

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

EDDY MOORE

Claimant

v.

PENSKE LOGISTICS LLC

Respondent

AP-00-0481-648

CS-00-0480-625

and

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

ORDER

Respondent and Insurance Carrier (Respondent) appeal the February 28, 2024, preliminary Order issued by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Jacob M. Mark appeared for the Claimant. Thomas G. Munsell and Connor A. DeWitt appeared for Respondent.

RECORD AND STIPULATIONS

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Proceedings, held February 28, 2024, with Claimant's Exhibits 1-2 and Respondent's Exhibits 1-5, and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Did Claimant sustain a left shoulder injury from an accident arising out of and in the course of his employment with Respondent?
2. Was the alleged accident of December 1, 2023, the prevailing factor causing the alleged injury and medical condition?

FINDINGS OF FACT

Claimant is employed by Respondent as a truck driver delivering headliners to the General Motors Fairfax plant. As part of General Motors' rules, Claimant is required to disconnect the trailer and put it on jack stands if the trailer cannot be unloaded before the

end of the day. On December 1, 2023, Claimant was disconnecting a trailer at the General Motors plant. One of the jack stands began to fall over and Claimant grabbed it with his left arm. The stand jerked Claimant's left arm down, and Claimant felt his left shoulder pop. Claimant felt an immediate onset of stinging pain.

Claimant sustained a left shoulder injury in 2017. Claimant received medical treatment by Dr. Shah at Concentra. Claimant underwent an MRI scan on February 15, 2017, indicating severe tendinitis and a high-grade partial tear on the bursal side of the supraspinatus. Dr. Shah diagnosed a high-grade partial thickness supraspinatus insertional rotator cuff tear, impingement, and tendinopathy of the long head of the biceps. Surgery was recommended, but declined by Claimant. Dr. Shah declared Claimant at maximum medical improvement on April 18, 2017. Dr. Shah and Dr. Rosenthal issued impairment ratings. Claimant received a settlement based on 15% disability of the left shoulder in Missouri.

Claimant testified his left shoulder improved over time after he was released by Dr. Shah in 2017. Claimant continued to perform his usual work without permanent restrictions. Claimant denied having problems working. Claimant denied receiving additional medical treatment for the left shoulder between April 18, 2017, and December 1, 2023. Claimant testified his left shoulder problems were worse than before December 1, 2023, with pain, decreased strength and decreased range of motion.

Following the December 1, 2023, event, Claimant reported the accident to the dispatcher. Claimant subsequently requested medical treatment, and was referred to Concentra.

Claimant was seen at Concentra on December 26, 2023. According to Concentra's records, Claimant reported he injured his left shoulder while trying to remove a jack stand. Claimant said he felt a sudden onset of left shoulder pain following the accident. Claimant's prior left shoulder injury and course of treatment was reviewed. X-rays were negative for fracture or dislocation, and demonstrated arthritic changes.

Claimant was diagnosed with a left shoulder strain, and a "traumatic rupture of the supraspinatus tendon left shoulder, subsequent encounter."¹ The health care provider stated Claimant's condition appears to have resulted from employment activities to a reasonable degree of medical certainty. An MR arthrogram was ordered, along with physical therapy and temporary work restrictions. The MR arthrogram was not authorized by Respondent.

¹ P.H. Trans., Resp. Ex. 5.

On January 15, 2024, Claimant returned to Concentra for a follow-up. The diagnoses were reiterated. Claimant was referred to an orthopedist. The referral was not authorized by Respondent.

Claimant's shoulder remains symptomatic. Claimant sought medical treatment and temporary total disability compensation at a preliminary hearing held before ALJ Hursh on February 28, 2024. ALJ Hursh subsequently issued the preliminary Order. ALJ Hursh found the records from Concentra established a new compensable injury, rather than a mere aggravation of the prior left shoulder injury. Medical treatment and temporary total disability compensation were awarded. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Order is erroneous because the medical records from Concentra, particularly the words "subsequent encounter," are ambiguous to whether a new injury occurred. Respondent also contends Claimant sustained an aggravation as a result of the December 1, 2023, event, which is not compensable. Claimant argues the Order was decided correctly and should be affirmed.

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.² The provisions of the Workers Compensation Act shall be applied impartially to all parties.³ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.⁴

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁵ The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁶ An accidental injury is not compensable if work

² See K.S.A. 44-501b(a).

³ See *id.*

⁴ See K.S.A. 44-501b(c).

⁵ See K.S.A. 44-508(d).

⁶ See K.S.A. 44-508(d), (g).

is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁷

It is undisputed Claimant was performing services for Respondent when the event of December 1, 2023, occurred. It is also undisputed Claimant experienced symptoms of an injury immediately after the event. At issue is whether the event of December 1, 2023, was the prevailing factor causing Claimant's injury and medical condition.

After reviewing the relevant evidence in the current record, the undersigned concludes Claimant met his burden of proving the December 1, 2023, accident was the prevailing factor causing his current medical condition. Claimant clearly suffered a prior left partial tear of the supraspinatus, which led to a surgical recommendation Claimant declined. Claimant testified his condition and residual symptoms improved over time, and Claimant was capable of working without limitation. Claimant's testimony his condition immediately worsened after the December 1 event is corroborated by the medical records of Concentra. Concentra related Claimant's current condition to work activities. The words "subsequent encounter" in Concentra's records indicate Claimant returned with a left supraspinatus pathology, and do not constitute a causation opinion. No other causation opinions are in evidence. Based on the limited evidence in the current record, Claimant met his burden of proving he sustained a left shoulder injury from an accident arising out of and in the course of his employment with Respondent on December 1, 2023.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Kenneth J. Hursh, dated February 28, 2024, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

⁷ See K.S.A. 44-508(f)(2).

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Hon. Kenneth J. Hursh