-to-day living. Legally, whether prevailing factor is proven in a given case is not dependent on whether the activity giving rise to an injury is arguably an activity of day-to-day living. Proof of prevailing factor is based on all factors. The claimant proved his accident was the prevailing factor causing his injury and medical condition.

The record establishes the claimant had a personal injury – a lesion or a change in the physical structure of the body. The claimant has disc bulging or disc protrusion for which Dr. Henry suggested surgery. Dr. Henry did not indicate the claimant's condition was merely degenerative or an aggravation of a preexisting condition.

The claimant sustained personal injury by accident arising out of and in the course of his employment, including the prevailing factor requirement. The claimant is entitled to benefits awarded, including reimbursement of unauthorized medical expense.

WHEREFORE, the Board affirms ALJ Moore's Order dated July 22, 2021.

IT IS SO ORDERED.

Dated this _____ day of August, 2021.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Michael Snider
Samantha Benjamin-House
Hon. Bruce Moore