

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>MELANIE CUMMINGS-LEWIS</b>	)	
Claimant	)	
V.	)	AP-00-0481-526
	)	CS-00-0469-628
<b>UNIFIED SCHOOL DISTRICT #500</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant requested review of the February 12, 2024, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on July 11, 2024.

**APPEARANCES**

John G. O'Connor appeared for Claimant. Frederick J. Greenbaum appeared for self-insured Respondent.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Regular Hearing held October 5, 2023; the transcript of the Deposition of Claimant from July 24, 2023; the transcript of the Evidentiary Deposition of Claimant from November 22, 2023, with attached exhibit; the transcript of the Evidentiary Deposition of Daniel D. Zimmerman, M.D., from October 31, 2023, with exhibits attached; the transcript of the Evidentiary Videoconference Deposition of Andre M. Jakoi, M.D., from January 24, 2024, with exhibits attached; the documents of record filed with the Division; and the briefs submitted by the parties.

**ISSUES**

1. What is the prevailing factor causing Claimant's injury, medical condition, and resulting disability or impairment?
2. What is the nature and extent of Claimant's disability?
3. Is Claimant entitled to future medical treatment?

### FINDINGS OF FACT

Claimant is an early childhood paraprofessional for Respondent, working with children aged 3 to 5 years. On May 19, 2022, Claimant was struck from behind by a student riding a metal “big wheel” tricycle during recess.<sup>1</sup> The tricycle hit Claimant in the back of both ankles and Achilles’ tendons, causing her to fall to the ground. Claimant’s right knee struck the ground when she fell, and her back twisted during the fall. Claimant described an immediate onset of pain in her right knee and left low back, stating she had never before experienced a similar pain.

Claimant reported the incident to Respondent, and she was initially sent to KU Corporate Health. Claimant was diagnosed with a right knee contusion and a strain of the muscle fascia and tendons of the low back. She was provided light-duty restrictions and referred to ARC Physical Therapy+ on June 6, 2022. Following approximately two months of physical therapy with no significant improvement, Claimant was referred to KU Comprehensive Spine Center. Claimant testified her right knee symptoms resolved, and all physical therapy was directed to her back complaints. Claimant had never been to a health care provider for low back pain prior to her work-related accident. Claimant continues to have pain and take pain medication.

Claimant first treated at KU Spine Center on September 6, 2022. Dr. McCasey Smith ordered an MRI of Claimant’s low back. Based upon the MRI taken on September 21, 2022, Dr. Smith recommended sacroiliac injections and physical therapy. Claimant declined the injections because she was scared of needles. Claimant treated conservatively with Dr. Smith until December 30, 2022. Claimant indicated her low back pain was improved, but not resolved, following treatment. Claimant continues to take over-the-counter and prescription pain medications on an intermittent basis.

Claimant stated she was involved in a motor vehicle accident on March 8, 2023, wherein she sustained a left wrist fracture and low back pain. Claimant testified the primary injury from this accident involved her left wrist, and all treatment she received as a result of this accident involved only her left wrist.

On May 17, 2023, Dr. Daniel Zimmerman, an internist, examined Claimant at her counsel’s request. Claimant complained of pain and discomfort affecting her lumbar spine and lumbar paraspinal musculature. Claimant reported no prior injuries or treatment for her low back. Dr. Zimmerman reviewed Claimant’s medical records, interpreting the MRI as showing disc height loss and disc desiccation with mild facet arthroses at L3-4 and L4-5 levels, with similar findings noted at L5-S1.

---

<sup>1</sup> Claimant Depo. (Nov. 22, 2023) at 6.

When Claimant went to Dr. Zimmerman, the doctor noted her gait was normal, no spasm in the paraspinal musculature and normal pinprick examination. Dr. Zimmerman performed a physical examination and wrote:

[Claimant] had intraspinous tenderness from L1-S1, she had tenderness on palpation of the lumbar paraspinous musculature with the left side being worse than the right. She had slight range of motion limitations at the lumbar level. She had normal reflexes in the knees and ankles. She had on the left side with the straight leg raising test at 70 degrees, pain affecting the left proximal posterior thigh and was only able to do 75 percent of a full deep knee bend and held her lumbosacral spine in a rigid posture to do so.<sup>2</sup>

Dr. Zimmerman identified three conditions arising from Claimant's accident: "chronic lumbar paraspinous myofascitis with disc height loss, disc desiccation and mild facet arthroses from L3-4 through L5-S1."<sup>3</sup> Dr. Zimmerman testified disc height loss would not have developed since the May 2022 accident, nor disc dessication or degenerative disc disease. These conditions usually occur over a lifetime. Dr. Zimmerman opined the prevailing factor causing Claimant's conditions was the work accident occurring May 19, 2022.

Using the *AMA Guides*,<sup>4</sup> Dr. Zimmerman found Claimant sustained 9 percent whole person impairment based on Table 17-4, Page 570 from Class I for motion segment lesions using the grade modifier tables and the net adjustment formula. Dr. Zimmerman testified this rating does not fully and accurately express the extent of Claimant's impairment. Giving consideration to Claimant's limitations, pain, and discomfort, Dr. Zimmerman adjusted his rating to 15 percent whole person impairment.

Dr. Zimmerman determined Claimant had reached maximum medical improvement and requires future medical treatment. Dr. Zimmerman opined Claimant could be treated with a therapeutic dosing schedule of nonsteroidal anti-inflammatory medication, and have trigger point injections of a steroid and a local anesthetic for pain and discomfort affecting the lumbar paraspinous musculature.

---

<sup>2</sup> Zimmerman Depo. at 8.

<sup>3</sup> *Id.* at 10.

<sup>4</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

Dr. Andre Jakoi, a board certified orthopedic surgeon, examined Claimant on September 21, 2023, at Respondent's request. Dr. Jakoi reviewed Claimant's history and medical records, noting the lumbar spine MRI revealed mild degenerative disc disease at L4-5, with minimal to mild stenosis throughout, and no signs of acute pathology. Additional x-rays demonstrated an L4-5 spondylolisthesis with 4 mm of motion. Dr. Jakoi performed a physical examination, finding limited, uncomfortable ranges of motion and mild tenderness in the low back. In his report, he wrote:

I believe the patient likely had a lumbar strain with underlying pathology such as a low-grade spondylolisthesis which is noted at L4-5 on flexion-extension views today and is not secondary to a pars fracture which potentially would have occurred during this injury. The combination of the patient's degenerative disc disease, spondylosis and spondylolisthesis is likely the main culprit in her persistent discomfort at this time and this is all degenerative in nature as well as the fact that it was likely present prior to this injury.<sup>5</sup>

Dr. Jakoi stated the prevailing factor causing Claimant's lumbar strain was the May 19, 2022, work-related accident. Claimant was offered a referral to pain management in the past, but refused because she did not want an injection. He indicated Claimant does not require future medical treatment for the work-related injury. Dr. Jakoi opined Claimant sustained 0 percent permanent partial impairment using the *AMA Guides* and his expertise. Dr. Jakoi assigned 1 to 4 percent whole person permanent partial impairment for Claimant's preexisting degenerative conditions.

Claimant stated her symptoms have not significantly improved. Claimant continues to work for Respondent, but she now requires assistance performing certain tasks. Claimant testified she had no restrictions in her ability to do the physical activities associated with her job prior to the accident. Claimant further testified she never experienced, or required treatment for, symptoms involving her low back prior to May 19, 2022.

The ALJ found Claimant sustained a back strain or myofascitis as a result of the May 19, 2022, work accident, noting the structural changes shown on MRI were the result of natural aging. The ALJ determined Claimant sustained 0 percent impairment "based on the extent of the injuries from the work accident and also considering the injury's relatively minor impact in terms of the treatment required and effect on the claimant's ability to work."<sup>6</sup> The ALJ found Claimant is not entitled to future medical treatment.

---

<sup>5</sup> Jakoi Depo., Ex. 2 at 2.

<sup>6</sup> ALJ Award (Feb. 12, 2024) at 5.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues her current disability is attributable to her lumbar strain/myofascitis and not preexisting degenerative changes. Claimant contends the ALJ's Award should be modified to reflect a permanent partial impairment in the range of 4 to 15 percent whole body impairment.

Respondent maintains the ALJ's Award should be affirmed in all respects. Respondent argues Claimant failed to sustain her burden of proving her personal injury by accident was the prevailing factor causing her medical condition and resulting disability. Alternatively, should this claim be found compensable, Respondent argues Claimant sustained 0 percent permanent partial impairment and is not entitled to future medical treatment.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>7</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>8</sup>

**1. What is the prevailing factor causing Claimant's injury, medical condition, and resulting disability or impairment?**

K.S.A. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 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.

---

<sup>7</sup> See K.S.A. 44-501b(a).

<sup>8</sup> See *id.*

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

(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)(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.

K.S.A. 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.

The accident must be the prevailing factor causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence. Proof of prevailing factor is not dependent on medical evidence alone.<sup>9</sup>

Dr. Zimmerman believed Claimant’s chronic lumbar paraspinous myofascitis with disc height loss, disc desiccation, and mild facet arthroses from L3-4 through L5-S1 were caused by her work-related accident. However, Dr. Zimmerman testified disc height loss and disc desiccation are conditions that would have likely been developing throughout Claimant’s lifetime. He admitted disc desiccation is also referred to as degenerative disc disease.

Dr. Jakoi opined the combination of Claimant’s degenerative disc disease, spondylosis, and spondylolisthesis were likely the main culprit in her persistent discomfort, and her condition was degenerative in nature. The Board finds the opinions of Dr. Jakoi consistent with the MRI findings and more persuasive. Dr. Jakoi believed Claimant suffered a low back sprain arising out of her work-related accident.

---

<sup>9</sup> See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430 (Kan. WCAB July12, 2018).

Claimant met the burden of proving the prevailing factor of her back strain was the May 19, 2022, work accident but did not meet the burden of proving her chronic lumbar paraspinous myofascitis with disc height loss, disc desiccation, and mild facet arthroses from L3-4 through L5-S1 were caused by her work-related accident.

## **2. What is the nature and extent of Claimant's disability?**

Dr. Zimmerman, in his report, wrote the prevailing factor causing Claimant's chronic lumbar paraspinous myofascitis with disc desiccation and mild facet arthrosis was her work-related injury. He also testified disc height loss and disc desiccation are conditions that would have likely developed throughout Claimant's lifetime.

K.S.A. 44-508(f)(3)(A) states "arising out of and in the course of employment" shall not include an injury which occurred as a result of the natural aging process or by the normal activities of daily living. All of the conditions rated by Dr. Zimmerman were related to the natural aging process.

Dr. Jakoi's opinion the degenerative disc disease, spondylosis, and spondylolisthesis are degenerative in nature and likely present prior to Claimant's work-related injury is more consistent with the MRI findings. Dr. Jakoi opined Claimant experienced no permanent impairment arising out of her work accident. Dr. Jakoi's opinion also bolsters Dr. Zimmerman's testimony disc height loss and disc desiccation are conditions that occur over a lifetime.

The Board finds the conditions rated by Dr. Zimmerman are degenerative and age-related. Claimant failed to meet the burden of proving her May 19, 2022, work-related injury by accident was the prevailing factor causing her permanent disability.

## **3. Is Claimant entitled to future medical treatment?**

K.S.A. 44-510h(e) states:

It is presumed that the employer's obligation to provide [medical benefits] shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. As used in this subsection, "medical treatment" means only that treatment provided or prescribed by a licensed healthcare provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 44-525(a) states:

Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

Claimant began experiencing pain in her low back when she was injured on May 19, 2022. She has continued to experience pain since that time, and she continues to take prescription pain medication on an intermittent basis. Claimant was offered injections for pain. She declined the referral for injections because she was afraid of needles. Dr. Jakoi did not think Claimant would need future medical treatment for a work-related condition. Dr. Zimmerman was very specific in recommending a therapeutic dosing schedule of nonsteroidal anti-inflammatory medication and having trigger point injections of a steroid and a local anesthetic for pain and discomfort affecting the lumbar paraspinal musculature.

The Board finds Claimant met her burden of proving the need for future medical treatment for ongoing pain related to her lumbar strain.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board the Award of ALJ Kenneth J. Hursh dated February 12, 2024, is affirmed, in part, and reversed, in part. Claimant failed to meet the burden of proving permanent disability related to her work-related injury by accident. Claimant met the burden of proving her right to future medical treatment.



**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2024.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

John G. O'Connor, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Self-Insured Respondent  
Hon. Kenneth J. Hursh, Administrative Law Judge