BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRIAN GOLUBSKI	)	
Claimant	)	
V.	)	
	)	AP-00-0482-502
OLD DOMINION FREIGHT LINE, INC.	)	CS-00-0452-734
Respondent	)	
AND	)	
	)	
INDEMNITY INS. CO. OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 15, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) Troy A. Larson.

APPEARANCES

William L. Phalen appeared for Claimant. Kevin J. Kruse appeared for 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 transcript of the Preliminary Hearing held October 31, 2023, with exhibits attached; the transcript of the Preliminary Hearing by Deposition of Brian Golubski held December 28, 2023, with exhibits attached; the transcript of the Preliminary Hearing held April 11, 2023, with exhibits attached; the transcript of the Preliminary Hearing held March 16, 2021; the transcript of the Evidentiary Deposition of Jacob Brubacher, M.D., from February 21, 2024, with exhibits attached; the transcript of the Remote Discovery Deposition of Brian C. Golubski from March 2, 2021; the documents of record filed with the Division; and the briefs filed by the parties.

ISSUE

The issue for the Board's review is: did Claimant prove either his August 21, 2019, injury or his repetitive trauma injury sustained through May 4, 2020, was the prevailing factor causing his need for medical treatment?

FINDINGS OF FACT

Claimant worked for Respondent as a delivery driver. In this position, Claimant delivered, loaded, and unloaded various goods in the Kansas City metro area. Claimant estimated he spent half of his shift unloading and loading and half of his shift driving a semi truck. Claimant described using a forceful, fixed grip while holding the vibrating steering wheel and vibrating gearshift in the work truck. He further described the unloading aspect of his position as requiring repetitious gripping, grasping, and lifting with his upper extremities. Claimant worked for Respondent for nearly ten years.

On August 21, 2019, Claimant unloaded bundles of pipe into a trailer. While grabbing a bundle of pipe and tossing the bundle in the trailer, Claimant felt a pop and sharp pain in his left hand and fingers. Claimant testified he experienced numbness and tingling in his left hand, ring finger, and little finger and lost the ability to grip, preventing him from unloading more pipe.

Claimant reported the incident to his supervisor, reporting pain in his hand with numbness and tingling, and he was physically unable to continue working. Accordingly, Respondent directed Claimant to Corporate Health KU MedWest for treatment.

Claimant testified the physicians at KU MedWest initially thought the hook of the hamate, a bone in his hand, was broken. X-rays revealed no fractured bones. Claimant stated the doctors seemed to be more concerned with his hand pain than numbness and tingling in his ring and little fingers. KU MedWest ordered physical therapy and imposed temporary restrictions. An MRI of Claimant's left hand was conducted and considered normal with no tendon injury or tear or bone fracture.

Claimant's first visit to KU MedWest was on August 21, 2019. Records indicate Claimant's chief complaint was left hand pain with no other acute symptoms of concern. Claimant's symptoms and complaints were similar on August 27, 2019. On September 4, 18, and October 2, 9, and 18, 2019, records state Claimant denied any numbness or tingling sensation to his left hand or fingers.

However, records from KU MedWest Physical Therapy indicate Claimant complained of numbness and tingling in his left hand on September 23, 2019. Claimant reported pain in the palm of his hand from the metacarpophalangeal joint (MCP) to the hypothenar region. The MCP is the top knuckles, where the fingers meet the hand bones. The hypothenar region is the group of muscles controlling movement of the little finger. Claimant reported increased symptoms on October 4, 2019, worsening to the extent Claimant could not open a jar by October 17, 2019. KU MedWest discontinued physical therapy on October 18, 2019, due to lack of progress and referred Claimant to an orthopedic upper extremity specialist.

Dr. Jacob Brubacher, a board certified orthopedic surgeon, was designated the authorized treating physician. Dr. Brubacher first examined Claimant on November 13, 2019. Dr. Brubacher noted the hamate was not well visualized on the previous MRI and planned to order another. When Claimant returned to Dr. Brubacher on January 2, 2020, some symptoms had resolved:

> Our last visit patient had significant symptoms at the hook of the hamate and I asked him to have an MRI performed that would image this portion of the hand. Since that time patient has stated that those symptoms have resolved. He now states that the majority of his symptoms relate to pain in a diffuse pattern in the hand and forearm and also numbness and tingling in the small and ring finger. Some of this seems to radiate from the medial elbow. No significant nighttime symptoms but occasional night awakenings. He has not tried any nonoperative measure in regards to this as this is relatively new symptoms he states it is been quite bothersome.[1]

Dr. Brubacher found Claimant's symptoms most consistent with ulnar neuritis at the elbow and ordered a nerve conduction study. Dr. Brubacher testified it is not typical for ulnar neuritis to be caused by a repetitive use injury. Dr. Brubacher also testified one would expect the symptoms of ulnar neuritis soon after a traumatic injury, within hours to days. Claimant first reported numbness and tingling to Dr. Brubacher on January 2, 2020. He returned Claimant to work with no restrictions, explaining Claimant did not have a diagnosis for which restrictions were required at that time.

The EMG of Claimant's left upper extremity, conducted February 4, 2020, was positive for mild left ulnar neuropathy. Dr. Brubacher provided Claimant with a splint to wear at night, imposed temporary restrictions, and ordered 8 weeks of physical therapy. At a telehealth visit on April 8, 2020, Claimant reported his numbness and tingling resolved with the latest treatment protocol. Dr. Brubacher recommended a two-week work hardening program before Claimant returned to full-duty work. Claimant reported on May 6, 2020, shooting pains from his medial elbow into his ring and little fingers. An additional MRI was taken, revealing changes consistent with medial epicondylitis. Dr. Brubacher then recommended surgery for left cubital tunnel syndrome (ulnar neuropathy) and left medial epicondylitis. This surgery was denied by Respondent. Dr. Brubacher opined the prevailing factor causing Claimant's left cubital tunnel syndrome was the work injury of August 2019.

Dr. Brian Divelbiss examined Claimant at Respondent's request on June 23, 2020. Dr. Divelbiss reviewed Claimant's history and certain medical records. He performed a physical examination of Claimant, finding Claimant sustained left ring finger flexor tenosynovitis (trigger finger) as a result of the August 2019 work incident. Dr. Divelbiss

---

[1] Brubacher Depo., Ex. 2 at 14.

further diagnosed Claimant with left cubital tunnel syndrome and medial epicondylitis that he did not relate to the work accident. Dr. Divelbiss based his conclusions on Claimant's lack of elbow pain at the time of the injury and lack of onset of numbness for at least a month following the injury. Dr. Divelbiss recommended cortisone injections and noted Claimant did not require work restrictions for left ring finger flexor tenosynovitis.

An Application for Benefits (E-1) was filed with the Division on August 21, 2020. Claimant listed an accident date of August 21, 2019. Claimant stated he sustained injury to his left hand, and all other body parts affected, performing his job duties at Respondent.

Dr. Pedro Murati examined Claimant at his counsel's request on January 8, 2021. Dr. Murati found Claimant sustained left carpal tunnel syndrome, left ulnar cubital tunnel syndrome, and left medial epicondylitis as a result of the August 2019 work incident. Dr. Murati recommended conservative treatment, with surgical intervention if necessary. Dr. Murati did not provide restrictions upon request.

Dr. Anne Rosenthal performed a records review at Respondent's request and produced a report dated April 17, 2021. Dr. Rosenthal reviewed the reports from Drs. Murati and Divelbiss, Dr. Brubacher's treatment records, Claimant's March 2021 deposition, KU MedWest records, the 2019 MRIs, and the EMG. Dr. Rosenthal concluded Claimant's work accident was the prevailing factor causing Claimant's left palmar pain and ring finger tenosynovitis. Dr. Rosenthal stated Claimant's left elbow diagnoses are not related to the work incident:

> [Claimant] had no complaints of left elbow pain or left ring or small finger numbness or tingling until 4 months later, at his 1/2/20 visit with Dr. Brubacher. Dr. Brubacher even noted that these were new symptoms.[2]

Dr. Clint Walker performed a court-ordered independent medical evaluation (IME) on May 6, 2021. Dr. Walker reviewed Claimant's available medical records and performed a physical examination, finding Claimant's left ring trigger finger was caused by the work incident. Dr. Walker noted Claimant did not show signs of medial epicondylitis on exam, but showed positive findings at the ulnar nerve and cubital tunnel. Dr. Walker did not consider Claimant's cubital tunnel syndrome related to the work accident, noting those symptoms were not present for several months. Dr. Walker recommended Claimant undergo left ring finger release surgery. This surgery was approved and performed by Dr. Divelbiss on November 29, 2021.

Claimant filed an Amended E-1 on October 7, 2021. Claimant adjusted his claim to include a series of dates, from June 1, 2010, through May 4, 2020. Claimant indicated

---

[2] P.H. Trans. (Oct. 31, 2023), Resp. Ex. 4 at 2.

he sustained injury to his left hand, elbow, fingers, and all other affected body parts while performing his job duties.

Dr. Lowry Jones examined Claimant on November 23, 2022, at his counsel's request. Dr. Jones reviewed the available medical records and performed a physical examination, noting Claimant continued to suffer from medial epicondylitis and ulnar neuropathy. Dr. Jones determined the prevailing factor of Claimant's conditions:

> It is my opinion, within a reasonable degree of medical certainty, that using the repetitive nature of his job, and the fact that it was his first and most significant job that was consistent for 10 years, that the development of a partial tear to the medial flexor origin, and the development of ulnar neuropathy a 34-year-old male (age at the time of injury) is more likely than not occurred secondary to repetitive heavy labor work activity then one specific injury. I believe that the injury that occurred, although the diagnosis of the actual injury is still somewhat questionable, certainly may have resulted in significant enough pain that as the hand pain resolved he appreciated more of his numbness and discomfort, and did not identify that well early on.
>
> I would certainly have some concern by the medical record delay in identifying the ulnar neuropathy, but believe that the nature of his work activity is much more likely to have resulted in the injury described, then other outside activity.
>
> It is therefore my opinion, that the work-related activity and the injury, being the repetitive nature of his work activity and the injury date itself where the prevailing cause for his left upper extremity pain, and his diagnosis of ulnar neuropathy and partial tear to the common flexor group.[3]

Dr. Jones recommended Claimant undergo the surgery suggested by Dr. Brubacher.

Dr. Walker provided a clarification of his IME opinions on August 9, 2023. Dr. Walker wrote:

> I refer to the timeline of reported symptoms outlined in my IME report. [Claimant] reported a work related injury on 8/21/2019. He last worked for this employer on 11/14/2019. The first mention of ulnar nerve or cubital tunnel syndrome related symptoms is during his 1/2/2020 appointment.
>
> In my medical opinion, based on the information available to me at this time, [Claimant's] work related injury and work related activities are not consistent with

[3] P.H. Trans. (Apr.11, 2023), Cl. Ex. 3 at 3-4.

> being the prevailing factor for his current right [*sic*] cubital tunnel syndrome symptoms or need for treatment.[4]

During the Preliminary Hearing by Deposition of Claimant, held December 28, 2023, it was discovered Respondent's counsel did not have the physical therapy records from KU MedWest.[5] Counsel for both parties agreed to investigate the matter, with concern the physicians in this claim were not provided these records. Upon further investigation, it was determined Dr. Walker did not have access to the physical therapy records because the parties had not yet obtained them.

The parties took Dr. Brubacher's deposition on February 21, 2024. Dr. Brubacher stated his prevailing factor opinion had not changed after he reviewed Claimant's initial treatment records from KU MedWest, including the physical therapy records. Dr. Brubacher agreed the first instance Claimant complained of numbness and tingling in his fingers was at his January 2, 2020, visit. Dr. Brubacher noted Claimant's left hand complaints had more or less resolved at that time, with the majority of the symptoms "now...going into his numbness and tingling into the small and ring finger."[6] Dr. Brubacher explained typically, ulnar neuritis is caused from an acute incident versus a repetitive injury. He stated he would normally anticipate the numbness and tingling to develop relatively quickly following an acute incident:

> I would say it's typically, yeah, typically quickly. It would be that they would notice it in a short period of time, meaning it could be immediate or minutes to hours or days; but, you know, one caveat that I would say there can be other injuries that we call distracting injuries that you can have something else going on that's causing a distraction or something like that may lead to a more unusual presentation. However, usually with an acute subluxation event or something with the ulnar nerve you would expect the symptoms to be relatively quickly identified.[7]

The ALJ found Claimant failed to meet his burden of proving a compensable injury for his left elbow condition and denied medical treatment. The ALJ determined the opinions of Dr. Walker were more persuasive, as Dr. Walker reviewed all of Claimant's medical records.

---

[4] P.H. Trans. (Oct. 31, 2023), Resp. Ex. 2.

[5] *See* P.H. Trans. (Dec. 28, 2023) at 17-19.

[6] Brubacher Depo. at 33.

[7] *Id*. at 34.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ erred in basing his findings on Dr. Walker's opinions, as Dr. Walker did not, in fact, review all of Claimant's medical records. Claimant contends he sustained his burden of proving the work incident of August 21, 2019, is the prevailing factor causing his left elbow injury and need for surgical care.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues for Claimant to have sustained injury to his left elbow on August 21, 2019, the numbness and tingling symptoms would have occurred quickly and not over a month later.

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.[8] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[9]

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.

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

> (2)(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
>
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
>
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

---

[8] *See* K.S.A. 44-501b(a).

[9] *See id*.

> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
>
> (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. Proof of prevailing factor is not dependent on medical evidence alone.[10] Preexisting degenerative conditions can be the prevailing factor, but the presence of a preexisting condition does not always preclude compensability after an accident.[11]

The ALJ performed a review of the evidence, citing K.S.A. 44-508(g), and found Claimant did not meet his burden of proving a compensable injury for the left elbow condition. The ALJ gave more weight to the opinions of Dr. Walker, noting his opinion was more informed because he reviewed Claimant's medical history. The undersigned agrees.

Dr. Brubacher's prevailing factor opinion is inconsistent with his testimony. He testified one would expect the symptoms of ulnar neuritis soon after a traumatic injury, within hours to days. Claimant did not report numbness and tingling to Dr. Brubacher until over three months after his work-related injury.

The undersigned agrees with and adopts the findings of the ALJ. This claim was originally filed as a injury by accident on August 12, 2019. The application for benefits was amended on October 7, 2021, to reflect a repetitive trauma injury from June 1, 2010, through May 4, 2020. Whether a single traumatic injury or an injury by repetitive trauma,

---

[10] *See Fish v. Mid America Nutrition Program,* No. 1,075,841, 2018 WL 3740430 (Kan. WCAB July 12, 2018).

[11] *See Shook v. Waters True Value Hardware,* No. CS-00-0368-737, 2019 WL 6695514 (Kan. WCAB Nov. 19, 2019).

Claimant failed to meet the burden of proving either the August 21, 2019, accident or the series of injuries through May 4, 2020, was the primary factor, in relation to any other factor, causing his left ulnar neuritis.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Troy A. Larson dated April 15, 2024, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2024.

_____
SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

William L. Phalen, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Hon. Troy A. Larson, Administrative Law Judge