

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

<b>JOHN WALROD</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,888
<b>CITY OF PRESCOTT</b>	)	
Respondent	)	
AND	)	
	)	
<b>TITAN INDEMNITY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's October 1, 2001, Preliminary Decision.

**ISSUES**

Claimant requested a preliminary hearing and asked the Administrative Law Judge (ALJ) to change his authorized treating physician from orthopedic surgeon David J. Clymer, M.D. to another qualified orthopedic surgeon. In the alternative, if the ALJ determines Dr. Clymer should not be removed as claimant's authorized treating physician, then claimant agrees to undergo additional fusion surgery suggested by Dr. Clymer to include L4-5 and L5-S1 vertebrae levels.

In the ALJ's Preliminary Decision that is the subject of this appeal, the ALJ found claimant's current need for medical treatment was related to his May 28, 1998, accident while employed by the respondent. The ALJ also found that claimant failed to prove that Dr. Clymer's medical treatment services were unsatisfactory and denied claimant's request to change Dr. Clymer as claimant's authorized treating physician. But the ALJ went on and denied claimant's request for additional surgery reasoning that the risk of surgery not improving claimant's condition was too great.

On appeal, claimant argues the ALJ exceeded his jurisdiction when he denied claimant's request for additional surgical treatment. Claimant testified at the preliminary hearing and also expressed his wishes to Dr. Clymer that he desired to go ahead with the fusion surgery. This decision was made after Dr. Clymer expressed the opinion that the additional surgery had no greater than a 50 percent chance of improving claimant's symptoms.

Conversely, in respondent's brief before the Appeals Board (Board), it argues that Dr. Clymer's medical opinion contained in his July 17, 2001, medical record proves that claimant's current need for surgery is related to a preexisting problem at L5-S1 and is not related to the May 28, 1998, accident while employed by the respondent. Respondent also argues that the ALJ's decision that denied claimant's request for additional surgery treatment is an issue the Board does not have jurisdiction to review from a preliminary hearing decision.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary record and considering the parties' briefs, the Board makes the following findings and conclusions:

Before the August 30, 2001, preliminary hearing, this matter came before the ALJ in a December 21, 2000, preliminary hearing and in a regular hearing held on May 29, 2001. During all proceedings, respondent always admitted that claimant injured his low back while working for the respondent on May 28, 1998. As a result of that low back injury, respondent first provided medical treatment through orthopedic surgeon William O. Reed, Jr., M.D. From an MRI scan completed on September 14, 1998, Dr. Reed diagnosed claimant with a herniated nucleus pulposus present with foraminal compression at L3-4. There was also a bulging disc with degenerative changes at L5-S1. As a result of the L3-4 herniated disc, Dr. Reed performed an arthroscopic microdiscectomy at L3-4. But after that surgery, claimant remained symptomatic which included persistent radicular pain in his lower extremities.

Respondent's insurance carrier then referred claimant for further evaluation and treatment recommendation to orthopedic surgeon David J. Clymer, M.D. Dr. Clymer opined that claimant's current symptoms may well be related to mechanical instability at the L3-4 vertebrae level. On March 9, 2000, Dr. Clymer performed a posterior lumbar fusion at L3-4 with pedicle screws.

Post surgery, claimant was placed in a physical therapy and work hardening program but made no progress. On September 20, 2000, Dr. Clymer determined claimant was at maximum medical improvement. He found claimant had a good result regarding mechanical alignment and fixation of the L3-4 fusion. But claimant's subjective complaints of pain and discomfort in his low back radiating down into his lower extremities continued. Because Dr. Clymer did not think, at that time, additional surgery was an option, claimant was released with permanent restrictions of lifting limited to 20 pounds, and to avoid highly repetitive bending and lifting. Claimant returned to work for respondent in October of 2000. But claimant was only able to perform light work for approximately 20 hours per week.

At the regular hearing that was held on May 29, 2001, claimant testified and terminal dates were set for the parties to submit their cases. But at the regular hearing, claimant testified he was having continuing pain in his low back, both legs and feet. And because

of the incapacitating pain he had a follow up appointment with Dr. Clymer on June 13, 2001.

During his return visit to Dr. Clymer on June 13, 2001, claimant had complaints of worsening bilateral leg pain. Dr. Clymer decided claimant should undergo further diagnostic testing and ordered claimant to undergo a lumbar myelogram with CT scan, and an EMG nerve test of both lower extremities to see if there was any evidence of nerve root impingement which might benefit from some form of additional medical treatment.

After the testing, Dr. Clymer saw claimant again on July 17, 2001. The EMG was essentially normal. The myelogram with CT scan indicated the fusion and decompression at L3-4 looked fine. But the L5-S1 disc was somewhat degenerative in its appearance and there was some disc prominence in the mid-line and slightly more to the right than to the left. During the examination, claimant expressed to Dr. Clymer that his back and leg symptoms were severe and incapacitating. In claimant's opinion, the symptoms worsened after he participated in the physical therapy and work hardening programs.

At that time, Dr. Clymer also discussed with claimant the possibility that surgery to extend the fusion to include L4-5 and L5-S1 might be appropriate. But Dr. Clymer explained that it was his opinion that chances of symptomatic improvement would be no greater than 50 percent. Regardless of the possibility of a poor post-surgery outcome, claimant expressed his desire to have the surgical treatment.

During the July 17, 2001, visit, Dr. Clymer, for the first time, raised the issue of whether claimant's problem at the L5-S1 level was related to claimant's May 28, 1998, work injury or instead was the problem more related to a preexisting condition. In 1986, claimant while employed by another employer, injured his low back and received conservative treatment for what was diagnosed in 1987 as a small disc herniation at L5-S1 centrally and to the right with a slight impingement of the S1 nerve root. Claimant settled this claim for a 20-23 percent work disability. After the 1986 injury, claimant testified that he had on occasion some flare ups of back pain but he would take medication and those flare ups would dissipate in a couple of days. After the 1998 work injury, claimant testified he has had continuous pain and problems. Dr. Clymer concluded in his July 17, 2001, medical note, that with the information he had available at that time, he could not clearly find any direct connection between claimant's L5-S1 disc problem and his May 28, 1998, work injury.

Claimant had previously been examined, at claimant's attorney's request, by orthopedic surgeon Edward J. Prostic, M.D. Dr. Prostic saw claimant on June 30, 1999, and September 6, 2000. He then re-evaluated claimant on August 20, 2001. At that time, Dr. Prostic had the diagnostic testing results from the EMG and the myelogram with the CT scan. After reviewing those results and conducting a physical examination of claimant, Dr. Prostic concluded that claimant could be helped by a discectomy at L5-S1. He further suggested that claimant undergo a psychometric testing to rule out contraindication to the

surgery. If claimant has a normal psychometric test and has reported his history accurately, Dr. Prostic concluded that the worsening at the L5-S1 vertebrae level would likely be a gradual worsening following his 1998 work accident.

The Board concludes that the ALJ's finding that claimant's current need for medical treatment for his continuing low back and bilateral leg symptoms is the result of claimant's May 28, 1999, work injury while employed by the respondent is supported by the evidence contained in the current record. The Board finds that both Dr. Clymer's and Dr. Prostic's opinions are somewhat equivocal because of either the need for additional information or additional time to make a more definitive opinion on the direct cause of claimant's current symptoms. The Board, however, agrees with the ALJ's finding that claimant would not have been able to perform the heavy and sometimes repetitive work duties for respondent if claimant's 1986 back injury was the cause of his current symptoms.

The only other remaining issue is whether the ALJ exceeded his jurisdiction when he denied claimant's request for additional surgery as suggested by Dr. Clymer. This of course is a request for medical treatment made at a preliminary hearing. The preliminary hearing statute specifically gives the ALJ authority to grant or deny a request for medical treatment or payment of temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim.<sup>1</sup> Thus, even if the ALJ was wrong in denying claimant's request for additional surgery, he did not exceed his jurisdiction.<sup>2</sup>

The Board concludes, as it has on numerous occasions, that it does not have jurisdiction, at this stage in the proceedings, to review the ALJ's preliminary finding in regard to granting or denying a request for medical treatment. Accordingly, the claimant's appeal in regard to that issue is dismissed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but are subject to modification upon a full hearing on the claim.<sup>3</sup>

**WHEREFORE**, it is the finding, decision, and order of the Board that the ALJ's finding that claimant's current need for additional surgery is related to his May 28, 1998, work accident is affirmed and claimant's appeal of the ALJ's decision that denied claimant's request for additional surgery is dismissed because of lack of jurisdiction. Thus, the Board concludes that ALJ Robert H. Foerschler's October 1, 2001, Preliminary Decision is affirmed and remains in full force and effect.

**IT IS SO ORDERED.**

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<sup>1</sup> See K.S.A. 44-534a(a)(2).

<sup>2</sup> See Allen v. Craig, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977)

<sup>3</sup> See K.S.A. 44-534a(a)(2).

Dated this \_\_\_\_ day of January 2002.

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BOARD MEMBER

c: Leigh C. Hudson, Attorney for Claimant  
J. Donald Lysaught, Jr., Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director