

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KEVIN HILL</b>	)	
Claimant	)	
V.	)	AP-00-0475-378
	)	CS-00-0458-092
<b>TEXTRON AVIATION, INC.</b>	)	
Self-Insured Respondent	)	

**ORDER**

Self-insured Respondent requests review of the May 5, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

**APPEARANCES**

Jonathan Voegeli appeared for Claimant. Vincent A. Burnett appeared for Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held May 3, 2023, with exhibits attached, and the documents of record filed with the Division.

**ISSUES**

1. Does the Board have jurisdiction to review Respondent's appeal?
2. If so, did Claimant sustain his burden of proving he sustained a compensable injury on November 16, 2020?
3. Is Respondent responsible for Claimant's need for surgical intervention, including the need for a total knee replacement?

**FINDINGS OF FACT**

Claimant worked for Respondent for over 30 years as a sheet metal mechanic, a position requiring extended kneeling, crouching, and squatting. On November 16, 2020, Claimant experienced pain while crawling on his hands and knees at work. Claimant went

to Respondent's medical clinic on November 18, 2020, with complaints of left knee pain and swelling. Claimant reported he started a new position approximately four weeks prior, with increased crawling into tight spaces and increased pressure on his knees. X-rays obtained December 7, 2020, were interpreted to reveal moderate-to-severe degenerative osteoarthritis with small effusion. Claimant was told to follow up with his primary care physician. Claimant returned to the clinic on December 21, 2020, to provide work restrictions from his physician.

There is no indication Claimant underwent treatment involving his left knee at the time of, or immediately preceding, his 2020 injury. Claimant has a history of left knee problems, however. Claimant filed a claim with the Division on July 16, 2002, for trauma to his left knee beginning with a fall in May 1994 and continuing due to repetitive work activities.

On July 16, 2002, Claimant underwent surgery on his left knee by Dr. Kenneth Jansson for a possible anterior cruciate ligament (ACL) tear. Dr. Jansson performed an examination under anesthesia, diagnostic arthroscopy of the left knee, and notchplasty involving the femoral attachment of the ACL. Dr. Jansson's operative report indicated Claimant's meniscus was normal at the time of the procedure.<sup>1</sup> Claimant entered into a settlement of his workers compensation claim on June 30, 2003, based on 15 percent permanent partial impairment to the left lower extremity.

A progress note from Dr. Val Brown, dated August 30, 2012, reported tenderness of Claimant's knees to pressure. Dr. Chris Fevurly noted Claimant's knees had been symptomatic for over a decade in a report dated August 15, 2016.

Related to the current claim, Dr. Pedro Murati performed an examination of Claimant at his counsel's request on July 7, 2021. Dr. Murati noted he previously examined Claimant in 2003, 2016, and 2017, though only the 2003 examination addressed Claimant's left knee. Dr. Murati reviewed Claimant's medical records and history and performed a physical examination, finding Claimant's left knee complaints were causally related to the work injury of November 2020. Dr. Murati recommended conservative treatment and provided temporary restrictions.

Dr. David Hufford examined Claimant on October 15, 2021, at Respondent's request. After reviewing the records and performing a physical examination, Dr. Hufford noted Claimant's left knee had no swelling or effusion, but tenderness at the medial and lateral joint lines. Dr. Hufford concluded Claimant's work activities aggravated preexisting degenerative osteoarthritis in his left knee.

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<sup>1</sup> See P.H. Trans., Resp. Ex. 2.

On January 24, 2022, the ALJ ordered Dr. Vito Carabetta to provide an independent medical evaluation. Dr. Carabetta performed a physical examination on October 7, 2022, in addition to reviewing approximately 400 pages of Claimant's medical records. Claimant complained of left knee pain and constant swelling. Claimant acknowledged prior left knee issues, but stated the swelling, extending from his knee to the lower leg region, was new. Dr. Carabetta noted the left knee swelling was a concern, and "[t]here is no doubt a significant joint effusion present here, and this was identified previously on x-rays."<sup>2</sup> Dr. Carabetta opined there was a possibility Claimant could have an aggravation of chronic osteoarthritis and some internal derangement. Dr. Carabetta further stated his suspicion Claimant sustained a meniscal injury, noting the meniscal tissues were found to be intact both medially and laterally at the time of the 2002 surgery. Dr. Carabetta indicated an MRI of the left knee was required before he could provide a more definitive diagnosis.

An MRI of Claimant's left knee was conducted on November 17, 2022, and provided to Dr. Carabetta. In a letter to the Court dated February 23, 2023, Dr. Carabetta wrote:

The ligamentous structures were mostly intact. However, a chronic tear of the [ACL] was present. In addition, as expected, he had severe osteoarthritis that was most advanced in the medial compartment, and this is no surprise, as he has had a history of arthritis in the knee. However, my suspicions about the meniscal tissue where indeed he was found to have a macerated tear within the medial meniscus.<sup>3</sup>

Dr. Carabetta stated operative intervention is necessary, the extent of which to be determined by an orthopedic surgeon. Dr. Carabetta provided his prevailing factor opinion:

In terms of the prevailing factor, clearly the injury in question has been the mechanism that has caused the ligamentous and meniscal injury. The arthritic changes were chronic and preexistent. However, we could not expect that an injury of this type would result in improvement, only for the deterioration thereof.<sup>4</sup>

Claimant was referred to Dr. Daniel Prohaska by Respondent on April 18, 2023. Dr. Prohaska reviewed the MRI taken in November 2022, obtained x-rays of Claimant's left knee, and performed a physical examination. In his interpretation of Claimant's MRI, Dr. Prohaska noted, "There is no meniscus medially which appears to have been previously resected by history."<sup>5</sup> Dr. Prohaska concluded Claimant "has longstanding end-stage age

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<sup>2</sup> Carabetta IME (Oct. 7, 2022) at 4.

<sup>3</sup> Carabetta IME Addendum (Feb. 23, 2023).

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

<sup>5</sup> P.H. Trans., Resp. Ex. 8 at 3.

related degenerative osteoarthritis of the left knee.”<sup>6</sup> Dr. Prohaska stated Claimant’s work injury was an exacerbation of his preexisting arthritis, with the arthritis the prevailing factor causing Claimant’s symptoms. Dr. Prohaska opined a total knee arthroplasty was likely in Claimant’s future, though the procedure would need to be billed under private insurance. Dr. Prohaska determined Claimant had reached maximum medical improvement and released him to return to full-duty work.

Following a preliminary hearing held May 3, 2023, the ALJ found Claimant’s work injury was the prevailing factor causing his left knee injury and medical condition. The ALJ adopted the opinions of Dr. Carabetta:

The Court is persuaded by Dr. Carabetta’s reports. He performed his evaluation at the Court’s request, and it appears the most neutral. The reports solicited by the parties favor the parties who obtained them. Dr. Carabetta had the Claimant’s prior records, and it appears Dr. Prohaska did not.<sup>7</sup>

The ALJ also found Claimant’s work injury the prevailing factor for his left knee injury and left knee medical condition. The ALJ ordered Respondent to provide a list of two qualified orthopedic surgeons to provide treatment for Claimant’s left knee. The ALJ authorized all treatment, tests, and referrals, including knee replacement surgery.

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

Respondent argues the prevailing factor causing Claimant’s left knee condition is preexisting degenerative osteoarthritis. Further, Respondent maintains Claimant is not entitled to a total knee replacement surgery under workers compensation.

Claimant argues the Board lacks jurisdiction to review an appeal of a preliminary hearing order wherein medical treatment is to be provided by an authorized treating physician. Alternatively, Claimant contends the ALJ’s Order should be affirmed.

#### **1. Does the Board have jurisdiction to review Respondent’s appeal?**

Respondent argues, pursuant to K.S.A. 44-534a(a)(2), the Board has jurisdiction to review whether the alleged November 16, 2020, accident is the prevailing factor causing Claimant’s medical condition. Generally, the Board possesses the authority to review preliminary orders on disputed issues of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of

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

<sup>7</sup> ALJ Order (May 5, 2023) at 3-4.

employment; whether notice was given; or whether certain defenses apply. "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.<sup>8</sup> If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.

Whether Claimant's accident was the prevailing factor in causing the medical condition is an issue over which the Board has jurisdiction under K.S.A. 44-534a.<sup>9</sup>

## **2. Did Claimant sustain his burden of proving he sustained a compensable injury on November 16, 2020?**

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>10</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>11</sup>

K.S.A. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

On November 16, 2020, Claimant experienced pain while crawling on his hands and knees at work, which was a normal work activity. On November 17, 2022, an MRI, according to Dr. Carabetta, showed a chronic tear of the ACL and a macerated tear in the medial meniscus.

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<sup>8</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>9</sup> See *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kommesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013); *Katz v. USD 229*, No. 1,068,293, 2014 WL 4976744 (Kan. WCAB Sept. 12, 2014).

<sup>10</sup> K.S.A. 44-501b(a).

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

Four physicians examined Claimant and provided causation opinions after the November 16, 2020, injury by repetitive trauma. Dr. Murati provided a generic prevailing factor opinion, saying the prevailing factor for the left knee condition was Claimant's work activities. Dr. Carabetta opined Claimant's work-related accident was the prevailing factor causing the ligamentous and meniscal injury.

Dr. Hufford opined the prevailing factor causing Claimant's left knee condition was preexisting degenerative osteoarthritis. Dr. Hufford's opinion was given prior to the November 17, 2022, MRI. As such, Dr. Hufford did not have a sufficient record at the time of his examination. Dr. Prohaska also found the prevailing factor causing Claimant's left knee condition was preexisting degenerative arthritis. In his Order, the ALJ referred to Dr. Prohaska's report, writing:

Dr. Prohaska saw the Claimant and noted he had no meniscus medially which appears to have been previously resected by history. This statement regarding the previous surgery appears to be incorrect. As noted by Dr. Carabetta and by Dr. Jansson's notes, the 2002 surgery dealt with the cruciate ligament. Photo 6 in Dr. Jansson's notes show a normal medial meniscus.<sup>12</sup>

Dr. Prohaska did not appear to have all the prior medical records. Dr. Hufford did not have the benefit of the November 17, 2022, MRI, and Dr. Murati was not specific regarding the left knee. The undersigned agrees with the ALJ's conclusion the opinions of Dr. Carabetta carry more weight.

Claimant met the burden of proving his repetitive work activities were the prevailing factor causing a chronic tear of the ACL and a tear in the medial meniscus.

### **3. Is Respondent responsible for Claimant's need for surgical intervention, including the need for a total knee replacement?**

This is an appeal from a preliminary hearing order. Not every alleged error is subject to review. The Board can review preliminary hearing orders in which an ALJ has exceeded his or her jurisdiction.<sup>13</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a. The issue of claimant's entitlement to medical treatment is not one of the jurisdictional issues listed in K.S.A. 44-534a and not subject to review at this time. As stated by a Board Member in *Ater v. Lang Diesel, Inc.*:<sup>14</sup>

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<sup>12</sup> ALJ Order (May 5, 2023) at 3.

<sup>13</sup> K.S.A. 44-551(l)(2)(A).

<sup>14</sup> *Ater v. Lang Diesel, Inc.*, No. AP-00-0472-104, 2023 WL 2376933 (Kan. WCAB Feb. 3, 2023).

This appeal is simply an attempt to challenge what medical treatment should be provided Claimant for his compensable work injury by attempting to graft on the prevailing factor standard what medical treatment is provided for a compensable injury. The prevailing factor standard does not apply to what medical treatment should be provided for a compensable work injury. K.S.A. 44-510h(a) imposes upon Respondent/insurance carrier the obligation to provide medical treatment as may be necessary to cure and relieve the effects of the accidental injury.

A challenge to the scope of medical treatment ordered by an ALJ is not an issue the Board has jurisdiction to review under K.S.A. 44-534a.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Gary K. Jones, dated May 5, 2023, is affirmed. The Board has no jurisdiction to review the ALJ's order for medical treatment, and the application for review is dismissed in part.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2023.

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SETH G. VALERIUS  
BOARD MEMBER

c: Via OSCAR

Jonathan Voegeli, Attorney for Claimant  
Vincent A. Burnett, Attorney for Self-Insured Respondent  
Hon. Gary K. Jones, Administrative Law Judge