

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

SHARON NEWTON)	
Claimant)	
VS.)	
)	Docket No. 213,225
SWAN MANOR, INC.)	
Respondent)	
AND)	
)	
KANSAS HEALTHCARE ASSOC. WC INSURANCE TRUST)	
Insurance Trust)	

ORDER

Respondent and its insurance trust appealed the April 1, 2002 Award entered by Administrative Law Judge Robert H. Foerschler. The Board placed this post-award request for additional medical treatment on its summary calendar.

APPEARANCES

Steven C. Effertz of Independence, Missouri, appeared for claimant. J. Sean Dumm of Kansas City, Missouri, appeared for respondent and its insurance trust.

RECORD

The record considered by the Board is listed in the April 1, 2002 Award. The record also includes the January 11, 2001 hearing transcript.

ISSUES

This is a post-award request for additional medical treatment. This claim was initially decided by Judge Foerschler in an Award dated May 9, 2000. After the Award, claimant continued receiving treatment from physicians at the University of Kansas Medical Center, and in July 2000 had a spinal cord stimulator implanted in her back. On December 20, 2000, claimant filed an application for a preliminary hearing, accompanied by a

November 17, 2000 demand letter in which claimant requested payment of the implant procedure and prescription charges.

After a January 11, 2001 hearing, Judge Foerschler entered a Post-Award Decision dated February 13, 2001, in which the Judge found claimant's request for medical treatment was made less than six months following claimant's implant surgery. Because no evidence was presented as to whether the implant surgery was necessary and because the charges for the medical treatment were neither itemized nor audited for compliance with the medical fee schedule, the Judge granted the parties additional time for presenting evidence and for referring the billings to the Division of Workers Compensation Medical Director for review.

On October 11, 2001, the Judge held a second hearing and allowed the parties additional time to determine the issues to be decided, to advise the Judge what evidence they intended to submit on those issues, and to submit medical evidence regarding the necessity of the implant procedure and the necessity of additional medications. At that hearing, the Judge ruled that it was claimant's burden to prove that she complied with the statutory formalities to obtain additional medical treatment but it was respondent and its insurance trust's burden to prove that the implant procedure was not reasonably necessary.

On April 1, 2002, the Judge entered an Award in which he ruled that respondent and its insurance trust were responsible for paying the reasonable costs of claimant's spinal implant, as determined by the audit conducted by the Division of Workers Compensation.

Respondent and its insurance trust contend Judge Foerschler erred. In their brief to the Board, they argue (1) claimant failed to comply with the May 9, 2000 Award as claimant failed to apply for additional medical benefits and failed to set the request for hearing before obtaining the additional medical treatment; (2) the Judge lacked jurisdiction to decide this matter as claimant failed to file an application for post-award medical treatment required by K.S.A. 44-510k; (3) the Judge failed to give proper merit to Dr. Christopher Edward Wilson's testimony that the implant did not address claimant's underlying structural abnormality and, therefore, the Judge failed to conclude the implant was not reasonable and necessary to cure and relieve the effects of claimant's injury; and (4) claimant did not comply with K.S.A. 44-510k as she failed to have the Judge determine whether the implant was reasonably necessary before undergoing the procedure. Accordingly, respondent and its insurance trust request the Board to overturn the April 1, 2002 Award and deny claimant's request for additional medical treatment, including the July 2000 spinal implant and the request for payment of the requested prescription charges.

Conversely, in her brief to the Board claimant contends the April 1, 2002 Award should be affirmed. Claimant argues (1) the Judge correctly determined that respondent and its insurance trust neglected and delayed authorizing treatment despite repeated contacts from claimant's attorney; (2) claimant established the implant was reasonably necessary as her pain has been relieved by the procedure and, moreover, it is logical the surgeon who performed the procedure would testify that it was necessary; (3) K.S.A. 44-510k does not apply to this request for additional medical treatment as that statute was enacted following claimant's request for authorization for additional treatment; (4) in the alternative, K.S.A. 44-510k does apply and the application for preliminary hearing that claimant filed in December 2000 satisfies that statute's requirement for an application for hearing; and (5) if K.S.A. 44-510k applies, that statute allows the Judge to order payment of the medical expenses which were incurred up to six months before the filing of the application for additional medical benefits.

The sole issue before the Board on this appeal is whether respondent and its insurance trust are responsible for paying the medical expenses incurred by claimant following the May 9, 2000 Award.

FINDINGS OF FACT

After reviewing the record, the Board finds:

1. This is a request for additional medical treatment following a final Award. On May 9, 2000, Judge Foerschler entered an Award in which claimant was granted permanent partial general disability benefits for a January 17, 1996 accident. The Award indicates that respondent and its insurance trust had paid \$62,107.07 in medical expenses by the time the stipulations were taken in the claim. Part of the treatment administered claimant following the January 1996 accident included a lumbar decompression and fusion from the fourth intervertebral level to the first sacral level with pedicle screws and instrumentation. The May 9, 2000 Award also stated that claimant could request additional medical treatment upon proper application and hearing. The Award reads, in part:

Also the medical expenses she has incurred as described in Claimant's Exhibit 2 at the regular hearing will be awarded and the respondent required to pay them forthwith. The claimant should be entitled to any future medical treatment that may appear to be necessary for the injury she suffered at Swan Manor, provided it be first authorized by a proceeding here in the Division with due notice to the respondent.

...

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

2. Claimant received medical treatment at the University of Kansas Medical Center before the May 2000 Award was entered. After the Award, claimant continued to receive medical treatment at that medical center. Eventually, it was determined that claimant should undergo surgery for a spinal column stimulator to treat claimant's pain and on May 23, 2000, claimant's attorney wrote respondent and its insurance trust's attorney requesting authorization for that procedure. In that letter, claimant's attorney also asked how respondent and its insurance trust desired claimant to submit her ongoing prescription charges. The May 23, 2000 letter reads, in part:

I spoke with Kris Purvis in your office and advised her of our position concerning possible settlement of Sharon's claim. Dr. Joseph has recommended that Sharon have a spinal column stimulator, and the surgery for installation of that device is to be scheduled within the next 30 days. Please let me know as soon as possible what steps my client should take in order to secure authorization for continued treatment with Dr. Joseph.

With regard to my client's ongoing prescription medication charges, please advise as to how you would like this to be handled. Should Ms. Newton submit the receipts to your office for reimbursement, or to the insurance company?

3. On June 12, 2000, claimant's attorney again wrote respondent and its insurance trust's attorney seeking authorization for the spinal column stimulator. That letter reads, in part:

This will confirm our phone conversation of June 8th where we discussed that Sharon Newton has continued treatment at K.U. with Dr. Joseph. Sharon has just had a spinal cord stimulator temporarily inserted, and I understand she is scheduled to return to the doctor on June 15th for more extensive treatment relating to the spinal cord stimulator. We have previously asked for authorization of this treatment, but I had not had [sic] heard back from you. . . .

4. In July 2000, claimant underwent surgery at the University of Kansas Medical Center, having a spinal column stimulator inserted into her spine. In October 2000, claimant forwarded the medical bills for that procedure to respondent's insurance trust, requesting payment. The medical bills were not paid and on December 20, 2000, claimant filed an application for a post-award preliminary hearing, requesting payment of the medical expenses that she had incurred following the May 2000 Award.

5. The Judge conducted two hearings on claimant's request for additional medical treatment – one in January 2001 and one in October 2001. At the January 2001 hearing, claimant told the Judge that the spinal implant had relieved a lot of her pain. At neither hearing did claimant present evidence that the surgical procedure was reasonable or necessary. Instead, claimant's attorney argued it was self-evident that the physician who performed the surgery on claimant would testify that the procedure was reasonable and necessary to relieve claimant's ongoing pain, and it would be silly to spend the money to obtain that opinion. Accordingly, at the October 2001 hearing, the Judge ruled that it would be respondent and its insurance trust's burden to prove that the spinal implant procedure was not reasonable and necessary.

6. The only medical opinion presented in this post-award request for additional treatment is from the doctor respondent and its insurance trust hired to provide an expert medical opinion, Dr. Christopher Edward Wilson. Dr. Wilson, who is a board-eligible orthopedic surgeon who limits his practice to the spine, saw claimant in November 2001. At his deposition, Dr. Wilson testified the dorsal column stimulator that was implanted into claimant's spine was a controversial procedure and that he did not feel it addressed either the failed fusion or the collapse at L3 and 4 in claimant's back. Accordingly, the doctor testified that the spinal stimulator would not have been his choice of treatment and that claimant's failed fusion should have been addressed before trying aggressive pain management procedures such as a spinal stimulator. The doctor testified, in part:

Q. (Mr. Effertz) There is more than one choice, obviously, in dealing with patients in some regards, I assume?

A. (Dr. Wilson) . . . And if the lady [claimant] had continued objective radiographically identified problems that were potentially addressable in a successful manner with surgery, it would appear to me that my next step would be to address those things. And if those options failed, then pain management and possibly the insertion of a dorsal column stimulator would have been appropriate. So it may be appropriate, but it would not have been my next step in treatment.

Q. And whose call would that have been at the time that the decision was being made?

A. Obviously the treating physician.¹

Dr. Wilson, however, in his November 16, 2001 medical report wrote that he would agree that a dorsal column stimulator was appropriate for treating pain. On page four of his report, the doctor wrote, in part:

¹ Dr. Christopher Edward Wilson's December 27, 2001 deposition, at pages 20 and 21.

She presents today with pseudoarthrosis across the previous fusion construct, with junctional instability and degenerative stenosis across L3-4. She has found opioid management, epidural injections, and her dorsal column stimulator to be of limited benefit in control of symptoms.

I would agree with the use of these modalities for palliative pain control. However, she will likely continue with persistent and limiting pain due to her degenerative changes across L3-4 and pseudoarthrosis spanning L4-5. (Emphasis added.)

7. Finally, Dr. Wilson testified that additional medical treatment would depend upon the amount of relief claimant obtains from the spinal stimulator and medications. If claimant gains adequate pain relief from the stimulator and medications and desires no additional surgery, she may continue with her current treatment. On the other hand, if she desires additional treatment and her pain level was intolerable, she may be a candidate for removing her previously placed hardware, for exploring her fusion mass, for decompressing the vertebrae at L3 and 4, and for reinserting hardware spanning L3, 4, 5 and S1 with bilateral pedicle screws, an iliac crest graft and post-operative bracing.

8. Before the December 20, 2000 application for a post-award preliminary hearing was filed, the legislature amended the Workers Compensation Act and added K.S.A. 44-510k, which provided a procedure for obtaining post-award treatment.

CONCLUSIONS OF LAW

The April 1, 2002 Award granting claimant's request for the payment of post-award medical expenses should be affirmed.

The legislature enacted the post-award medical statute, K.S.A. 44-510k, on July 1, 2000. That statute provides:

(a) 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.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following [sic] the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto.

The Board finds the application for a preliminary hearing for post-award medical benefits that claimant filed on December 20, 2000, satisfies the requirement set forth in K.S.A. 44-510k that an injured worker file an application for a hearing in order to request post-award medical benefits. Accordingly, the Judge had jurisdiction to address claimant's request for post-award medical benefits.

Respondent and its insurance trust argued that they should not be required to pay the post-award medical expenses that claimant has incurred because claimant failed to obtain advance authorization from the Judge. The Board concludes that respondent and its insurance trust's position is not, and was not, the law.

First, K.S.A. 44-510k does not require a worker to obtain advance authorization. Instead, the statute empowers the administrative law judges to award medical treatment relating back to the entry of the underlying award; provided, however, that the order for post-award medical benefits cannot go back more than six months before the application for post-award medical benefits was filed.

Second, before K.S.A. 44-510k was enacted, requests for post-award medical benefits were treated much like preliminary hearings. In *Morris*,² the Court of Appeals held that post-award medical benefits, which had been incurred before the worker requested

² *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 598 P.2d 544 (1979).

modification of his underlying award, were properly granted despite specific language in the underlying award that future medical expense would only be awarded upon application. The Court reasoned that delays in obtaining needed medical care could prove detrimental to the worker and to hold otherwise could reward the employer or its insurance carrier for withholding medical treatment. The Court stated, in part:

If an employee is in need of additional medical care after the original treatment has ended and after the original award of compensation has been awarded, any further delay in providing further care could prove detrimental to the employee. An employer waiting for authorization from the director under the change of physician regulation might be tempted to withhold treatment even with notice of the changed condition, if the award was to operate only prospectively. Therefore, the employer would be rewarded for dilatory action in withholding medical treatment. . . .³

In the case at hand, claimant's attorney had requested advance authorization for the spinal implant procedure. But respondent and its insurance trust were dilatory in responding to claimant's request for additional treatment. The medical treatment provided claimant was reasonably necessary even by the standards of respondent's medical expert, Dr. Wilson, who indicated in his November 2001 report that the implant surgery was appropriate for treating claimant's pain.

Accordingly, under these facts K.S.A. 44-510k controls and claimant is awarded the reasonable and necessary medical expenses that were incurred following the underlying Award dated May 9, 2000, but not more than six months before the December 20, 2000 filing of the application for additional medical benefits. Respondent and its insurance trust are also ordered to provide claimant with ongoing medical treatment that is reasonably necessary to treat claimant's work-related back injury.

AWARD

WHEREFORE, the Board affirms the April 1, 2002 Award entered by Judge Foerschler. Additionally, in the event respondent and its insurance trust do not designate an authorized treating physician, claimant may select her own doctor and respondent and its insurance trust shall be responsible for the medical expenses incurred as authorized medical treatment.

IT IS SO ORDERED.

³ *Morris*, at 534.

Dated this ____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Steven C. Effertz, Attorney for Claimant
J. Sean Dumm, Attorney for Respondent and its Insurance Trust
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director