

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PATRICIA HUSCIO)
Claimant)
V.) AP-00-0475-071
) CS-00-0223-066
GENERAL MOTORS, LLC)
Self-Insured Respondent)

ORDER

The claimant, through Zachary Kolich, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's preliminary hearing Order, dated April 19, 2023. Kristina Mulvany appeared for the respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) preliminary hearing transcript, held April 19, 2023; (2) exhibits uploaded and admitted under HE-00-0080-465; (3) pleadings; and (4) parties' briefs.

ISSUES

1. Does the Board have jurisdiction to review the claimant's appeal?
2. If so, is the claimant's work-related repetitive trauma the prevailing factor in her need for bilateral total knee replacements?

FINDINGS OF FACT

The claimant has worked for the respondent for over 20 years as an assembly line worker. She alleged an injury by repetitive trauma to her left lower extremity through October 27, 2017, and ongoing. In an Order, dated May 23, 2018, the ALJ found the claim compensable and concluded the claimant's date of accident was April 4, 2018. On August 28, 2018, a single Board Member affirmed the ALJ's ruling.

At the respondent's request, the claimant saw Alexandra Strong, M.D., on May 1, 2019. The doctor diagnosed the claimant with continued left knee pain and osteoarthritis. Dr. Strong recommended treatment for osteoarthritis, including anti-inflammatories, possible intra-articular injections, and physical therapy. The doctor stated, "I am asked if I believe the claimant's alleged work injury is the prevailing factor in the cause and the

need for the recommended treatment. No I do not. I think she has pre-existing and significant osteoarthritis.”¹

At some point, the claimant began treating with Daniel Stechschulte, M.D. On November 19, 2019, Dr. Stechschulte diagnosed the claimant with, among other things, (1) left knee medial meniscus tear; (2) left knee degenerative joint disease, early, preexisting, with exacerbation; and (3) low back complaints. The doctor opined the claimant’s reported injury/repetitive trauma was the primary and prevailing factor for her left medial meniscus tear, but not her preexisting arthritis, within a reasonable degree of medical certainty. Dr. Stechschulte imposed temporary work restrictions and recommended an injection to the left knee which was administered on December 3, 2019.

The claimant testified she began noticing problems in her right knee during treatment which she attributed to overcompensating for the left knee.

On January 28, 2020, the claimant returned to Dr. Stechschulte . She reported right knee complaints and worsening low back pain. The doctor noted arthroscopic surgery only had a “50/50 chance of making her better.”² Dr. Stechschulte provided permanent work restrictions.

On November 6, 2020, the claimant returned to Dr. Stechschulte complaining of right knee pain, swelling and her knee giving out. She denied a specific injury and believed it was “from limping and favoring this [left] knee for so long.”³ The doctor diagnosed right knee pain, right knee medial meniscus tear, right knee degenerative joint disease, preexisting, with exacerbation. Dr. Stechschulte stated, “After review of the provided records, radiographs, and physical exam findings, we feel the patient’s reported injury of 10/27/2017 is probably the primary and prevailing factor for her current [right] knee complaints, but not her pre-existing arthritis, within a reasonable degree of medical certainty.”⁴

On November 25, 2021, Dr. Stechschulte issued correspondence to the respondent’s attorney, stating the claimant’s right knee condition was early degenerative arthritis with a large complex tear of the lateral meniscus. The doctor opined the prevailing factor was the right knee lateral meniscal tear, but not the underlying degenerative arthritis.

¹ P.H. Trans., Strong Report (dated May 1, 2019) at 3.

² *Id.*, Stechschulte Note (dated Jan. 28, 2020) at 2.

³ *Id.*, Stechschulte Report (dated Nov. 6, 2020) at 1.

⁴ *Id.* at 3.

The claimant returned to Dr. Stechschulte on September 15, 2022. The doctor stated the claimant will require bilateral total knee replacements.

At her attorney's request, the claimant saw Anne Rosenthal, M.D., on January 10, 2023. The claimant complained of bilateral knee pain and swelling. She reported limping for years due to her left knee issues and relying more on her right knee. Dr. Rosenthal noted the claimant sustained a work-related left knee medial meniscal tear and right knee lateral meniscal tear. Dr. Rosenthal stated:

Her bilateral knee injuries arose out of and in the course of her employment. She suffered a material change in each knee, the left medial meniscal tear and the right lateral meniscal tear. There was a change in the physical structure of both of her knees, the meniscal tears, and the only way to treat her meniscal tears is bilateral knee replacement due to the underlying arthritis in both knees. Any other treatment is not going to provide her relief. The only reasonable and necessary treatment would be total knee replacements. In order to cure and relieve the effects of the injury, she needs to undergo bilateral total knee arthroplasties.

Yes, the knee replacements recommended by Dr. Stechschulte are a direct and natural consequence of her repetitive work injuries through 10/27/17 to her bilateral knees.

Yes, her work activities are the prevailing factor in her injuries and her need for medical treatment.

Ms. Huscio's work related injury of repetitive trauma through 10//27/17 and ongoing while employed at General Motors LLC was the prevailing factor in causing her injury, medical treatment and resultant disability. The prevailing factor is defined as the primary factor in relation to any other factor.⁵

The claimant testified her symptoms have worsened since being released by Dr. Stechschulte. Her current job duties involve walking around cars on a continuous basis, causing her to be on her feet all day

The ALJ stated:

The treating physician, Dr. Stechschulte, said the need for the knee replacements was pre-existing arthritis versus the meniscus tears. The claimant offered a second opinion from Dr. Rosenthal. She said the meniscus tears with arthritis rendered knee replacements the only way to treat the meniscus tears.

⁵ P.H. Trans., Rosenthal IME Report (dated Feb. 25, 2023) at 6.

Here, underlying arthritis essentially made it pointless to treat just the meniscus tears. In that sense, knee replacements for the claimant are not directed at curing and relieving the work injury, but rather the underlying arthritis. And, from a common sense perspective, doctors don't do total knee replacements for torn menisci.

The claimant's proposed knee replacements are not due to the work injury. The claimant's request is denied.⁶

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues the respondent has the "absolute and unavoidable responsibility"⁷ to provide the proposed total knee replacements as reasonable and necessary medical treatment to cure and relieve the effects of her compensable work-related injuries. The claimant contends the ALJ erred in denying such treatment.

The claimant's Application for Review states an issue concerns whether the prevailing factor standard applies to whether medical treatment is owed to an injured worker. This issue is not addressed in the claimant's brief.

The respondent argues the Board is without jurisdiction to consider this appeal because compensability for the meniscal tears is not an issue, and the only dispute is the appropriate medical treatment for the claimant's condition. Alternatively, the respondent maintains the Order should be affirmed. Regarding prevailing factor, the respondent argues the work injuries are not the prevailing factor for the medical condition necessitating the need for total knee replacements.

1. The Board lacks jurisdiction to entertain the claimant's arguments concerning the denial of medical treatment.

K.S.A. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment,

⁶ ALJ's Order at 2.

⁷ Claimant's Brief at 8.

whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 44-551(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. . . .

Following a preliminary order, the Board can review allegations a judge exceeded his or her jurisdiction, including whether: (1) the employee sustained an accident, repetitive trauma or resulting injury; (2) the injury arose out of and in the course of employment; (3) notice; and (4) whether certain defenses regarding compensability apply.⁸ An order providing or denying medical treatment is not appealable from a preliminary hearing decision under K.S.A. 44-534a.⁹ The ALJ's Order concerned a denial of medical treatment, so this Order is not appealable from the preliminary ruling. If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.¹⁰

2. The ALJ did not rule on the prevailing factor standard. The Board is without jurisdiction to address the arguments concerning prevailing factor.

The Workers Compensation Act states the Board's review shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.¹¹

Before the Board may exercise authority under K.S.A. 44-551(l), it must possess legal authority to conduct review of the ALJ's decision. The preliminary hearing Order does not show the ALJ ruled on the prevailing factor requirement. Absent a record showing the ALJ ruled on any such disputed issue, the Board lacks jurisdiction under K.S.A. 44-555c(a) to consider the issue at this time.

⁸ See *Carpenter v. Nat'l Filter Serv.*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁹ See *Timmer v. ResCare, Inc.*, No. CS-00-0436-779, 2019 WL 3705910, at *7 (Kan. WCAB July 23, 2019).

¹⁰ See *Carpenter*, 26 Kan. App. 2d at 676.

¹¹ See K.S.A. 44-555c(a).

WHEREFORE, the undersigned Board member dismisses the appeal of the preliminary hearing Order dated April 19, 2023.

IT IS SO ORDERED.

Dated this _____ day of July, 2023.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Zachary Kolich
Kristina Mulvany
Hon. Kenneth Hursh