

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

CARLTON BURTON)	
Claimant)	
VS.)	
)	Docket No. 225,093
LABOR READY, INC.)	
Respondent)	
AND)	
)	
LEGION INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of an Order Referring Claimant for Independent Medical Evaluation entered by Administrative Law Judge Brad E. Avery on June 30, 1999.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared on behalf of claimant. Michael H. Stang of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

ISSUES

Neither party filed a brief. According to the Application for Review by Respondent and Carrier, "respondent requests the Board review this Order and remand the matter to the Administrative Law Judge with an Order demanding his rescission of his June 30, 1999 Order." At issue, as best the Board can ascertain, is whether the ALJ exceeded his jurisdiction by entering an order for an independent medical examination of claimant. Also at issue is whether this appeal is from a final order. The Board's jurisdiction is limited to review of final orders except for appeals from a preliminary hearing order. This is not an appeal from a preliminary hearing and the Board does not have jurisdiction unless the order is a final award or order. K.S.A. 1998 Supp. 44-551.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Judge Avery's June 30, 1999 order provides "that the claimant is referred for an independent medical examination and recommendations per K.S.A. 44-510e(a) and/or K.S.A. 44-516." Respondent argues this order is improper for two reasons. First, under

K.S.A. 1998 Supp. 44-510e(a) the ALJ may only refer a matter to an independent health care provider "if the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment." In this case claimant was examined at the request of claimant's counsel by Dr. Daniel Zimmerman and given a rating. Respondent likewise scheduled claimant to be examined by a physician of its choice but, as of the date of Judge Avery's order, respondent's medical examination had been scheduled but not yet completed. Secondly, K.S.A. 44-516 allows for medical examinations by neutral health care providers "in case of a dispute as to the injury." According to respondent's application for review, "in the case at hand, there is no dispute as to the injury, only the nature and extent. As such, a referral under this statute is inappropriate."

The limited record in this case reflects no stipulation to claimant's percentage of functional impairment. The record likewise does not reflect whether or not respondent is stipulating that claimant's May 7, 1997 accident and injuries arose out of and in the course of his employment with respondent. The statement in respondent's application for review to the effect that "there is no dispute as to the injury, only the nature and extent" could be read as a stipulation to the compensability of this claim. But that stipulation, if it is a stipulation, came after Judge Avery's Order Referring Claimant for Independent Medical Evaluation. In that order Judge Avery refers to "an alleged work-related injury sustained by claimant allegedly with this respondent." Either way, it would seem that a dispute as to the nature and extent of an injury would be "a dispute as to the injury" as contemplated by K.S.A. 44-516. Before that issue can be reached, however, the Board must first determine whether it has jurisdiction to review the Order Referring Claimant for Independent Medical Evaluation at this point in the proceeding. The Board does not have jurisdiction unless the order is final.

The Board has previously held that an order for an independent medical evaluation is an interlocutory order.¹ It is neither a preliminary hearing award of benefits entered under the preliminary hearing statute nor is it a final award.

Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.² In Skahan v. Powell, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982), the Court of Appeals states three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on

¹ See e.g., Kitchen v. Luce Press Clippings, Inc., WCAB Docket No. 228,213 (April 1999).

² Rhodeman v. Moore Management, WCAB Docket No. 234,890 (Oct. 1999).

appeal from a final judgment. In our view, however, the Order Referring Claimant for Independent Medical Evaluation does not satisfy these three criteria. The order will not conclusively determine the disputed question of the nature and extent of claimant's disability. Furthermore, it does not even determine the question concerning whether the order itself is proper because the independent medical examiner's report can be objected to at the time of the submission of the case and that issue can be determined by the ALJ at the time of award and reviewed on an appeal from that award, if necessary. The purpose of the ordered examination goes to the merits of the action in that the issue is the nature and extent of claimant's injury. And, as stated, the questions concerning the propriety of the examination and the admissibility of the results of that examination are reviewable both at the time of submission to the ALJ and on appeal. The Order, therefore, is interlocutory and not final and the Board is without jurisdiction to review the Order.

WHEREFORE, the Appeals Board dismisses this appeal leaving the June 30, 1999 Order Referring Claimant for Independent Medical Evaluation in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Michael H. Stang, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director