

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL COX)	
Claimant)	
)	
V.)	
)	
FLINT HILLS AUTOMOTIVE, LLC)	
Respondent)	CS-00-0450-988
)	AP-00-0455-677
AND)	
)	
ALLIED PROPERTY & CASUALTY INS.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 28, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Todd King, of Wichita, Kansas, appeared for Michael Cox. John Rathmel, of Overland Park, Kansas, appeared for respondent.

The ALJ appointed Dr. David Hufford as a neutral physician to perform an independent medical evaluation (IME) to evaluate the compensability of Mr. Cox's left hip condition and the need for total hip arthroplasty. The ALJ further noted Mr. Cox's remaining preliminary hearing requests were taken under advisement pending receipt of Dr. Hufford's IME report. The parties were requested to schedule a telephone status conference or return to court for a follow-up preliminary hearing upon receipt of the report for resolution of all outstanding issues.

The record on appeal is the same record considered by the ALJ and consists of the transcript of the November 19, 2020, Preliminary Hearing and the exhibits; the transcript of the October 29, 2020, deposition of Michael Cox; the transcript of the November 11, 2020, evidentiary deposition of Broc Carr; the transcript of the November 11, 2020, evidentiary deposition of Michael Hughes; the transcript of the November 11, 2020, evidentiary deposition of James Johnson; the transcript of the November 11, 2020, evidentiary deposition of Robert Morris and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the preponderance of the evidence shows Mr. Cox failed to prove he suffered a personal injury by accident on January 21, 2020, and failed to prove he provided timely notice of his injury by accident. Respondent requests the ALJ's Order be vacated and the claim denied.

Mr. Cox did not file a brief in this matter.

The issues for the Board's review are:

1. Does the Board possess authority to review the order dated December 28, 2020?
2. Did Mr. Cox suffer a personal injury by accident on January 21, 2020?
3. Did Mr. Cox provide timely notice of his injury by accident to respondent?

FINDINGS OF FACT

Mr. Cox worked as an automobile mechanic for approximately 25 years, specializing in drivability diagnostics, electrical diagnostics, and repairs. He began working for respondent on July 2, 2019. Mr. Cox exited a lifted truck and sustained injuries to his bilateral hips and low back on January 21, 2020. The truck was not on a lift, but rather a lifted truck, raised higher than a standard truck due to its tires. Mr. Cox stated he was climbing down from the truck and dropped approximately one or two feet to the ground. His left hip "collapsed"¹ upon landing, causing him to fall to his left knee. No one witnessed the fall.

Mr. Cox continued working in the hope his condition would improve. He informed his shop manager and direct supervisor, James Johnson, about the accident the same day. Mr. Cox stated Mr. Johnson told him to wait and see if his condition improved. Mr. Cox indicated he did not ask for medical treatment at the time because he did not want to get fired by asking for workers compensation benefits. Mr. Johnson disputed Mr. Cox' testimony, stating Mr. Cox did not tell him he had sustained a work injury, nor did they ever have a conversation about a work-related injury.

Mr. Cox went to Dr. Bradley Dart on his own for medical treatment on January 31, 2020, with complaints of left hip pain. Dr. Dart recorded the following history:

¹ P.H. Trans. at 17.

Michael presents today with complaints of left hip pain. The pain began in July 2018. He denies an injury. Since it started the pain has progressively been getting worse. He reports he got to my clinic after researching on the internet. He works as an auto mechanic and continues to work.

On average he rates the pain as a 10 on a scale of 1-10. He describes the pain as constant, deep, electric, sharp, and stabbing. The pain does wake him at night. He also feels a loss of motion and stiffness in the hip. His symptoms are aggravated by walking and relieved with rest. He does have to avoid some activities due to pain. He has remained full weightbearing. He does use a cane for ambulation assistance. He does walk with a limp.²

Dr. Dart obtained x-rays of Mr. Cox's left hip, which were read to reveal avascular necrosis of the femoral head and complete joint space loss superiorly. Dr. Dart diagnosed idiopathic aseptic necrosis of the left femur and left hip pain. He recommended Mr. Cox undergo a total hip arthroscopy, noting Mr. Cox's "progressive debilitating pain in the left hip for years"³ and lack of improvement with conservative treatment.

Robert "Bob" Morris was respondent's owner from May 2015 through June 30, 2020. When Mr. Cox was hired, Mr. Morris noticed at the time Mr. Cox walked with "a very noticeable limp."⁴ Mr. Johnson agreed Mr. Cox walked with a limp when he came to interview for his position. Both Mr. Morris and Mr. Johnson were aware Mr. Cox was planning a hip surgery, stating Mr. Cox talked about scheduling this surgery several times over the course of his employment. However, they denied Mr. Cox related his need for hip surgery to any work incident, and they denied Mr. Cox ever asked respondent to provide medical treatment for his hip.

Michael Hughes, respondent's shop foreman, testified he observed Mr. Cox walking with a limp at the time he was hired. Mr. Hughes recalled a conversation with Mr. Cox within two to four weeks of Mr. Cox's hire date in July 2019, where Mr. Cox informed him of his need for surgery. Mr. Hughes could not recall what type of surgery Mr. Cox claimed to need. Mr. Hughes indicated he was unaware of Mr. Cox alleging a work-related injury until the present case was filed; Mr. Cox never related his need for surgery to a work accident.

Broc Carr is a mechanic for respondent. He testified he noticed Mr. Cox walked with a limp at the time he was hired. He denied any conversations with Mr. Cox regarding a

² P.H. Trans., Resp. Ex. 1 at 1.

³ *Id.* at 2.

⁴ Morris Depo. at 5.

work-related injury, admitting he rarely spoke with Mr. Cox, and they worked on opposite ends of the shop during Mr. Cox' employment.

Mr. Cox initially disputed he had a noticeable limp at the time of his hiring, but then allowed for the possibility of a limp at the time. When asked what caused his limp, Mr. Cox replied, "I don't know. Age."⁵ Mr. Cox denied any accidents prior to working for respondent.

Mr. Cox signed a copy of respondent's employee handbook on July 2, 2019, which was the day he began working for respondent. The handbook states use of drugs or alcohol at work is grounds for immediate termination. It states any employee who is injured while working must give immediate notice to the service manager or owner. The handbook further indicates jeopardizing the safety of the shop is a reason for termination.

Mr. Cox was terminated from respondent on January 31, 2020, for substance abuse. Mr. Cox testified he was unaware of the reason for his termination until he attended an unemployment hearing.

Mr. Morris testified Mr. Cox seemed intoxicated, or "stoned," while working on January 13, 2020.⁶ He saw evidence of medication on Mr. Cox' desk. Mr. Morris believed Mr. Cox was unable to safely drive himself and Mr. Morris drove Mr. Cox home that day. Mr. Johnson confirmed Mr. Morris' testimony, as he witnessed Mr. Cox's behavior and also found him to be impaired. Mr. Johnson saw prescription medication in Mr. Cox's vehicle, but he did not know for sure what type of medication it was.

On January 31, 2020, Mr. Cox came to work and again seemed intoxicated. Mr. Morris described Mr. Cox as listless and staring at his computer. Mr. Morris determined Mr. Cox was a safety risk and decided to terminate him. Mr. Morris testified:

Q. In the condition that you observed both on the 13th and 31st of January, was he a safety risk?

A. Yes, he was.

Q. To himself and to others?

⁵ Cox Depo. at 11.

⁶ Morris Depo. at 10.

A. Yes, especially to himself with the equipment that he's charged with maintaining, but also if he's involved with working with anybody else, he's a significant risk.⁷

Mr. Morris testified he made Mr. Cox' termination effective at the beginning of February so Mr. Cox' health insurance would not end until the end of the month and not affect Mr. Cox' ability to undergo surgery. Mr. Cox underwent left hip replacement surgery on February 19, 2020.

Mr. Morris stated he was unaware of Mr. Cox alleging a work-related injury until he received a letter from counsel dated May 13, 2020. Mr. Johnson testified he could not recall exactly when he learned of Mr. Cox' claim, but he estimated it was around April 2020. Mr. Morris then produced a Memo to File on May 22, 2020, regarding Mr. Cox' termination. The memo described the incidents of January 13 and 31, 2020.

Dr. Pedro Murati examined Mr. Cox at his counsel's request on July 13, 2020. After a review of Mr. Cox' medical records and performing a physical examination, Dr. Murati recorded the following impression:

1. Status post, "Left total hip arthroplasty via a direct anterior approach." Dr. Dart 02-19-20 at [maximum medical improvement].
2. Low back sprain secondary to antalgia.
3. Bilateral patellofemoral syndrome.⁸

Dr. Murati recommended conservative treatment for Mr. Cox' low back and bilateral knees. Dr. Murati opined the prevailing factor causing Mr. Cox' condition and need for medical treatment was the January 21, 2020, work accident.

Mr. Cox no longer receives medical treatment and is unable to do the recommended post-surgical physical therapy due to his lack of insurance after termination. Mr. Cox began a new job after working for respondent, but eventually stopped because he was unable to maintain the physical demands of the job due to his injury and difficulties with the owners. Mr. Cox was involved in a motor vehicle accident on September 28, 2020, and he sustained injuries to his right ankle, bilateral knees, hips, and low back. Mr. Cox testified he is only alleging a left hip injury to his work accident, and his right hip and low back complaints are related to the motor vehicle accident.

⁷ *Id.* at 11.

⁸ P.H. Trans., Cl. Ex. 1 at 4.

ANALYSIS

The underlying hearing giving rise to the ALJ's December 28, 2020, Order was held pursuant to K.S.A. 44-534a. Respondent asserts Mr. Cox did not prove he suffered a personal injury by accident on January 21, 2020, or provide timely notice pursuant to K.S.A. 44-520. Both are appealable issues under K.S.A. 44-534a.

K.S.A. 44-516 confers an ALJ the authority to appoint a physician to conduct an IME. Here, there exists a dispute as to whether claimant's ongoing physical problems stem from a compensable injury on January 21, 2020. The Board held on many occasions an ALJ has the right and authority to order an IME for the purpose of determining a multitude of questions. An order for an IME is not a finding of compensability. Likewise, it is also not medical treatment. It is an interlocutory order, which is well within the authority of the ALJ.⁹ As the order for an IME constitutes an interlocutory order and is not final, the Board is without jurisdiction to review the ALJ's Order for an IME.

CONCLUSION

Respondent's appeal concerns an ALJ's interlocutory order for an IME. The Board does not have jurisdiction to address the issues raised by respondent, and this appeal must be dismissed.

ORDER

WHEREFORE, the Board dismisses the appeal of the Order dated December 28, 2020.

IT IS SO ORDERED.

Dated this _____ day of February, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

⁹ See *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB April 2, 1999); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB April 9, 2009); *Myers v. Four B Corporation d/b/a Price Chopper*, No. 1,043,611, 2009 WL 1996487 (Kan. WCAB June 30, 2009).

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c: Todd King, Attorney for Mr. Cox
John Rathmel, Attorney for Respondent and its Insurance Carrier
Hon. Ali Marchant, Administrative Law Judge