BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JONATHAN NELSON	)	
Claimant	)	
V.	)	
	)	AP-00-0481-981
STATE OF KANSAS	)	CS-00-0475-195
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals the March 7, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Duncan A. Whittier appeared for Claimant. Nathan D. Burghart, appeared for Respondent and its insurance carrier.

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 9, 2024, with exhibits attached and the documents of record filed with the Division.

ISSUE

Whether Claimant sustained personal injury by accident, repetitive use/trauma, and/or occupational disease arising out of and in the course of his employment with Respondent, including was Claimant's accident the prevailing factor causing his injury and medical condition?

FINDINGS OF FACT

Claimant is forty-two years of age and has worked as a chemist for Respondent since August 9, 2021. Due to personnel turnover in September, 2022, Claimant's duties changed. He became responsible for dairy testing, which required use of a microscope. Claimant worked at a microscope for two full days, at the end September. After September, Claimant's use of the microscope diminished. Claimant estimated his monthly microscope usage at two to six hours. He did not use a microscope everyday and when he used it, it

was less than two hours. Claimant experienced dizziness and nausea while using the microscope.

On February 27, 2023, Claimant experienced head pain, dizziness and nausea. Claimant reported his symptoms to his supervisor and was unable to complete his work day. He did not work on February 28 due to his symptoms. Claimant returned to work the next day. Respondent denied Claimant's injury and did not provide medical treatment.

Claimant sought medical treatment at his own expense on March 2, 2023, from his personal physician, Dr. Mark McHaney, who released him to return to work except for microscope work. Dr. McHaney recommended Claimant see an optometrist. On March 4, 2023, Claimant sought treatment at the Ascension Via Christi Hospital emergency department in Manhattan, Kansas. Claimant reported developing symptoms of headache, nausea and dizziness, which began five days prior while reading a microscope at work. A CT scan of Claimant's brain was obtained and found to be unremarkable. Claimant was advised to follow-up with his primary care physician for MRI and further out-patient work-up.

On March 8, 2023, Claimant was seen by Scott McClain, O.D. Claimant reported his physical complaints began "rather suddenly" on February 27, 2023. Dr. McClain recorded a history of sudden-onset photophobia (a symptom that describes an abnormal sensitivity to light). He recommended prism lenses, which were not helpful and did not improve Claimant's symptoms. Dr. McClain recommended referral to a neurologist.

On August 2, 2023, Claimant was evaluated by John J. Sand, M.D., a neurologist, for the purpose of an independent medical examination (IME). Dr. Sand reviewed Claimant's medical records and noted Claimant had a long history of headaches. He noted Claimant had undergone two MRI scans of his brain, and a CT scan of his head, which were negative. Dr. Sand stated Claimant had an essentially negative medical evaluation, including optometric and ophthalmologic examination, physical examination by his primary care physicians and cerebral imaging. "It is not clear this is work related or an underlying condition exacerbated by his change in work situation."[1] Dr. Sand opined Claimant likely has a peripheral vestibular syndrome (a common disease that occurs when there is a problem with the inner ear or vestibular nerve. The vestibular nerve is a paired nerve in the inner ear responsible for balance, eye movements and other functions) without evidence of central neurologic disorder. He recommended evaluation by a neurotologist, who would be more experienced and qualified to determine whether claimant's symptoms are work-related.

[1] Sand IME Report (August 2, 2023) at 8.

An examination was scheduled with a neurotologist on November 2, 2023. Upon arrival, Claimant was informed he had to undergo testing with an audiologist to determine if he needed to be seen by the neurotologist. After performing a battery of tests, all within normal limits, the audiologist determined there was no evidence of a peripheral or central vestibular disorder. Because no vestibular disorder was identified, Claimant was not seen by the neurologist.

Dr. McHaney provided a letter, dated February 22, 2024 which states, in part:

> To a reasonable degree of medical certainty, it is more probably true than not that Mr. Nelson's current conditions of migraine headaches and light sensitivity are directly attributable to his work-related use of microscopes, during the period of September 2022 through February 27, 2023. It is also most likely that the microscope based work activity is the prevailing factor in regard to these diagnoses, especially given these symptoms abated when proper precautions were taken.[2]

Claimant continues to work for Respondent, performing all duties, except use of the microscope. Respondent accommodated all restrictions Claimant presented. Claimant attributes the headaches, dizziness, nausea, light sensitivity and one instance of blurry vision to the alleged accident caused by using the microscope. Claimant reports he suffers from daily headaches and light sensitivity since February 27. His dizziness and nausea was limited to the first two weeks after February 27. Claimant does not recall using a microscope since February 27. Claimant's current complaints are pain in his right temple and light sensitivity. Diagnostic tests performed on Claimant include two MRIs, CT scan, auditory and blood testing. All tests were normal.

The ALJ found Claimant failed to sustain his burden of proving personal injury by accident or repetitive trauma. The ALJ discounted Dr. McHaney's prevailing factor opinion, stating:

> Claimant's preliminary hearing requests are CONSIDERED but DENIED. Claimant has failed to sustain his burden of proof of personal injury by accident or repetitive trauma. Claimant has also failed to establish that he has suffered an occupational disease.[3]

The ALJ further stated:

> Here, Nelson fails to identify a personal injury (a change in the physical structure of the body) that he suffered as a result of looking through a microscope. He also fails

---

[2] Ex. #15, McHaney Letter (February 22, 2024).

[3] ALJ Order (March 7, 2024) at 7.

> to identify an "accident" – an undesigned, sudden and unexpected traumatic event – or "repetitive trauma" --associated with the onset of symptoms. There was no trauma. He did not describe any impact with the microscope – just the sudden onset of subjective symptoms when looking through the lens of a microscope in the course of performing his normal duties. While Nelson apparently told Dr. McHaney his symptoms developed over time, he told Dr. McClain they developed suddenly on February 27, 2023. Despite the suggestion of repetitive trauma, there was no physical trauma, repetitive or otherwise, alleged or sustained.
>
> Other than in September, 2022, when he first assumed his duties using a microscope, Nelson has only used the microscope one day a month, for as little as two hours, up to as many as six hours in a single day. Use of the microscope is usually at the end of the month, when "end-of-the month count comparisons" were submitted to the FDA. Nelson's symptoms on February 27, 2023 developed suddenly and spontaneously when he began to use the microscope. There was no physical contact described between Nelson's head and the microscope. If he only did end-of the-month comparisons, the last time he would have used the microscope before February 27, 2023 would have been the end of January, 2023.
>
> ...
>
> Nelson attempts to characterize the development of his symptoms as progressive, but was unable when testifying to recall when or how many times he had experienced symptoms prior to February 27, 2023, and he told Dr. McClain those symptoms developed "suddenly" on February 27, 2023. Neither Nelson nor any physician has yet identified an "injury" – any lesion or change in the physical structure of his body – as a source of his subjective symptoms. Nor has any rationale been offered as to how a change in the physical structure of the body could result from simply looking through the eyepiece of a microscope, without physical contact or trauma. Nelson has failed to sustain his burden of proof of having suffered personal injury by accident or repetitive trauma.[4]

The ALJ also found Claimant failed to establish he suffered an occupational disease. The ALJ stated:

> Here, Nelson has not been diagnosed with any "disease" relative to his employment with the Stateof Kansas, although he has been diagnosed with subjective complaints of headaches and photophobia, which are two potential symptoms of possible disease. Second, there is no evidence before the court that there is attached to the job of looking through a microscope between 2 and 6 hours a month, a "particular and peculiar hazard" of suffering such symptoms as headaches and photophobia, which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease (or the symptoms

[4] ALJ Order (March 7, 2024) at 4.

> complained of) which is in excess of the hazard of such disease in general. There is no evidence that Nelson's constellation of symptoms has "its origin in a special risk of such disease (or symptoms) connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk."[5]

Claimant argues the March 7, 2024, Preliminary Hearing Order should be reversed, because Dr. McHaney's opinions are uncontroverted, his testimony is sufficient to prove his condition and a specific diagnosis is not required to establish a compensable claim. Respondent maintains the ALJ's Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.[6] The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.[7] A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.[8] Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,[9] the Board is not required to do so and may modify an award as it deems necessary.[10]

An accident is an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. 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.[11] The accident must be the prevailing factor causing the injury. An injury is any

---

[5] *Id* at 6.

[6] See K.S.A. 44-501b(c) and K.S.A. 44-508(h).

[7] See K.S.A. 44-555c(a).

[8] See *Rivera v. Beef Products, Inc.,* No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

[9] See *Parker v. Deffenbaugh Industries, Inc.,* Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471 (Kan. WCAB Oct. 14, 2014).

[10] See *Samples v. City of Glasco,* No. 265,499, 2011 WL 2693241 (Kan. WCAB June 22, 2011).

[11] See K.S.A. 44-508(d).

lesion or change in the physical structure of the body, causing damage or harm.[12] Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[13] An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.[14]

An injury by repetitive trauma shall be compensable only if the employment exposes the worker to an increased risk of injury, the employment is the prevailing factor in causing the repetitive trauma and the repetitive trauma is the prevailing factor in causing the medical condition.[15] The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests.[16]

The ALJ found Claimant failed to prove he suffered an accidental injury or an injury by repetitive use/trauma. This Board Member agrees. Claimant alleges he was injured when he used a microscope. There was no undesigned, sudden or unexpected traumatic event accompanying his use of the microscope in September when his symptoms began or on February 27, 2023 when his symptoms increased.

Claimant was not injured by repetitive use. He described use of a microscope for two six hour days at the end of September, followed by once per month for two to six hours until February 27, 2023. According to Claimant, his nausea and dizziness continued with each use of the microscope through this time frame. He experienced a significant increase of his symptoms on February 27, but did not describe any difference or increase in his use of the microscope to account for the increase of his symptoms. Repetitive involves doing the same thing over and over again. Microscope use for two six hour days followed by once a month for two to six hours for the next five months does not equate to repetitive use.

All of the diagnostic tests performed on Claimant were normal. None of the medical evidence provided a working diagnosis or an explanation for the cause of Claimant's nausea, dizziness, headaches and light sensitivity. Claimant contends his use of the microscope caused these symptoms, but is unable to establish he suffered an injury resulting in these symptoms. Dr. McHaney opined Claimant suffers from headaches and

---

[12] See K.S.A. 44-508(f)(1).

[13] See K.S.A. 44-508(g).

[14] See K.S.A. 44-508(f)(2).

[15] *Id.*

[16] See K.S.A. 44-508(e).

light sensitivity which he attributes to his use of the microscope. It is unclear how these symptoms were caused by use of the microscope and what injury caused them to surface.

An employer is liable to pay compensation to an employee incurring personal injury by occupational disease arising out of and in the course of employment.[17] "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" means the employment the employee is engaged in creates an increased hazard of disease in excess of the hazard of disease in general due to a special employment-related risk. Ordinary diseases of life and conditions to which the general public may be exposed outside of the particular employment are not compensable as occupational diseases.[18] The occupational disease statute does not refer to the prevailing factor statute requirement contained in K.S.A. 44-508(f)[19] when the plain language of the statute is clear and unambiguous, a court must apply the statute as written.[20]

The ALJ found Claimant failed in his burden of proving he suffered an occupational disease from exposure while employed with Respondent. Specifically, the ALJ found Claimant failed to present sufficient evidence establishing he was diagnosed with any disease and his use of a microscope for a limited number of hours per month constitutes a particular and peculiar hazard distinguishing his employment from other occupations or employment. The ALJ's decision is well-reasoned and supported by the evidence. This Board Member agrees with his analysis and conclusions. The greater weight of the credible evidence establishes Claimant's exposure at work did not constitute an occupational disease.

In summary, the ALJ's preliminary hearing Order explains in great detail how Claimant failed in his burden to prove he suffered personal injury by accident, injury by repetitive use/trauma and/or to establish he suffered an occupational disease. The ALJ's finding of Claimant failing to prove compensability of his claim is affirmed and Claimant's preliminary hearing requests for benefits are denied.

---

[17] See K.S.A. 44-501b(b).

[18] See K.S.A. 44-5a01(b); see also *Casey v. Dillon Companies, Inc.*, 34 Kan App. 2d 66, 72-73, 114 P.3d 182 (2005).

[19] See *Beard v. Wolf Creek Nuclear Operating Corp.,* 2019 WL 4253361 (Kan. WCAB August 27, 2019).

[20] See *Bergstrom v Spears Mfg. Co.,* 289 Kan. 605, 607, 214 P.3d 676 (2009).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Bruce E. Moore, dated March 7, 2024, is affirmed.

IT IS SO ORDERED.

Dated this day of June 2024.

_____
CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Duncan A. Whittier, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge