

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**WILLIAM M. HINTON** )  
Claimant, )  
 )  
v. )  
 )  
**HOBBY LOBBY STORES, INC.** )  
Respondent, )  
 )  
and )  
 )  
**INDEMNITY INSURANCE COMPANY** )  
**OF NORTH AMERICA** )  
Insurance Carrier. )

Docket No. CS-00-0437-236  
AP-00-0450-766

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the April 21, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Kenton Wirth appeared for Claimant. Samantha N. Benjamin-House appeared for Respondent and its Insurance Carrier.

The ALJ's Order authorized Dr. John Estivo to provide all treatment, tests and referrals for Claimant's lumbar strain. Temporary total disability benefits (TTD) were ordered paid from January 22, 2019, through May 3, 2019, at the rate of \$458.26 per week. Temporary partial disability benefits (TPD) were ordered paid from May 3, 2019, and continuing until Claimant has attained maximum medical improvement (MMI) or is returned to work earning equal to or in excess of his pre-injury average weekly wage (AWW).

The record on appeal is the same as that considered by the ALJ and consists of the transcripts of the March 28, 2019, and March 5, 2020, preliminary hearings and exhibits, the independent medical evaluation report of John P. Estivo, D.O., June 20, 2019, and the evidentiary deposition of John Estivo, D.O., taken February 4, 2020, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent argues the ALJ's Order incorrectly determined Claimant's fall on January 22, 2019, subsequent to his original injury on November 17, 2016, arose out of and in the course of his employment. Respondent further argues the ALJ exceeded her

jurisdiction in granting medical, TTD and TPD benefits. Finally, Respondent argues the ALJ incorrectly calculated Claimant's AWW.

Claimant argues the sole issue raised by Respondent which is properly before the Board is whether Claimant's fall at home on January 22, 2019, arose out of and in the course of his employment with Respondent. Claimant further argues the Board does not have jurisdiction over the remaining issues raised by Respondent.

The Issues are:

1. Did Claimant meet his burden of proof to establish his fall on January 22, 2019, arose out of and in the course of his employment with Respondent necessitating medical treatment for his back?
2. Did the ALJ exceed her jurisdiction in granting medical, TTD and TPD benefits?
3. Did the ALJ miscalculate Claimant's AWW?

#### **FINDINGS OF FACT**

The facts of this claim are essentially undisputed. Claimant suffered a compensable injury to his left knee on November 17, 2016. The left knee was surgically repaired by Dr. Brennan Lucas on November 7, 2017. Dr. Lucas performed a diagnostic arthroscopy with posterior cruciate ligament with allograft. Despite surgery and post-surgery physical therapy, Claimant continued to complain of pain, stiffness and instability. Since Claimant stopped wearing his brace in February 2018, he has repeatedly fallen due to his knee giving out.

Claimant returned to see Dr. Lucas on May 2, 2018, with continued complaints of pain and stiffness of the left knee. Dr. Lucas provided a corticosteroid injection to the left knee and prescribed work hardening. Claimant reported to Dr. Lucas on June 27, 2018, and July 30, 2018, with the same complaints of left knee pain and stiffness. Dr. Lucas scheduled Claimant for a manipulation, under anesthesia, to the left knee along with diagnostic arthroscopy with lysis of adhesions, which was performed on August 16, 2018. Dr. Lucas found Claimant to be at maximum medical improvement on November 7, 2018.

Upon release from medical treatment, Claimant described his condition as "I still have pain. I still have the limited movement. It still wants to give out, still walk funny."<sup>1</sup> Despite the second surgery, Claimant reported still experienced buckling or giving way, on average, once or twice per month.

On January 22, 2019, Claimant's left knee buckled causing him to fall down his front steps. He lost consciousness. He woke up on the ground with injuries to his low back, left

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<sup>1</sup> P.H. Trans., (Mar 28, 2019), at 24.

hand and knee. He does not know why his knee gave out, "it just suddenly gives."<sup>2</sup> The next day, Claimant sought treatment at Via Christi and was taken off work until he had an MRI of the left knee and low back.<sup>3</sup>

Respondent asked Dr. Lucas to review the Via Christi medical records from January 23, 2019, generated in connection with Claimant's fall. In a February 25, 2019, letter, Dr. Lucas stated he last evaluated Claimant on November 7, 2018. He found Claimant had a negative posterior drawer and his PCL was stable along with the rest of the ligaments to the left knee. He stated a repeat arthroscopy was performed on August 16, 2018, which showed the PCL ligament reconstruction had incorporated and vascularized well and ligamentously the left knee was stable. Based on the information available to him, he could find no reason why the left knee would be unstable.<sup>4</sup>

A preliminary hearing was conducted on March 28, 2019. The ALJ ordered an IME with Dr. Lowry Jones. Due to scheduling issues, the Order was subsequently changed to an IME with Dr. John Estivo, which was conducted on June 20, 2019.

Following review of the medical records provided and examining Claimant, Dr. Estivo diagnosed:

1. Status post left knee arthroscopic PCL reconstruction completed by Dr. Lucas on 11/7/17.
2. Status post diagnostic arthroscopy to the left knee with manipulation under anesthesia and lysis of adhesions performed by Dr. Lucas on 08/16/18.
3. Flexion contracture to the left knee.
4. Status post left hand 4<sup>th</sup> metacarpal shaft fracture.
5. Lumbar spine pain.

Dr. Estivo opined no treatment was warranted for the left knee and hand. The only treatment recommended was a lumbar MRI and conservative treatment for the low back pain. He placed temporary restrictions on Claimant.

Dr. Estivo opined Claimant's fall was related to the initial left knee injury. "It is not because of instability to the left knee that he fell. It is because he has a flexion contracture to the left knee preventing him from fully extending his left knee as he ambulates." He explained in detail:

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<sup>2</sup> P.H. Trans., (Mar 28, 2019), at 27.

<sup>3</sup> P.H. Trans., (Mar 28, 2019), Cl. Ex. A at 6

<sup>4</sup> P.H. Trans., (Mar 28, 2019), Resp. Ex. B at 1.

“Claimant underwent the second arthroscopy with manipulation under anesthesia in hopes of regaining range of motion to his left knee but unfortunately, he remains with a loss of range of motion to the left knee. Given the fact that he cannot fully extend his left knee, I think that it is reasonable that this could have caused him to fall in January 2019, resulting in a left hand fracture as well as the injury to his lower back. The fact that he has an altered gait, having to walk on the toes of his left foot rather than flatfooted, would also be a contributing factor to his complaints of lower back pain. It is my opinion that the prevailing factor and need for medical treatment of this patient’s left knee pain with flexion contracture, lumbar spine pain, and left hand 4<sup>th</sup> metacarpal fracture would be the work accident of 11/17/2016.”<sup>5</sup>

Claimant returned to work at Holiday Inn Express on May 3, 2019. Evidence was presented by the parties regarding an offer to return to work with Respondent sometime in January 2019. The details of the evidence presented regarding the job offer do not need to be restated here.

#### **PRINCIPLES OF LAW and ANALYSIS**

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> 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), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>7</sup>

K.S.A. 44-508 states in pertinent part:

(f)(2) “An injury is compensable only if it arises out of and in the course of employment...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury that occurred as a result of the natural aging process or by the normal activities of day-to-day living;

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<sup>5</sup> See Estivo IME June 20, 2019 at 6.

<sup>6</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>7</sup> K.S.A. 2018 Supp. 44-555c(j).

- (ii) accident or injury that arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury that arose out of a risk personal to the worker; or
- (iv) accident or injury that arose either directly or indirectly from idiopathic causes.

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Employees are entitled to compensation for secondary injuries that are the natural and probable result of the primary injury.<sup>8</sup> “[A]ll injuries, including secondary injuries, must be caused primarily by the original work accident.”<sup>9</sup> Under the law in effect from May 15, 2011, forward, secondary injuries are compensable if caused primarily by the original work accident and are the natural and probable consequence of the original injury.<sup>10</sup>

Two medical opinions were provided to the Court by the parties in support of their respective positions. Dr. Lucas, the treating physician opined “There should be no reason regarding instability for his fall dated January 22, 2019, at home based upon the information I have available to me at this point in time.” Dr. Estivo concluded Claimant’s fall was not due to instability, but because “he has a flexion contracture to the left knee preventing him from fully extending his left knee as he ambulates.” The ALJ found the opinions of Dr. Estivo to be more credible and supported by the evidence. This Board Member concurs.

Claimant consistently complained about the status of his knee condition since his injury and two subsequent surgical procedures. Claimant had issues with falling before his fall on January 22, 2019. Dr. Lucas opined the fall did not occur as a result of instability. Dr. Estivo agreed with this assessment. Dr Estivo, however, gave a detailed and rational explanation as to what caused Claimant to fall. In so doing, Dr. Estivo testified it appeared the flexion contracture had begun to develop as early as November 7, 2018, when Dr. Lucas found Claimant to be at MMI. This Board Member finds and concludes the evidence supports the ALJ’s Order finding Claimant’s injuries arose out of and in the course of his employment. The ALJ did not exceed her jurisdiction in so doing.

The remaining issues deal with whether the ALJ exceeded her authority in awarding TTD and TPD benefits. K.S.A. 44-534a sets forth the jurisdictional issues subject to

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<sup>8</sup> See *Casco v. Armour Swift-Eckridge*, 283 Kan. 508, 515-16, 154 P.3d 494 (2007).

<sup>9</sup> See *Buchanan v. JM Staffing, LLC*, 52 Kan. App. 2d 943, 951, 379 P.3d 428 (2016).

<sup>10</sup> See *Id.*

review.<sup>11</sup> When the record reveals a lack of jurisdiction, the Board authority extends no further than dismissing the action.<sup>12</sup> The order for payment of TTD and TPD benefits are not listed as jurisdictional issues subject to review by the Board under 44-534a. Respondent's request for review of the ALJ's order requiring payment of TTD and TPD is dismissed.

### CONCLUSION

After reviewing the record compiled to date, the undersigned Board Member concludes Claimant met his burden of proof in establishing the injuries sustained in a fall on January 22, 2019, to his back, left knee and hand arose out of and in the course of his employment.

### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member the Order of Administrative Law Judge Ali Marchant dated April 21, 2020, is hereby affirmed.

**IT IS SO ORDERED.**

Dated this 19<sup>th</sup> day of June, 2020.

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CHRIS CLEMENTS  
APPEALS BOARD MEMBER

c: Via OSCAR

Kenton Wirth, Attorney for Claimant  
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier  
Hon. Ali Marchant, Administrative Law Judge

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<sup>11</sup> See *Omar v. Tyson Meats*, No. 103,534 (Kansas Court of Appeals unpublished opinion filed October 29, 2010)

<sup>12</sup> See *Bibbs v. Pawnee Mental Health Services*, No. 1,035,339, 2015 WL 6776991 (Kan. WCAB Oct. 16, 2015).