

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NATHAN DEWICK

Claimant

v.

H F RUBBER MACHINERY INC.

Respondent

AP-00-0483-323

CS-00-0477-526

and

TRANSPORTATION INSURANCE CO.

Insurance Carrier.

ORDER

Claimant appeals the May 30, 2024, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Brian Brown.

APPEARANCES

Roger D. Fincher appeared for Claimant. James R. Hess appeared for Respondent and Insurance Carrier (Respondent).

RECORD AND STIPULATIONS

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held October 18, 2023, including Claimant's Exhibits 1-6; the transcript of Evidentiary Deposition of Nathan Dewick, taken January 23, 2024, including Exhibits A-C, the transcript of Evidentiary Deposition of Shawna Loh, taken January 23, 2024, including Exhibit D; the transcript of Evidentiary Deposition of Robert Moss, taken January 23, 2024, including Exhibit D; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Did Claimant prove he sustained personal injuries from an accident arising out of and in the course of his employment with Respondent on March 27, 2023?
2. Is Claimant entitled to a preliminary award of temporary total disability compensation (TTD) from June 9, 2023, through August 27, 2023?

FINDINGS OF FACT

Claimant worked for Respondent as an assembler from January 2023 through June 8, 2023. Claimant's work involved operating a forklift, among other tasks.

In March 2022, before working for Respondent, Claimant was riding a motorcycle and hit a pothole. Claimant "tweaked" his back¹ on the right side, and felt low back pain. Claimant received treatment at an emergency room, and was prescribed pain medication. Claimant testified his back pain resolved a week later. Claimant denied seeing his primary care physician for treatment, but he did see a chiropractor. While working for Respondent, Claimant told his lead, Robert Moss, about the motorcycle incident, but did not recall telling Mr. Moss he hurt his back. Claimant denied having other prior problems with his back.

Before working for Respondent, Claimant worked as a corrections officer for the Osage County Sheriff's Office. Claimant was required to carry a gear belt holding equipment. Claimant denied suffering back injuries while working for Osage County.

On March 27, 2023, Claimant was operating a forklift as part of his work for Respondent. Claimant completed his work, parked the forklift and began to climb down. Claimant testified he turned his torso to get off the forklift, and felt a strain or pull in his low back. Claimant also rolled his ankle, although he does not allege he injured his ankle. Claimant felt an immediate onset of pain running down both legs and up his back. Claimant testified the pain was different compared to the pain he felt after the motorcycle incident. Due to the severity of the pain, Claimant stood still for five to ten minutes. Claimant testified Mr. Moss and the Safety Manger, Kane Johnson, came to Claimant with a wheeled chair, and helped transport Claimant to Mr. Johnson's truck. Claimant testified he told Mr. Johnson what happened, but not Mr. Moss. Mr. Johnson transported Claimant to a healthcare provider.

Claimant was seen at St. Francis Emergency Department. According to St. Francis' records, Claimant stated he woke up and felt tightness in his low back. Claimant went to work and felt a spasm in the left side of his low back while getting off a forklift, along with a sudden onset of crampy, dull and nonradiating pain. Claimant denied numbness, tingling or weakness. Claimant also reported he had similar problems with low back spasms in June 2022. An acute injury was denied. Examination was notable for low back pain and left-sided paraspinal muscle tenderness with spasm. Straight-leg raise was negative bilaterally. Medication was administered, and Claimant's symptoms improved. Claimant was diagnosed with lumbar paraspinal muscle spasm, and was taken off work for two days. Claimant was told to follow with his primary care physician for physical therapy.

¹ P.H. Trans. at 7

Claimant testified he took one week off from work, and returned to regular duty work until June 9, 2023. Claimant testified he continued to have low back pain and problems.

Claimant testified he could not recall completing a written accident report for Respondent. Claimant was presented a copy of a written accident report completed by hand and dated March 28, 2023. The report stated the accident was “stepping off of forklift,” and the cause of Claimant’s injuries was “preexisting condition.”² Claimant’s name was printed on the signature line.³ The bottom of the form, which a supervisor was required to complete, was blank. Claimant testified the report did not look familiar to him. Claimant could not tell whether the writing on the report was his handwriting. Claimant denied the signature on the form was his. Claimant did not know when the report was completed. Claimant denied completing the form or signing it.

Claimant was seen at St. Francis Urgent Care on May 18, 2023, for chronic asthma. There is no record Claimant reported back pain or received treatment for back pain. It appears Claimant underwent an MRI scan on June 8, 2023, but the report of the MRI is not in evidence.

On June 9, Claimant told Pat, his foreman, about his symptoms and Pat told him to go home if his symptoms were bad. Claimant testified he was subsequently seen at St. Francis Urgent Care, and received light-duty work restrictions. Claimant testified he advised Respondent of his restrictions, and was told no light duty work was available. Claimant did not work from June 9 through August 28, 2023, when he started working for another employer. Claimant testified Respondent never offered light-duty work between June 9 and August 28.

According to the records from St. Francis, Claimant was seen at the Family Practice department on June 14, 2023, for an annual physical. The records state Claimant reported he threw his back out two weeks ago. Claimant also reported he experienced back pain for the past four years, which had worsened over the past two weeks. Claimant went to a hospital for treatment a few weeks ago. Claimant reported soreness in the low back bilaterally with pain shooting down the left leg. Claimant also reported numbness and tingling in both hands. Examination of the back revealed normal range of motion, and Claimant walked normally. Claimant was diagnosed with chronic low back pain. An EMG/NCS study of both lower extremities and an x-ray were ordered, and Claimant was prescribed physical therapy before proceeding with an MRI. Claimant advised his back condition may be treated under workers compensation, and he was told to wait for a

² Dewick Deposition Trans., Ex. A.

³ See *id.*

response from Respondent before proceeding with treatment. Claimant's work status was not addressed.

Claimant denied having problems with his back two years before March 27, 2023. Claimant denied telling anyone his back symptoms were due to a prior accident or injury. Claimant denied telling the providers at St. Francis he was seen several times in the past for low back pain.

On June 16, 2023, Claimant was seen at St. Francis for low back pain. Claimant received light-duty restrictions and a referral for physical therapy.

Claimant returned to St. Francis on June 29, 2023, for a follow-up and advised his symptoms were not better. Claimant also advised his treatment was not authorized by workers compensation. Examination revealed a normal gait, right-sided lumbosacral tenderness, spasm and right flank tenderness. Claimant's light-duty status continued.

Dr. Zimmerman evaluated Claimant at his attorney's request on August 2, 2023. Dr. Zimmerman reviewed the E1, the records from St. Francis of June 16 and 29, 2023, and the MRI of June 8, 2023. Dr. Zimmerman interpreted the MRI as showing disc pathology at L4-5 and L5-S1. Claimant told Dr. Zimmerman he developed lumbosacral spine pain when he rolled his ankle while getting out of a forklift, and he received treatment from St. Francis on June 16 and June 29. Claimant reported he underwent a prior left ACL reconstruction, and had prior left leg weakness on account of the prior injury. Examination was notable for tenderness at L3-S1. No spasm was found, and no trochanteric bursal tenderness was present. Straight-leg raise testing was positive bilaterally. Range of motion testing revealed complaints of pain and guarding. Reflexes and strength were symmetric, with decreased sensation and strength of the fourth and fifth toes of the left foot.

Dr. Zimmerman diagnosed acute lumbar paraspinous myofasciitis and disc bulges or herniations at L4-5 and L5-S1 on account of a work injury occurring on March 27, 2023. Dr. Zimmerman recommended additional medical treatment, including an orthopedic surgery consultation. Dr. Zimmerman imposed light-duty restrictions.

Claimant continues to have low back pain radiating down both legs. Claimant testified his symptoms worsen with walking. Claimant currently works as a Security Shift Manager at Prairie Band Casino. Claimant testified his current work is a desk job, which he has no problems performing.

Shawna Loh, Respondent's Human Resources Manager, testified to Respondent's workers compensation procedure. Ms. Loh testified procedure requires an employee to report an injury to his or her supervisor. The supervisor would notify Mr. Johnson and the Plant Manager, Justin Powell. While Respondent refers an injured worker to a healthcare

provider, a report of accident is filed with the State of Kansas and the worker is expected to complete the top half of an internal accident report. The accident is investigated and the bottom half of the form is completed after the investigation is concluded. Ms. Loh confirmed completing a false report is contrary to company policy, and she had never seen a false report prepared during her tenure.

Ms. Loh testified Mr. Moss or Mr. Johnson told her about Claimant's accident of March 27 the following day. Ms. Loh was not present when the internal accident form was completed, but Mr. Moss or Mr. Johnson would have been present. Ms. Loh also testified a lot was going on at the time the accident report was completed, and she did not know if someone else completed the form on Claimant's behalf.

According to Ms. Loh, in the middle of May 2023, Claimant said he was having problems with his back. Claimant did not report problems between March 28 and May 2023. Ms. Loh said she would start the workers compensation process with the insurance carrier. Ms. Loh testified Claimant said his back problems were due to a prior injury from carrying gear while working for Osage County. Claimant did not report the motorcycle incident as a cause of his symptoms. Ms. Loh also confirmed she told Claimant the light-duty restrictions of June 2023 could not be accommodated, and she referred Claimant to Respondent's workers compensation insurance carrier for further information.

At the request of Insurance Carrier, Ms. Loh spoke with Mr. Johnson, Mr. Powell, and Mr. Moss. Mr. Moss told Ms. Loh about Claimant's prior motorcycle incident. At the request of Insurance Carrier, Mr. Moss completed a hand-written statement, dated July 19, 2023, stating he saw Claimant hunched over and leaning on a forklift on March 27, and Claimant said his back problems were due to a preexisting condition.

Mr. Moss testified he works for Respondent as an Assembly Lead Man, and Claimant was a member of Mr. Moss' crew on March 27, 2023. Mr. Moss testified before March 27, Claimant said he injured his back from wearing a gear belt while working for Osage County, but did not report ongoing problems or difficulties performing his job. Claimant also mentioned the motorcycle incident. Mr. Moss did not witness the event of March 27, but saw Claimant gingerly climbing off a forklift and Claimant appeared to be in pain. Mr. Moss went to Claimant, and Claimant said he twisted while getting off the forklift and needed medical treatment. Mr. Moss also testified Claimant said his back condition was preexisting and happened before.

Mr. Moss reviewed the hand-written accident report. Mr. Moss testified he was not familiar with the form and did not complete it. Mr. Moss denied his handwriting was on the form. Mr. Moss thought Claimant completed the form because his name was printed on the signature line. At the request of Ms. Loh, Mr. Moss completed the hand-written statement dated July 19, 2023.

Claimant demanded TTD, and a preliminary hearing took place on October 18, 2023, followed by additional depositions. On May 30, 2024, ALJ Brown issued the Preliminary Hearing Order. According to the Order, Claimant was involved in an incident on a forklift, but Claimant's credibility affected the compensability determination. ALJ Brown concluded Claimant was equivocal on whether he completed the internal accident report. ALJ Brown found Respondent did not complete a false accident report, and Claimant's testimony on the subject was not credible. ALJ Brown also found Claimant was not credible about reporting his prior back injuries. ALJ Brown concluded Claimant did not prove by a greater weight of the credible evidence he sustained a compensable injury on March 27, 2023. Claimant's request for benefits was denied. These proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Preliminary Hearing Order's determination Claimant did not prove compensability by a greater weight of the credible evidence is erroneous. Claimant argues his description of the accident was uncontradicted and Dr. Zimmerman established causation. Claimant also argues he was not equivocal about the incident report. Claimant maintains he is eligible to receive TTD. Respondent argues the ALJ's credibility determination is entitled to deference and the Preliminary Hearing Order was decided correctly.

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.⁴ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁵ 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.⁶

The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges,⁷ and the Board possesses the authority to grant or refuse compensation, or to increase or diminish an award of compensation.⁸ A *de novo* hearing is a decision of the matter anew, giving no

⁴ See K.S.A. 44-501b(a).

⁵ See *id.*

⁶ See K.S.A. 44-501b(c).

⁷ See K.S.A. 44-555c(a).

⁸ See K.S.A. 44-551(l)(1).

deference to findings and conclusions previously made by the administrative law judge.⁹ Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,¹⁰ the Board is not required to do so, and may modify an award as it deems necessary.¹¹ For example, the Board previously reversed an administrative law judge's credibility determination of an employee's live testimony, after asserting its authority to conduct *de novo* review.¹² Moreover, the Board is as equally capable as an administrative law judge in reviewing evidence when a witness does not testify live.¹³ Personal observation of testifying witnesses is a common basis for determining witness credibility, but another method to determine credibility is analyzing the facts and determining which witness' version makes the most sense based on those facts.¹⁴

The primary issue is whether Claimant met his burden of proving by a greater weight of the credible evidence he sustained personal injuries from an accident arising out of and in the course of his employment with Respondent. 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.¹⁵ 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.¹⁶ 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.¹⁷

⁹ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555, at *4 (Kan. WCAB June 22, 2017).

¹⁰ See, e.g., *Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471, at *9 (Kan. WCAB Oct. 14, 2014).

¹¹ See *Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241, at *3 (Kan. WCAB June 22, 2011).

¹² See *Lichtenberger v. Air Capital Vending*, No. 1,012,933, 2004 WL 1778911, at *3 (Kan. WCAB July 16, 2004).

¹³ See *Gilmore v. Henke Manufacturing Co.*, No. 1,074,792, 2016 WL 3208237, at *3 (Kan. WCAB May 12, 2016).

¹⁴ See *Dick v. Park Electrochemical Corp.*, No. CS-00-0444-763, 2020 WL 2991808, at *2 (Kan. WCAB Mar. 19, 2020).

¹⁵ See K.S.A. 44-508(d).

¹⁶ See K.S.A. 44-508(d), (g).

¹⁷ See K.S.A. 44-508(f)(2).

Furthermore, the accidental injury arises out of employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹⁸

Claimant consistently testified on March 27, 2023, he was at the place of employment performing his usual duties of employment when he twisted his body while getting off of a forklift. Claimant testified he felt an immediate onset of low back pain different in character from prior low back symptoms, and had to wait for the symptoms to recede. Ms. Loh was not present, and Mr. Moss did not witness the event. Mr. Moss confirmed he saw Claimant after the event, and Claimant appeared to be in pain. Mr. Moss testified Claimant described the twisting event to him. Claimant's history to St. Francis of March 27, 2023, is consistent with his testimony. No evidence suggests the event of March 27, 2023, did not occur. Based on the uncontested evidence, Claimant proved the accident of March 27, 2023, occurred and produced symptoms of an injury.

Claimant also proved by a greater weight of the credible evidence the accident of March 27, 2023, was the prevailing factor causing the injury. Determining whether Claimant proved the prevailing factor element requires consideration of all relevant evidence.

While Claimant admitted he wore a gear belt while working for Osage County, and Respondent's witnesses stated he reported prior back problems while wearing the belt, there is no evidence Claimant sustained an injury or had ongoing back problems due to wearing a gear belt. With regard to the motorcycle incident, the record contains no medical records concerning Claimant's prior treatment. Ms. Loh was not aware of a motorcycle incident. Claimant told Mr. Moss about the prior incident generally, but Mr. Moss confirmed Claimant did not report ongoing back problems or symptoms prior to the March 27 accident. None of the medical records in evidence indicate Claimant's symptoms or medical condition were caused by wearing a gear belt or from the motorcycle incident.

The undersigned respectfully disagrees with the ALJ's credibility assessment based on the internal accident report. Claimant clearly denied completing or signing the form. Claimant did not allege the accident report was manufactured by Respondent. Ms. Loh and Mr. Moss did not recognize the form, either, and denied completing it. Mr. Moss assumed Claimant completed it because Claimant's name was printed on the signature line. Ms. Loh testified to prior instances where a report was completed by someone else on behalf of the injured worker. Mr. Johnson did not testify. It is possible the report was completed by someone else who did not testify. The undersigned does not find the controversy regarding the provenance of the accident report fatal to Claimant's credibility.

¹⁸ See K.S.A. 44-508(f)(2)(B).

The medical evidence currently in evidence supports finding the accident was the prevailing factor causing Claimant's injuries. Dr. Zimmerman thought the accident caused Claimant's back injuries. Although Dr. Zimmerman reviewed very few records, no other physician contradicted Dr. Zimmerman's opinions. The medical records from St. Francis do not address the cause of Claimant's condition. While the notes from Claimant's annual physical of June 14, 2023, indicate Claimant threw his back out in May or June 2023, the notes also document a prior hospital visit coinciding with the Emergency Department visit of March 27, 2023. Other records document an onset of symptoms after Claimant twisted while getting off a forklift. Claimant testified his symptoms were different from the back symptoms he experienced before.

Based on the limited information contained in the current record, the undersigned concludes Claimant proved the accident of March 27, 2023, was the primary factor, compared to all other factors, causing his low back injuries. Claimant met his burden of proving he sustained back injuries from an accident arising out of and in the course of his employment with Respondent.

With regard to Claimant's request for TTD, the ALJ did not address the merits of Claimant's demand for TTD. The Board's authority to review preliminary decisions is limited to issues of compensability.¹⁹ On review, the Board has the authority to remand a matter to the ALJ for further proceedings.²⁰ This matter is remanded to the ALJ with instructions to conduct further proceedings and issue a ruling on the merits of Claimant's request for TTD.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Brown, dated May 30, 2024, is reversed. This matter is remanded to ALJ Brown with instructions to conduct additional proceedings and issue a ruling on Claimant's request for TTD.

¹⁹ See K.S.A. 44-534a.

²⁰ See K.S.A. 44-551(l)(1).

NATHAN DEWICK

10

**AP-00-0483-323
CS-00-0477-526**

IT IS SO ORDERED.

Dated this _____ day of August, 2024.

**WILLIAM G. BELDEN
APPEALS BOARD MEMBER**

c: Via OSCAR

Roger D. Fincher
James R. Hess
Hon. Brian Brown