BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CLAYTON BOLTON	)	
Claimant	)	
v.	)	
	)	CS-00-0447-321
LSI CORP.	)	AP-00-0454-839
Respondent	)	
and	)	
	)	
ZURICH AMERICAN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the December 9, 2020, preliminary Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Roger Riedmiller appeared for Claimant. Terry Torline appeared for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the deposition transcript of Claimant held May 13, 2020, with exhibits B1 through B5; the transcript of preliminary hearing held May 5, 2020, with exhibits A1 to A3 and B1; the transcript of preliminary hearing held October 13, 2020, with exhibits A1, A2, B1, and B2; and the documents of record filed with the Division.

ISSUES

1. Does the Board have jurisdiction to review Respondent's appeal related to the medical treatment ordered by the ALJ?

2. Are modified work boots "medical treatment"?

FINDINGS OF FACT

Claimant has been a welder for approximately eighteen years. He was employed with Respondent for approximately three months. Claimant was required to wear steel toe boots. On Friday, September 27, 2019, Claimant was welding on a jig when slag (molten metal) rolled off the product, burned through his pants, landed inside his boots and burned the top parts of both feet. The burns affected the right more than the left foot. Claimant reported the injury to his supervisor, who rendered first aid and sent him back to work. Claimant did not work over the weekend.

On Monday, September 30, 2019, a second injury occurred in the same manner. This injury affected the left more than the right foot. After reporting his injury, Claimant sought medical treatment at the Newton Medical Center emergency room.

Thereafter, Claimant received additional treatment by Dr. Timothy Wiens. This treatment included regular wound care and debridement through the Newton Wound Healing Center. Dr. Wiens advised Claimant to establish a personal care physician for treatment of his diabetes because wound healing would depend upon it.

Claimant saw Dr. Wiens on October 24, 2019. He reported he was unable to work because wearing the required steel toed boots put too much pressure on his burns resulting in intolerable pain. Claimant and Dr. Wiens discussed the steel toe boots issue again on November 18, 2019. Dr. Weins started Claimant on gabapentin and provided a note to Claimant for work stating "he is still unable to wear boots due to foot pain."[1] Dr. Wiens continued Claimant on gabapentin at the December 12, 2019, recheck appointment.

According to the medical records contained in the record, Claimant saw Dr. Wiens for the last time on January 8, 2020. Claimant and Dr. Wiens discussed a surveillance report showing Claimant wearing soft leather cowboy boots. Claimant stated his cowboy boots have plenty of room and were tolerable to wear. Claimant again explained to Dr. Wiens steel toe boots put pressure on his burns resulting in intolerable pain. Dr. Wiens continued Claimant on gabapentin and wrote a note for work stating "May try working in extra large work boots that don't put pressure on the tops of his feet." Dr. Wiens noted "I want to see him in 3-4 weeks, or about one week after being back at work."[2]

Claimant was seen by Dr. George G. Fluter on January 6, 2020, for an independent medical evaluation at Claimant's request. Claimant reported he was not working because he was unable to wear steel toe work boots. Dr. Fluter's assessment was: 1. status post work-related injuries; 2. Right and left foot/lower leg burn wounds; 3. Lower extremity

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[1] *See* P.H. Trans. (Oct. 13, 2020) Cl. Ex. A2 at 14.

[2] *See Id.* at 7.

dysesthesia. Dr. Fluter attributed causation and prevailing factor to the work-related accidents. Dr. Fluter supported, at least temporary, restrictions due to Claimant being unable to wear the necessary steel toe work boots for his job as a welder. Dr. Fluter placed a thirty minute per hour limit on standing or walking. Dr. Fluter recommended medications to modulate pain, gabapentin or other such adjuvant medication, and topical preparations for pain. He did not believe further wound care was needed.

Claimant was seen by Dr. John F. McMaster on February 28, 2020, for an independent evaluation at Respondent's request. Dr. McMaster diagnosed Claimant with status post thermal burns to both feet, partial thickness-superficial, 1% BSA (body surface area), resolved. Dr. McMaster noted non-injury related diabetes mellitus, insulin requiring, and peripheral neuropathy. Claimant confirmed his diabetes diagnosis and treatment started in 2010. Dr. McMaster characterized Claimant's neuropathic pain as caused by his diabetes.

Dr. McMaster reported the mechanism of injury reported by the examinee was possibly consistent with thermal injuries sustained to less than 1% of body surface area. Dr. McMaster causally connected Claimant's burns to the work accidents and were the prevailing factor for treatment provided from September 30, 2019, to December 12, 2019. Claimant reached maximum medical improvement no later than December 12, 2019. Dr. McMaster did not believe Claimant had any injury-related limitations to his activities of daily living or work. Dr. McMaster found no burn-related sensory, motor, or autonomic alteration of skin function on Claimant's feet.

Claimant was seen by Dr. Vito J. Carabetta for a Court-ordered independent medical evaluation on August 7, 2020. Upon physical examination, Dr. Carabetta noted sensory function appeared to be relatively intact, but both feet had substantial hypersensitivity in the areas near his wounds. The wounds were healed, but the hypersensitivity remained. Claimant reported some limited benefit with the continued use of gabapentin.

Dr. Carabetta opined Claimant was at maximum medical improvement and did not require temporary or permanent restrictions, Dr. Carabetta did, however, state "accommodations need to be made in terms of the type of protective equipment he uses. Boots might need to be specially modified for him on an indefinite basis, and those would need to provide adequate protection as well as relief of pressure in the area he has his burn wounds."[3]

Dr. Carabetta, Dr. Fluter and Dr. McMaster provided impairment of function ratings.

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[3] *See Id.* Cl. Ex. A1 at 3.

As of October 13, 2020, Claimant continues to experience pain in his feet and has not worked as a welder because he cannot wear steel toed boots without experiencing intolerable pain.

PRINCIPLES OF LAW AND ANALYSIS

The ALJ ordered Respondent to provide gabapentin and modified work boots prescribed by Dr. Wiens. Respondent seeks review of the ALJ's Order, arguing the ALJ lacked jurisdiction to order Respondent to provide medical treatment (gabapentin and work boots) as Claimant was at maximum medical improvement (MMI) and provided no medical evidence to overcome the presumption set forth in K.S.A. 44-510h(e). Respondent also seeks review of the ALJ's finding work boots, under the facts of this claim, are "medical treatment."

Claimant maintains the ALJ's Order should be affirmed. Claimant argues ordering Respondent to provide gabapentin as prescribed by Dr. Wiens is not appealable because it is a preliminary order regarding medical treatment. Claimant further argues modified work boots are "medical treatment."

1. The Board does not have jurisdiction to review Respondent's appeal related to gabapentin ordered by the ALJ

The Board's authority to consider appeals of preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma, or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether "certain defenses" apply.[4] In general, preliminary orders granting or denying medical benefits are not subject to Board review. The authority to make a determination regarding medical care rests clearly within the authority granted to the ALJ by K.S.A. 44-534a.[5]

Respondent's argument, the ALJ lacked jurisdiction to order Respondent to provide medical treatment (gabapentin and work boots) because Claimant was at maximum medical improvement (MMI) and provided no medical evidence to overcome the presumption set forth in K.S.A. 44-510h(e), is without merit. Claimant sent a notice of intent on August 19, 2020, seeking additional medical treatment. A hearing was scheduled and notice of the hearing was sent to the parties. At the preliminary hearing, Claimant presented medical evidence in support of his request for additional medical treatment.

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[4] *See* K.S.A. 44-534a(a)(2).

[5] *See Vizcarra v. LoanSmart, LLC*, No. 1,079,548, 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).

After reviewing the evidence and listening to the arguments presented by the parties in support of their positions, the ALJ issued an order for additional medical treatment.

The ALJ had jurisdiction to address Claimant's request for medical treatment. The Board does not have jurisdiction to review the ALJ's order regarding gabapentin. Respondent's appeal regarding this issue is dismissed for lack of jurisdiction.

2. Modified work boots are "medical treatment."

K.S.A. 44-510h(a) states in part:

> (a) It shall be the duty of the employer to provide the services of a healthcare provider and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with K.S.A. 44-515(a), and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

Respondent argues a modified pair of steel toed work boots cannot fit the definition of medical treatment because they are recommended as a job accommodation and not as medical treatment for the injury. Respondent's argument is rejected. K.S.A. 44-510h(a) lists certain items an employer is obligated to provide an injured worker. The statute contains the catch-all word "including," which means the list is not exclusive. "The determination of what constitutes a reasonably necessary 'apparatus' should be made on a case by case basis."[6] An apparatus "may serve to relieve the employee of the adverse effects of his or her condition as it relates to the basic functioning of the body."[7]

Here, Claimant seeks authorization of modified steel toe boots to enable him to return to work as a welder. Steel toe boots are required equipment for welders.[8] Dr. Wiens, the authorized treating physician, recommended modified boots as early as October 24, 2019. Dr. Carabetta, the Court-ordered physician, noting significant hypersensitivity in the burn areas, also recommended modified boots. Dr. Carabetta stated the boots were needed to provide adequate protection, as well as relief of pressure in the

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[6] *See Roberts v. Midwest Mineral, Inc.*, No. 109,116, 2013 WL 5507453, at *4 (Kansas Court of Appeals unpublished opinion filed Oct. 4, 2013).

[7] *See id.*

[8] See P.H. Trans. (Oct. 13, 2020) at 18.

burn areas. Claimant testified unmodified steel toe boots put pressure on the burn areas resulting in intolerable pain.

This Board Member finds modified work boots constitute "medical treatment" under K.S.A. 44-510h(a) and are reasonably necessary to cure and relieve the effects of Claimant's accidental injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] 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.[10]

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Thomas Klein, dated December 9, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2021.

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CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Roger Riedmiller, Attorney for Claimant
Terry Torline, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge

[9] *See* 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).

[10] *See* K.S.A. 2018 Supp. 44-555c(j).