

by it. Temporary Total Disability during that treatment is to be provided as previously ordered.

For reasons that are not readily apparent, Judge Foerschler then issued a second order, which is dated April 11, 2006, and entitled Order on 2nd Preliminary Hearing. That preliminary hearing order denied claimant's request for surgery. But the Judge indicated claimant was entitled to receive "palliative medication" and, perhaps, temporary total disability benefits, upon presenting "documentary evidence." The April 11, 2006, Order on 2nd Preliminary Hearing reads, in part:

The workers compensation benefits for Clifford Reeves were re-considered at another preliminary hearing on March 16, 2006 and the matter taken under advisement. Extensive previous treatment for his heel injury has been provided, but has not eliminated problems, particularly of function and comfort. Claimant's case has recently been considered by Susan Boner [*sic*], M.D., a foot specialist, after determination of such a long delay in an appointment with Dr. Horton. Her recommendation of additional surgery suggested for Mr. Reeves appears in her report of examination on December 21, 2005, in Ex. 2 in the transcript of the recent hearing. Its distribution was somewhat mysterious. However, it is not very encouraging in its predictions of expectations. Considering the possible effects on both parties, it should be undertaken only by the mutual agreement of the party submitting to the procedure and the party liable for its expense and outcome. This accord does not appear likely at this time, so no further treatment, other than palliative medication, is ordered.

Respondent and its insurance carrier appealed the March 30, 2006, Preliminary Decision and, in essence, contend claimant failed to prove his present request for medical treatment is related to his May 2004 injury. They also challenge the April 11, 2006, Order for the same reason. In summary, respondent and its insurance carrier request the Board to reverse both preliminary hearing orders.

In addition, respondent and its insurance carrier contend that the Board should not consider claimant's brief as it was arguably filed outside its allotted time. Moreover, they contend the Board should not consider claimant's supplemental brief as they allege supplemental briefs are not permitted in preliminary hearings.

Claimant appealed the April 11, 2006, Order. Claimant argues the Judge issued the order without conducting another hearing or having any additional evidence. Accordingly, claimant argues the Judge did not have the authority or jurisdiction to issue that preliminary hearing order. Finally, claimant denies his present need for medical treatment arose from a later injury and, in the alternative, any later injury should be considered the natural consequence of his May 2004 injury. In summary, claimant requests the Board to set aside the April 11, 2006, Order, leaving the March 30, 2006, Preliminary Decision in effect.

The issues before the Board on this appeal are:

1. Is claimant's present need for medical treatment related to his May 2004 accident, which arose out of and in the course of his employment with respondent, or did the need for the requested medical treatment arise from a later, unrelated accident?
2. Should the Board strike either claimant's brief or claimant's supplemental brief filed with the Board?
3. Did the Judge have the authority and jurisdiction to issue the April 11, 2006, Order on 2nd Preliminary Hearing?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes that claimant's brief to this Board should be accepted, although it was filed after its designated date. Claimant did not appeal the March 30, 2006, Preliminary Decision but respondent and its insurance carrier did. But claimant did appeal the April 11, 2006, Order, by facsimile on April 18, 2006.

K.A.R. 51-18-4 sets forth the time schedule for briefs to be filed with the Board. But in this claim, there was confusion as to the effect of consolidating for purposes of review the appeals of the two orders in question. More specifically, there was confusion as to whom should be considered the appellant and questions as to whether the time periods for filing briefs should be governed by the appeal of the March 30, 2006, Preliminary Decision or by the appeal of the April 11, 2006, Order. Moreover, the issues in these appeals should not surprise any party. The Board does not believe respondent and its insurance carrier are unduly prejudiced if the Board considers claimant's brief. Accordingly, under these circumstances, the Board denies respondent and its insurance carrier's requests to strike both claimant's brief and claimant's supplemental brief.

The Board concludes the April 11, 2006, Order on 2nd Preliminary Hearing should be set aside. The Judge decided the issues presented to him at the March 16, 2006, preliminary hearing in the March 30, 2006, Preliminary Decision. In fact, by the time the Judge issued the April 11, 2006, Order, respondent and its insurance carrier had already appealed the March 30, 2006, Preliminary Decision to this Board.

There is nothing in the March 30, 2006, Preliminary Decision to indicate Judge Foerschler was taking any issues under advisement to be addressed in a later supplemental order. There must be a certain finality to preliminary hearing orders and there must be a certain level of due process. Consequently, under these circumstances, the Judge did not have the authority or jurisdiction to revisit the issues that were

adjudicated in the March 30, 2006, Preliminary Decision. In short, the April 11, 2006, Order should be set aside.

Claimant contends he has continued to experience left foot and ankle problems from his May 4, 2004, accident despite the medical treatment he received for that injury. Conversely, respondent and its insurance carrier contend claimant injured his left foot and ankle on July 13, 2005, while working for General Pet Supply as a delivery man. In the alternative, they contend claimant injured his left foot and ankle working as a certified nurses' aide, which is the work claimant performed after he left the pet supply company.

After he injured his left foot and ankle in the May 2004 accident, claimant received medical treatment, including arthroscopic surgery, from Dr. Daniel D. Schaper. The doctor released claimant from treatment in late January 2005. But shortly afterwards, claimant's ankle began to hurt again.

Respondent did not take claimant back to work as a security guard. Consequently, claimant looked for other employment and in approximately May 2005 claimant found a job working for General Pet Supply delivering dog food to veterinarians. In June 2005, after working for the pet supply company for only three or four weeks, at his attorney's request claimant saw Dr. Theodore L. Sandow, Jr., for an evaluation. Claimant told the doctor that being on his feet more had caused a constant aching and throbbing in his left ankle. Dr. Sandow concluded claimant's ongoing symptoms were related to his May 2004 accident and recommended that claimant be evaluated by a foot and ankle surgeon.

Claimant worked for the pet supply company for a couple of months but eventually quit due to his symptoms. In fact, the pet supply company referred claimant for medical treatment after reporting to the State of Missouri that claimant had sustained a work-related injury, which claimant now denies. From the medical records presented at the first preliminary hearing, which was held in October 2005, it appears claimant received that medical treatment in July 2005.

Shortly after leaving the pet supply company, claimant worked for a short period of time as a certified nurses' aide. But claimant experienced problems with his left foot and ankle in that job. According to claimant, his employer placed him on medical leave.

In August 2005, respondent's insurance carrier permitted claimant to return to Dr. Schaper. The doctor recommended an MRI but the insurance carrier refused to provide that study until Judge Foerschler ordered it after the October 2005 preliminary hearing. Eventually claimant received the study and in November 2005 Dr. Schaper indicated that the present lesion in claimant's left foot and ankle did not appear to have changed. Consequently, the doctor could not attribute claimant's ongoing foot and ankle problems to a new injury. In his November 21, 2005, report, the doctor concluded, in part:

This is in regard to Clifford Reeves. I saw Mr. Reeves in the office today on November 21, 2005 and I had seen him previously on multiple occasions. Mr. Reeves basically, in my opinion, has an ongoing problem with his ankle related to the original injury and surgery. He had ankle arthroscopy in 2004 in the fall and went on to improve. I released him on January 24, 2005. He tells me that two weeks after I released him, his ankle began to hurt again and he was not allowed by workers' comp to come back and see me. It continued to hurt. He tried another job, was on his feet a lot and the ankle became too sore to be tolerated. He is not able to work at this time doing a job where he walks around. He states his ankle now hurts with everyday activities. *There was no re-injury as far as I know either by history or by evidence from studying his MRI and examining his ankle today.*¹ (Emphasis added.)

Dr. Schaper recommended that claimant see Dr. Greg Horton, who is a foot and ankle specialist. But claimant could not obtain an appointment with Dr. Horton within a reasonable time and, therefore, an appointment was made with Dr. Susan K. Bonar. Dr. Bonar saw claimant in December 2005 and told claimant he needed surgery on a ligament in his foot. Furthermore, Dr. Bonar advised claimant that the arthroscopic surgery claimant received from Dr. Schaper did not address the actual injury in his foot.

Dr. Bonar noted in her medical report that the surgery she recommends may not make claimant pain-free but there is an excellent chance of improving his pain quite a bit. Later, in early February 2006, Dr. Bonar wrote respondent's insurance carrier and advised that "50% of his problem is related to his previous work injury and 50% of the problem is related to his current work injury."² There is nothing in the doctor's notes to indicate what prompted her to write that letter or to what current work injury she is referring. On the other hand, the doctor initially believed claimant's present symptoms were due to scarring and tenderness in the anterolateral corner of the ankle and lateral ankle ligament.

At this juncture, the Board concludes claimant's present symptoms are directly related to his May 2004 injury. Claimant's symptoms improved following his earlier arthroscopic surgery and they remained relatively mild as long as he remained off work. But as soon as claimant returned to work and began walking and standing on a regular basis, the left ankle symptoms returned. Based upon the present record, it seems claimant's left ankle symptoms are the natural sequelae of his May 2004 injury. Moreover, the evidence does not establish that claimant sustained a later left foot or ankle injury that accounts for his present symptoms. In summary, the March 30, 2006, Preliminary Decision should be affirmed.

¹ P.H. Trans. (March 16, 2006), Cl. Ex. 1.

² *Id.*, Resp. Ex. A.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.³

WHEREFORE, the Board affirms the March 30, 2006, Preliminary Decision entered by Judge Foerschler. But the Board sets aside the April 11, 2006, Order on 2nd Preliminary Hearing.

IT IS SO ORDERED.

Dated this ____ day of June, 2006.

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ K.S.A. 44-534a(a)(2).