

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SORIA HERRMAN)
Claimant)
V.)
SALINA SURGICAL CENTER) AP-00-0482-182
Respondent) CS-00-0480-182
AND)
ACCIDENTAL FUND NATIONAL)
Insurance Carrier)

ORDER

The claimant, through Jan Fisher, requested review of Administrative Law Judge (ALJ) Bruce Moore's preliminary hearing Order, dated March 25, 2024. Matthew Schaefer appeared for the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) preliminary hearing transcript, held February 8, 2024; (2) court-ordered independent medical examination report of Mark Melhorn, M.D., dated March 12, 2024; (3) documents of record filed with the Division; and (4) parties' briefs.

ISSUES

1. Did the claimant meet with personal injury by accident arising out of and in the course of her employment, including is the accident of September 28, 2020, the prevailing factor causing the claimant's injury, medical condition and resulting disability or impairment?
2. Is the claimant entitled to temporary total disability (TTD) benefits or medical treatment?

FINDINGS OF FACT

The claimant alleges injuries to her neck, right shoulder and right upper extremity from an influenza inoculation (flu shot or vaccination).

The claimant worked for the respondent for over 20 years. As a surgical scrub tech, she had direct patient contact while assisting doctors in surgery.

The claimant testified the respondent conducted yearly events on safety, including infection control through the use of vaccinations. At this event, employees completed paperwork and were offered a flu vaccination administered by Gerilyn Diederich at no charge. The claimant testified the vaccinations were voluntary, but they were “strongly encouraged because of it being a hospital and the patients.”¹ She testified Ms. Diederich would make flyers and post them around the hospital to remind employees to get their flu vaccination. During her employment with the respondent, the claimant testified she would get a flu vaccination almost every year because it was encouraged and she wanted to keep herself healthy and not give anything to the patients.

Gerilyn Diederich, R.N., has been the respondent’s Infection Control Nurse and Employee Health Nurse since 2011. She testified the promotion of the flu vaccine was no different in 2020 as compared to previous years. In or around September of each year, she placed a poster offering flu vaccines at no cost and showing the dates available in the staff lounge and doctors’ dictation room, put out an infection control newsletter discussing the importance of getting the flu vaccine, and distributed baskets of candy promoting the flu vaccine clinic to all departments.

Nurse Diederich testified each employee signs a form either consenting to or declining the flu vaccine. She testified the respondent encourages inoculation, but does not mandate it, stating: “We feel like it’s their own personal decision for their own health care, they make their own decisions for their own health care.”² She estimated around 70% of employees choose to get the vaccine each year.

On September 28, 2020, on respondent’s premises, Ms. Diederich administered the flu vaccination in the claimant’s right arm. At the time, the claimant was on the clock. She testified she experienced soreness and stiffness around the injection site. The following week, the claimant developed numbness, tingling and stiffness in her right arm which gradually became painful. She denied ever having a reaction to the flu vaccination before.

The claimant reported her symptoms to her supervisor. When her symptoms did not improve, she sought treatment with Bradley Daily, M.D.

The claimant saw Dr. Daily on October 28, 2020. She testified her symptoms remained the same over the month it took her to get in to see Dr. Daily. The claimant complained of right shoulder loss of motion, weakness, and pain, paresthesias down the right arm, and right-sided neck pain which started three days after receiving the flu vaccination. Dr. Daily diagnosed the claimant with “[p]ossibility of post influenza vaccine

¹ P.H. Trans. at 11.

² *Id.* at 63.

Parsonage-Turner syndrome (brachial/axillary plexopathy).”³ The doctor prescribed medication and ordered physical therapy. In a letter dated February 19, 2021, Dr. Daily opined the flu vaccination on September 28, 2020, was the cause and the prevailing factor for the claimant’s acute brachial neuritis.⁴ Thereafter, the respondent accepted the claim and began providing treatment. On May 10, 2021, Dr. Daily released the claimant to return to regular duties.

The claimant continued to have symptoms affecting her work and activities of daily living. She took Tramadol and over-the-counter pain medicine for relief. After waiting a year to see if her symptoms would improve, the claimant requested a second opinion. She was referred to Alexander Bollinger, M.D. The claimant saw Dr. Bollinger on December 8, 2022. Dr. Bollinger diagnosed the claimant with right brachial neuritis. Dr. Bollinger opined the claimant would not require further treatment and assigned her 3% permanent partial impairment to the right upper extremity for her injury.

The claimant returned to Dr. Daily on November 20, 2023, because of severe pain. The claimant denied ever being pain free from the time of her vaccination until she saw Dr. Daily in November 2023. The claimant complained of right upper extremity pain, fasciculations and sensory changes. The claimant described the sensory changes as feeling like pins and needles and fasciculations in the forearm and occasionally at the base of the thumb. Dr. Daily took the claimant off work and recommended bilateral upper extremity EMG nerve conduction studies by William Kossow, M.D.

Dr. Kossow’s bilateral EMG and nerve conduction studies, dated November 30, 2023, were normal. Dr. Kossow found the claimant had right upper extremity neuropathic pain, hypersensitivity and weakness following her flu shot. The doctor indicated the claimant behaved as if she had complex regional pain syndrome (CRPS) and stated she should be treated as a patient with a CRPS variant. Dr. Kossow suggested the claimant have a right stellate ganglion block.

On December 6, 2023, Dr. Daily also diagnosed the claimant with CRPS and recommended a stellate ganglion block. The claimant remained off work with Dr. Daily stating:

[The claimant] has been dealing with right upper extremity, acute brachial neuritis pain and complex regional pain syndrome, type 1 of the right upper extremity since Sept. 28th of 2020. This has limited significantly her ability to work continuously and

³ *Id.*, Cl. Ex. 1 at 2.

⁴ See *id.*, Cl. Ex. 1 at 7.

provide for herself. . . . I think it is medically reasonable to assume her symptom[s] and limitations, will likely continue for the next six months.⁵

On January 31, 2024, Timothy Sowder, M.D., administered a stellate ganglion block. The claimant testified the block relieved some of her pain.

Following a preliminary hearing, held February 8, 2024, the ALJ found the claimant's injuries arose out of and in the course of her employment. The ALJ's preliminary Order dated February 8, 2024, stated, in part:

As a surgical hospital employee, the activity that resulted in injury (Herrman getting her flu shot) is connected to, or is in, the performance on her job. As a scrub tech, Herrman is in contact with physicians performing surgery, other health care employees of Salina Surgical Center, and patients of the facility. Avoiding transmission of the flu virus to each of those categories of individuals is both "connected to" and "in" the performance of her duties, whether "voluntary" or not.

. . .

Here, Herrman was ostensibly injured as a result of a flu vaccination drive "organized, encouraged, and supervised by the employer on company premises," during Salina Surgical Center's annual "Competencies Days" when the values and core mission of the surgical hospital were reviewed and emphasized to employees. Getting one's flu shot was recognized as a value to both the employee and the hospital, as avoiding the flu both benefitted the employee, by not getting sick, and the employer, by limiting the opportunity for the flu virus to be transmitted to other employees, thus limiting absenteeism, and to patients of the hospital, reducing risks of illness and mortality. Emphasizing the need for the flu shot, in conjunction with other core "competencies" of the surgical hospital renders the "voluntary" nature of the activity of getting the flu shot irrelevant.

Salina Surgical Center asks the court to find that injuries suffered as a result of the "voluntary" administration of a flu shot are not compensable, as not "arising out of and in the course of employment." The court declines to make that finding, and finds, instead, that Herrman's act of getting her flu shot arose out of her employment, because it was either "connected to" or "in" the performance of her duties as a scrub tech in a surgical hospital setting.⁶

The preliminary Order was not appealed. In a separate Order, the ALJ appointed Mark Melhorn, M.D., to perform a court-ordered independent medical examination for determining diagnosis, prevailing factor and treatment recommendations.

⁵ *Id.*, Cl. Ex. 1 at 37.

⁶ ALJ's Order (Feb. 8, 2024) at 5-6.

The claimant saw Dr. Melhorn on March 12, 2024. She reported experiencing muscle spasms, twitching, pain and cramping in her right arm shortly after receiving a flu vaccination on September 28, 2020. Dr. Melhorn's physical examination of the claimant's arms revealed normal skin color, no mottling, no cyanosis, normal skin temperature, no edema, normal skin texture, normal skin appearance, and no muscle atrophy. The doctor was able to detect a slight fasciculation in the claimant's right deltoid. She had good right shoulder range of motion.

Dr. Melhorn indicated the claimant did not have CRPS. He told the claimant there are exceedingly rare instances of shoulder injury related to vaccine administration (SIRVA). While Dr. Melhorn observed the claimant conceivably had some variant of a previously-provided diagnosis, her most likely classification was "primary pain." The doctor stated a second injection could be beneficial. Dr. Melhorn did not provide any input as to the prevailing factor requirement.

In an Order dated March 25, 2024, the ALJ denied the claimant's preliminary hearing requests, stating: "Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment. Claimant has failed to establish that the work-related accident was the prevailing factor in causing her injury, medical condition or disability."⁷

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues her current symptoms are related to the flu vaccination. The claimant asserts Dr. Melhorn's opinion does not provide a diagnosis or causation and the weight of the evidence shows a work-related accident has occurred as a result of the vaccination. The respondent maintains the Order should be affirmed.

Dr. Daily diagnosed the claimant with right brachial plexus neuritis. Dr. Daily opined the claimant's influenza vaccine was the cause and the prevailing factor for her injury. Dr. Daily later added the diagnosis of CRPS.

Dr. Kossow opined the claimant presented as if she had CRPS and stated she should be treated for a CRPS variant. Dr. Kossow's suggestion for a right stellate ganglion block helped reduce the claimant's pain.

Dr. Bollinger diagnosed the claimant with right brachial neuritis. Further, Dr. Bollinger provided the claimant with an impairment rating for her injury. The only injury for which Dr. Bollinger examined the claimant was the injury following the inoculation.

⁷ ALJ Order at 1.

Dr. Melhorn diagnosed the claimant with “primary pain” and stated a second injection could be beneficial. Dr. Melhorn did not comment on the prevailing factor requirement.

Prior to receipt of Dr. Melhorn’s report, the ALJ found this claim was compensable. After receipt of Dr. Melhorn’s report, the ALJ determined the claimant did not sustain personal injury by accident arising out of and in the course of her employment, including the prevailing factor for her injury, medical condition and disability was her accident. The undersigned Board Member disagrees.

All of the examining doctors indicated the claimant had symptoms following the inoculation. While the doctors provided different diagnoses, there need not be unity of medical opinions for compensability. The only doctor explicitly giving a prevailing factor opinion was Dr. Daily, and his opinion was in the claimant’s favor. Additionally, it appears Drs. Kossow and Bollinger linked the claimant’s injury to the influenza shot. No physician provided an alternative prevailing factor opinion.

The parties cited a Board decision, *Sauerwein*.⁸ In such case, a worker alleged injury from a series of mandatory inoculations. A single Board Member found the claim compensable. The Board Member found the claimant’s supervisor instructed her to get the shots. Additionally, the Board Member specifically disagreed with the legal analysis hinging on a voluntary inoculation being not compensable versus a mandatory inoculation being compensable.

The parties also presented arguments based on case law and Larson’s Treatise. The general rule from these sources is an injury from a non-mandatory, yet employer-encouraged and provided inoculation in a medical setting is compensable because an adverse reaction was a consequence of the employment.⁹ It is practical for an employee to recognize the responsibility to keep patients healthy.¹⁰ The employer benefits from improved employee attendance due to lack of a flu outbreak and medical facilities are in the interest of promoting public health.¹¹ Another way to accept compensability is by

⁸ *Sauerwein v. Sedgwick County Area Educational Services*, No. 233,967, 1999 WL 595925 (Kan. WCAB June 1, 1999).

⁹ See *Monette v. Manatee Memorial Hosp.*, 579 So. 2d 195, 197 (Fla. Ct. of App. 1991).

¹⁰ See *Monette*, 579 So. 2d at 197. See also *Lampkin v. Harzfeld’s*, 407 S.W.2d 894, 897 (Mo. 1966) (Employee was given a voluntary influenza injection by her employer’s agent on the employer’s premises during normal working hours. The employer encouraged the vaccination with the purpose of preventing the worker from getting sick and losing time from work. The accidental injury arose out of and in the course of the employment).

¹¹ See *Case of Hicks*, 820 N.E.2d 826, 835, 62 Mass. App. Ct. 755 (2005).

likening a voluntary inoculation to any activities covered under the personal comfort doctrine, such as injuries incurred when taking a drink break, cigarette break or restroom break.¹² Other jurisdictions view injury from a voluntary inoculation provided by an employer as not compensable, even if encouraged by an employer, because the shot is akin to a personal errand.¹³ These arguments concerning voluntariness were rejected by the ALJ in his preliminary Order dated February 8, 2024.

The Kansas Supreme Court cautioned against resorting to a treatise to interpret a statute if the statute provides plain meaning based on the statutory language.¹⁴ Looking at Kansas statutes, under K.S.A. 44-501b: (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 trier of fact considers the whole record; and (3) the burden of proof is on the worker.

K.S.A. 44-508 states:

(d) "Accident" means 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. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(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.

...

¹² See *Monette*, 579 So. 2d at 197.

¹³ See *Rolsen v. Walgreen Co.*, No. 104,431, 2016 WL 7427246, at *5 (Ct. Appeals of Ohio, 2016).

¹⁴ See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-62, 293 P.3d 723 (2013).

(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 which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...

(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.

Purely looking at statutory language, the undersigned makes the following conclusions. First, the inoculation was a manifestation of force with an undesigned, sudden and unexpected afflictive or unfortunate nature. Second, the claimant sustained personal injury due to this accident.

Next, there was a causal connection between the conditions under which the work is required to be performed and the resulting accident. The inoculation was offered to the claimant as part of her job. Further, the accident was the prevailing factor causing the injury, medical condition, and resulting disability or impairment. The employer-provided and encouraged inoculation had a particular employment character.

This is a clear example of an injury occurring in the course of employment. An injury happens in the course of employment "when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee

is fulfilling work duties or engaged in doing something incidental thereto.”¹⁵ The claimant was at her employer’s location, during work and while being paid to do something encouraged by the respondent.

The voluntariness of obtaining the injection is not particularly relevant. Workers routinely are injured in the performance of voluntary actions, such as bending, lifting and twisting.

The ALJ’s February 8, 2024, preliminary Order found this case compensable. While it was not appealed and not subject to review, it was a correct decision. The undersigned does not view Dr. Melhorn’s report as supporting a denial of compensability.

The undersigned reverses the ALJ’s preliminary Order. This matter is remanded to address the claimant’s requests for benefits. The Board does not have the preliminary authority to address requests for TTD and medical treatment.

WHEREFORE, the undersigned Board member reverses and remands the preliminary hearing Order for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Jan Fisher
Matthew Schaefer
Hon. Bruce Moore

¹⁵ *Atkins v. Webcon*, 308 Kan. 92, 98, 419 P.3d 1 (2018).