

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LORRAINE BISHOP)	
Claimant)	
V.)	
)	AP-00-0477-818
KANSAS TURNPIKE AUTHORITY)	CS-00-0463-575
Respondent)	
AND)	
)	
SELF-INSURED)	

ORDER

Respondent appealed the July 19, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Phillip B. Slape appeared for Claimant. Matthew S. Crowley 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 July 19, 2023, with exhibits attached and the documents of record filed with the Division.

ISSUES

1. Is the prevailing factor for Claimant’s medical condition the January 15, 2022 work accident?
2. Does the Board have jurisdiction to review the denial of Respondent’s Motion to strike the Court-ordered report of Dr. Gurba from the record?
3. Did the ALJ err in awarding TTD?

FINDINGS OF FACT

Claimant worked for Respondent for approximately fifteen years as a toll collector. On January 15, 2022, Claimant stepped out of the ticket booth to get a ticket from a customer, fell off the curb and landed onto her left hip. She was taken by ambulance to the emergency room at Ascension Via Christi St. Francis, where she was diagnosed with a left comminuted intertrochanteric femur fracture and admitted to the hospital.

On January 16, 2022, Christopher Halphen, D.O., performed an open reduction internal fixation of the left hip fracture, which included the implementation of hardware. Claimant was hospitalized until January 24, 2022. She was transferred to Via Christi Rehabilitation Hospital, where she was treated until her release on February 10, 2022. Claimant continued with physical therapy following her release. On March 29, 2022, Dr. Halphen released Claimant from further care without restrictions. He recommended Claimant proceed with hardware removal and hip replacement with Dr. Bhargava in 3-4 weeks.

Dr. Halphen saw Claimant on June 30, 2022 for pre-op testing. Claimant was scheduled for hardware removal and hip replacement surgery on July 20, 2022. Claimant was ambulatory with a cane and reported she could not return to work if she was on an assistive device. X-rays revealed Claimant's hardware was well aligned and the fracture fully healed.

At her attorney's request, Claimant was evaluated by George G. Fluter, M.D., on November 8, 2022. Dr. Fluter opined the prevailing factor for the injury and the need for medical treatment was the reported work-related injury occurring on January 15, 2022. Dr. Fluter recommended conservative medical treatment and placed temporary restrictions on her activities. Dr. Fluter opined Claimant should undergo surgical intervention as recommended by Dr. Halphen to reduce pain as well as reduce her leg length discrepancy.

Claimant has a history of osteoarthritis of her hips. On March 5, 2019, Claimant was seen by Tarun Bhargava, M.D., for treatment of her hips. Dr. Bhargava diagnosed bilateral greater trochanteric bursitis and injected Claimant's hips. Claimant received hip injections from Dr. Bhargava on June 26, 2019, October 3, 2019, July 1, 2020, October 15, 2020, March 23, 2021 and August 26, 2021. On August 26, Claimant reported her hip pain was worsening and her left hip was worse than the right. She discussed total hip replacement surgery with Dr. Bhargava. Pending surgical clearance, including weight loss, surgery was to be scheduled in March 2022. Claimant canceled her left hip replacement surgery, scheduled for March 7, 2022, because she did not lose enough weight as discussed with Dr. Bhargava.

On April 13, 2022, Claimant was evaluated by Dr. Bhargava. She reported her left hip symptoms were worsening. She reported her January 15, 2022, work accident and subsequent treatment. Claimant wanted to re-schedule her left hip replacement surgery. Dr. Bhargava advised Claimant surgery could not be scheduled until her fracture was healed. He advised Claimant to return in three months and to have a CT scan just prior to her appointment.

Claimant was referred to Danny M. Gurba, M.D., for a Court-ordered evaluation on April 4, 2023. Dr. Gurba recommended Conversion Total Hip Replacement, with removal of the internal fixation hardware. He opined the prevailing factor for the hip fracture and the treatment recommended was the January 15, 2022 work injury.

I do feel that the work injury on 1/15/2022 is the prevailing factor for the hip fracture as described, as well as the treatment recommendation provided above. Clearly, she had pre-existing osteoarthritis of the hip requiring hip replacement. Unfortunately, the surgery now required is significantly more complicated and has higher risks. Hardware removal is not always straight forward and entails a risk of intraoperative fracture and added soft tissue dissection. Likewise, component placement on the femoral side may be compromised by altered anatomy.

While the prevailing factor for a Primary Total Replacement prior to her injury was Osteoarthritis, I believe the prevailing factor for her current surgery requirement of Conversion Total Hip Replacement is the work related injury of 1/15/2022. In my experience this is a much different surgery.¹

Dr. Gurba released Claimant to return to work to sedentary work only, with use of a cane, walker, or wheelchair.

This matter went to preliminary hearing on July 19, 2023. The ALJ overruled Respondent's objection to the admission of Dr. Gurba's report because he would not make himself available for a deposition. The ALJ relied upon K.S.A. 44-516(a) and K.A.R. 51-9-6 requiring the admission and consideration of any neutral physicians. He stated:

The Respondent has not cited, and the Court is not aware of, any statute or case law that says that the doctor's report should be excluded if he is not available for a deposition. The Court finds that Dr. Gurba's retirement and unavailability for a deposition is not sufficient basis to exclude his report.²

¹ Gurba COIME Report (April 4, 2023) at 3.

² ALJ Order (July 19, 2023) at 2.

The ALJ found the prevailing factor for Claimant's injury, medical condition and need for treatment, including the hardware removal and total hip replacement, was the January 15, 2022 work accident. He stated:

Dr. Gurba was clearly aware of the Claimant's preexisting osteoarthritis. But he notes that she now requires a different type of hip replacement surgery that is significantly more complicated and has higher risks than before the accident. This is not an aggravation, acceleration or exacerbation of the Claimant's preexisting osteoarthritis.³

He further found Claimant was entitled to temporary total disability compensation (TTD) beginning January 29, 2023 at the rate of \$619.58 per week.

Respondent argues Dr. Gurba's report should be stricken from the record because Dr. Gurba refused to make himself available for a deposition, thereby denying Respondent's due process rights to cross-examine the Court-ordered physician. In the alternative, Respondent argues Dr. Gurba's prevailing factor opinion relates to the medical treatment and not the medical condition as set forth in K.S.A. 44-508(f)(2)(B)(ii), rendering it deficient and not credible medical evidence.

Claimant argues the Board does not have jurisdiction to review the ALJ's denial of Respondent's Motion to Strike the report of Dr. Gurba because it does not fall within the preliminary scope of K.S.A. 44-534a. Claimant maintains the July 21, 2023 Order of the ALJ should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.⁴ The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.⁵ A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.⁶

³ *Id.* at 3.

⁴ See K.S.A. 44-501b©) and K.S.A. 44-508(h).

⁵ See K.S.A. 44-555c(a).

⁶ See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

1. The Board does not have jurisdiction to review Respondent's appeal regarding the motion to strike the report of Dr. Gurba, medical treatment and TTD.

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.⁷ In general, preliminary hearing 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.⁸ The determination regarding TTD is also within the ALJ's discretion and not reviewable by the Board.⁹

Respondent argues the Board has jurisdiction to review the Motion to Strike issue pursuant to K.S.A. 44-551, asserting the ALJ exceeded his or her jurisdiction. Respondent argues their due process rights have been violated by denying their right to cross-examine the Court-ordered evaluator who refused to sit for a deposition. The two cases cited by Respondent in support of their argument are distinguishable from the present case. Those two cases concern requests by one of the litigants to strike the report of the opposing litigant's retained medical expert. Here, the report of Dr. Gurba was ordered by the Court. Pursuant to K.S.A. 44-516, the ALJ is required to consider the Court-ordered report of Dr. Gurba. The ALJ did not exceed his jurisdiction in considering Dr. Gurba's report.

Respondent's appeal regarding these issues is dismissed for lack of jurisdiction.

2. The prevailing factor for Claimant's medical condition is the January 15, 2022 work accident.

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.¹⁰ The accident must be the prevailing factor causing the injury. Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all

⁷ See K.S.A. 44-534a(a)(2).

⁸ See *Vizcarra v. LoanSmart, LLC*, No. 1,079,548, 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).

⁹ See *Hargraves v. Goodyear Tire & Rubber Co.*, No. 1,022,008, 2005 WL 2519631 (Kan. WCAB Sept. 9, 2005).

¹⁰ See K.S.A. 44-508(d).

relevant evidence.¹¹ An accidental injury is not compensable if work is a triggering factor or if the injury solely aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.¹²

It is not disputed Claimant suffered from preexisting osteoarthritis in her left hip and hip replacement surgery had been scheduled prior to her work accident. It is also not disputed Claimant suffered a compensable work injury to her left hip on January 15, 2022 when she stepped out of the toll booth and fell, landing on her left hip, which required surgery, including the implementation of hardware. Claimant's hip fracture healed, but she continues to experience significant pain in her hip. Dr. Gurba opined the surgery now required is significantly more complicated and has higher risks than the hip replacement previously scheduled. He further opined the prevailing factor for the needed surgery was the January 15 work injury.

Dr. Gurba acknowledged Claimant had preexisting osteoarthritis of her left hip requiring hip replacement. However, he opined the January 15 work injury and the treatment subsequently provided to cure or relieve Claimant from the effects of this injury, requires a Conversion Total Hip Replacement to cure or relieve Claimant from the effects of her injury.

Respondent argues Dr. Halphen and Dr. Bhargava do not believe the January 15 accident was the prevailing factor for causing the degeneration of the hip. These two physicians did not provide prevailing factor opinions. They did not provide opinions regarding Dr. Gurba's opinions and recommended Conversion Total Hip Replacement. Dr. Halphen and Dr. Bhargava simply recommended hip replacement based upon the diagnosis of left hip osteoarthritis. This does not give rise to prevailing factor opinions regarding Claimant's current medical condition.

Respondent is trying to maneuver around the issue by arguing the Claimant's medical condition, the preexisting osteoarthritis, is not the prevailing factor requiring treatment for the hip replacement. In other words, the prevailing factor analysis should focus on the underlying need or cause for medical care for Claimant's underlying preexisting osteoarthritis. This argument is misplaced.

Claimant was scheduled to have a left hip replacement prior to the work accident. Unfortunately, Claimant's work accident required the implementation of hardware which Dr. Gurba opined changed the need for a common hip replacement to the need for

¹¹ See K.S.A. 44-508(g).

¹² See K.S.A. 44-508(f)(2).

Conversion Total Hip Replacement. The greater weight of the credible evidence establishes Claimant's accident was the prevailing factor in causing her medical condition.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones, dated July 19, 2023, is affirmed regarding prevailing factor. Respondent's appeal regarding the motion to strike and TTD is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of September, 2023.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Phillip B. Slape, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge