

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHET ZIMMER)	
Claimant)	
V.)	
)	AP-00-0477-428
CITY OF MANHATTAN, KANSAS)	CS-00-0125-751
Self-Insured Respondent)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Self-insured Respondent requests review of the June 30, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Frederick J. Greenbaum appeared for Respondent. Travis J. Ternes appeared for the Kansas Workers Compensation Fund (Fund).

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 June 23, 2023, with exhibits attached; the transcript of the Preliminary Hearing held November 23, 2022, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Did Claimant's injury arise out of and in the course of his employment?
2. What is the prevailing factor causing Claimant's injury, medical condition, and need for medical treatment?

3. Did Claimant's need for medical treatment arise out of and in the course of his employment?

4. Is Claimant's additional medical treatment, in the form of weight loss medication as a precursor to lumbar surgery, owed?

FINDINGS OF FACT

Claimant worked as a street laborer for Respondent. On June 6, 2017, Claimant lifted a large piece of concrete and experienced immediate pain in his low back and right leg. Claimant received conservative treatment and underwent an MRI of his low back on July 5, 2017. The MRI revealed mild degenerative changes at L4-5 and L5-S1, a disc bulge at L5-S1 superimposed on a right paracentral disc protrusion, and moderate right lateral recess narrowing. Claimant was diagnosed with a muscle strain and disc degeneration of the lumbar region.

Claimant is a smoker with a medical history of obesity. He weighed over 300 pounds throughout most of the medical record in evidence. Claimant gained an additional 80 to 100 pounds since June 6, 2017.

Claimant's history includes vehicular accidents in 2011, 2012, and 2014, involving a four-wheeler, a dirt bike, and a motor vehicle, respectively. Claimant began treating with a chiropractor in 2014 for various reasons, including back pain. On June 5, 2017, the day prior to the work incident, Claimant presented to the chiropractor with complaints of shoulder, arm, neck, and midback concerns after a weekend spent at the sand dunes in Oklahoma. He returned to the chiropractor on June 8, 2017, reporting pain after lifting concrete at work.

Claimant treated conservatively after the incident with physical therapy, medications, and injections. Claimant began treating with Dr. Alexander Bailey in November 2017. A lumbar spine MRI was taken November 16, 2017, and showed mild degenerative changes at L5-S1 with an asymmetric disc bulge to the right abutting the S1 nerve root. Dr. Bailey initially found the work incident the prevailing factor causing Claimant's low back and right leg condition. Dr. Bailey noted at the time of his initial assessment he was not provided Claimant's medical records, and Claimant denied preexisting lumbar complaints. In a report dated December 4, 2018, Dr. Bailey changed his causation opinion after a review of Claimant's records, finding Claimant had a preexisting condition and did not suffer a work injury on June 6, 2017. Claimant returned to Dr. Bailey on June 25, 2020. After conducting a physical examination and a review of Claimant's updated medical records, Dr. Bailey diagnosed Claimant with low back pain with radiculitis and lumbar spine degenerative disc disease, L5-S1 greater than L4-5, without signs of significant neurologic impingement. Dr. Bailey's causation opinion remained unchanged from December 4, 2018.

Other physicians concurred with Dr. Bailey's opinions, including Drs. Eden Wheeler, Sean Jackson, and Edward Braun. Dr. Howard Aks disagreed, finding the work accident to be the prevailing factor causing Claimant's injuries. Dr. Benjamin Gelber, who first examined Claimant on January 15, 2020, considered Claimant a good candidate for disc arthroplasty at L5-S1. Dr. Lowry Jones examined Claimant on January 14, 2021, and reported surgery was unlikely to be successful due to Claimant's history of obesity and his status as a smoker. Dr. Matthew Pierson also opined surgery would likely be unsuccessful due to Claimant's obesity.

Claimant returned to Dr. Gelber on April 12, 2022. Dr. Gelber noted bariatric surgery could help Claimant lose weight prior to the proposed disc arthroplasty, though he stated the procedure was feasible even without prior weight loss. He opined weight loss would decrease the stress on Claimant's lumbar spine and could possibly improve Claimant's back pain without surgery.

Following a preliminary hearing held November 23, 2022, wherein Claimant was asking for additional medical treatment, including bariatric surgery, Dr. Douglas Burton was ordered by the ALJ to provide a second opinion. The parties stipulated Dr. Burton's second opinion report would be treated as a court-ordered independent medical evaluation pursuant to K.S.A. 44-516(a). Dr. Burton was asked to diagnose injuries suffered as a result of the work accident and make recommendations for any additional treatment.

Dr. Burton examined Claimant on February 10, 2023, and determined Claimant sustained chronic low back pain with equivalent right leg pain following the work injury. Dr. Burton opined the prevailing factor causing Claimant's condition and need for treatment was the work accident of June 6, 2017. Dr. Burton recommended a spinal fusion rather than disc replacement and noted Claimant would need to lose weight and be nicotine-free prior to surgery.

Dr. Kent Erickson evaluated Claimant on April 3, 2023, when he was erroneously advised Claimant's surgery would be paid for through workers compensation, and a weight loss solution was needed. Dr. Erickson recommended Mounjaro, a weight loss medication, instead of bariatric surgery. By the follow-up visit on April 20, 2023, Dr. Erickson reported Claimant was doing well with the medication and had already lost weight.

After the June 23, 2023, hearing, the ALJ found the June 6, 2017, work accident was the prevailing factor causing Claimant's injury, need for treatment, and resulting impairment or disability. The ALJ noted Claimant was diagnosed with radiculopathy into the right lower extremity following the accident, and while Claimant has a history of previous low back pain, there was no prior record of radiculopathy into the right lower extremity. The ALJ determined:

Providing weight loss assistance to [Claimant] will provide him with the only available opportunity to cure or relieve the effects of his work injury by reducing or

eliminating his back pain and radicular pain into his right lower extremity. Respondent objects to paying for weight loss treatment because [Claimant's] weight was a pre-existing condition and wasn't caused by the accident.

While [Claimant] was obese before, his obesity is preventing available treatment. Treating [Claimant's] obesity is a necessary step towards curing and relieving the effects of the work injury.¹

The ALJ ordered Respondent to provide medical care in the form of medicated weight loss assistance and designated Dr. Erickson as an authorized treating physician.

PRINCIPLES OF LAW AND ANALYSIS

In its application for review, Respondent challenges whether the work accident is the prevailing factor causing Claimant's injuries. Respondent further argues Claimant's obesity is a preexisting condition not related to any work injury, and his weight loss treatment is not Respondent's responsibility.

Claimant argues the Board lacks jurisdiction to review Respondent's appeal because an order for medical treatment is not an appealable issue. Alternatively, Claimant contends the ALJ's Order should be affirmed.

The Fund takes no position in the dispute between the parties.

In its preliminary hearing brief to the ALJ, Respondent raised only two issues:

1. Whether Claimant's obesity is a separate, unrelated, non-compensable condition; and
2. Whether Claimant's need for weight loss treatment is reasonably necessary to the treatment of the claimant's alleged work-related injury such that it is the responsibility of the respondent to cover it.²

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing where one of the parties alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to specific jurisdictional issues: accidental injury, injury arising out of and in the course of employment, timely notice, and certain other

¹ ALJ Order (June 30, 2023) at 3.

² Resp. Brief to ALJ (filed June 23, 2023) at 1.

defenses. The Court of Appeals, in *Carpenter v. National Filter Service*, stated, “Because in 44-534a jurisdiction means coverage by the Act, ‘certain defenses’ are subject to review only if they dispute the compensability of the injury under the Act.”³ Where no jurisdiction is present, it is appropriate to dismiss the appeal.

1. Did Claimant’s injury arise out of and in the course of his employment?

Claimant is not claiming his obesity arises out of and in the course of his employment. Whether his back injury arises out of and in the course of his employment was not raised as an issue before the ALJ at the June 23, 2023, hearing. K.S.A. 44-555c mandates the Board’s consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal.⁴ K.S.A. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board 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.

The Board generally will not address issues raised for the first time on appeal.⁵ The Board does not have jurisdiction to review this issue at this time.

2. What is the prevailing factor causing Claimant’s injury, medical condition, and need for medical treatment?

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.⁶ However, the prevailing factor issue was not raised to the ALJ at the hearing giving rise this appeal. Neither the word “prevailing” nor the phrase “prevailing factor” can be found in the transcript of the Preliminary Hearing held June 23, 2023.

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999) (emphasis omitted).

⁴ See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

⁵ See *Miller v. General Motors Corporation*, Nos. 1,048,350, 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013); *Tackett v. ABM Industries, Inc.*, No. 1,052,155, 2012 WL 5461461 (Kan. WCAB Oct. 1, 2012).

⁶ See *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kornmesser 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).

As this issue was not raised before the ALJ, the Board does not have jurisdiction to review this issue at this time.

3. Did Claimant's need for medical treatment arise out of and in the course of his employment?

The standard determining entitlement to medical treatment under the Workers Compensation Act is: when an employee sustains a compensable injury, it shall be the duty of the employer to provide such medical treatment as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁷ This is not an issue listed in K.S.A. 44-534a over which the Board has authority to review. The Board does not have jurisdiction to review this issue at this time.

4. Is Claimant's additional medical treatment, in the form of weight loss medication as a precursor to lumbar surgery, owed?

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.⁸ 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.

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 appeal of the Order of ALJ Bruce E. Moore, dated February 15, 2023, is dismissed for lack of jurisdiction. The Order issued by ALJ Moore, dated February 15, 2023, remains in full force and effect.

⁷ K.S.A. 44-510h(a).

⁸ K.S.A. 44-551(l)(2)(A).

IT IS SO ORDERED.

Dated this _____ day of August, 2023.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Travis J. Ternes, Attorney for Kansas Workers Compensation Fund
Hon. Bruce E. Moore, Administrative Law Judge