

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROSA LUNA</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,187
<b>WESTERN UNIFORM &amp; TOWEL SERVICE</b>	)	
Respondent	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the January 2, 2009, Post Award Medical order of Administrative Law Judge Nelsonna Potts Barnes (ALJ).

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Post Award Medical order of the ALJ. The record includes the transcript of the Post Award Hearing of September 2, 2008, with exhibits; the Stipulation of medical records entered on October 9, 2008; and the documents filed of record in this matter with the Kansas Workers Compensation Division (Division).<sup>1</sup>

**ISSUES**

Claimant was referred by agreement of the parties to orthopedic surgeon George L. Lucas, M.D., for an examination and treatment recommendations on November 27, 2007.

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<sup>1</sup> The record also contains the deposition of Bonnie Luna taken July 5, 2007, in the matter of Mario S. Luna v. Remediation Contractors, Inc., Docket No. 1,030,496. This deposition does not seem to be connected to this matter, but it was listed as part of the record in the Post Award Medical decision of the ALJ.

Dr. Lucas referred claimant to Novacare Outpatient Rehabilitation for physical therapy. A bill in the amount of \$534.00 was incurred. Claimant requested payment of the bill as authorized medical treatment. Respondent objected, contending the shoulder was not part of the original injury and, thus, did not arise out of and in the course of claimant's employment with respondent. Respondent's liability for the payment of the physical therapy bill as authorized medical treatment is the only issue before the Board.

#### FINDINGS OF FACT

Claimant, a long-term employee of respondent, suffered a series of injuries to her upper extremities, with an agreed injury date of October 14, 2004. Claimant's initial symptoms began in 1998 while working for respondent. She was originally awarded a 19 percent whole body functional impairment by the ALJ in an Award dated January 10, 2007. That Award was appealed to the Board and modified in an Order dated May 15, 2007, granting claimant a 15.5 percent loss of use of the right hand and a 7.5 percent loss of use of the left hand based on the Supreme Court's decision in *Casco*.<sup>2</sup> The awards were limited to claimant's upper extremities at the level of the hands. However, the ALJ in the original Award noted that, "[t]he pain was in claimant's hands and wrists, but also in her elbows and shoulders."<sup>3</sup> The Board's Order of May 15, 2007, did not discuss this finding by the ALJ.

An Application For Post-Award Medical, form K-WC E-4, was filed by claimant on July 27, 2007, requesting medical treatment for claimant's ongoing problems. No hearing was held as the parties agreed that claimant could return to Dr. Lucas, the original authorized treating physician, for an examination. Dr. Lucas, in his report of November 27, 2007, noted that claimant continued as a working supervisor with respondent. Claimant's examination was basically normal. In the November 27, 2007, report, it says, "[s]he has a full range of motion of the right shoulder with some pain on elevation of the shoulder and some pain with an impingement test." The possibility of rotator cuff tendinitis was discussed. Dr. Lucas then recommended a period of physical therapy for the shoulder, and claimant was referred to Novacare. In a follow-up report of January 30, 2008, Dr. Lucas stated that the shoulder complaint causes were multifactorial. He went on to state that rotator cuff tendinitis situations can be aggravated by lifting episodes, but he was unable to "swear that this occurred at work or at home."<sup>4</sup> Respondent did not object to the referral for physical therapy. The objection came after the presentation of the bill for the physical therapy.

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<sup>2</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

<sup>3</sup> Award of January 10, 2007, at 4, paragraph # 6.

<sup>4</sup> Stipulation filed October 9, 2008.

Claimant was referred by her attorney to board certified independent medical examiner Pedro A. Murati, M.D., for an examination on October 31, 2007. Dr. Murati had earlier examined claimant on August 23, 2005. At the time of the 2007 examination, Dr. Murati diagnosed claimant with pain in both upper extremities and a decreased range of motion in her right shoulder. He determined that claimant may have a right rotator cuff tear versus sprain. He then recommended cortisone injections in the shoulder, a possible MRI, appropriate anti-inflammatory medication and physical therapy. Dr. Murati also opined that claimant's current diagnoses were a direct result of the May 12, 1999, work-related injury and the aggravations during her employment with respondent.

The ALJ found that, while claimant did complain of pain in her shoulders in 2004, the treatment and impairment ratings were confined to her hands. The ALJ then denied claimant's request for payment of the physical therapy bill, after determining that neither medical opinion persuaded the Court that claimant's shoulder complaints were causally related to the original injury.

#### PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact 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.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.<sup>8</sup>

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<sup>5</sup> K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 44-501(a).

<sup>8</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

Claimant requests payment of the physical therapy bill from the treatment ordered by Dr. Lucas, claimant's original treating physician and the doctor to whom claimant was referred by agreement of the parties. No objection to the physical therapy was raised by respondent. Only an objection to the payment of the bill after the physical therapy was completed. The ALJ denied payment based on a finding of a lack of causation between the shoulder complaints and the original injuries. The medical evidence in this record does not support the ALJ's determination. Dr. Murati found the shoulder problems to be a direct result of the original injuries from the series beginning in 1999. Dr. Lucas, on the other hand, was unable to state, with any certainty, whether there was a relationship between this current problem and the original injuries to claimant's upper extremities. The preponderance of the credible evidence between a "yes" and a "maybe" tips in favor of the "yes" vote. Here, the Board finds the opinion of Dr. Murati to be the more persuasive.

The scenario leading to the incurring of this bill also leads the Board to a conclusion that payment by respondent is required. Claimant was referred to the original authorized treating physician by agreement of the parties. That treating physician then recommended that claimant be referred for physical therapy, and even named the company to whom the referral was to be made. No objection to the recommended treatment was raised until after the physical therapy was completed.

Where an authorized attending physician has once made a referral of an injured employee to a specialist, and his authority to make further referrals is not withdrawn or repudiated by the employer or the insurance carrier by notice either to him or to the employee, a subsequent referral by the same physician is authorized, and the employer and insurer are charged with the obligation for medical services rendered as a result of the second referral."<sup>9</sup>

Here, respondent is prohibited from initially allowing claimant to attend treatment with the authorized treating physician, including referrals for physical therapy, and, then, after the fact, refusing to pay for the treatment. If an objection to the physical therapy were justified, then a timely objection would be required. Once a respondent sends a claimant to a doctor and assumes the responsibility of providing medical treatment, the claimant has the right to rely on the respondent's action.<sup>10</sup>

### **CONCLUSIONS**

The determination by the ALJ, that claimant failed to prove a causal connection between her current shoulder complaints and the original injuries beginning in 1999, is reversed. Additionally, respondent is precluded from objecting to the presentation of a

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<sup>9</sup> Blake v. Hutchinson Manufacturing Co., 213 Kan. 511, Syl. ¶ 1, 516 P.2d 1008 (1973).

<sup>10</sup> Johnson v. Skelly Oil Co., 180 Kan. 275, 303 P.2d 172 (1949).

physical therapy bill after authorizing the treatment. A timely objection to the physical therapy and notice of that objection are required. Respondent failed to timely object. Respondent is obligated to pay for the physical therapy bill in the amount of \$534.00 as authorized medical treatment.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Post Award Medical order of Administrative Law Judge Nelsonna Potts Barnes dated January 2, 2009, should be, and is hereby, reversed and respondent is ordered to pay the physical therapy bill in the amount of \$534.00 as authorized medical treatment.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant  
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge