

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RALPH WHITTLEY)	
Claimant)	
V.)	
)	CS-00-0149-575
DAYTON SUPERIOR CORP.)	AP-00-0450-297
Respondent)	
AND)	
)	
TRAVELERS PROPERTY CASUALTY CO.)	
OF AMERICA)	
Insurance Carrier)	

ORDER

Claimant requests review of the March 26, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for Claimant. William L. Townsley, III, of Wichita, Kansas, appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from March 7, 2018, with exhibits attached; the transcript of Preliminary Hearing from March 9, 2020, and the documents of record filed with the Division.

ISSUE

The ALJ denied Claimant's request for further medical treatment, pursuant to 44-508(f)(2), finding Claimant is not in need of additional medical treatment necessary to cure and relieve him from the effects of the injury because his injury aggravated a preexisting condition rendering it symptomatic. Claimant requested review arguing the ALJ's Order should be reversed based on the opinions of Dr. Harold Hess. Respondent argues the analysis and findings of the ALJ should be affirmed.

The issue is whether Claimant's February 5, 2015, work event is the prevailing factor for Claimant's current need for medical treatment.

FINDINGS OF FACT

Claimant injured his low back and right leg in the course of his employment on February 5, 2015. He received authorized medical treatment for his injury through Tiffany George, ARPN, and was released at maximum medical improvement (MMI) without restrictions on February 25, 2015. Claimant returned to work. Unfortunately, his symptoms persisted and gradually worsened over time. He sought medical treatment at his own expense and ultimately retained counsel in December 2016.

At his attorney's request, Claimant met with Dr. William Hopkins on April 9, 2017. Dr. Hopkins opined Claimant sustained injuries to his thoracic and lumbar spine as a result of the accidental injury he sustained on February 5, 2015, and the injury was the prevailing factor in his need for additional treatment. Dr. Hopkins recommended additional diagnostic studies, conservative treatment and possible consultation with an orthopaedic spine surgeon.

Claimant saw Dr. Pat Do on June 28, 2017, for a Court-ordered IME. This occurred more than two years after Claimant's accidental injury. Dr. Do opined part of Claimant's injury and need for treatment was work related and part of it was not. Specifically, Claimant had a right lateral disk protrusion at L1-L2 causally related to the work injury of February 5, 2015. Claimant's suffered from degenerative disc disease at L3-L4, L4-L5, and L5-S1 and facet arthritis at L4-L5, none of which was due to the work injury or work-related activities.

Dr. Do opined:

Within a reasonable degree of medical probability, his described work injury is consistent with history and consistent with the pop and consistent with the right leg pain, is that of the right-sided disk protrusion at L1-L2.

Within a reasonable degree of medical probability, his degenerative disk disease and facet arthritis is not causally related to his work activities. Treatment recommendations for his work-related issue, which is just the right-sided disc protrusion, he has had appropriate time, physical therapy, three epidurals for which case his right leg pain is still present, but much resolved. He is at maximum medical improvement for any kind of work-related issues.

In regards to his current complaints, which is lower lumbar pain, which is NOT causally related to his work activities. If he and Dr. Ipsen ever decided that the benefit of surgery outweighs the risks, he is a candidate for decompression of his spinal stenosis that is not due to work-related issues and a spinal fusion that would

be due to the degenerative disk disease should be done under his commercial insurance.

The only surgery that might be warranted under his Worker's Compensation injury is that to the disk protrusion L1-L2 to the right. However, of all the things that is going on, the vast majority of his pain is to the lower lumbar spine segments, all consistent with his degenerative disk disease. Thus, again for his work-related issues at L1-L2 to the right, he is at maximum medical improvement.¹

A telephone conference was held on April 16, 2018. As a result, Dr. Do became the authorized treating physician "for additional conservative and palliative care."² Dr. Do provided conservative treatment and released Claimant at MMI, for the second time, on October 17, 2018.

At his own expense, Claimant met with Dr. Harold Hess for an IME on January 25, 2019. Claimant reported low back pain and pain radiating down both legs to his feet. Dr. Hess opined Claimant was suffering from lumbar radiculopathy secondary to a broad-based disc protrusion at L3-L4 causing lumbar stenosis and nerve root impingement, and an annular tear at L4-L5. Dr. Hess recommended Claimant undergo an L3-L4 laminectomy and discectomy. Depending on the results of a lumbar discogram, a lumbar fusion could be warranted at L3-L4, L4-L5 and L5-S1. Dr. Hess found the work injury was the prevailing factor in causing Claimant's current medical condition and need for treatment.

Claimant saw Dr. Fermin Santos on May 6, 2019, for a Court-ordered IME. Dr. Santos examined Claimant and diagnosed low back pain, bilateral lumbar radiculitis, lumbar degenerative disc disease and L3-4 protrusion with moderate central stenosis. Dr. Santos opined Claimant's back and leg pain were "related to the work injury."³ He recommend an updated MRI to compare with the 2017 MRI.

A second MRI was performed and the results provided to Dr. Santos. He issued a second report on November 12, 2019. Dr. Santos opined the ever-worsening, non-work degenerative disc disease was the leading cause of Claimant's need for medical treatment and his work-related injury was merely an exacerbation of a preexisting condition.

After receiving Dr. Santos' second report, Claimant sought an updated report from Dr. Hess. Dr. Hess reviewed both of Dr. Santos' IME reports and the second MRI. He opined, in the second report, dated February 17, 2020, his opinions were unchanged.

¹ Do IME report dated June 28, 2017, at 3.

² ALJ Order (Apr. 23, 2018).

³ Santos IME report dated May 6, 2019, at 4.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-508(f)(2) states in part:

An injury is compensable only if it arises out of and in the course of employment.
An injury is not compensable because work was a triggering or precipitating factor.
An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Claimant urges the Court to adopt the opinions of Dr. Harold Hess finding this claim compensable. The sole issue before the Board is whether Claimant's work-related injury on February 5, 2015, is the prevailing factor for Claimant's need for medical treatment.

In denying Claimant's request for additional medical treatment, the ALJ stated:

the evidence tips in favor of Doctors Do and Santos, with particular weight to Dr. Do. Succinctly, Claimant has a work injury at L1-L2, which still generates pain but is now at MMI. All other low back conditions now needing medical attention derive from an original non-symptomatic pre-existing condition which, at worst, was solely aggravated by the work accident.⁴

This Board Member agrees with the ALJ's analysis, findings and conclusions.

Initially, Dr. Do was Court-ordered to perform an independent medical evaluation. In his June 28, 2017, IME report, he opined Claimant was at MMI for his work-related condition. Following an April 16, 2018, telephone conference, Dr. Do became the authorized treating physician. He was the first physician to offer a causation opinion with the benefit of having an MRI to review. Dr. Do specifically detailed his diagnoses and which of those were and were not work related. He found Claimant to be at MMI again on October 17, 2018. Claimant has not received active medical treatment since that time.

Dr. Santos was Court-ordered and specifically asked to address which medical conditions were and were not related to Claimant's accidental injury. After receipt and review of a second MRI, Dr. Santos offered his opinions which found Claimant's need for medical treatment was not related to his accidental injury. In response to the ALJ's request for a prevailing factor opinion, Dr. Santos stated, "I do feel that the work injury exacerbated his pre-existing degenerative condition."⁵ He offered no treatment recommendations for the work related condition.

⁴ ALJ Order (Mar. 26, 2020) at 11-12.

⁵ Santos Amendment to IME report dated Nov. 12, 2019, at 2.

Claimant argues the prevailing factor opinions of Dr. Do and Dr. Santos are not credible. He asks the Board to find the only credible opinion is provided by Dr. Hess. This Board Member disagrees. Dr. Hess' examination of Claimant occurred on January 5, 2019, almost four years after Claimant's accidental injury. Dr. Hess recognized a severe, ongoing degenerative process throughout Claimant's low back. He relates everything back to the accidental injury without explanation. To overcome the opinions of two Court-ordered evaluations, essentially giving the same opinions, more explanation is necessary.

Claimant suffers from severe degenerative changes in his low back. There is no question he needs medical treatment. Claimant did not receive any medical treatment through workers compensation until the Court-ordered IME by Dr. Do more than two years after his accidental injury. With no history of prior back problems, there is no reference point for any of the physicians to use for comparison. The medical opinions provided in this claim have been made by qualified physicians familiar with the Kansas worker's compensation system. After review of the medical records, diagnostic studies and examination of the Claimant, the physicians provided their opinions as to the prevailing factor. This Board Member agrees with the analysis and conclusion of the ALJ. The greater weight of the evidence supports his Order denying Claimant's request for additional medical treatment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSION

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant's request for additional medical treatment is denied pursuant to 44-508(f)(2).

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Steven M. Roth dated March 26, 2020, is affirmed.

⁶ K.S.A. 2018 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

William L. Phalen, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Steven M. Roth, Administrative Law Judge