BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY J. GROHUSKY Claimant	)	
VS.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	Docket Nos. 1,027,783 1,032,468
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 26, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler. Keith L. Mark, of Mission, Kansas, appeared for claimant. Stephanie Warmund, of Overland Park, Kansas, appeared for respondent.

In Docket No. 1,027,783, claimant alleged he fell and sustained an injury to his low back on March 17, 2005.[1]

In Docket No. 1,032,468, claimant alleged he injured his bilateral shoulders, arms, elbows, and psyche on October 17, 2005 by "pulling rollers over extendo."[2]

The Administrative Law Judge (ALJ) consolidated these claims for preliminary hearing and found that a work injury that occurred from repetitive package hauling was not disputed, that claimant had been released to return to work with a 40-pound lifting restriction, and that respondent had refused to accommodate claimant's restrictions and allow him to return to work. The ALJ stated: "Under these circumstances, we have little

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[1] K-WC E-1, Application for Hearing filed Mar. 6, 2006.

[2] Form K-WC E-1, Application for Hearing filed Dec. 28, 2006.

choice but to reinstate his temporary total disability from date of application." The parties were also allowed to submit any additional authority on the issue to the ALJ within ten days and "before this order takes full effect."[3]

The record is the same as that considered by the ALJ and consists of the transcript of the March 22, 2007, Preliminary Hearing and the attached exhibits, together with the pleadings contained in the administrative file. For purposes of the preliminary hearing, the parties have stipulated that claimant had on-the-job accidents.

By statute, preliminary hearing findings, conclusions and orders are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to having been determined by the entire Board, as it is when the appeal is from a final order.[5]

ISSUES

Respondent contends the ALJ erred in awarding temporary total disability (TTD) benefits to claimant based on a repetitive package hauling injury when no such injury has been claimed. Respondent further asserts the ALJ abused his discretion and exceeded his authority by ordering TTD benefits based on respondent's refusal to reassign claimant to accommodated work and by ordering benefits with no end date.

Claimant argues the Board does not have jurisdiction to review the ALJ's order granting him TTD benefits. Should the Board decide it does have jurisdiction to review this issue, claimant requests the Board affirm the ALJ's order. Further, claimant asks the Board to remand the case to the ALJ with a direction to appoint an authorized orthopedic specialist to implement treatment recommendations made by Dr. James Stuckmeyer.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issues raised by the parties in this appeal?

(2) In the event the Board finds it has jurisdiction over this issue, did the ALJ err in awarding TTD benefits based on a repetitive package hauling injury if no such injury was claimed?

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[3] Preliminary Decision filed Mar. 26, 2007.

[4] K.S.A. 44-534a.

[5] K.S.A. 2006 Supp. 44-555c(k).

(3) In the event the Board finds it has jurisdiction over this issue, did the ALJ exceed his authority by ordering TTD benefits based on respondent's refusal to reassign claimant to accommodated work?

(4) In the event the Board finds it has jurisdiction over this issue, should the Board remand the matter with directions that the ALJ appoint an authorized treating physician?

FINDINGS OF FACT

Claimant was injured while working for respondent on March 17, 2005. He had been sitting in his chair and stood up to put his ID in a computer. Unbeknownst to claimant, a coworker moved his chair, and when claimant attempted to sit back down, he fell backwards. Claimant landed on his back. He heard a pop and had back problems from that time on. He had pain up into his chest, going around his ribs to his thoracic spine. Claimant filed an Application for Hearing claiming injuries to his back.[6]

Claimant saw Dr. R. Christopher Glattes on April 14, 2005, for his on-the-job injury in March 2005. Dr. Glattes diagnosed him with thoracic back strain. Dr. Glattes found claimant to be at maximum medical improvement for his back but said claimant would slowly improve over time. Claimant was given no work restrictions.

On October 17, 2005, claimant suffered another job-related injury while trying to put a pair of 140-pound rollers on an extension in a truck and trailer. Claimant was pulling one way, and the wheels of the rollers folded up and went another way. Claimant felt a jerking motion, and both his shoulders popped at the same time. Claimant filed an Application for Hearing for his October 2005 accident claiming injury to his "bilateral shoulders, arms & elbows."[7] An Amended Application for Hearing was filed February 16, 2007, which added "psyche" to the list of injuries.[8]

Claimant was seen by Dr. Daniel Stechschulte for the injuries to his shoulders, arms, and elbows. Claimant had two surgeries on his right shoulder and two on his left shoulder.

On September 8, 2006, claimant was examined by Dr. Terrence Pratt by order of the ALJ. Claimant complained to Dr. Pratt of near continuous aching below his shoulder blades and extending to the lower thoracic region. On occasion, the symptoms went into the lumbar region. Claimant had a sensation as if his vertebrae were catching, followed by popping with a decrease in symptoms. Dr. Pratt diagnosed claimant with thoracolumbar

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[6] *Supra* note 1.

[7] *Supra* note 2.

[8] Form K-WC E-1, Amended Application for Hearing filed Feb. 16, 2007.

syndrome with reported compression fractures and mild thoracic spondylosis. He recommended claimant have an MRI assessment. The MRI was performed on October 4, 2006, and showed no evidence of abnormalities in the disc spaces or disc herniations. Dr. Pratt recommended no additional evaluations or active medical care.

A functional capacity evaluation (FCE) was performed on claimant on December 11, 2006, by physical therapist Bob Mitchell. Mr. Mitchell's report indicates claimant's lifting ability from shoulder to overhead was 40 pounds, waist to shoulder was 75 pounds, 12 inches to waist was 75 pounds, and floor to waist was 75 pounds. Mr. Mitchell indicated that claimant demonstrated the ability to perform work for respondent but stated "it is likely that reinjury would occur based on his history and extreme subjective complaints throughout his entire rehabilitation process."[9]

On December 12, 2006, claimant was seen by Dr. Daniel Stechschulte, Jr., for complaints of his bilateral shoulders. Dr. Stechschulte concurred with Mr. Mitchell that claimant was a high risk for reinjury. Although Dr. Stechschulte released claimant to full duty, he recommended that claimant find less demanding work.

On December 15, 2006, Mr. Mitchell wrote Dr. Stechschulte advising he had been contacted by respondent because the FCE showed claimant could lift to 40 pounds overhead on an occasional basis and the job required claimant to be able to lift up to 70 pounds. Mr. Mitchell reported that claimant "does not demonstrate with the ability to perform all the essential functions of his job according to this information provided."[10]

On December 17, 2006, Dr. Stechschulte wrote an addendum to his report wherein he added "a permanent restriction of 40 lbs max overhead lift."[11]

Claimant returned to work at respondent on December 17, 2006. Claimant said he told his supervisor, Gary Watkins, that he was still having problems but was willing to try to do his job. He worked about 15 minutes when he was told by Mr. Watkins that he could not work that day and that he should go home. Claimant has not worked since.

On January 17, 2007, claimant was seen by Dr. James Stuckmeyer at the request of claimant's attorney. After examining claimant and reviewing his medical history, Dr. Stuckmeyer concurred with Dr. Stechschulte that a 40-pound overhead lifting restriction would be appropriate. In a letter to claimant's attorney on March 14, 2007, Dr. Stuckmeyer indicated that this 40-pound weight restriction was temporary until such time as treatment was rendered. Dr. Stuckmeyer also opined that claimant was temporarily totally disabled.

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[9] P.H. Trans., Resp. Ex. D at 1.

[10] P.H. Trans., Resp. Ex. C.

[11] *Id*., Resp. Ex. E.

Claimant's goal is to return to work for respondent. He admits he is not able to work for respondent now but thinks with additional treatment, he could eventually return. He requested continued authorized medical treatment.

The ALJ, in his Preliminary Decision of March 26, 2007, found that claimant's work injury from "repetitive package hauling" was not disputed. The ALJ also found that claimant had a 40-pound weight restriction and that respondent refused to accommodate that restriction. The ALJ reinstated claimant's TTD benefits, but did not set out an end-date for those benefits. The ALJ also did not authorize further medical treatment.

PRINCIPLES OF LAW

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[12] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[13]

K.S.A. 44-555c(a) states in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The issues of whether a worker is in need of medical treatment or satisfies the definition of being temporarily and totally disabled are not jurisdictional issues listed in K.S.A. 44-534a(a)(2). Additionally, the issues of whether a worker needs treatment or meets the definition of being temporarily and totally disabled are questions of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary

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[12] K.S.A. 2004 Supp. 44-551.

[13] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

> total disability compensation to be in effect pending the conclusion of a full hearing on the claim . . . .

An ALJ has the jurisdiction and authority to grant or deny medical treatment and TTD benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address those issues at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[14]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[15]

ANALYSIS

Whether claimant is in need of medical treatment or is temporarily and totally disabled are not jurisdictional issues. Those issues cannot be considered by the Board on an appeal from a preliminary hearing order. Likewise, there is no requirement that an ALJ put an ending date on an order for payment of TTD compensation. Should respondent believe claimant is no longer temporarily and totally disabled and TTD compensation should be ended, then respondent may file for a preliminary hearing and request an order be entered by the ALJ terminating TTD compensation. As the ALJ did not exceed his jurisdiction by not putting an ending date on the award of TTD compensation, that issue is dismissed. Likewise, the ALJ did not exceed his jurisdiction by finding claimant entitled to TTD compensation where he was unable to return to his regular job with respondent but could perform some work if it was within his restrictions, but no such work was offered or available.

However, even though respondent admits claimant suffered compensable work-related injuries to his low back on March 17, 2005, and to his upper extremities on October 17, 2005, respondent denies claimant suffered a series of work related accidents from repetitive package hauling and disputes the ALJ's findings that "a work injury . . . occurred from repetitive package hauling."[16] Respondent likewise disputes the ALJ's findings that such a claim is not disputed by respondent.

Respondent argues that the ALJ awarded benefits for a series of accidents that were never alleged. This is an allegation that the ALJ exceeded his jurisdiction. It is also a denial that claimant suffered such a series of accidents at work. The Board has jurisdiction to review this issue.

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[14] *See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[15] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[16] *Supra* note 3.

CONCLUSION

The ALJ did not exceed his jurisdiction in awarding TTD compensation and in not awarding medical treatment. However, it is not clear that the ALJ made his decisions on these issues based upon the accidents and injuries that were alleged. The Board's review is de novo. Based upon the record presented and the stipulations of the parties, this Board Member finds claimant's injuries are a direct result of the admitted work-related accidents that occurred on March 17, 2005, and October 17, 2005. Claimant is unable to perform his regular preinjury job duties and accommodated work is not available. Claimant is not working. Claimant has established the necessary prerequisites to an award of preliminary benefits in the form of TTD compensation.

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ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal of the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated March 26, 2007, is dismissed in part and is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

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BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge