BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT LYNN BURTON Claimant VS. **FIBERGLASS SYSTEMS A/K/A VARCO** Respondents AND **PACIFIC EMPLOYERS INSURANCE** **ACE AMERICAN INSURANCE CO.** Insurance Carriers	)))))))))))))	Docket Nos. **1,012,655;** **1,016,105 &** **1,019,424**

ORDER

Respondent Fiberglass Systems and its insurance carrier, ACE American Insurance Co. request review of the Application for Post Award Medical and Review and Modification by Administrative Law Judge Thomas Klein. The Board heard oral argument on September 16, 2008.

APPEARANCES

John Carmichael of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the pleadings and correspondence contained in the administrative file, the transcripts of hearings and deposition taken in connection with the litigation of claimant's Awards in Docket Nos. 1,012,655, 1,016,105 and 1,019,424, as well as the transcript of the Hearing on Application for Review and Modification held on February 7, 2008; the transcript of the Hearing on the Application for Post-Award Medical held on October 11, 2007; and the transcript of the deposition of John Estivo, M.D. taken on December 7, 2007.

ISSUES

Although these three docketed claims were consolidated for litigation purposes the Administrative Law Judge (ALJ) issued a separate award for Docket No. 1,012,655 and a

separate award combining Docket Nos. 1,016,105 and 1,019,424. Nunc Pro Tunc Awards were later issued for each award. In Docket No. 1,012,655 the award was for a scheduled disability to claimant's left lower extremity but it was further determined that claimant had not suffered a permanent disability to his back. In Docket Nos. 1,016,105 and 1,019,424 the award was for a work disability as a result of repetitive injuries claimant suffered to his neck, shoulder and bilateral upper extremities.

Claimant then filed applications for post-award medical seeking additional treatment for his knee and back in Docket No. 1,012,655 and for his shoulder in Docket Nos. 1,016,105 and 1,019,424. All three docketed claims were included in the post-award hearing held on October 11, 2007. Before the hearing began respondent had authorized a referral to Dr. Paul C. Pappademos for examination and treatment, if necessary, of the claimant's left knee. And respondent had referred claimant to Dr. John P. Estivo for examination and evaluation to determine if claimant required treatment for his shoulder or back.

On October 31, 2007, an application for review and modification in Docket No. 1,012,655 was filed by claimant's attorney. At the review and modification hearing held on February 7, 2008, the claimant sought temporary total disability compensation for the time period from October 23, 2007 through January 9, 2008, when Dr. Pappademos had taken claimant off work due to his left knee.

On June 10, 2008, the ALJ entered a decision styled Application for Post Award Medical and Review and Modification. This decision determined the issues raised at both the post-award medical hearing held on October 11, 2007, and the review and modification hearing held on February 7, 2008. The post-award medical hearing resulted in appointment of Dr. Pappademos as the authorized treating physician for claimant's knee.[1] The ALJ further ordered respondent to designate a physician to provide claimant physical therapy and a trial with a TENS unit as well as any further treatment necessary for his back. But the ALJ denied claimant's request for further treatment for his shoulder. Finally, the ALJ awarded $768.76 in post-award attorney fees. The decision in the review and modification proceeding in Docket No. 1,012,655, resulted in an award to claimant of temporary total disability compensation benefits from October 23, 2007 through January 9, 2008.

Respondent requests review of the following: (1) whether the ALJ erred in finding claimant is entitled to post award medical treatment; and, (2) whether the ALJ erred in awarding temporary total disability compensation while claimant was receiving permanent partial disability compensation.

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[1] As previously noted the respondent had, on the day of the post-award hearing, already authorized Dr. Pappademos to provide treatment for claimant's left knee.

Respondent argues additional treatment for claimant's back should be denied as the only medical evidence offered at the post-award medical hearing was provided by Dr. Estivo and he opined claimant did not need further treatment for his back. Respondent further argues claimant should be denied temporary total disability compensation because he is receiving permanent partial disability compensation (work disability). Because both types of compensation are for wage replacement, respondent argues claimant cannot receive both at the same time as that would result in a duplication of benefits. In the alternative, respondent argues the permanent partial disability benefits should be stayed while claimant receives the temporary total disability benefits.

Claimant argues he is entitled to temporary total disability compensation because he was taken off work due to his knee injury which was the result of a separate discrete injury and an award in a separate docketed claim from the award for the permanent partial disability (work disability). Stated another way, the claimant suffered a distinct traumatic injury to his left knee and is entitled to compensation for that injury irrespective of his later award for repetitive injuries to his neck, right shoulder and bilateral upper extremities. Claimant further argues the ALJ's decision that respondent provide medical treatment for his back should be affirmed.

The issues for Board determination are whether claimant is entitled to additional medical treatment for his back and whether he is entitled to temporary total disability compensation for the time period, post award, that the authorized doctor had taken him off work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Post Award Medical

As previously noted, at the post-award medical hearing the claimant was seeking additional treatment for his left knee and back in Docket No. 1,012,655 and his right shoulder in Docket Nos. 1,016,105 and 1,019,424. At the start of the hearing the parties agreed that respondent had authorized claimant to see Dr. Pappademos for his left knee and had referred claimant to Dr. Estivo for evaluation of his need for right shoulder and back treatment. The ALJ's decision granted claimant additional treatment for his knee with Dr. Pappademos and authorized treatment for his back but the ALJ denied further treatment for claimant's right shoulder.

Respondent argues that the ALJ erred in granting claimant's request for treatment for his back and further argues because it had authorized Dr. Pappademos to treat claimant's knee it was inappropriate to award such treatment.

Claimant testified that he was having a lot of back pain. The claimant had been provided treatment for his back with Dr. Philip Mills. Claimant testified that his back had been treated with a TENS unit and duragesic patch prescribed by Dr. Mills. After Dr. Mills left town, Dr. Stein examined and evaluated claimant's back. Claimant testified that Dr. Stein did not provide any additional treatment other than claimant's medications which had been prescribed by Dr. Mills. Claimant testified that his prescription for Duragesic patches has run out and that he is in need of an authorized doctor to continue the prescriptions that Dr. Mills had prescribed.

On October 5, 2007, Dr. John P. Estivo performed an examination and evaluation of claimant. He diagnosed claimant as having status post rotator cuff repair to the right shoulder with some mild tendonitis and degenerative changes to the lumbar spine with a mild strain. The doctor opined claimant was not in need of any further medical treatment for his lumbar spine. Dr. Estivo noted that claimant did not have a significant limp and the way he walked would not cause further injury to his lumbar spine. Dr. Estivo recommended that if claimant performed basic stretches and exercises for his lumbar spine and lose weight his lumbar spine pain should completely resolve. Dr. Estivo agreed claimant has had some mild muscular strains to his lower back due to an altered gait while recovering from his left knee surgeries.

Dr. Estivo testified that claimant's physical examination of his shoulder was normal and therefore no additional testing was required. The doctor opined claimant had complete range of motion and a normal examination. With regard to claimant's back pain, Dr. Estivo opined that claimant was overweight and he has some mild arthritis in his back. He further opined that the back pain was not caused by his knee and gait.

No other medical opinions were offered at the post-award medical hearing. However, the ALJ, in determining that claimant should receive treatment for his back, relied upon a report issued by Dr. Stein in July 2005 which suggested that a trial with a TENS unit might be appropriate. But Dr. Stein, in a progress note dated August 8, 2005, later stated there was nothing further to do in regard to claimant's lower back. Moreover, the more contemporaneous examination by Dr. Estivo resulted in his opinion that claimant is not in need of treatment for his back. The Board finds the opinion of Dr. Estivo, in this instance, is persuasive. The Board further finds the claimant has failed to meet his burden of proof to establish that he needs additional medical treatment for his back in Docket No. 1,012,655.

At the post-award proceeding the claimant also sought additional treatment for his knee. At the start of the hearing the claimant's counsel noted that he had been told by

respondent's counsel a few days before that respondent intended to authorize Dr. Pappademos to treat claimant's knee. The Board finds that under the factual circumstance in this case it was appropriate for the ALJ to memorialize this authorization in his decision.

Review and Modification

A review and modification hearing in Docket No. 1,012,655 was held on February 7, 2008. Claimant requested temporary total disability compensation beginning October 23, 2007 through January 9, 2008. At the earlier hearing on claimant's request for post-award treatment for his knee the parties had informed the ALJ that a few days before the hearing the respondent had agreed to authorize Dr. Pappademos to treat the knee. Claimant saw Dr. Pappademos on October 23, 2007, and the doctor took claimant off work at that time. On January 9, 2008, Dr. Pappademos provided claimant with work restrictions and released him from further treatment but to return as needed.

Respondent had denied payment of the temporary total disabililty compensation because claimant was receiving permanent partial disability benefits at the rate of $338.35 per week consistent with the Award Nunc Pro Tunc in Docket Nos. 1,016,105 and 1,019,424. Respondent argued that claimant is not entitled to receive temporary total disability compensation at the same time he is receiving permanent partial disability compensation.

Initially, it should be noted that there is no dispute that claimant was taken off work from October 23, 2007 through January 9, 2008, by the authorized physician. This was the result of a discrete injury claimant suffered to his knee in Docket No. 1,012,655. This was a separate and distinct injury from those which were the subject of his separate claims in Docket Nos. 1,016,105 and 1,019,424.

In this instance claimant suffered injuries to his neck, shoulder and bilateral upper extremities which resulted in a work disability award in Docket Nos. 1,016,105 and 1,019,424. Claimant suffered a separate and distinct injury to his knee in Docket No. 1,012,655 for which he underwent numerous surgeries. While receiving treatment for his knee he was taken off work and was entitled to temporary total disability compensation. Simply stated, claimant suffered separate and distinct injuries which resulted in separate and distinct awards and there is no provision in the Workers Compensation Act which mandates an offset under these factual circumstances. The Board Affirms the ALJ's Award of temporary total disability compensation in Docket No. 1,012,655.

AWARD IN DOCKET NOS. 1,012,655; 1,016,105 & 1,019,424

WHEREFORE, it is the decision of the Board that the Application for Post Award Medical and Review & Modification Award of Administrative Law Judge Thomas Klein dated June 10, 2008, on claimant's request for post-award medical in Docket Nos.

1,012,655; 1,016,105 and 1,019,424 is modified in Docket No. 1,012,655 to find claimant failed to meet his burden of proof to establish a need for medical treatment for his back and affirmed in all other respects.

AWARD IN DOCKET NO. 1,012,655

WHEREFORE, it is the decision of the Board that the Application for Post Award Medical and Review & Modification Award of Administrative Law Judge Thomas Klein dated June 10, 2008, on claimant's request for review and modification in Docket No. 1,012,655 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority and believe that claimant should receive additional medical treatment for his back. Claimant's testimony is uncontradicted that he continues to have low back complaints. Indeed, Dr. Stein early on recommended physical therapy and additional use of a TENS unit, which was never provided. Indeed, Dr. Estivo, who was hired by respondent to evaluate claimant for purposes of this review and modification proceeding, examined claimant in October 2007 and found that he continued to have symptoms of mild lumbar strain. Moreover, Dr. Estivo indicated that exercises and a weight loss program should help claimant.

In short, the evidence establishes that claimant has ongoing low back symptoms that might be relieved by additional treatment. Accordingly, I would affirm the ALJ's conclusion that respondent should provide claimant with an authorized physician to provide what, if any, additional medical care is reasonably necessary to address claimant's ongoing symptoms.

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BOARD MEMBER

c: John Carmichael, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge