BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRADLEY K. MCCARTER	)	
Claimant	)	
V.	)	Docket Nos. 1,074,243
	)	& 1,074,244
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the December 7, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Bruce A. Brumley of Topeka, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent.

As discussed below, the record consists of the transcript of the September 23, 2015, preliminary hearing; the November 2, 2015, independent medical evaluation report of Dr. Steven T. Joyce; and all pleadings contained in the administrative file.

ISSUES

Claimant is a police officer. His Application for Hearing in Docket No. 1,074,243 alleges he injured his neck, back and right shoulder on or about October 4, 2014, when he stepped in a hole while chasing a suspect. Claimant's Application for Hearing in Docket No. 1,074,244 alleges that on or about June 9, 2015, he injured his right shoulder, neck and back during a chase when he stepped in a hole.

At the preliminary hearing held in both claims, no testimony or evidence was presented. The parties indicated that Drs. Zimmerman and Fevurly provided opposing medical opinions. The ALJ ordered claimant be evaluated by Dr. Steven T. Joyce to render opinions on causation, temporary work restrictions, prevailing factor and recommendations for treatment. After receiving Dr. Joyce's report, the ALJ gave the parties 10 days to comment on the report. Neither party did so and the ALJ issued an order stating, "Claimant is entitled to medical care. Dr. Steven T. Joyce is designated as the authorized treating physician."[1]

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[1] ALJ Order (Dec. 7, 2015) at 1.

Respondent asserts that even though claimant alleges he suffered work accidents on October 4, 2014, and June 9, 2015, the ALJ instead relied on Dr. Joyce's report, which indicated claimant's injuries were caused by a series of microtraumas. Respondent argues claimant's alleged injuries were not the result of his two alleged accidents, nor the result of injury by repetitive trauma. Respondent also contends the ALJ exceeded her authority for two reasons: (1) she relied on a medical report construing claimant's accidents with the inclusion of repetitive microtraumas and (2) she allowed these claims to become claims for injury by repetitive trauma without first meeting the elements of injury by repetitive trauma.

Respondent's brief contains numerous references to claimant's discovery deposition testimony. However, the deposition transcript was not placed into the record, and from the language of the December 7, 2015, Order, it is unknown if the ALJ considered the deposition transcript. Respondent's brief mentions the reports of Drs. Zimmerman and Fevurly and cites pages in Dr. Fevurly's report. The doctors' reports were not placed into evidence and it is not known if they were considered by the ALJ.

Claimant asserts Dr. Joyce attributed claimant's work injuries to his October 4, 2014, and June 9, 2015, accidents and his repetitive work. Claimant contends that if respondent was concerned with the history claimant provided Dr. Joyce, respondent should have deposed the doctor. Claimant notes that after receiving Dr. Joyce's report, he filed a new Application for Hearing in Docket No. 1,075,757,[2] alleging a repetitive injury. That claim is not part of this appeal. Claimant asserts claimant's discovery deposition should not be considered because he did not agree it is part of the record.

The only issues before the Board are:

1. What is the record?

2. Did claimant prove he sustained personal injury by accident on October 4, 2014, and June 9, 2015, arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant was evaluated by Dr. Joyce on November 2, 2015. Claimant gave a history of developing right shoulder pain on October 4, 2014, when he stepped into a ditch, lost his footing and jarred his entire body while chasing a suspect. Claimant also reported that on June 9, 2015, he was running on uneven ground when he felt right shoulder pain, although he did not fall. Dr. Joyce noted that a June 16, 2015, MRI revealed a full-thickness tear of the distal supraspinatus tendon of the rotator cuff without significant tendon retraction and a partial thickness tear of the distal subscapularis tendon with slight

[2] Claimant's brief states the docket number is 1,075,775, but the Division's records indicate the docket number is 1,075,757.

subluxation of the long head of the biceps tendon. The doctor diagnosed claimant with a right shoulder rotator cuff tear with impingement and right shoulder long head of the biceps tendon pathology with probable tear and recommended repair of those conditions.

With regard to causation, Dr. Joyce opined:

> *In my opinion, the right shoulder rotator cuff tear is a work-related injury due to repetitive microtrauma that has occurred during his course of employment in the Topeka Police Department. It is also my opinion that the reported injuries of October 4, 2014 and June 9, 2015 caused additional stress to the rotator cuff, which culminated in a full-thickness tear.* (Italics in original.)[3]

Dr. Joyce also opined, "*In my opinion, the accidental injury and pre-existing microtrauma are work-related and is the prevailing factor for the claimant's current condition and complaints.* (Italics in original.)"[4]

PRINCIPLES OF LAW AND ANALYSIS

This Board Member finds neither claimant's deposition transcript nor the reports of Drs. Zimmerman and Fevurly were placed into evidence. Therefore, the record in this matter is limited to the transcript of the September 23, 2015, preliminary hearing; the November 2, 2015, independent medical evaluation report of Dr. Steven T. Joyce; and all pleadings contained in the administrative file.

Respondent assumes the ALJ determined claimant sustained an injury by repetitive trauma arising out of his employment. Respondent makes this assumption because Dr. Joyce opined claimant's rotator cuff tear was due to repetitive microtrauma. The preliminary hearing order does not provide a basis for respondent's assumption, because it is silent on the matter.

Claimant alleged traumatic accidents in his applications for hearing in Docket Nos. 1,074,243 and 1,074,244. After receiving Dr. Joyce's report, claimant filed a new claim for an injury by repetitive trauma. That action creates even more confusion concerning whether claimant's alleged work injuries arose out of one or both of his alleged traumatic work accidents or arose from his alleged injury by repetitive trauma.

This Board Member recognizes the Kansas Workers Compensation Act does not specifically require an ALJ to provide a statement of the basis for granting benefits. In order for an ALJ to grant a claimant's request for medical benefits, the ALJ has to find claimant sustained a personal injury by accident or repetitive trauma arising out of and in

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[3] Joyce IME Report at 2.

[4] *Id.*

the course of his or her employment. The requirements to prove an injury by repetitive trauma are somewhat different than when an injury by accident is asserted. For example, where personal injury by repetitive trauma is asserted, the employment must expose the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life.[5] When an injury by accident is claimed, date of accident is normally easy to determine. However, the date of injury by repetitive trauma and notice are often contested.

Because the preliminary hearing Order does not specify whether claimant suffered a personal injury by accident or injury by repetitive trauma, this Board Member has no alternative but to remand the matter to the ALJ to amend the preliminary hearing Order explaining her reason for granting claimant medical treatment. This is not without precedent as in several past instances, the Board or a Board Member has remanded a claim where there is an insufficient explanation for denying benefits.[6]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, the undersigned Board Member reverses the December 7, 2015, preliminary hearing Order entered by ALJ Sanders and remands this matter with instructions to provide an explanation for granting claimant's request for medical treatment.

IT IS SO ORDERED.

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[5] K.S.A. 2014 Supp. 44-508(f)(2)(A)(i).

[6] *Guerrido v. D & L Painting, Inc.*, No. 1,031,067, 2007 WL 740423 (Kan. WCAB Feb. 8, 2007); *Ortiz v. Excel Corporation*, Nos. 180,732 & 180,733 (Kan. WCAB Mar. 22, 1996); *Chaloux v. American Red Cross and Shawnee Country Club*, Nos. 195,993 & 162,499, 1995 WL 399353 (Kan. WCAB May 5, 1995); *Kerns v. Best Buy*, No. 192,934, 1995 WL 338197 (Kan. WCAB Feb. 28, 1995); *Richardson v. Ace Electric Company*, Nos. 184,353 & 184,362, 1994 WL 749456 (Kan. WCAB Dec. 14, 1994) and *Woodham v. Visiting Nurses Assoc.*, No. 187,146, 1994 WL 749135 (Kan. WCAB Nov. 30, 1994).

[7] K.S.A. 2014 Supp. 44-534a.

[8] K.S.A. 2014 Supp. 44-555c(j).

Dated this ____ day of February, 2016.

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HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
bruce@brucebrumleylaw.com;
johnna@brucebrumleylaw.com; tara@brucebrumleylaw.com

Karl L. Wenger, Attorney for Respondent
kwenger@mvplaw.com; mvpkc@mvplaw.com

Rebecca Sanders, Administrative Law Judge