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

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| **DAVID W. RIGGS**<br>Claimant | ) | |
| VS. | ) | |
| **SPIRIT AEROSYSTEMS, INC.**<br>Respondent | ) | Docket Nos. 1,038,568<br>and 1,053,870 |
| AND | ) | |
| **AMERICAN HOME ASSURANCE CO., and INSURANCE CO. OF STATE OF PENNSYLVANIA**<br>Insurance Carriers | ) | |

# ORDER

## STATEMENT OF THE CASE

Respondent and its insurance carriers (respondent) requested review of the May 31, 2012, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was at maximum medical improvement but was in need of ongoing pain management. The ALJ ordered "the respondent to provide ongoing pain management during the pendency of this claim."[1] Although the Order directed payment for the pain management during the pendency of the "claim," singular, the ALJ did not indicate if the Order was directed in Docket No. 1,038,568; Docket No. 1,053,870; or both, but both docket numbers are listed on the Order.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 10, 2012, Preliminary Hearing and the exhibits and the transcript of

[1] ALJ Order (May 31, 2012).

the August 18, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

## ISSUES

Respondent argues the ALJ did not have jurisdiction to award ongoing pain management because claimant did not set out a request for it in his notice of intent. Further, respondent argues that claimant's need for ongoing pain management is related to his diagnosis of rheumatoid arthritis and/or polyarthralgia and myalgia, not for any work-related conditions.

Claimant argues the Board does not have jurisdiction over the issues in the appeal of a preliminary hearing order. In the event the Board finds it has such jurisdiction, claimant contends his notice of intent requested a change of claimant's treating physician and appropriate medical treatment, and ongoing pain management would fall into either of those categories. Claimant also asserts that he has not been diagnosed with rheumatoid arthritis and his need for ongoing pain management is related to his work activities at respondent.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over either of the issues in this appeal?

(2) Did the ALJ lack jurisdiction to order respondent to provide claimant with ongoing pain management?

(3) Is claimant's need for ongoing pain management related to his work at respondent in either docketed claim?

## FINDINGS OF FACT

This appeal involves two docketed cases. Docket No. 1,038,568 involves a series of accidents from July 5, 2007, through January 23, 2008, for injuries to claimant's legs, knees and low back due to "[r]epetitive bending and working on knees."[2] An Agreed Award was entered in this case on December 11, 2008, wherein claimant was given an award of 7.5 percent general bodily functional impairment and a 7.5 percent permanent partial impairment to his right lower extremity at the level of the leg. Future medical and review and modification were left open upon proper application to and approval by the Director. Docket No. 1,053,870, also involves a series of accidents. In that claim, claimant claims injuries to his "back, knees, fingers, wrists, elbows, shoulders and all affected body parts"

[2] Form K-WC E-1, Application for Hearing filed February 4, 2008.

as a result of repetitive motion and trauma beginning January 21, 2008, and each day worked thereafter.[3]

On January 14, 2011, claimant filed both an Application for Review and Modification and an Application for Post Award Medical in Docket No. 1,038,568.

On July 6, 2011, an Application for Preliminary Hearing was filed by claimant in Docket No. 1,053,870 only. The application was scheduled for hearing on August 18, 2011. Although no Application for Preliminary Hearing was filed in Docket No. 1,038,568, nor was a notice of hearing sent in Docket No. 1,038,568, by agreement, the preliminary hearing held August 18, 2011, was held in both docketed cases. The ALJ's Order filed August 18, 2011, listed both docket numbers and ordered that Dr. Peter Bieri be requested to perform an independent medical evaluation (IME). Dr. Bieri's IME report was received and filed with the Division in both claims on November 9, 2011.

On March 7, 2012, claimant filed an Application for Preliminary Hearing that included both Docket No. 1,038,568 and Docket No. 1,053,870. Attached to the Application for Preliminary Hearing was claimant's notice of intent letter to respondent's attorney dated February 28, 2012, which listed claimant's requested benefits as:

1. Change of claimant's treating physician . . . .
2. Reimbursement of unauthorized medical not previously reimbursed.
3. Appropriate medical treatment.

The Application for Preliminary Hearing was scheduled for May 10, 2012.

No testimony was taken at either the hearing on August 11, 2011, or May 10, 2012. Instead, attorneys for the parties argued their positions and medical records were attached to the respective preliminary hearing transcripts.

## PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether

[3] Form K-WC E-1, Application for Hearing filed December 21, 2010.

the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2010 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) 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.
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> (2) 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. 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. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. 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.

By statute, preliminary hearing findings and conclusions 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

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[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2011 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.[5]

## ANALYSIS

At the May 10, 2012, hearing before the ALJ, the parties agreed to proceed under the preliminary hearing procedure, K.S.A. 44-534a, for both docketed claims. As such, no terminal dates were established and the records were not left open for additional evidence. The ALJ entered a single order covering both docketed claims. That order awarded ongoing medical treatment in the form of pain management. The order was for respondent to provide this benefit. The order did not specify in which docketed claim the benefits were awarded or which insurance carrier was to be responsible for the cost of the treatment. The order did not specify which accident caused the need for treatment or for which body part, injury or condition the treatment was to be provided. If the order intended for both insurance carriers to be jointly and severally liable, this would not be appropriate for an injury resulting from a new accident or an aggravation of a preexisting condition that constitutes a new accident as opposed to a natural consequence of the original injury. K.S.A. 2010 Supp. 44-501(a) only requires an employer and its insurance carrier to pay compensation for personal injury by accident arising out of and in the course of the employees' employment.

Although the ALJ is not required to settle disputes between insurance carriers, the ALJ is required to decide whether claimant's need for treatment is the result of an accident and injury that arose out of and in the course of employment. In order to review this order, it is necessary to know for which accident and for what injury or injuries the treatment was found to be necessary. The respondent and its insurance carriers dispute that the treatment is for an injury that resulted from an accident that arose out of the employment. In order to review this decision, the Board must know for what accident and injury the benefit was awarded.

## CONCLUSION

This matter is remanded to determine for which accident and injury or injuries the benefits were awarded.

## ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 31, 2012, is remanded.

**IT IS SO ORDERED.**

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[5] K.S.A. 2011 Supp. 44-555c(k).

Dated this _____ day of July, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
firm@raresq.com

Vincent A. Burnett, Attorney for Respondent and its Insurance Carriers
Vburnett@MTSQH.com

Thomas Klein, Administrative Law Judge