

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KATHLEEN VAN ORDEN</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0474-949
<b>GENERAL MOTORS CORP.</b>	)	CS-00-0017-851
Respondent	)	
AND	)	
	)	
<b>AMERICAN HOME ASSUR CO.</b>	)	
<b>NATIONAL UNION FIRE OF PIT</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and insurance carrier requested review of Administrative Law Judge (ALJ) Thomas Klein's April 7, 2023 Post-Award Medical Award. This case was placed on the summary docket for disposition without oral argument.

**APPEARANCES**

Jonathan E. Voegeli appeared for Claimant. Karl L. Wenger appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

1. Vito J. Carabetta, M.D., IME Report dated Jan. 10, 2022;
2. Deposition of Vito J. Carabetta, M.D., taken Feb. 28, 2022, with exhibits.
3. The pleadings and orders in the administrative file and the parties' briefs.

**ISSUES**

1. Is Claimant entitled to additional medical treatment pursuant to K.S.A. 44-510k?
2. Is Claimant's attorney entitled to an award of post-award attorney fees?

**FINDINGS OF FACT**

Claimant was injured in the course of her employment on November 1, 2007, when she slipped, striking both knees and hands on the ground. Claimant was initially diagnosed

with bilateral knee contusions. She received conservative treatment in the form of physical therapy, injections, medication and temporary restrictions. X-rays taken February 15, 2008, revealed no evidence of arthritis or acute abnormalities in either knee. Additional diagnostic imaging revealed a medial meniscus tear in her right knee and patellofemoral syndrome in her left knee. Neither condition in her knees required surgical intervention. Claimant is currently 72 years of age.

Claimant settled her claim on a running award for 17.5% functional impairment to the whole body on May 4, 2010. On July 26, 2012, Claimant closed all remaining issues except for future medical benefits. On August 28, 2018, Claimant filed an Application for Post-Award Medical requesting medical treatment for her knees and attorney fees.

Respondent authorized Pat Do, M.D., to provide treatment for Claimant's knees. Dr. Do administered viscosupplementation injections to her knees. He placed Claimant at maximum medical improvement (MMI) in March 2019. Claimant sought a second opinion regarding treatment from Pedro Murati, M.D., on June 30, 2020. He recommended additional treatment. As a result of the competing opinions, the Court ordered an evaluation with Vito J. Carabetta, M.D., which was conducted on January 10, 2022. Dr. Carabetta's report and testimony are the only medical evidence in the record.

Dr. Carabetta is board-certified in physical medicine and rehabilitation. He diagnosed severe bilateral patellofemoral osteoarthritis. Dr. Carabetta suggested Claimant might get limited improvement with synthetic joint fluid injections, but ultimately will require bilateral total knee joint arthroplasties. He opined the November 1, 2007 traumatic event significantly contributed towards the development of Claimant's bilateral knee osteoarthritis. Dr. Carabetta stated other factors, such as her body habitus (morbidly obese currently and on the date of accident), genetics and the passage of time contribute to her present medical condition, but the traumatic event was a significant contributing factor.

In support of Claimant's position, Dr. Carabetta testified osteoarthritis developed in Claimant's knees as a direct and natural consequence of the compensable injury she suffered on November 1, 2007. He testified, "when the meniscus gets torn, you end up with some abnormal wear. So it does promote, in time, some degree of arthritis to increase."<sup>1</sup> Dr. Carabetta explained any trauma on the knee, even if no arthritis is present at the time of impact, increases the risk of arthritic development.<sup>2</sup> Dr. Carabetta further testified "it would happen eventually. The question is, did the incident make it happen sooner. And the answer to that would be, of course, it would."<sup>3</sup>

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<sup>1</sup> Carabetta Depo. at 13.

<sup>2</sup> *Id.* at 16.

<sup>3</sup> *Id.* at 18.

In support of Respondent's position, Dr. Carabetta testified Claimant's fall on November 1, 2007 would not have aggravated a preexisting condition, because x-rays taken after the accident showed no evidence of arthritis in her knees.<sup>4</sup> Regarding the contributing factors to Claimant's current condition, Dr. Carabetta testified,

Q. Okay. The need for the injections and the total knee replacements you recommended, looking at the patellofemoral syndrome and meniscus tear, are those necessary to cure and relieve the effects of those injuries?

A. Of those specific injuries, no.

Q. Okay. You said it's -- you said it's a significant contributing factor. If you're looking at, percentage-wise, a hundred percent, what percentage would you put on her weight causing the need for the knee replacement?

A. Fifty percent.

Q. And on the age?

A. Thirty.

Q. And I would assume the accident, then, would be about 20 percent or accident combined with other history and trauma?

A. You pulled the words out of my mouth, because the remaining 20 is going to be to that accident and any other similar events she may have had throughout her life.<sup>5</sup>

Lastly, Dr. Carabetta testified, Claimant would ultimately require total knee replacements due to her age, weight, activity levels and consistent history of obesity absent the November 1 injury.<sup>6</sup>

Dr. Carabetta described how arthritis develops from a torn meniscus. He testified:

You're not going to get arthritis directly from it, but, indirectly, there's going to be a relationship, because when you tear the meniscus, you have removed a -- a buffer, if you want to think of it that way, which keeps the cartilage between the tibia and the femur from making contact directly. And so what you end up with when

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<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* at 30.

<sup>6</sup> *Id.* at 17.

the meniscus gets torn, you end up with some abnormal wear. So it does promote, in time, some degree of arthritis to increase.<sup>7</sup>

Dr. Carabetta also testified:

Q. Okay. But, ultimately, she started having arthritis, and it has continually and significantly progressed since her -- a few months after her date of accident; is that fair?

A. That is fair.<sup>8</sup>

Regarding the acceleration of the osteoarthritis and need for a knee replacement, Dr. Carabetta testified:

Q. Okay. And would you say that the development of that osteoarthritis was accelerated because of the knee injury?

A. To one degree or another, yes. How much it was accelerated, only God knows at this stage.

Q. Okay. But you are saying that, yes, it did accelerate the need for the knee replacement?

A. That is correct, because it is a contributing factor that is significant. It doesn't have to be number one or number two. It's still a contributing factor.<sup>9</sup>

And finally:

Q. Dr. Carabetta, what I'm asking in very simple terms is, the osteoarthritis that developed and needs treatment as of today was significantly contributed to by the work injury in 2007, correct?

A. Yes.

Q. And while a knee replacement is not necessary for patellofemoral syndrome or for a medial meniscus tear, the subsequent development of severe osteoarthritis was significantly contributed to by those injuries; is that correct?

A. Yes.

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<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Id.* at 16.

<sup>9</sup> *Id.* at 23.

Q. Okay. And because of that, the pathology, which has developed as a portion to those significant contributions by the 2007 injury, it is necessary to have the treatment which you described in your report to cure and relieve the effects of those contributions, correct?

A. That is correct.<sup>10</sup>

The ALJ found:

[T]he report of Dr. Carbetta and his testimony satisfy the causation requirements in place at the time of Claimant's accident to justify her request for treatment at this time. Respondent is ordered to provide a list of two physicians from which Claimant is to choose an authorized treating physician for the provision of the treatment outlined by Dr. Carabetta.<sup>11</sup>

The Order is silent as to post-award attorney fees. At the Post-Award hearing, the ALJ noted attorney fees were an issue:

THE COURT: So that means that in addition to -- also, I guess I should mention, in addition to the request for treatment, Mr. Voegeli, that application also includes a request for post-award attorney fees. I'm sure that the two of you already knew that, but that's also an issue at this point.

MR. VOEGELI: We can submit those with our brief, Your Honor.<sup>12</sup>

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

The version of the Kansas Workers Compensation Act in effect at the time of the injury controls the rights and obligations of the parties.<sup>13</sup> Because the date of accident is November 1, 2007, the "old" version of the Act applies to this matter. In 2007, K.S.A. 44-510k(a) stated, in part:

At any time after the entry of an award for compensation, the employee may make application for a hearing in such form as the director may require for the furnishing of medical treatment. Such

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<sup>10</sup> *Id.* at 32.

<sup>11</sup> ALJ Order (April 4, 2022) at 3.

<sup>12</sup> P.A.H. Trans. at 4.

<sup>13</sup> *Jamison v. Sears Holding Corp.*, No. 109,670, 2014 WL 1887645 (Kansas Court of Appeals unpublished opinion filed May 9, 2014).

post award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure and relieve the effects of the accidental injury which was the subject of the underlying award.

The Appeals Board may make an award for additional medical treatment if the Board finds such care is necessary to cure or relieve the injured worker from the effects of the underlying compensable injury.<sup>14</sup> The direct and natural consequence rule applies in post-award medical proceedings. Future medical treatment to cure or relieve the later consequence of an injury may be awarded if the consequence is a direct and natural result of the primary injury.<sup>15</sup> The passage of time is not a compensable injury, however, where deterioration would have occurred absent the primary injury, it is not compensable.<sup>16</sup>

**1. Claimant is entitled to additional medical treatment pursuant to K.S.A. 44-510k.**

This case requires analysis under the old law and standards. Here, Claimant is not required to prove her injury was the prevailing factor for her medical condition and need for treatment. Claimant must prove her current diagnosis and need for treatment is an aggravation or acceleration of a preexisting condition or is the direct and natural consequence of the original injury.

Dr. Carabetta testified X-rays from 2007 did not show evidence of arthritis. Therefore, Claimant has not aggravated or accelerated a preexisting condition. Claimant must prove her current condition is the direct and natural consequence of the original injury. Claimant must also prove the medical treatment sought is reasonably necessary to cure or relieve the consequence of the original injury. The ALJ found Claimant met her burden of proof and awarded medical treatment. The Board agrees.

Under the "old" law injured workers were taken as is. Claimant was short and morbidly obese at the time of her injury. This has not changed. Dr. Carabetta opined Claimant suffers from severe osteoarthritis in her knees and her November 1, 2007 accidental injury was a significant contributor to this condition. He further testified Claimant's condition and need for treatment was accelerated in time due to the injury.

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<sup>14</sup> See K.S.A. 44-510k(a).

<sup>15</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 923 (2006).

<sup>16</sup> *Nance v. Harvey County*, 263 Kan. 542, 550 P.2d 411 (1997).

Under the applicable law for this claim, Claimant met her burden of proof. The Board affirms the ALJ's award of post-award medical benefits as outlined by Dr. Carabetta and requiring Respondent to provide a list of two physicians from which Claimant may choose an authorized treating physician.

## **2. Claimant's attorney is entitled to an award of attorney fees.**

An attorney rendering services to an injured worker seeking additional medical benefits after an award is issued shall be entitled to reasonable attorney fees for such services based upon the reasonable and customary charges in the locality for such services and shall be paid by the employer.<sup>17</sup>

The board previously acknowledged the importance of attorney services in procuring post-award medical treatment:

The Board concludes the statute, however, provides attorneys should be compensated for the preliminary and preparatory work required to determine whether a worker has a legitimate claim for post-award medical benefits, gather the evidence to support such request, formulate a strategy and advance the request through hearing, if needed. Legal counsel is important during this preliminary phase as the worker must be prepared to prove the necessity and reasonableness of the requested medical treatment and, perhaps, its relationship to the original compensable injury.<sup>18</sup>

The Board ruled in *Stithem*<sup>19</sup> an actual hearing on the matter of additional medical benefits was not required to award attorney fees. Here, it is undisputed a hearing was conducted resulting in an award of additional medical benefits to Claimant. As set forth above, the Board affirmed the ALJ's award of post-award medical benefits as outlined by Dr. Carabetta. The Board finds Claimant's attorney is entitled to post-award attorney fees. However, the record is silent to the value of attorney fees sought, or the time expended by Claimant's counsel. Therefore, this matter is remanded to ALJ Klein for ruling on Claimant's request for post-award attorney fees.

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<sup>17</sup> See K.S.A. 44-536(g).

<sup>18</sup> *Bennett v. Scott Masonry, Inc.*, No. 255,335, 2007 WL 4296007 (Kan. WCAB Nov. 28, 2007).

<sup>19</sup> *Stithem v. Cessna Aircraft*, No. 1,012,897, 2008 WL 378641 (Kan WCAB June 30, 2008).

**AWARD**

**WHEREFORE**, it is the decision of the Board the Award of ALJ Thomas Klein, dated April 7, 2023, is affirmed with regard to the award of post-award medical treatment and remanded to consider Claimant's request for post-award attorney fees.

**IT IS SO ORDERED.**

Dated this day of June, 2023.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)

Jonathan E. Voegeli, Attorney for Claimant  
Karl L. Wenger, Attorney for Respondent and its Insurance Carrier  
Hon. Thomas Klein, Administrative Law Judge