

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

RONALD JOE WHITE)	
Claimant)	
)	
VS.)	
)	
AUTO RECYCLERS OF KANSAS, INC.)	
Respondent)	Docket No. 1,047,567
)	
AND)	
)	
TRAVELERS INDEMNITY CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 29, 2012, Post Award Medical entered by Administrative Law Judge John D. Clark. The Director appointed Joseph Seiwert to serve as Appeals Board Member Pro Tem in place of recused Board Member John F. Carpinelli. John L. Carmichael, of Wichita, Kansas, appeared for claimant. Ali N. Marchant, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant's low back problems were not related to his work-related knee injury and limited medical treatment by Dr. David Harris to claimant's left hip. The ALJ awarded claimant's attorney fees in the amount of \$1,275, to be assessed against respondent.

The Board has considered the record and adopted the stipulations listed in the Post Award Medical. The Board has also considered the transcript of the Regular Hearing of January 10, 2011, with exhibits; deposition of Dr. Pedro Murati taken January 24, 2011, with exhibits; transcript of Review & Modification Hearing of January 5, 2012; transcript of Preliminary Hearing held March 22, 2012; transcript of Settlement Hearing of April 25, 2011; and transcript of Settlement Hearing of March 16, 2012. The initial date of injury was August 24, 2007.

ISSUES

Claimant asks the Board to decide whether the ALJ's Post Award Medical order represented a final award of claimant's request for post award medical treatment or was a preliminary hearing order. Likewise, claimant asks the Board to decide whether the written report of Dr. David Harris, which was an exhibit to the Post Award Preliminary Hearing, should be considered as evidence. Claimant further asks the Board to find claimant's sacroiliitis, spondylolisthesis and inflammation at L5-S1, and symptoms at the L4-L5 level of his back are related to his injury at work on August 24, 2007, and that claimant is, therefore, entitled to medical treatment for those conditions. Claimant also asks the Board to find that Dr. Harris remains authorized to provide treatment for claimant's left knee injury.

Respondent asks the Board to affirm the ALJ's Post Award Medical. It argues the ALJ's November 29, 2012, order was more likely than not a final award on claimant's request for post award medical treatment. Respondent acknowledges if the ALJ's order is considered an order from a preliminary hearing, the written report of Dr. Harris would be considered as evidence. Respondent argues claimant is not entitled to treatment of his spondylolisthesis and inflammation at the L5-S1 level of his back, nor is he entitled to treatment for his complaints at the L4-L5 level of his back.

Both claimant and respondent agree if the ALJ's order of November 29, 2012, is an order from a preliminary hearing, the written report of Dr. Harris would correctly be considered as part of the evidence in the case. Furthermore, both claimant and respondent agree that claimant is entitled to treatment for his left-sided sacroiliitis. The remaining issues for the Board's review are:

(1) Is the ALJ's order a final award on claimant's Application for Post Award Medical or it is an order from a preliminary hearing?

(2) If the Board finds the ALJ's order is a final award on claimant's Application for Post Award Medical, should the written report of Dr. David Harris be considered as evidence?

(3) Is claimant's need for medical treatment for his back related to his original work-related injury of August 24, 2007?

FINDINGS OF FACT

On August 24, 2007, claimant injured his left knee when he slipped in some mud and fell. As a result of his injury, he underwent four surgeries on his left knee. His workers compensation claim was settled on April 25, 2011. Claimant has since filed two applications for review and modification. The first, filed May 19, 2011, asked for modification of temporary total disability compensation and an increase in impairment of

function. The second application for review and modification, filed April 12, 2012, asks for a change in the nature and extent of disability, claiming that claimant now suffers a whole body disability. Claimant settled the nature and extent of impairment of his left knee a second time.¹

Claimant filed an Application for Post Award Medical on July 20, 2012, asking for medical treatment of his hip and back. He filed an Application for Preliminary Hearing on August 1, 2012. Claimant's Notice of Intent to respondent, dated July 18, 2012, asked for medical treatment of claimant's hip and back as recommended by Dr. Harris. The Notice of Intent further asked for medical treatment of claimant's back as recommended by Dr. Robert Cusick. A Notice of Preliminary Hearing was filed by claimant, scheduling the matter for preliminary hearing on August 23, 2012. On that date, the ALJ called the matter for hearing on claimant's "Post Award Preliminary Hearing request for additional medical."² The ALJ asked:

THE COURT: All right. Let me set terminal dates. What does the claimant want for terminal dates?

MR. CARMICHAEL [claimant's attorney]: Today.

THE COURT: I will give the claimant a date of August 23rd, and respondent's September 23rd.³

At the post award preliminary hearing held August 23, 2012, claimant testified his primary injury on August 24, 2007, was to his left knee. However, he said he also felt pain in his left hip at the time of the fall. Claimant testified about the surgeries on his left knee and said he continued having problems with his left knee. He claims his left knee is not getting better and he is also having problems with his hip and back. Claimant said he walks with a limp and uses a cane. Claimant first started noting pain in his back around the time of his second knee replacement. Claimant also has problems with his left foot feeling like it is falling asleep. He has had that problem since right after his first knee surgery.

Dr. Harris directed a report to claimant's attorney on July 25, 2012, in which he stated claimant's back pain came to his attention on June 11, 2012, and July 9, 2012. Prior to those dates, his attention was focused solely on claimant's left knee. Dr. Harris said it would be reasonable to consider that claimant may have developed hip and back pain as a result of his gait instability and multiple complications and the fact he is dependent upon a cane for mobility. Dr. Harris said a chronic limp with resulting pelvic obliquity could predispose one to sacroiliitis and a possible trochanteric bursitis, both of

¹ Post Award P.H. Trans. (Aug. 23, 2012) at 10.

² *Id.* at 4.

³ *Id.* at 5.

which he diagnosed on July 9, 2012, and which he believed were likely resultant from claimant's injuries. Dr. Harris, however, believed treatment of claimant's discomfort at the L5-S1 regions would be more appropriately treated under claimant's general insurance, not under workers compensation. Dr. Harris' report was placed into the record as evidence without objection by the respondent.

Dr. John Estivo, a board certified orthopedic surgeon, has evaluated claimant two times, both at the request of respondent. He first examined claimant on December 10, 2010. Dr. Estivo reviewed copies of claimant's medical records at the time of that examination and did not note anything significant in those records regarding complaints of left hip or back pain associated with claimant's work-related injury. When Dr. Estivo examined claimant on December 10, 2010, claimant had undergone multiple surgeries on his left knee—a left knee arthroscopy, left knee replacement, and a revision of his left knee replacement. Claimant's only complaints in December 2010 were to his left knee. Dr. Estivo found nothing significant concerning claimant's left hip or back during his examination in December 2010.

Dr. Estivo examined claimant again on September 14, 2012. He reviewed some additional reports from Drs. Cusick, Harris and Murati. An MRI of the lumbar spine done July 2, 2012, revealed degenerative disc disease at L4-5 and L5-S1, as well as a bulging disc at L4-5 with no neuroforaminal impingement. On September 14, 2012, claimant was complaining of left-sided lower back pain at the left sacroiliac joint, left hip pain laterally, and discomfort and stiffness to his left knee. In his examination, Dr. Estivo found claimant had tenderness over his left sacroiliac joint and tenderness over the lateral side of his left hip at the greater trochanteric bursa. Claimant also had some tenderness throughout range of motion of his left knee. Dr. Estivo ordered x-rays of claimant's lumbar spine and left hip. The x-rays showed some degenerative changes to claimant's lumbar spine with grade I spondylolisthesis at L5-S1, which was age-related. X-rays of claimant's left hip showed no abnormalities.

Dr. Estivo recommended claimant have treatment for his left hip greater trochanteric bursitis and for the left sacroiliitis, which he opined were causally related to claimant's work accident of 2007. Dr. Estivo said claimant continued to walk with an altered gait after the polyethylene exchange performed in June 2011. Dr. Estivo, however, opined there was no evidence to indicate claimant's disc bulge at L4-5 was caused or exacerbated, accelerated or aggravated by his work injury in 2007. Nor did Dr. Estivo believe claimant's disc degeneration and spondylolisthesis at L5-S1 were related to his work injury in 2007.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the

furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-534a(a)(Furse 2000) states:

(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.⁴ In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁵

⁴ K.S.A. 2007 Supp. 44-501(a).

⁵ K.S.A. 2007 Supp. 44-510k(a).

ANALYSIS

The Board will analyze three issues raised by the parties in this appeal. First, is this an interlocutory appeal or an appeal of an award of post award medical? Second, are the low back conditions alleged by claimant related to the original injury? Third, does Dr. Harris continue to be the authorized treating physician?

1. Nature of the Appeal

Claimant filed applications for Post Award Medical Treatment with the Division on June 11, 2012, and July 20, 2012. Claimant filed an Application for Preliminary Hearing on August 1, 2012. In order to determine the nature of the hearing, the Board must consider the type of proceeding conducted by the ALJ. The preliminary hearing provisions contained in K.S.A. 44-534a (a)(2)(Furse 2000) state:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act.

The post award medical provisions are contained in K.S.A. 2007 Supp. 44-510k(a)(2) and state:

Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto.

K.S.A. 2007 Supp. 44-523(b) provides, in part:

[T]he administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter.

In this case, there is no doubt as to the intent of the ALJ with regard to the nature of the hearing being conducted. At the beginning of the hearing, the ALJ noted, "This is a Post Award Preliminary Hearing request for additional medical."⁶ The claimant's attorney then confirmed with the ALJ prior to the beginning of the hearing that the proceeding was a "post award application for medical in the form of a Preliminary Hearing."⁷

⁶ Post Award PH Trans. (Aug. 23, 2012) at 4.

⁷ *Id.*

There is no provision in the Kansas Workers Compensation Act for a hybrid post award medical preliminary hearing. The proceeding is either a hearing on an Application for Post Award Medical pursuant to K.S.A. 2007 Supp. 44-510k or a preliminary hearing pursuant to K.S.A. 44-534a. As such, the Board must determine which statute applies to this proceeding. The proceeding was not summary in nature. The ALJ allowed a full hearing of all issues. Terminal dates were set by the ALJ. While the ALJ may have used the phrase “preliminary hearing” and did not clarify the claimant attorney’s interpretation of the nature of the hearing, the ALJ clearly conducted the proceeding as though it were a hearing on an Application for Post Award Medical. The Board finds this matter is before the Board as an appeal of a hearing on claimant’s Application for Post Award Medical.

2. Medical Records

Claimant raised the issue of whether the report of Dr. Harris attached to the hearing should be included in the record. Medical reports of Dr. Harris, Dr. Cusick, Dr. Bhargava, and Dr. Dobyns were placed into the record without objection. The parties were asked by the ALJ if they had objections to any of the exhibits. Both parties told the ALJ they had no objection. As such, the Board considers the content of the medical documents to have been stipulated into the record, and they will be given full weight.

3. Low Back

Claimant argues that the low back conditions are related to the injury because altered gait, related to the knee injury, caused an aggravation to his low back condition. The only medical evidence placed into the record in support of the development of degenerative changes in the low back is a report from Dr. Harris dated July 25, 2012. In his report, the doctor wrote the claimant “may have” developed hip and back pain as a result of gait instability.⁸

With regard to other low back conditions, Dr. Harris said “I am very reluctant to assign any of the chronic degenerative changes noted in his back to the injury he sustained in 2007.”⁹ Dr. Estivo testified that an MRI taken July 2, 2012, included findings of preexisting age-related degenerative disc disease of the lumbar spine and preexisting spondylolisthesis at L5-S1 with a possible L5 nerve root impingement at L5-S1.

Dr. Harris wrote he would have difficulty assigning causation to many of the areas of pathology found in an MRI ordered by Dr. Cusick, referring to the July 2, 2012, MRI. He then stated that the nature of the pathology, including spondylolysis are “probably less

⁸ Post Award PH Trans., Cl. Ex. 1 at 1.

⁹ *Id.* at 2.

likely to have been caused by trauma sustained in any of Mr. White's injuries or subsequent degeneration as a result of his gait deviation or complications."¹⁰

Dr. Harris concluded by saying, "Although I certainly do agree he should receive medical treatment for his areas of discomfort, especially at the L5 and S1 dermatome regions, I feel this would be more appropriately treated under his general insurance and not under worker's [sic] compensation."¹¹

Dr. Estivo, the only physician to testify, stated that claimant's problems at L5-S1 and the spondylolisthesis were preexisting conditions. He also stated the disc bulge at L4-L5 was not caused by the work injury. On cross-examination, Dr. Estivo agreed it was not unusual that claimant would start developing back pain. He also agreed an altered gait could result in lumbar spine symptoms. Dr. Estivo agreed there is some contribution between the altered gait and the low back pain. However, Dr. Estivo testified on redirect that any contribution would be expected to have occurred within three to four years after the accident. Finally, Dr. Estivo testified he did not believe, within a reasonable degree of medical certainty, that claimant's altered gait contributed to the need for treatment of claimant's current lumbar complaints.

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.¹² 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.¹³ The Board finds claimant has failed to prove that the need for treatment for his back is a natural and probable consequence of the work injury or altered gait.

CONCLUSION

Based upon the foregoing, the Board finds:

1. This matter comes before the Board as an appeal of a hearing resulting from claimant's Application for Post Award Medical;
2. The report of Dr. David Harris, admitted into evidence at the post award preliminary hearing, was stipulated to by the parties and may be considered by the Board;

¹⁰ *Id.*

¹¹ *Id.*

¹² K.S.A. 44-501 and K.S.A. 44-508(g).

¹³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

- 3. The claimant has failed to prove by a preponderance of the evidence that the need for the requested medical treatment for his low back relates to a condition that was caused, aggravated or accelerated by the work injury or resulting altered gait, or the natural and probable consequence of the original injury;
- 4. Dr. Harris is authorized to treat only claimant’s sacroiliitis and hip; and
- 5. Dr. Cusick is authorized to treat the claimant’s left knee.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical of Administrative Law Judge John D. Clark dated November 29, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member and Board Member Pro Tem dissent from the finding of the majority that the January 10, 2011, hearing held by ALJ Clark was a post award medical hearing. Claimant filed an application for preliminary hearing. ALJ Clark clearly indicated at the beginning of the hearing that he was conducting a preliminary hearing. The Board has ruled that a preliminary hearing may be held in a post-award

medical proceeding.¹⁴ Respondent's counsel did not object to Dr. Harris' report being admitted without corroborating testimony, which is a further indication the parties thought a preliminary hearing was being conducted. When ALJ Clark set terminal dates for the parties, he did not indicate the status of the hearing had changed from a preliminary hearing to a regular hearing.

For the foregoing reasons, the undersigned Board Member and Board Member Pro Tem would find the January 10, 2011, hearing was a preliminary hearing.

BOARD MEMBER

BOARD MEMBER PRO TEM

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John D. Clark, Administrative Law Judge

¹⁴ *Perla v. Fry Wagner Moving and Storage*, No. 1,051,775, 2012 WL 2061767 (Kan. WCAB, May 1, 2012).