BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN NELSON	)	
Claimant	)	
V.	)	
	)	
NANO LLC	)	AP-00-0484-057
Respondent	)	CS-00-0470-162
AND	)	
	)	
MIDVALE INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, pro se, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's Order, dated July 2, 2024. Kevin Johnson 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: (1) the preliminary hearing transcript, held November 2, 2022, with exhibits; (2) the preliminary hearing transcript, held July 12, 2023, with exhibits; (3) the preliminary hearing and motion to dismiss hearing transcript, held December 27, 2023, with exhibits; (4) additional evidence presented to the ALJ and referenced in his Order, dated January 3, 2024; (5) the preliminary hearing and motion to dismiss hearing transcript, held June 26, 2024, with exhibits; (6) documents filed with the Division; and (7) the parties' briefs.

ISSUES

1. Was dismissal of this claim pursuant to K.S.A. 44-523(f)(2) appropriate?

2. Did the claimant prove he contracted work-related COVID?

FINDINGS OF FACT

This is the fourth time this claim has been before the Board. The claimant, currently aged 74, owns the respondent, a janitorial service. One of his customers was a medical clinic, Centra Care.

Between September 11 and September 13, 2021, the claimant stated he only left his residence to get groceries at Walmart and Price Chopper on September 11, for a Moderna vaccination appointment at Walmart on September 12, and a doctor's appointment on September 13 at 1:45 p.m.

According to the claimant, around 9:00 p.m., on September 13, 2021, he opened the back door to Centra Care and inhaled a terribly bad chemical smell coming from the hallway. The claimant indicated he worked in an enclosed space at Centra Care until 11:00 p.m., and was the only person there during such time.

The claimant testified he was exposed to COVID on September 13 while working at Centra Care and inhaling bad-smelling air. He also testified his exposure occurred on or about September 11-13. He stated his exposure was to coronavirus hanging in the air from infected people, from coronavirus coming from an open biohazard container (the lid was not closed), and poor ventilation at Centra Care. A hand-drawn map of Centra Care contains the claimant's handwritten statement the main sources of coronavirus were the customer's restroom, biohazard containers, an open drain in the custodial room and the restroom where lab tests are done. According to the publication *Science*, onset of symptoms occurs one to four days following exposure.

On September 14, 2021, the claimant was hospitalized. According to the claimant, he remained in the hospital until September 20. On September 25, he was readmitted to the hospital for shortness of breath. These medical records are not in evidence. The claimant had a biopsy of a right inguinal lymph node on October 13. A discharge summary dated October 14 noted the claimant had been exposed to COVID on September 13.[1]

The claimant stated Aaditya Verma, D.O., said COVID attacked his lung in two places. Dr. Verma did not testify. No medical professionals testified or provided expert opinions regarding causation.

On September 1, 2022, the claimant filed an Application for Benefits (E-1) alleging he was exposed to COVID on September 13, 2021, while working at Centra Care and inhaling bad-smelling air.

On September 20, 2022, the claimant filed an Application for Preliminary Hearing (E-3). Following a preliminary hearing on November 2, 2022, the ALJ denied benefits, stating: "The record failed to prove by a preponderance of credible evidence the claimant contracted COVID, contracted it as [a] single traumatic workplace event, or as an

[1] See "Additional Information for E-3 filed by Pro Se" uploaded into OSCAR's "Case Record" on September 20, 2022, at 40.

occupational disease, or requires medical treatment for effects of COVID."[2] The claimant appealed to the Board, and in an Order dated January 4, 2023, a single Board member affirmed the ALJ.

On May 1, 2023, the claimant filed an E-3. Following a preliminary hearing on July 12, 2023, the ALJ denied benefits, stating:

> COVID is a medical diagnosis that is confirmed by testing. If the claimant saw a medical professional around the time of the alleged exposure and tested positive for COVID, there should be a record of such positive test, but there is not. If no COVID test was done around the time of the alleged exposure, there is simply no way for the court to make a factual finding the claimant had COVID. Without proof the claimant['s] injury or occupational disease existed, there is no way to order benefits for the claimed injury or occupational disease under the workers compensation act.[3]

The claimant appealed to the Board. In an Order dated September 11, 2023, the Board found the claimant's appeal was out of time and dismissed it for lack of jurisdiction.

On November 10, 2023, the respondent filed a Motion to Dismiss pursuant to K.S.A. 44-523(f)(2). On November 22, the claimant filed an E-3. On November 28, the respondent filed an Application for Dismissal (E-6). The record contains no indication the claimant sought to extend the time to prosecute his claim. Following a joint preliminary and motion hearing on December 27, 2023, the ALJ ruled:

> The court considered new evidence presented by the claimant. A record from Advent Health Shawnee Mission from a few days after the alleged event showed the claimant did test positive for COVID. The new evidence failed to change the court's finding on causation.
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> The new evidence consisted of the cover to an article on single proton detection, handwritten-copied excerpts attributed to an American Scientist article on how aerosols can disperse viruses and bacteria, an FBI form reply to an inquiry from the claimant, a handwritten list of alleged crimes committed by American Family Insurance. There was a July 17, 2023 medical record from a cardiologist, Matthew Earnest, M.D, that said the claimant had COVID related pneumonia in October, 2021, and later, cardiac arrythmia and other health conditions. The record stated nothing about causation.
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> There were articles about T-cell immunity to COVID 19 vaccines and about doctors receiving awards for COVID vaccines, information on the claimant's wages, and

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[2] ALJ Order (Nov. 3, 2022) at 3.

[3] ALJ Order (July 12, 2023) at 1-2.

> other handwritten statements and drawings that were basically the claimant's theories on how he could have gotten COVID in the workplace. The evidence was speculation and not reliable for proving causation.
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> COVID is so ubiquitous it is very hard to prove it was contracted in a workplace versus any other place, and the workplace was not proved to be [the] source, here. The claimant's request for workers compensation benefits is denied.
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> The respondent and insurance carrier moved for dismissal of the claim under K.S.A. 44-523(f)(2). That section allows the employer to apply for dismissal of the claim if one year has passed since the denial of the claim at preliminary hearing and the matter has not since proceeded to settlement hearing, award, or agreed award. The court has the discretion to grant the dismissal request or extend the time limit to prosecute the claim for good cause. The court does not find good cause to extend the time limit to prosecute this claim after repeated preliminary findings it is not a compensable claim. This claim is dismissed with prejudice.[4]

The claimant appealed to the Board. In an Order dated March 4, 2024, the Board concluded the claimant failed to prove he contracted work-related COVID and reversed the ALJ's dismissal of the claim after finding the respondent's motion to dismiss was premature.

On March 5, 2024, the respondent again filed an Application for Dismissal (E-6). On May 1, 2024, the claimant filed an E-3. The record contains no indication the claimant sought to extend the time to prosecute his claim nor did he present evidence of good cause. Following a joint preliminary and motion hearing on June 26, 2024, the ALJ ruled:

> The claimant sought benefits for alleged work-related Covid virus infection. This has been the subject of several preliminary hearings where it was held the claimant failed to prove he contracted the Covid virus or that he failed to prove he contracted the Covid virus from the workplace. More than one year has passed since the last preliminary hearing finding the alleged claim was not compensable, and more than one year from the Workers Compensation Appeals Board's affirming the finding. The claim is ripe for dismissal under K.S.A 44-523(f)(2) which says:
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> > In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer

[4] ALJ Order (Jan. 3, 2024) at 1-2.

> reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

Here, the only thing offered by way of "good faith reason for delay" was the claimant's filing for another preliminary hearing. He offered evidence that was much the same as the other hearings—printed news articles and the claimant's handwritten theories about how the Covid virus can be transmitted. According to the claimant, he was infected by toilets at the doctor's office where he provided the cleaning service. For support, he cited an article from a publication called C&EN that said there haven't been any confirmed cases of people catching Covid through exposure to feces or urine.

The claimant also testified that, at the time of his infection, he went nowhere but his home and the workplace, ergo, he was infected at the workplace. However, his evidence contained, in his own handwriting, a sheet of paper stating he had been to Price Chopper and Wal-Mart around the time he tested positive. And there has been no evidence to account for the various maladies he now attributes to Covid—cataracts, thyroid problems, lymph node problems, and urethral cancer.

Delaying this claim further would only serve to permit more preliminary hearings with the same lacking evidence. The court does not find this a good faith reason for delay. This claim is dismissed with prejudice.[5]

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues he contracted COVID while at work and he disputes the ALJ's Order. The respondent maintains dismissal under K.S.A. 44-523(f)(2) was appropriate and the Order should be affirmed.

1. The Order granting the respondent's motion to dismiss the claim with prejudice is affirmed.

K.S.A. 44-523(f)(2) states:

> In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer

[5] ALJ Order (July 2, 2024) at 1-2.

> reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

This claim was initially denied on November 3, 2022. The initial determination of lack of compensability occurred when a single Board Member affirmed the ALJ's denial of compensability on January 4, 2023. The respondent filed another motion to dismiss on March 5, 2024.

After a denial of compensability following a preliminary hearing, the claim did not proceed to a regular hearing within one year. The respondent filed a motion to dismiss based on lack of prosecution. The claimant presented no evidence of a good faith reason for delay. In such case, K.S.A. 44-523(f)(2) requires dismissal of the claim with prejudice, a final disposition.

The claimant's claim is dismissed with prejudice pursuant to K.S.A. 44-523(f)(2).

2. The claimant did not meet his burden of proving he contracted work-related COVID.

An employer is liable to pay compensation to an employee incurring personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.[6] The Workers Compensation Act should be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[7] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[8] 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.[9] To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[10]

K.S.A. 44-508 provides, in pertinent part:

> (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

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

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

[8] See *id*.

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

[10] See *id*.

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.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(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.

(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

(iii) the repetitive trauma is the prevailing factor in causing both the 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
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . .
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> (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.
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> (h) "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.

"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.[11]

Determination of this issue is likely moot, insofar as the resolution of issue one is dispositive. The Board is addressing this issue as a matter of comprehensiveness.

The record is unclear if the claimant is alleging injury from a single accident, injury by repetitive trauma or injury from an occupational disease. However, based on the record presented to the ALJ and considered by the Board on appeal, the claimant failed to prove he sustained a compensable injury.

The claimant failed to prove he actually contracted COVID while working for the respondent. No medical records indicate the cause of the claimant's COVID infection, or show he was infected at Centra Care. Rather, the claimant argues he must have contracted COVID while working because he inhaled bad-smelling air at Centra Care. Essentially, the claimant's argument is based on *post hoc, ergo propter hoc*: the symptoms follow the alleged exposure; therefore they must be due to it. In workers compensation

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[11] 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).

cases, the maxim of *post hoc, ergo propter hoc* is not competent evidence of causation.[12] In the absence of competent evidence establishing the cause of the claimant's COVID infection, the claimant failed to prove he sustained a compensable injury. Therefore, the request for workers compensation benefits is denied.

A hospital discharge summary from October 14 stated the claimant was exposed to COVID on September 13, but without any mention of a work-related link. The only evidence the claimant's work was the prevailing factor in developing COVID is his testimony. As noted by the ALJ, the claimant's theories as to getting COVID are speculative and not persuasive. Scientific journals discussing transmission of COVID do not constitute proof the claimant contracted COVID at Centra Care while he was working in September 2021.

With respect to an occupational disease, the claimant failed to prove the nature of his employment created an increased risk or a special employment-related risk of a COVID infection. The claimant suspects he was exposed to airborne particles of COVID left in Centra Care from people infected with COVID. This theory is speculative. The record does not establish a special employment-related risk associated with the respondent.

The claimant failed to prove work-related exposure to COVID or actually contracting COVID arising out of and in the course of his employment.

AWARD

WHEREFORE, the Board affirms the Order dated July 2, 2024. The claimant's claim is dismissed with prejudice pursuant to K.S.A. 44-523(f)(2).

IT IS SO ORDERED.

Dated this _____ day of August, 2024.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

[12] *See Chriestenson v. Russell Stover Candies*, 46 Kan. App. 2d 453, 461, 263 P.3d 821 (2011), *rev. denied* 294 Kan. 943 (2012).

c: (via OSCAR)
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Hon. Kenneth Hursh

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