

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

CLAYTON JOHN CROSS)	
Claimant)	
)	
VS.)	
)	
WAL-MART)	
Respondent)	Docket No. 1,031,571
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 2, 2007, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Frank D. Taff, of Topeka, Kansas, appeared for claimant. Matthew R. Bergmann, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the preponderance of the evidence indicated that claimant's ongoing back pain and present need for treatment was related to a preexisting injury rather than the April 18, 2006, accident. Accordingly, the ALJ ordered that the respondent shall not be liable for any more medical treatment or for temporary total disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 1, 2007, Preliminary Hearing; the transcript of the July 25, 2007, Preliminary Hearing and the exhibits, the transcript of the May 16, 2007, Preliminary Hearing and the exhibits, and the transcript of the December 18, 2006, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file, including the independent medical examination report from Dr. Vito Carabetta.

ISSUES

Claimant contends the ALJ exceeded his jurisdiction by issuing a final order finding that claimant's condition and need for medical treatment was related to his prior accident rather than his accident of April 18, 2006, in essence overruling the Board's Order of August 15, 2007, without conducting a full hearing. Claimant next contends that the independent medical examination (IME) report was impermissibly used in the October 1, 2007, preliminary hearing, arguing that neither K.S.A. 44-510e(a) nor K.S.A. 44-516 permit the appointment of a neutral medical examiner for the purpose of determining causation. Next, claimant argues he was denied due process because he was not given warning that the issue of causation would be revisited at the October 1, 2007, preliminary hearing. Claimant also argues that the medical report and opinion of Dr. Carabetta does not constitute a preponderance of evidence on any issue in this case. Finally, claimant argues that K.A.R. 51-9-6 was not followed as the ALJ did not apprise or offer the parties the opportunity to cross-examine Dr. Carabetta. Accordingly, claimant requests the Board reverse and remand this case so the parties may cross-examine Dr. Carabetta pursuant to K.A.R. 51-9-6.

Respondent contends it was within the jurisdiction of the ALJ to order the IME by Dr. Carabetta and to make his Order of October 2, 2007, denying further benefits to claimant. Respondent asserts that the preponderance of the evidence at the time of the October 1, 2007, preliminary hearing showed that claimant's ongoing back pain and current need for treatment is related to a preexisting work injury suffered by claimant rather than the alleged April 18, 2006, accident. Respondent further argues that the issues of whether claimant proved a need for medical treatment or temporary total disability benefits are not issues the Board has jurisdiction to consider on an appeal from a preliminary hearing order. In the event the Board finds it has jurisdiction of those issues in this appeal, respondent contends the ALJ did not exceed his jurisdiction in denying benefits to claimant as per his Order of October 2, 2007, as ALJ's are not bound by earlier Board preliminary findings, especially when new evidence is presented at a later preliminary hearing. Respondent also argues that the ALJ had authority to appoint Dr. Carabetta to conduct an IME and that the report of Dr. Carabetta is properly part of the official court record in this case. Regarding claimant's argument that K.A.R. 51-9-6 was not observed by the ALJ, respondent argues that IME reports may be admitted into evidence without testimony. Respondent further contends that claimant was not denied a full hearing as he alleged, since preliminary hearing findings and conclusions are neither final nor binding, as they may be modified upon a full hearing of the claim.

The issues for the Board's review are:

(1) Is the ALJ bound by an earlier Board preliminary finding when new evidence is presented at a later preliminary hearing?

(2) Does the Board have jurisdiction over the issues of whether claimant is entitled to medical treatment or temporary total disability benefits?

(3) If so, is claimant's ongoing back pain and current need for treatment related to his alleged work injury of April 18, 2006?

(4) Do either K.S.A. 44-510e(a) or K.S.A. 44-516 permit the appointment of a neutral medical examiner for the purpose of determining causation?

(5) Was claimant denied due process because he was not given warning that the issue of causation would be visited at the October 1, 2007, preliminary hearing?

(6) Was it error, under K.A.R. 51-9-6, for the ALJ not to offer the parties the opportunity to take the deposition testimony of Dr. Carabetta?

FINDINGS OF FACT

In the Application for Hearing filed in this claim, claimant alleged he injured his back at work on May 18, 2006¹, when he felt low back pain while unloading a trailer. A preliminary hearing was held on December 18, 2006, at which time claimant requested medical treatment and temporary total disability benefits. Respondent denied claimant suffered an injury that arose out of and in the course of his employment and denied that claimant had provided timely notice of the alleged injury. On December 20, 2006, the ALJ ordered respondent to provide claimant with medical treatment after finding claimant injured or aggravated his back on April 18, 2006, while working for respondent. That order was not appealed to the Board. However, respondent did not comply with that Order. Instead, respondent referred claimant to Dr. Jeffrey T. MacMillan, who examined claimant on February 12, 2007. Dr. MacMillan concluded that claimant's increased back pain was most likely related to an earlier work-related injury and low back surgery. Based upon this opinion, respondent refused to authorize medical treatment.

Claimant filed another Application for Preliminary Hearing when respondent failed to comply with the December 6, 2006, Order. A hearing was held on May 16, 2007. Claimant offered a medical report from Dr. James Warren, Jr., to the effect that claimant's current condition and need for treatment was caused by an exacerbation of a preexisting condition. Respondent entered a report from Dr. Macmillan that indicated in his opinion, claimant's back pain was "most likely related to his original injury and surgery in 2004."² The ALJ entered an Order on May 21, 2007, finding that "the preponderance of the

¹ In a preliminary hearing Order dated December 20, 2006, Judge Hursh determined the accident date for this claim was April 18, 2006.

² P.H. Trans. (May 20, 2007), Resp. Ex. A at 2.

evidence still indicates that the claimant had a reinjury to his low back . . . and the respondent and insurance carrier remain liable for medical treatment.”³ Respondent was ordered to provide medical treatment with Dr. Warren. Respondent appealed this order to the Board.

Before the Board entered an Order in the appeal, claimant filed another Application for Preliminary Hearing requesting temporary total disability benefits. A hearing was held on July 25, 2007, at which time claimant entered into evidence a medical statement from Dr. Warren containing what the ALJ found to be “work restrictions that are so severe they are just hard to believe.”⁴ The ALJ also noted that respondent’s physician, Dr. Zimmerman,⁵ related claimant’s back trouble to a previous injury. The ALJ concluded that it was appropriate in this case to have an independent medical examination and appointed Dr. Carabetta to evaluate claimant. The ALJ ordered Dr. Carabetta to:

. . . evaluate the claimant, and to provide the court and the parties a written opinion about the nature and extent of the claimant’s injury, and to comment specifically on treatment recommendations for the claimant, and work restrictions, if any, that the claimant should observe. Dr. Carabetta is also asked to recommend one or more providers for treatment in the appropriate specialty.⁶

On August 15, 2007, a Board Member entered an Order affirming the ALJ’s earlier finding that:

. . . claimant injured his back working for respondent in April or May 2006 and that his accidental injury arose out of and in the course of his employment and that his current need for treatment is a direct result of that accident and subsequent aggravation.⁷

Claimant was seen on September 12, 2007, by Dr. Carabetta for his IME. After examining claimant and reviewing his medical records, Dr. Carabetta diagnosed claimant with low back pain and epidural fibrosis. Dr. Carabetta stated that the “exact source of [claimant’s] complaints at this time is unclear” but opined that “the probable source for his

³ ALJ Order, May 21, 2007, at 2.

⁴ ALJ Order, July 27, 2007, at 2.

⁵ Although both ALJ Orders dated May 21, 2007, and July 27, 2007, mention a report of Dr. Zimmerman, a review of the record reveals that no report of Dr. Zimmerman was entered as evidence in this case.

⁶ ALJ Order, July 27, 2007, at 2.

⁷ *Cross v. Wal-Mart*, No. 1,031,571, 2007 WL 2586184 (Kan. WCAB Aug. 15, 2007).

complaints really is likely to be the epidural fibrosis issue.”⁸ Dr. Carabetta recommended that claimant have a series of epidural steroid injections or, if injections do not help, that he proceed with routine physical therapy. Dr. Carabetta recommended Dr. Michael Smith or Dr. Eric Yorke as potential physicians to provide claimant with the recommended treatment.

A fourth preliminary hearing was held on October 1, 2007, at which time claimant requested temporary total disability compensation and a referral to Dr. Warren for the series of epidural injections recommended by Dr. Carabetta. The ALJ noted on the record that the report of Dr. Carabetta had been received and that he would “consider that a part of this record.”⁹ No objection was made by counsel for either party. The ALJ asked claimant’s attorney: “Is there anything new you need to present other than the arguments?” Claimant’s attorney responded: “No, sir, Judge. [Claimant] is still off work and the symptoms remain the same so I don’t believe there’s any new testimony to present.”¹⁰ Accordingly, no testimony was taken at the hearing, and the ALJ heard arguments of the parties.

In his October 2, 2007, preliminary hearing Order, the ALJ found:

Though Dr. Carabetta was not asked specifically to give a causation opinion, he was asked to comment on the nature of the injury. His determination that the present symptoms probably relate to fibrosis from the prior surgery necessarily touches the causation issue.

As an independent examiner, Dr. Carabetta’s comments carry considerable weight. The preponderance of the evidence now indicates that the claimant’s ongoing back pain, and present need for treatment, is related to the prior 2004 injury rather than the April 18, 2006 accident.¹¹

The ALJ denied claimant’s request for medical treatment and temporary total disability compensation.

PRINCIPLES OF LAW

The Board’s jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

⁸ IME report of Dr. Vito Carabetta filed September 17, 2007, at 3.

⁹ P.H. Trans. (Oct. 1, 2007) at 3.

¹⁰ *Id.*

¹¹ ALJ Order filed Oct. 2, 2007, at 1-2.

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the 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 total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹² the Kansas Court of Appeals stated:

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.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹³

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of

¹²*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

¹³See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

K.S.A. 44-516 states:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

K.A.R. 51-9-6 states:

If a neutral physician is appointed, the written report of that neutral physician shall be made a part of the record of hearing. Either party may cross examine each neutral physician so employed. The fee of the neutral physician giving such testimony shall be assessed as costs to a party at the administrative law judge's discretion.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹⁴ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹⁵

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.¹⁶ In *Nance*,¹⁷ the Kansas Supreme Court stated:

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

¹⁴ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁵ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹⁷ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

In *Collins*,¹⁸ the Kansas Supreme Court stated: “The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.”

“To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections.”¹⁹

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁰ 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 being determined by the entire Board as it is when the appeal is from a final order.²¹

ANALYSIS

Claimant alleges the ALJ exceeded his jurisdiction in entering his preliminary hearing Order. That Order denied claimant’s request for preliminary benefits. The ALJ did so not because he determined claimant was not injured as alleged, or not temporarily and totally disabled, or even that claimant was not in need of medical treatment. Rather, the ALJ determined that claimant’s current symptoms, diagnosis, and need for treatment are related to his prior injury and surgery and are not due to the work-related accident alleged in this case. That was a causation determination, which gives rise to the jurisdictional issue of whether claimant’s injury and need for benefits is the result of the accident alleged herein and, thus, whether it is due to the accident that arose out of and in the course of his employment with respondent in this claim.

There are now three expert medical opinions on the question of causation. The physician selected by respondent, Dr. MacMillan, opined that claimant’s condition was more probably related to his prior work injury in 2004. The physician selected by claimant, Dr. Warren, believes claimant’s injury is attributable to an aggravation of his preexisting condition by the work-related accident in this case. The IME physician selected by the ALJ, Dr. Carabetta, concurred with Dr. MacMillan that claimant’s condition is a natural consequence of a preexisting degenerative condition and his prior injury. Dr. Carabetta

¹⁸ *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

¹⁹ *Johnson v. Brooks Plumbing*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

²⁰ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

²¹ K.S.A. 2006 Supp. 44-555c(k).

agrees that claimant is in need of medical treatment but disagrees with claimant and Dr. Warren that it is due to the claimant's accident at work in April or May of 2006.

CONCLUSION

(1) Preliminary hearing orders are preliminary. As such, they are subject to change. There is no limit to the number of preliminary hearings an ALJ may hear. The ALJ was within his jurisdiction to consider additional evidence and render a new preliminary hearing order. Under these circumstances, neither the ALJ nor this Board Member is bound by the previous preliminary hearing order of another Board Member.

(2) Whether claimant is in need of medical treatment or whether claimant is temporarily and totally disabled are not issues that the Board has jurisdiction to review on an appeal from a preliminary hearing order. However, the Board does have jurisdiction of the issue of causation. Whether claimant's condition is the result of his work-related accident is an issue the Board has jurisdiction to consider at this stage of the proceedings.

(3) Based on the record presented to date, it is more probably true than not true that claimant suffered a temporary aggravation of his preexisting low back condition on or about April 18, 2006. That aggravation constituted a personal injury by accident that arose out of and in the course of claimant's employment with respondent. It is also more probable than not that claimant's current need for medical treatment is a natural consequence of his 2004 work-related injury and surgery rather than a direct consequence of his April 18, 2006, accident.

(4) K.S.A. 44-516 permits an ALJ to obtain an examination of claimant by a neutral health care provider and permits the ALJ to consider the opinions of that examiner for purposes of deciding causation and awarding preliminary hearing benefits.

(5) Claimant was not denied due process. Even if claimant's counsel did not understand the referral to Dr. Carabetta to include the issue of causation, it was apparent from Dr. Carabetta's report that the issue of causation was addressed. The ALJ advised counsel that he would be considering that report in making his determination on claimant's request for preliminary hearing benefits. Counsel for claimant did not object to the ALJ considering that report, did not request additional time to present evidence, and did not request that the record be held open to give claimant's counsel time to depose Dr. Carabetta.

(6) The ALJ did not deny claimant the opportunity to depose Dr. Carabetta. If claimant's counsel wanted the opportunity to depose Dr. Carabetta, then he should have made that known to the ALJ. In fact, claimant's counsel is free to take Dr. Carabetta's deposition now and to request another preliminary hearing to present that testimony and any other evidence claimant wants the ALJ to consider in connection with another request for preliminary benefits.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 2, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge