

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**RICHARD HERROLD**  
Claimant

v.

**FIRST GROUP AMERICA, INC.**  
**d/b/a FIRST STUDENT MANAGEMENT LLC**  
Respondent

AP-00-0462-926  
CS-00-0432-877

and

**NEW HAMPSHIRE INSURANCE COMPANY**  
Insurance Carrier

**ORDER**

Respondent and Insurance Carrier requested review of the December 21, 2021, Award issued by Administrative Law Judge (ALJ) Troy A. Larson. The Board heard oral argument on April 14, 2022.

**APPEARANCES**

Michael H. Stang appeared for Claimant. Rachel A. Rioux and Christopher J. McCurdy appeared for Respondent and Insurance Carrier.

**RECORD AND STIPULATIONS**

The Board adopted the stipulations and considered the same record as the ALJ, after overruling all objections, consisting of the Transcript of Regular Hearing Taken via Teleconference, held September 21, 2021; the transcript of Continuation of Regular Hearing by Deposition of Richard Herrold, taken September 27, 2021, including Exhibit 1; the transcript of Remote Evidentiary Deposition of Clyde Allen Perryman, taken May 6, 2021; the transcript of Evidentiary Deposition of Michael J. Poppa, D.O., taken September 24, 2021, including Exhibits 1-3; the Agreed Stipulation with the attached medical records of Dr. Lingenfelter; the narrative report of Dr. Pratt, dated June 5, 2020, concerning his Court-ordered independent medical examination; the written fee agreement between Claimant and his counsel; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Is Claimant entitled to an award of temporary total disability compensation from August 1, 2017, through July 18, 2018?

FINDINGS OF FACT

Claimant was employed by Respondent as a technician at Respondent's garage in Shawnee, Kansas. Claimant performed various maintenance jobs on school buses, including changing oil filters, changing tires, repairing brakes and replacing seat covers. Claimant picked up items of varying weights, used vibratory tools and repetitively gripped equipment and materials. It is undisputed Claimant sustained injuries to his right elbow from repetitive trauma arising out of and in the course of his employment with Respondent.

After notifying his supervisor, Mr. Perryman, of his injuries, Claimant was referred to Concentra for medical treatment directed to the right elbow. Claimant received conservative treatment at Concentra from December 2016 through April 2017. While treating at Concentra, Claimant was placed on light-duty work restrictions, which Respondent accommodated. Essentially, Claimant continued performing his usual work, but coworkers performed job tasks Claimant was unable to perform. Claimant was released from Concentra's care on April 6, 2017, without restrictions.

On April 21, 2017, Respondent notified its employees, including Claimant, the Shawnee garage would close in July 2017 because Respondent lost a school bus account. The letter Respondent generated advising of the garage closure told employees transfer opportunities were possible, but no written instructions for obtaining a job transfer were made.

When Claimant was released from Concentra's care, his right arm pain and loss of strength were the same as before. Claimant also had left arm pain because he was using his left arm more on account of the right elbow injuries. Claimant thought he needed additional medical treatment, and was incapable of working full duty. Mr. Perryman allowed Claimant to continue working in his accommodated position through July 28, 2017. Claimant's arms continued to worsen while he worked for Respondent.

Mr. Perryman learned through the manager at Respondent's Kansas City garage, Mr. Bollinger, there was an opening for a technician at Kansas City. Mr. Perryman told Claimant on several occasions prior to July 28 about the job opening, and Claimant needed to contact Mr. Bollinger to arrange a transfer to Kansas City. Claimant did not contact Mr. Bollinger prior to July 31. On July 28, the Shawnee garage closed.

On July 31, 2017, Claimant appeared at the Kansas City shop and spoke with Mr. Bollinger. Claimant was wearing his work uniform and was ready to start work. Mr. Bollinger discussed the job duties and showed Claimant around the shop. Claimant testified Mr. Bollinger did not seem surprised to see Claimant, and offered Claimant a technician job at the garage. Claimant told Mr. Bollinger about his right elbow injury, his prior accommodated work at the Shawnee location, and his need for accommodated work while he sought additional treatment for his ongoing problems. Mr. Bollinger rescinded the job offer and told Claimant to return when he was 100%. Claimant testified he did not quit his employment and would have performed the accommodated work he performed at the Shawnee garage if it was offered.

On August 1, 2017, Claimant was evaluated at his attorney's request by Dr. Poppa. Dr. Poppa understood Claimant sustained a work-related injury to his right upper extremity, as well as injury by repetitive trauma to the left elbow and shoulder. Dr. Poppa diagnosed right-sided chronic lateral epicondylitis, and a partial tear of the common extensor tendon. Dr. Poppa also diagnosed an overuse strain of the left elbow with mild lateral epicondylitis. Dr. Poppa recommended additional treatment, and imposed temporary restrictions of no use of impact tools, no repetitive or forceful gripping with either hand, and no lifting greater than two pounds extended away from the body. Dr. Poppa wrote a note with his restrictions, and gave the note to Claimant. Claimant thought Dr. Poppa's note reflected his physical capabilities. Claimant did not contact Respondent about work within those restrictions or working at other locations.

Claimant sought additional medical treatment, and Dr. Lingenfelter performed a Court-ordered independent medical examination on January 30, 2018. Dr. Lingenfelter diagnosed right-sided chronic lateral epicondylitis and radial tunnel syndrome, with a possible insufficiency of the radial collateral ligament. Dr. Lingenfelter recommended surgery, and thought the conditions were work-related. No work restrictions were imposed.

Claimant returned to Dr. Lingenfelter on May 2, 2018, for a follow-up. Dr. Lingenfelter's notes state he awaited authorization to proceed with surgery. Claimant's symptoms were unchanged compared to January 30. Dr. Lingenfelter imposed temporary restrictions of no repetitive gripping or grasping, and no use of torque guns or vibrating tools. Claimant was not offered accommodated work within Dr. Lingenfelter's restrictions by Respondent, although Claimant would have accepted an offer of accommodated work if it were made.

On July 19, 2018, Claimant underwent the first surgery by Dr. Lingenfelter, which was a tennis elbow repair and radial tunnel release. On February 6, 2019, Dr. Lingenfelter performed a right-sided cubital tunnel release surgery. Claimant was on work restrictions from July 19, 2018, through August 27, 2019, when Claimant was released with permanent work restrictions. Claimant was paid temporary total disability compensation by Respondent from July 19, 2018, through August 27, 2019.

On September 10, 2019, Dr. Lingenfelter issued a report rating Claimant's functional impairment at 7% of the right upper extremity based on the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*). Dr. Poppa evaluated Claimant on December 9, 2019, and diagnosed right severe lateral epicondylitis, lateral collateral ligament insufficiency, radial tunnel syndrome and left shoulder overuse strain. Dr. Poppa rated Claimant's functional impairment at 23% of the body as a whole for those conditions, as well as additional impairment for pain and the burden of medical treatment. Dr. Poppa recommended home exercises and prescription medication in the future.

Dr. Pratt performed a Court-ordered independent medical examination of Claimant on June 5, 2020. Dr. Pratt noted a history of right elbow discomfort and prior bilateral shoulder injuries, with additional left shoulder symptoms from increased use of the left arm. Dr. Pratt noted the physical examination was not a consistent indicator of Claimant's functional abilities. Dr. Pratt diagnosed a right elbow injury. Dr. Pratt thought Claimant's left shoulder symptoms were primarily caused by Claimant's preexisting condition, and work activities aggravated the right shoulder condition. Dr. Pratt rated Claimant's impairment at 8% of the right arm based on the *AMA Guides*, and recommended permanent restrictions based on Dr. Lingenfelter's restrictions. No future medical treatment was anticipated.

Claimant returned to work for Respondent in the middle of August 2021. Claimant denied having any income sources between August 1, 2017 and July 19, 2018, and denied applying for or receiving unemployment compensation. Claimant testified he lived on money he borrowed from friends and family. Claimant did not apply for Social Security disability benefits. Claimant has reduced grip strength on the right side, cannot lift much weight and cannot grip tools.

ALJ Larson issued the Award on December 21, 2021. Claimant was awarded temporary total disability compensation from August 1, 2017 through July 18, 2018, after finding Claimant neither resigned, nor was terminated for cause. ALJ Larsen found Dr. Poppa imposed restrictions, and Dr. Lingenfelter's recommendation of additional treatment supported applying his restrictions retroactively to August 1, 2017. Respondent was awarded a credit for an overpayment of temporary total disability compensation. Claimant was awarded permanent partial disability compensation based on 8% functional impairment of the right arm, after the opinions of Dr. Pratt were adopted. Future medical treatment was denied. These review proceedings follow.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The sole issue on review is whether Claimant should receive an award of temporary total disability compensation from August 1, 2017, through July 18, 2018. Respondent argues the award of temporary total disability compensation is erroneous because

Claimant was released to work without restrictions by Concentra. In the alternative, Respondent argues Claimant cannot receive temporary total disability compensation because he refused an offer of work and essentially resigned. Claimant argues the award of temporary total disability compensation was correct.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>1</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>2</sup> The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.<sup>3</sup>

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any substantial and gainful employment, and an authorized treating physician's opinion regarding work status shall be determinative.<sup>4</sup> Where the employee remains employed by the employer and an authorized treating physician imposes restrictions, the employee shall receive temporary total disability compensation if the employer cannot accommodate the restrictions.<sup>5</sup> A rebuttable presumption arises an employee is not eligible to receive temporary total disability compensation if the employee refuses accommodated work within the temporary restrictions.<sup>6</sup> An employee terminated for cause or who voluntarily resigns shall not receive temporary total disability if the employer could have accommodated the temporary restrictions imposed by an authorized treating physician, and an employee shall not be entitled to receive temporary total disability compensation during the weeks the employee also receives unemployment compensation.<sup>7</sup>

Based on the credible evidence of the record as a whole, Claimant proved he was temporarily and totally disabled from engaging in any substantial and gainful employment from August 1, 2017, through July 18, 2018. Although Concentra initially declared Claimant at maximum medical improvement and capable of working without restrictions in

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<sup>1</sup> See K.S.A. 44-501b(a).

<sup>2</sup> See *id.*

<sup>3</sup> See K.S.A. 44-501b(c).

<sup>4</sup> See K.S.A. 44-510c(b)(2)(A).

<sup>5</sup> See K.S.A. 44-510c(b)(2)(B).

<sup>6</sup> See *id.*

<sup>7</sup> See K.S.A. 44-510c(b)(2)(C) & (b)(4).

April 2017, Claimant was still symptomatic and did not believe he could work full-duty. Respondent agreed with Claimant and continued to provide accommodated work within Concentra's temporary restrictions until July 28, 2017, when the Shawnee garage closed. Claimant appeared at the Kansas City location ready to work on July 31, 2017, but an offer of work extended by Mr. Bollinger was rescinded after Claimant stated he was seeking additional treatment for his work-related injuries and required accommodated work. Respondent never offered accommodated work after July 28, 2017. Claimant did not work elsewhere.

Dr. Poppa thought Claimant was not at maximum medical improvement and imposed temporary work restrictions on August 1, 2017. Dr. Lingenfelter concurred with Dr. Poppa on January 30, 2018, and recommended additional medical treatment for the work-related injuries. There is no evidence Claimant's condition changed between August 1, 2017, and January 30, 2018. Dr. Lingenfelter became the authorized treating physician, and imposed restrictions on May 2, 2018. Again, there is no evidence Claimant's condition changed between January 30, 2018, and May 2, 2018.

In the absence of evidence Claimant's condition changed due to some unrelated, intervening cause, the Board finds Claimant had not reached maximum medical improvement for his work-related injuries between August 1, 2017, and May 2, 2018, and his condition was temporary. Based on the opinions of Drs. Poppa and Lingenfelter, Claimant was physically capable of performing light-duty work and his normal work as a technician exceeded those restrictions. As a result, Claimant was totally incapable of engaging in substantial and gainful employment on account of the work-related injuries between August 1, 2017, and May 2, 2018. After May 2, 2018, Dr. Lingenfelter's work restrictions became determinative of Claimant's ability to work because Dr. Lingenfelter was the authorized treating physician. Claimant proved he was temporarily and totally disabled on account of his work-related injuries between August 1, 2017, and July 18, 2018.

The Board also concludes Respondent failed to prove Claimant is ineligible to receive temporary total disability compensation between August 1, 2017, and July 18, 2018. Respondent never offered Claimant accommodated work after July 28, 2017, and Claimant therefore did not refuse an offer of accommodated work. Although Respondent suggests Claimant engaged in dilatory conduct by failing to contact Mr. Bollinger before appearing at the Kansas City garage on July 31, 2017, Claimant still received an offer of work from Mr. Bollinger until it was rescinded after Claimant advised he had residual problems from his work-related injuries. Claimant did not voluntarily resign. Claimant is working for Respondent and was not terminated for cause. Claimant testified he did not apply for or receive unemployment compensation, and Claimant's testimony was not contradicted. Respondent failed to prove the statutory defenses to the payment of temporary total disability compensation apply in this case. Accordingly, the award of temporary total disability compensation in the Award should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Larson, dated December 21, 2021, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Michael H. Stang  
Christopher J. McCurdy  
Rachel A. Rioux  
Hon. Troy A. Larson