

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL PETTIT

Claimant

v.

TSL CO. HOLDINGS LTD

Respondent

AP-00-0484-364

CS-00-0482-390

and

GREAT WEST CASUALTY COMPANY

Insurance Carrier

ORDER

Claimant appeals the August 1, 2024, Order issued by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Jacob M. Mark appeared for Claimant. Seth M. Jurcyk appeared for Respondent and Insurance Carrier.

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 July 31, 2024, including Claimant's Exhibits 1-4 and Respondent Exhibit A; and the pleadings and orders contained in the administrative file. The Board also reviewed Respondent's Objection to Claimant's Application for Review, Claimant's Response to Respondent's Objection, and the parties' briefs.

ISSUES

1. Does the Appeals Board possess authority to consider Claimant's Application for Review?
2. If the Appeals Board possesses authority to review this matter, did Claimant prove he sustained personal injuries from an accident arising out of and in the course of his employment with Respondent, including prevailing factor?

3. If the Appeals Board possesses authority to review this matter, is Claimant entitled to a preliminary award of temporary total disability compensation?

FINDINGS OF FACT

Claimant is 61 years old, and is employed by Respondent as a heavy equipment mechanic. Claimant's works on lift machines and repairs trucks. Claimant's work requires crawling, twisting, turning and lifting. The lifting includes moving drums weighing over 300 pounds. Claimant characterized his work as strenuous.

In 1999, Claimant sustained a work-related injury treated as a workers compensation claim in Missouri. Claimant indicated he injured his back and received conservative treatment. Claimant received a settlement based on 10% permanent disability to the body as a whole in Missouri. The records concerning the prior settlement or Claimant's course of treatment are not in evidence.

On March 5, 2024, Claimant was transporting a load of fifty-gallon drums of hydraulic fluid and washer fluid in a truck. The load shifted while Claimant was driving, and Claimant pulled over to secure the load. Claimant had to pull and tug on the drums to move them, and Claimant estimated each drum weighed 470 pounds.

As Claimant was moving the drums, he felt an immediate onset of sharp low back pain. Claimant also felt pain in both legs and across the right foot. Claimant was unable to stand up straight, but he continued working. Claimant drove to the delivery site, and helped a coworker unload the drums. After Claimant completed his work, he notified his supervisor. Respondent referred Claimant to Concentra for medical treatment. Claimant denied having lower extremity symptoms before March 5.

Claimant received conservative treatment from Dr. Wakwaya at Concentra from March 6, 2024, through April 3, 2024. On March 6, Claimant reported pain in his back and buttocks from lifting 300-pound drums at work. Examination of the lumbar spine revealed swelling, tenderness at L1-4, bilateral muscle spasms, limited range of motion and reduced muscle tone. Sensation was intact, no weakness was noted and no atrophy was found. Straight-leg raise testing was positive bilaterally. X-rays of the lumbar spine were interpreted as showing osteophytes, moderate facet hypertrophy, normal disc spaces and no acute fracture. Dr. Wakwaya diagnosed acute lumbar radiculopathy and a lumbar strain. Physical therapy and prescription medication were ordered, and Claimant was placed on light-duty restrictions effective March 7, 2024.

On March 8, 2024, Claimant returned to Concentra, and reported he felt worse with sharp pain running down both legs. Clinical examination was unchanged. X-rays of the left knee were interpreted as showing reduced joint space and no fracture. Claimant was

diagnosed with acute lumbar radiculopathy, lumbar strain and acute bilateral knee pain. Claimant was taken off work, and an MRI of the lumbar spine was ordered.

Claimant returned to Concentra on March 12, 2024, and reported pain radiating to the thighs, constant and sharp back pain, stiffness and reduced range of motion. Clinical examination was the same, and Dr. Wakwaya made the same diagnoses. Claimant was released to perform light-duty work. Claimant testified Respondent did not have light-duty work available.

On March 19, 2024, Claimant returned to Concentra and confirmed the MRI was scheduled for March 26, 2024. Clinical examination was unchanged. Dr. Wakwaya diagnosed Claimant with acute lumbar radiculopathy and a lumbar strain.

According to the report of the MRI of the lumbar spine performed on March 26, 2024, signal changes throughout L1 to S1 were noted. The radiologist interpreted the study as showing multilevel spondylosis resulting in multilevel spinal cord stenosis, compression of the thecal sac, and multilevel neural foraminal stenosis most pronounced at L3-4 and L4-5.

Claimant last saw Dr. Wakwaya at Concentra on April 3, 2024. Claimant reported right-sided low back pain with sharp pain shooting to the foot, which prevented Claimant from sleeping on the right side. Clinical examination was unchanged compared to prior visits. It is unclear from Concentra's records if the MRI was reviewed. Dr. Wakwaya diagnosed acute lumbar radiculopathy, spinal stenosis at the lumbar region with neurogenic claudication, and an annular tear of an intervertebral disc. Dr. Wakwaya did not believe Claimant's conditions were work-related, but he did not elaborate on etiology. Claimant was released to work full duty, and told to see his primary care physician for additional treatment for his current symptoms.

Claimant was evaluated by Dr. Ceule at his attorney's request. Dr. Ceule reviewed treatment records from Concentra, the MRI report and workers compensation pleadings from Kansas and Missouri. Claimant's course of treatment at Concentra was reviewed, and Dr. Ceule noted Claimant attended four physical therapy sessions. Dr. Ceule thought the MRI indicated multilevel spondylosis resulting in stenosis, and multilevel foraminal stenosis at L3-4 and L4-5. Dr. Ceule noted Claimant had a prior workers compensation injury thirty years ago, but the details of the injury or treatment were not recorded.

Clinical examination was notable for reduced right hip strength compared to the left. Dr. Ceule noted Claimant walked with a limp and used a cane. Tenderness and reduced range of motion of the lumbar spine was also noted. Straight-leg raise testing was positive bilaterally, along with muscle spasm of the bilateral thoracolumbar paraspinals and bilateral lumbar paraspinals. Bilateral sacroiliac joint tenderness was also present. No atrophy was present.

Dr. Ceule diagnosed a lumbar back sprain, radicular nerve pain to the lower legs consistent with the L3-5 distribution, and an annular tear of an intervertebral disc. Dr. Ceule believed all of Claimant's conditions were caused by the work-related accident of March 5, 2024. Dr. Ceule did not believe Claimant reached maximum medical improvement, and additional treatment was recommended. Dr. Ceule's treatment recommendations included a pain management evaluation and consultation by a spine surgeon. Temporary work restrictions were imposed.

Dr. Ebelke evaluated Claimant at Respondent's request on July 3, 2024. Claimant completed an intake form and a pain diagram. Claimant reported low back pain and bilateral leg pain, right greater than left, following a work-related accident occurring in March 2024. Prior back problems were denied. Claimant recalled having a work injury approximately thirty years ago, which Dr. Ebelke did not believe was relevant. Claimant walked with a cane. Claimant also reported occasional leg numbness and weakness, and feeling like his legs were giving out. Claimant was vaguely aware he had right hip arthritis.

Dr. Ebelke reviewed the treatment records from Concentra and Dr. Ceule's report. The MRI was reviewed by Dr. Ebelke, and he interpreted the study as showing degenerative disc disease at virtually every level of the lumbar spine, with bulging, facet arthritis and spinal stenosis. Dr. Ebelke thought the disc space at L5-S1 was fairly well maintained. A mild bulge at L5-S1 with signal changes interpreted as an annular tear or fissure of an indeterminable age, but not an acute change, was noted. A CT urogram taken due to an unrelated health condition was also reviewed and thought by Dr. Ebelke to display moderate right hip arthritis. Multiple osteophytes throughout the lumbar spine were noted, with arthritic facets. Dr. Ebelke thought Claimant possibly had Forestier's disease. A CT of the chest and lungs taken on June 18, 2024, was interpreted as showing multiple bridging osteophytes at the thoracic spine indicating an ankylosing condition unrelated to work. X-rays of the low back were interpreted as showing severe right hip arthritis and vacuum signs at the sacroiliac joint bilaterally.

Clinical examination was notable for an antalgic gait, tenderness of the low back to touch but no evidence of spasm, and poor range of motion. Lower extremities displayed full strength, no reflexes of both knees or ankles, trace evidence of clonus on the right side, mild bilateral edema, and reduced right hip rotation consistent with arthritis. Dr. Ebelke also noted subjectively intermittent reduced sensation in a nondermatomal pattern.

Dr. Ebelke thought the work-related accident caused a strain or overuse syndrome of the low back, and may have triggered or precipitated the onset of low back or leg symptoms. Dr. Ebelke did not believe the work-related accident was the prevailing factor causing Claimant's current symptoms or overall condition. Dr. Ebelke thought Claimant had well-documented and clearly preexisting severe stenosis at L4-5 and to a lesser degree at L3-4, right hip arthritis, Forestier's disease, facet arthritis at L4-5 and L5-S1, and degenerative disc disease at L1-5.

Dr. Ebelke stated the natural history of most spinal stenosis patients entails being symptom-free until the last few months before being seen by a physician. Dr. Ebelke did not believe Claimant's work-related injury was significant or permanent, and did not produce impairment. According to Dr. Ebelke, virtually everything Claimant presented was preexisting. Claimant required restrictions and probably surgery on account of the preexisting condition, but not for the work-related injury.

Claimant testified he remains symptomatic and is unable to work. Claimant denied working anywhere since March 5, 2024, and denied receiving unemployment compensation. Claimant received short-term disability for eight weeks. Currently, Claimant has low back and leg pain when he stands, and his legs become weak when he walks. Claimant has problems sleeping due to pain running down his legs. Claimant denied having this type of pain, or using a cane to walk, before March 5, 2024. Claimant wanted additional medical treatment and temporary total disability compensation.

A preliminary hearing on Claimant's request for compensation took place on July 31, 2024. Claimant argued the work-related accident caused his current medical condition necessitating further treatment. Claimant also argued his current medical condition rendered him temporarily and totally disabled from working. Respondent admitted Claimant sustained a compensable low back injury, but did not require additional medical treatment. At the conclusion of the preliminary hearing, Respondent also argued the work-related accident was not the prevailing factor causing Claimant's current medical condition or need for additional medical treatment.

On August 1, 2024, ALJ Hursh issued the Order. The work-related accident was reviewed, as well as Claimant's course of treatment. The examinations by Drs. Ceule and Ebelke were also reviewed. ALJ Hursh found the opinions of Dr. Ebelke the most persuasive, and found Claimant sustained a work-related low back strain, which did not require additional medical treatment. ALJ Hursh found the medical conditions requiring additional medical treatment were not work-related. ALJ Hursh stated the condition of Claimant's work-related injury was permanent, and Claimant was not eligible to receive temporary total disability compensation. Claimant's requests for medical treatment and temporary total disability compensation were denied. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Order is erroneous because he proved the prevailing factor causing his current medical condition and need for treatment was the work-related accident of March 5, 2024. Claimant points out he was symptom-free and capable of working prior to March 5, 2024, and Concentra's findings of acute radiculopathy and the MRI evidence of an annular tear were objective evidence of a change of physical condition rendering the claim compensable. Claimant argues he should be awarded temporary total disability and

additional medical treatment. Claimant also argues the Board has jurisdiction to review this matter because a compensability issue is involved.

Respondent argues the Board does not possess jurisdiction to review the Order because it accepted Claimant's lumbar strain/sprain as compensable, and no other compensability issues are present. Respondent argues the denial of compensation because Claimant did not require additional treatment for his work-related injury and because Claimant's condition was permanent are not reviewable. In the alternative, Respondent argues the 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.¹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.² 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.³

1. THE APPEALS BOARD POSSESSES JURISDICTION TO REVIEW THE ORDER'S COMPENSABILITY DETERMINATION, BUT NOT THE MERITS OF THE DENIALS OF MEDICAL TREATMENT OR TEMPORARY TOTAL DISABILITY COMPENSATION.

The Board first addresses whether it possesses authority to review the Order. The Board possesses the authority to review preliminary orders on disputed issues of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether certain defenses apply.⁴ "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.⁵ If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.⁶ Where an underlying point of contention is whether a work-related accident was the prevailing factor causing the medical condition, the Board has jurisdiction to review the compensability issue under K.S.A. 44-

¹ See K.S.A. 44-501b(a).

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-534a(a)(2).

⁵ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁶ See *id.* at 676.

534a.⁷ The Board, however, does not possess jurisdiction to consider the accompanying issue of whether an administrative law judge erred in finding treatment was not necessary to cure or relieve the alleged injury.⁸

Claimant argued the work-related accident of March 5, 2024, caused a lumbar sprain, L3-5 radiculopathy and an annular tear of an intervertebral disc. Respondent admitted it accepted the lumbar sprain as compensable, but argued at preliminary hearing the work-related accident was not the prevailing factor causing Claimant's other medical conditions. Respondent also argued the work-related accident was not the cause of Claimant's current need for medical treatment. The undersigned Board Member finds the issue of whether the work-related accident caused Claimant's current medical condition is a compensability issue the Board may review under K.S.A. 44-534a. The Board, however, does not possess authority to review whether Claimant requires additional medical treatment to cure or relieve a work-related injury, or whether Claimant is ineligible to receive temporary total disability compensation because his condition is permanent.

2. CLAIMANT DID NOT PROVE THE WORK-RELATED ACCIDENT WAS THE PREVAILING FACTOR CAUSING HIS CURRENT MEDICAL CONDITION.

The Board next addresses whether Claimant met his burden of proving the work-related accident was the prevailing factor causing his medical condition. 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.⁹ 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.¹⁰ 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.¹¹ 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.¹²

⁷ See *Cantrell v. Timber Creek Constr.*, No. 1,063,723, 2016 WL 6584719, at *6 (Kan. WCAB Oct. 18, 2016).

⁸ See *id.*

⁹ See K.S.A. 44-508(d).

¹⁰ See K.S.A. 44-508(d), (g).

¹¹ See K.S.A. 44-508(f)(2).

¹² See K.S.A. 44-508(f)(2)(B).

It is undisputed the event of March 5, 2024, occurred. Claimant was performing work duties in service to Respondent when he felt a sudden onset of symptoms consistent with an acute injury. It is also undisputed the event of March 5, 2024, produced a lumbar strain/sprain injury treated conservatively at Concentra. At issue is whether the March 5, 2024, accident was the primary factor, compared to any other factor, causing the remainder of Claimant's medical conditions. Determination of this issue requires examination of the relevant evidence contained in the entire record.

Claimant testified he did not have radicular symptoms prior to March 5, 2024, and was capable of performing strenuous physical labor before the accident. Claimant had a prior work-related injury in 1999, but no treatment records or other evidence establishing the location of the prior injury, course of treatment or the need for restrictions are in the record. Essentially, Claimant argues he was symptom-free before the accident, and the onset of symptoms indicates a compensable injury beyond a mere aggravation. The Act states, however, an injury is not compensable solely because it renders a preexisting condition symptomatic. Claimant's testimony regarding the onset of symptoms, alone, does not establish compensability.

The medical records from Concentra indicate an initial diagnosis of acute lumbar radiculopathy and lumbar strain. Claimant received conservative treatment for the lumbar strain, but remained symptomatic. An MRI was ordered, which was interpreted by the radiologist as showing multilevel spondylosis causing multilevel spinal cord stenosis, thecal sac compression, and multilevel neural foraminal stenosis. Dr. Wakwaya also thought an annular tear was present. Dr. Wakwaya subsequently stated Claimant's condition did not appear to be related to the work-related accident, but Dr. Wakwaya did not provide an explanation for his opinion.

Dr. Ceule, Claimant's examining physician, reviewed the Concentra and MRI records, and evaluated Claimant. Dr. Ceule diagnosed a lumbar back sprain, radicular nerve pain to the lower legs at L3-5, and an annular tear. Dr. Ceule thought all of Claimant's conditions were caused by the work-related accident. Like Dr. Wakwaya, Dr. Ceule did not provide a explanation for his causation opinion.

Dr. Ebelke, a spine surgeon, evaluated Claimant at Respondent's request. Dr. Ebelke reviewed Claimant's treatment records and the report of Dr. Ceule. Dr. Ebelke considered the prior work compensation injury, but did not think it was relevant. Dr. Ebelke reviewed the MRI extensively with other radiologic studies, including a CT urogram and CT of the chest and lungs. Dr. Ebelke thought Claimant sustained a strain/sprain injury from the work-related accident, and the accident could have triggered or precipitated symptoms in the low back and legs. Dr. Ebelke thought the balance of Claimant's medical conditions were preexisting and unrelated to the work-related accident. Dr. Ebelke stated the findings of an annular tear were age-indeterminate and did not indicate an acute injury. Dr. Ebelke

did not recommend additional treatment to cure or relieve the work-related strain/sprain injury. Dr. Ebelke explained how preexisting stenosis could initially manifest symptom-free.

Having considered the competing medical opinions, the undersigned, like ALJ Hursh, finds the opinions of Dr. Ebelke the most credible on causation. Dr. Ebelke is a spine surgeon, and reviewed in detail the radiologic studies he consulted. The MRI, CT scans and x-rays clearly document degenerative and ankylosing conditions at multiple levels, and did not display an acute change of structure. Dr. Ebelke suggested preexisting spinal stenosis could exist symptom-free for a long time before becoming symptomatic and necessitating treatment. Dr. Ebelke's opinions are supported by the radiologic tests, and Dr. Ebelke explained the basis for his opinions. Under the Act, an injury is not compensable merely because it was rendered symptomatic. Based on Dr. Ebelke's opinion, the undersigned finds Claimant's compensable injuries consist of a lumbar strain/sprain injury, but Claimant did not prove the work-related accident was the prevailing factor causing the balance of his other medical conditions requiring additional medical treatment.

3. THE APPEALS BOARD DOES NOT POSSESS JURISDICTION TO REVIEW THE DENIAL OF TEMPORARY TOTAL DISABILITY SEPARATELY.

Independent of the compensability issue, Claimant argues he is entitled to temporary total disability compensation. As stated earlier, while the Board may have authority to consider a compensability determination, the Board does not have jurisdiction to consider an accompanying issue of whether additional medical treatment is necessary to cure or relieve the effects of an alleged injury.¹³ The presence of a compensability issue does not create jurisdiction under K.S.A. 44-534a to review other issues not pertaining to compensability. Entitlement to temporary total disability compensation is not a compensability issue. The Board does not have authority to review the Order's determinations Claimant was not rendered temporarily and totally disabled on account of the work-related injury. As a result, Claimant's request for review of the issue is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Kenneth J. Hursh, dated August 1, 2024, is affirmed. Claimant's application for review is dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of September, 2024.

¹³ See *Cantrell*, 2016 WL 6584719, at *6.

MICHAEL PETTIT

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WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Jacob M. Mark
Seth M. Jurcyk
Hon. Kenneth J. Hursh