

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

DENNIS SIEVERS)	
Claimant)	
)	
VS.)	
)	
MANPOWER)	
Respondent)	Docket No. 1,026,073
)	
AND)	
)	
CONTINENTAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent requested review of the October 29, 2008¹ Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on February 3, 2009.

APPEARANCES

Jeffery K. Cooper, of Topeka, Kansas, appeared for the claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ A Nunc Pro Tunc Award was issued on November 3, 2008 to correct a clerical error in the original Award calculation. For purposes of this Order both the original Award and the Nunc Pro Tunc will collectively be referred to as the "Award".

ISSUES

The ALJ awarded claimant a 5 percent whole body functional impairment and further ordered respondent to pay \$4,977 to St. Mary's Chiropractic Clinic as an authorized medical expense.²

The respondent requests review of the ALJ's determination that the chiropractic bills associated with claimant's care should be paid by respondent. Respondent maintains these bills were incurred as a result of claimant's unilateral decision to seek care without first seeking a preliminary hearing and during a period of time that medical treatment was being provided. As such, respondent argues that the bills are unauthorized and are subject to the statutory limit of \$500 under K.S.A. 44-510h(b)(2).

Respondent also contends that the 5 percent permanent partial impairment assigned by the ALJ is attributable to claimant's preexisting degenerative disc disease and not due to his accidental injury as evidenced by Dr. Stein's testimony. Accordingly, the Award should be reversed in its entirety and claimant entitled to no further recovery in this matter.

Claimant argues that the ALJ's Award should be affirmed as the respondent failed to sustain its burden of proving that claimant bore a preexisting functional impairment. Moreover, claimant maintains that at the Regular Hearing the parties stipulated that claimant sustained a 5 percent permanent impairment as a result of his accident. Claimant also argues that respondent negligently failed to provide him with medical treatment reasonably necessary to cure and relieve him from the effects of his work-related injury through chiropractic treatments.³ Thus, claimant's decision to seek medical care on his own with a chiropractor was appropriate and should be ordered paid as authorized care.

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 finds the ALJ's Award should be affirmed in part and modified in part.

There are three issues to be determined in this litigation. First, whether the ALJ erred in ordering respondent to pay for claimant's chiropractic treatment as authorized medical. Second, the nature and extent of claimant's permanent impairment attributable to his accident. And third, whether respondent met its burden of proving a preexisting

² These bills would be subject to the fee schedule set forth in K.S.A. 44-510h(j).

³ Claimant's Brief at 1-2 (filed Dec. 29, 2008).

impairment and therefore is entitled to a credit against the 5 percent permanent partial impairment assessed by the ALJ.

The facts surrounding claimant's accident and resulting need for treatment are well known to the parties and largely not in dispute. After claimant's accident he testified that he reported it to his on-site manager and asked to see a doctor for pain complaints to his neck and back. But claimant was told to finish his work before he could receive treatment. By the time work was completed it was the end of the day and claimant simply went home.

The next day claimant went to respondent to report his accident and again asked to be sent to a doctor. But his request was denied and he returned to work. Claimant admits he was fearful of losing his job if he reported any injury.⁴

After continuing to complain, respondent finally allowed claimant to go to Mercy Health where he was treated by physician's assistant Kami Albers.⁵ Ms. Albers examined the claimant and sent him back to work with instructions to take some Motrin for the pain. A week later the claimant was back to see Ms. Albers and was hurting quite a bit more. He was given some Flexeril and assigned restrictions of no lifting, pushing, or pulling more than 40 pounds.⁶ Claimant was back to see Ms. Albers again on October 14, 2005. Claimant was again given medications, sent back to work and advised he could return as needed. That next Monday, October 17, 2005, claimant went to see a chiropractor because he was in a lot of pain and believed he had been released by Ms. Albers. Claimant testified that he spoke with his manager about going to the chiropractor and he was told that Manpower would be contacted for permission, but the claimant never heard anything else about it and decided to go on his own.⁷

Claimant stated that before this incident he had never had any problems with his back or neck. He stated that he had been to the chiropractor off and on for adjustments.⁸ Whether that previous treatment was for low back or neck complaints, or both, is unclear from the record. All that is clear is that claimant, at various times, sought treatment from a number of chiropractors. The extent of that treatment, the dates, the length of the treatment periods, the diagnosis, or any other details is absent from this record.

⁴ R.H. Trans. at 12-13.

⁵ *Id.* at 13.

⁶ *Id.* at 15.

⁷ *Id.* at 18.

⁸ *Id.* at 10.

After his work accident claimant first met with the chiropractor on October 17, 2005 and continued to see him through March 22, 2007.⁹ Claimant indicated that this chiropractic treatment relieved some of the tension he had in his neck and back. Claimant continued to work while he was receiving chiropractic treatment. At one point he returned to see Kami Albers and when she learned that he was receiving chiropractic treatment and had received x-rays, she too had x-rays taken. But claimant was again released to return to work and told to alternate his activities frequently throughout his shift. Her office note indicates claimant is to return to the clinic as needed.

At respondent's direction, claimant met with Dr. Paul Stein in April 2006 for an evaluation. Dr. Stein noted claimant's complaints of neck pain and he recommended the claimant undergo a month of physical therapy. According to the notes in Dr. Stein's file, therapy was not originally authorized by the insurance carrier. There is a letter dated May 17, 2006 within the Division's file that indicates claimant's counsel demanded the physical therapy treatment recommended by Dr. Stein, but no preliminary hearing was ever scheduled or held.

In March 2007, physical therapy was finally approved by respondent and provided over a two month period. Claimant testified the therapy was helpful and felt about 80 percent better at the end of it.¹⁰ Claimant continues to have pain in his neck, along with headaches at the base of his skull and muscle cramps.

Dr. Stein noted a limitation in claimant's range of motion during the examination. That finding, along with claimant's ongoing complaints of pain led him to assign a 5 percent permanent partial impairment to the neck. When advised that claimant had experienced problems with his *neck* and had received treatment "from at least four different chiropractors during at least the ten years prior to his injury October 4, 2005" he asked to consider whether that 5 percent preexisted the claimant's injury in this claim, Dr. Stein responded as follows:

Q. . . . Would any of his permanent impairment of function that you provided be considered preexisting . . . ?

. . .

A. Assuming that to be the case -- *because it would be helpful if I could look at records and see specifically what was treated and what was discussed* -- then he very well might have preexisting. . . .¹¹

⁹ *Id.* at 18-19.

¹⁰ *Id.* at 23.

¹¹ Stein Depo. at 7-8.

The ALJ awarded claimant a 5 percent impairment, denying respondent any credit for the alleged preexisting impairment. She also ordered respondent to pay the outstanding chiropractic bills. She reasoned that “[r]espondent, through disregard, poor communication or negligence failed to provide the [c]laimant with the medical care he needed and when he needed it.”¹²

As for the 5 percent impairment finding, the Board affirms this part of the Award. Although she did not note it, the parties stipulated to a 5 percent functional impairment as a result of this accident.¹³ This stipulation was not, as respondent contends, a stipulation contingent upon the 5 percent being found preexisting. To the contrary, the record clearly states that the parties agreed claimant’s functional impairment is 5 percent. They go on to recite that the only issue is the payment of the outstanding chiropractic bills. And while it is true that as the testimony developed during the Regular Hearing claimant disclosed his previous chiropractic treatment history, at no point did respondent attempt to retract his earlier stipulation or modify the parties agreement in light of this additional evidence. Accordingly, the 5 percent permanent partial impairment to the whole body found by the ALJ is affirmed.

Likewise, her decision to deny respondent a credit for the preexisting impairment under K.S.A. 44-501(c) if affirmed. The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹⁴

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment actually be rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constitute an impairment in that it somehow limited the individual’s abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides*¹⁵ cannot serve as a basis to reduce an award under the above statute.

¹² ALJ Award (Oct. 29, 2008) at 6.

¹³ R.H. Trans. at 6.

¹⁴ K.S.A. 2005 Supp. 44-501(c).

¹⁵ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

A physician may appropriately assign a functional impairment rating for a preexisting condition that has not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

Respondent contends that Dr. Stein's opinion somehow satisfies the statutory criteria. But the Board finds his testimony wholly inadequate for that purpose. Here, no previous medical records were provided to Dr. Stein for purposes of evaluating what, if any, preexisting impairment claimant may have had. Claimant's testimony is less than specific in describing the nature of his previous treatment, whether solely for his low back or his neck, or both. Respondent seems to believe that a suggestion of earlier problems and treatment is enough to meet the statutory requisites. It is not. This record is insufficient upon which to base any conclusion of preexisting impairment. The ALJ's decision to deny a credit under the statute is affirmed.

Finally, the Board finds the ALJ's conclusion with respect to the chiropractic bills should be reversed. While the ALJ's compassion for the claimant's plight is understandable, the fact is claimant was being provided with treatment within days of his accident. The treatment provided at Mercy West may well have been less than optimum in claimant's eyes, but he was nevertheless being provided with treatment and he knew he could return as evidenced by his own decision to return even while receiving treatment from the chiropractor. If he was displeased with his treatment, there are mechanisms within the Act to achieve a change of physician.

Claimant has suggested that his need for chiropractic treatment on October 17, 2005 was in the nature of an emergency. Thus, he should be allowed to forego the normal statutory procedure in obtaining care. Had claimant sought out such treatment from an emergency room that argument might be appealing. But instead, he sought out treatment from a chiropractor, a provider that in most instances is not available at all times of the day and night. Moreover, the bills claimant hopes to have paid span a period beginning October 17, 2005 and ending on March 27, 2007. This belies the argument of an emergency. For 18 months claimant went for regular treatments and there is no indication within this record that claimant ever asked for respondent to pay for these visits before the Regular Hearing.

Admittedly, the respondent's failure to immediately provide the physical therapy recommended by Dr. Stein is troublesome and should not be condoned. But claimant's lawyer sent a demand within a few weeks of Dr. Stein's recommendation and again, there is a procedure within the Act to obtain additional treatment when the opposing party does not provide the sought-after benefit change. None of this changes the fact that claimant

sought chiropractic treatment on his own for a significant period of time. The bills are deemed to be unauthorized and subject to the statutory maximum of \$500.¹⁶

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated October 29, 2008, is affirmed in part and modified in part as set forth above.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffery K. Cooper, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

¹⁶ K.S.A. 44-510h(b)(2).