BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCES R. DAVENPORT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,034,647
MARCON OF KANSAS, INC.	)	& 1,043,900
Respondent	)	
AND	)	
	)	
WESTERN AGRICULTURAL INSURANCE	)	
COMPANY and BANKERS STANDARD	)	
INSURANCE COMPANY,	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier, Western Agricultural Insurance Company (Western Agricultural), appeal the June 30, 2009, Order On Appointing An Independent Medical Evaluation wherein Administrative Law Judge Rebecca Sanders (ALJ) determined that an independent medical examination (IME) was appropriate and necessary to determine whether claimant's ongoing low back problems stem from her original injury on June 10, 2005, in Docket No. 1,034,647, or are the result of a new series of injuries beginning on September 22, 2008, and thereafter, in Docket No. 1,043,900.

Respondent and its insurance carrier, Western Agricultural, also appeal the separate June 30, 2009, Order of the ALJ, wherein an IME with Terrance Pratt, M.D., was ordered.

Claimant appeared by her attorney, Paul D. Post, of Topeka, Kansas. Respondent and its insurance carrier, Western Agricultural, appeared by their attorney, Matthew S. Crowley, of Topeka, Kansas. Respondent and its insurance company, Bankers Standard Insurance Company (Bankers Standard), appeared by their attorney, Jodi J. Fox, of Kansas City, Kansas.

The Board adopts the same stipulations as the ALJ and has considered the same record as did the ALJ, consisting of the evidentiary deposition of Peter V. Bieri, M.D., taken March 31, 2008, with attachments; the transcript of Regular Hearing held April 10, 2008, with attachments; the deposition of William T. Jones, M.D., taken June 2, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ exceed her authority in granting claimant's motion for an IME filed in connection with either or both the claimant's Application for Post Award Medical and/or Application for Review and Modification?

2. Did the ALJ exceed her authority in directing the independent medical examiner to offer opinions on permanent impairment?

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Order and the Order On Appointing An Independent Medical Evaluation entered June 30, 2009, remain in full force and effect, and respondent's appeals are dismissed.

This dispute stems from a multitude of filings with the Division of Workers Compensation (Division), in several cases. A brief explanation of the filings is necessary in order to understand these proceedings.

Claimant works as a baker for respondent, preparing pies for distribution to grocery stores. As part of her duties, claimant also cleans the ovens used to do the baking. On June 10, 2005, claimant was cleaning an oven when she experienced a sudden sharp pain in her low back. An E-1, Application for Hearing, was filed with the Division for this accident and assigned Docket No. 1,034,647. The matter proceeded to litigation. Claimant then filed a second E-1, alleging a date of accident on September 17, 2007, when, while bending over to sugar some pies, she again experienced low back pain. This claim was assigned Docket No. 1,036,824. Both claims went to an Award on July 14, 2008. The ALJ denied claimant an award in Docket No. 1,036,824, finding that claimant had not sought medical treatment for this alleged injury and there was no medical evidence supporting a finding that claimant was impaired in any way, or the cause of that impairment. The alleged injury of September 17, 2007, was dismissed for lack of evidence as to any injury arising out of or in the course of claimant's employment. In the same Award, claimant was awarded a 9 percent whole body impairment for the low

back injury suffered on June 10, 2005, in Docket No. 1,034,647. No appeal was taken from that Award.

Claimant filed a third E-1 on January 16, 2009, alleging an injury, aggravation or re-injury on September 22, 2008, to her low back. This claim was assigned Docket No. 1,043,900. A fourth E-1 was filed on April 24, 2009, alleging an injury on September 22, 2008, and each and every day thereafter to the present to claimant's low back and neck. This claim was also assigned Docket No. 1,043,900, even though it was not filed as an amended claim and the date of accident and body parts varied from the previous injury claim.

An Application for Post Award Medical was filed on November 17, 2008, in Docket No. 1,034,647. Claimant also filed an Application for Review and Modification in Docket No. 1,034,647 on April 24, 2009. Claimant then filed a Motion For Appointment of Physician To Perform Independent Medical Evaluation on June 19, 2009, in both Docket No. 1,034,647 and Docket No. 1,043,900. This request was due to the conflict regarding the cause of claimant's ongoing back problems and whether these problems stem from the original injury on June 10, 2005, or the more recent injuries claimed on September 22, 2008, and thereafter.

The ALJ issued both her Order On Appointing An Independent Medical Evaluation and Order on June 30, 2009. Respondent and its insurance company, Western Agricultural, appealed both Orders on July 7, 2009. Respondent and its insurance company, Western Agricultural, listed only Docket No. 1,034,647 on its application to the Board. However, respondent argues both dates of accident in its brief. Additionally, the attorney for Western Agricultural has, on several occasions, failed to copy the attorney for Bankers Standard with documents filed with the Division. The Board assumes this oversight will be corrected.

On June 30, 2009, the ALJ sent a letter to Dr. Pratt, requesting an IME to determine recommendations for treatment and Dr. Pratt's opinions of any permanent impairment that claimant may have suffered. The letter failed to address the conflict between the differing dates of accident alleged. Respondent and its insurance company, Western Agricultural, sent a letter to the ALJ dated July 7, 2009, wherein respondent noted the lack of an order to the IME doctor on the cause of claimant's low back problems and from which date or dates of accident they stem. Respondent's letter requests clarification of the ALJ's Order. The ALJ's letter of July 9, 2009, to Dr. Pratt put the matter on hold pending a decision regarding a possible modification of the IME Order. On July 29, 2009, the ALJ sent a third letter to Dr. Pratt and issued an Order On Motion For Reconsideration And/Or Clarification. Both the letter and the Order clarify the responsibility of the IME doctor to include a determination as to whether claimant's symptoms are the result of the new work-related accident alleged in Docket No. 1,043,900 or are the natural and probable consequence of

claimant's work-related accidental injury of June 10, 2005, in Docket No. 1,034,647. No appeal of this July 29, 2009, Order was filed with the Division.

PRINCIPLES OF LAW AND ANALYSIS

> 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.[1]

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[2]

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.[3]

> 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

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[1] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[2] K.S.A. 44-534a(a)(2).

[3] K.S.A. 2008 Supp. 44-551(2)(A).

> may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.[4]

K.S.A. 44-516 determines the procedure for an administrative law judge to appoint a physician to conduct an IME. Here, there exists a dispute as to whether claimant's ongoing back problems stem from an injury on June 10, 2005, for which an award has already been granted, or from an injury on September 22, 2008, and thereafter, which claim is still pending. The IME Order of the ALJ requests a determination by the IME doctor on that issue. Respondent argues a lack of due process as the ALJ has not allowed a hearing under either K.S.A. 2007 Supp. 44-510k or K.S.A. 44-528, even though both require that a hearing be held and the parties be granted the opportunity to present evidence. While respondent's concerns may be legitimate, they nevertheless are premature. The orders of the ALJ are not orders for benefits. They are orders requesting a physician's opinion on causation which will facilitate the determination by the ALJ on the issue of causation and how to proceed.

The Board has held on many occasions that an administrative law judge has the right and authority to order an IME for the purpose of determining a multitude of questions. An order for an IME is not a finding of compensability. Likewise, it is also not medical treatment. It is an interlocutory order, well within the authority of the ALJ.[5] Once the ALJ has received the IME report, the parties should be given every opportunity to argue their positions in this matter. As the orders for an IME constitute interlocutory orders and are not final, the Board is without jurisdiction to review those orders, and respondent's appeal is dismissed.

CONCLUSIONS

The Order and Order On Appointing An Independent Medical Evaluation of the ALJ issued on June 30, 2009, are interlocutory, and respondent's appeal of those orders is premature. As such, the Orders remain in full force and effect, and respondent's appeal of those orders is, hereby, dismissed.

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[4] K.S.A. 44-516.

[5] *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB April 2, 1999); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB April 9, 2009); *Myers v. Four B Corporation d/b/a Price Chopper*, No. 1,043,611, 2009 WL 1996487 (Kan. WCAB June 30, 2009).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order and the Order On Appointing An Independent Medical Evaluation of Administrative Law Judge Rebecca Sanders dated June 30, 2009, are interlocutory, and respondent's appeals of those orders should be and are hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier Western Agricultural Insurance company
Jodi J. Fox, Attorney for Respondent and its Insurance Carrier Bankers Standard Insurance Company
Rebecca Sanders, Administrative Law Judge