

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|-------------------------------------|---|----------------|
| ALBERT LEWIS |) | |
| Claimant |) | |
| V. |) | |
| |) | AP-00-0461-875 |
| DITCH & ASSOCIATES, INC. |) | CS-00-0460-776 |
| Respondent |) | |
| AND |) | |
| |) | |
| OLD GLORY INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier (respondent) request review of the October 19, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Jeff K. Cooper appeared for Albert Lewis. Sarah N. Boston 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 October 14, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ found Mr. Lewis entitled to medical care for work-related injuries sustained August 7, 2021, and appointed Dr. Bryan Vopat the authorized treating physician. The ALJ determined Mr. Lewis' sworn testimony at the preliminary hearing held greater weight than the witness statements submitted by respondent.

Respondent argues Mr. Lewis' condition stems from an intervening cause and is not a natural consequence of his November 2020 work-related injury. Further, respondent maintains its witness statements are admissible evidence within workers compensation proceedings and should be given the same weight as Mr. Lewis' live testimony.

Mr. Lewis contends the ALJ's Order should be affirmed. Mr. Lewis argues respondent lacks any medical evidence supporting a new injury, and the evidence clearly shows Mr. Lewis' current condition is directly traceable to the original November 2020 injury.

The issues for the Board's review are:

1. What is the prevailing factor causing Mr. Lewis' injury and need for medical treatment?
2. Should respondent's witness statements be given the same weight as Mr. Lewis' live testimony?
3. Did the ALJ exceed his authority and/or jurisdiction in granting Mr. Lewis benefits?

FINDINGS OF FACT

Mr. Lewis is a full-time driver and loader of a refuse truck owned by respondent. Mr. Lewis was first employed in April 2020. On November 13, 2020, Mr. Lewis sustained a work-related injury to his left ankle when he stepped unevenly on a curb. Mr. Lewis initially went to the emergency room, where x-rays revealed no fracture, dislocation, or bone destruction to his left foot or ankle, but showed mild generalized soft tissue swelling. He was referred to Dr. Ronald Carlson.

Mr. Lewis missed two weeks of work following his injury, but was paid his full wages. Mr. Lewis returned to work with a splint and continued treating with Dr. Carlson, including physical therapy, until his release without restrictions on January 25, 2021. Mr. Lewis stated he never returned to baseline and still experienced pain following his care. He did not seek additional treatment for his left ankle after his release. Mr. Lewis continued working for respondent full-time, without restrictions, until August 6, 2021.

Mr. Lewis testified he was walking across a restaurant parking lot with his wife on August 7, 2021, when he experienced a sharp, intense pain in his left foot and ankle. Mr. Lewis explained he was only walking and did not step wrong or trip when the pain began. Mr. Lewis could no longer walk and went to the emergency room at St. Francis.

Emergency room records state:

Albert M. Lewis is a 42 y.o. male who presents complaining of left ankle and foot pain. States he went to a concert yesterday and a female bumped into him causing him to fall. States he did not have severe pain at that time but pain worsened after running this morning. States pain radiates to posterior aspect of leg and reports

pain throughout ankle and midfoot. Denies numbness, tingling, radicular symptoms. Denies additional injuries.¹

X-rays revealed a possible subacute fracture or avascular necrosis, and an MRI was recommended. Mr. Lewis also had a mild increase in soft tissue swelling about the ankle and mild diffuse subcutaneous edema. Mr. Lewis was diagnosed with a closed fracture of the left foot, provided with a splint and medication, and taken off work.

On Sunday afternoon, August 8, 2021, Mr. Lewis called Steven Ditch, co-owner and president of respondent, to say he would not be at work the following Monday because he hurt his foot and needed to seek treatment. Mr. Ditch submitted a witness statement, indicating Mr. Lewis said he hurt himself at a function where a lady bumped into him and knocked him off his feet. On August 9, 2021, Kris Chapman, another employee, was told by Mr. Lewis that he and his wife were at a concert when a lady bumped into him, knocking him off his feet. Mr. Lewis testified he was bumped into by a woman during a concert on August 6, 2021, but he did not fall and did not injure his ankle at that time.

Dr. Kenneth Teter examined Mr. Lewis on August 10, 2021. Records state:

Albert is a 42 y.o. male who presents today for left ankle. Albert has had the problem since November 2020 when he slipped and fell at work. . . . He improved somewhat until recently he just stepped on the left foot and felt severe pain. The pain is in the exact location it was in November 2020 and he states although it improved a lot never completely resolved. He was recently walking into a store and lost his ability to bear weight on his foot due to intense pain. The current status of the condition is unchanged.²

Recent x-rays showed a fragmentation of the talus dorsally at the talonavicular joint not present on November 2020 x-rays. Dr. Teter assessed Mr. Lewis with a nondisplaced avulsion fracture of unspecified talus and chronic pain of the left ankle. Dr. Teter recommended an MRI of Mr. Lewis' left foot, noting Mr. Lewis' condition could be from osteonecrosis, potentially even infection. Dr. Teter opined Mr. Lewis' need for care is a direct result of the work-related injury from November 2020. Dr. Teter provided work restrictions and pain medication.

Dana Ditch, employee of respondent, also submitted a witness statement indicating Mr. Lewis went to respondent's offices on August 13, 2021, to claim his paycheck with crutches and a boot. When asked what happened, Mr. Lewis stated he was shopping with his wife over the weekend and his ankle gave out. Mr. Lewis was seen by Bailey

¹ P.H. Trans., Cl. Ex. A3 at 25-26.

² *Id.* at 21.

Stallbaumer, APRN, on September 7, 2021, and the records provide a history of Mr. Lewis stepping on his left foot and feeling severe pain after grocery shopping. Mr. Lewis testified he and his wife planned to go shopping on August 7, 2021, but never went because Mr. Lewis sustained injury in the restaurant parking lot before they could go. Mr. Lewis stated he did not tell either Dana Ditch or the nurse practitioner he was shopping with his wife, but rather they were headed to go shopping.

Dr. Howard Aks evaluated Mr. Lewis at his counsel's request on October 6, 2021. Mr. Lewis provided a history of his November 2020 accident and explained he was walking with his wife on August 7, 2021, when he experienced sharp pain in his left ankle and foot. Dr. Aks reviewed medical records, excepting those from Dr. Teter, and performed a physical examination. Dr. Aks determined Mr. Lewis suffered from significant chronic left foot and ankle pain, decreased range of motion, decreased strength, and possible avascular necrosis. He provided temporary restrictions and noted Mr. Lewis had an upcoming appointment with an orthopedic surgeon, which he found beneficial. Dr. Aks concluded the work-related accident in November 2020 was the prevailing factor for Mr. Lewis' left foot and ankle conditions.

On October 11, 2021, Mr. Lewis went to orthopedic surgeon Dr. Bryan Vopat. Dr. Vopat recommended talonavicular fusion surgery, scheduled for December 2, 2021. Mr. Lewis has not worked at respondent since August 6, 2021, but remains an employee.

PRINCIPLES OF LAW AND ANALYSIS

1. What is the prevailing factor causing Mr. Lewis' injury and need for medical treatment?

K.S.A. 44-508(f) states, in part:

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Dr. Teter, on August 10, 2021, noted the pain complaints made by Mr. Lewis were in the exact same location as November 2020. He concluded the current need for treatment was the direct result of the November 13, 2020, injury by accident. Dr. Aks opined the November 13, 2020, injury by accident was the prevailing factor for Mr. Lewis' left foot and ankle pain and need for medical treatment. There is no evidence contradicting the medical opinions of Drs. Teter and Aks.

The undersigned finds the weight of the evidence supports finding the November 13, 2020, injury by accident was the prevailing factor for Mr. Lewis' compensation.

2. Should respondent's witness statements be given the same weight as Mr. Lewis' live testimony?

K.S.A. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

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 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. How the ALJ should weigh the evidence is not one of the jurisdictional issues enumerated in the Act and the undersigned does not possess the authority to rule on the issue.

3. Did the ALJ exceed his authority and/or jurisdiction in granting Mr. Lewis benefits?

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.

The ALJ did not exceed his jurisdiction by ordering medical treatment and temporary total disability benefits. Such an order is contemplated by K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven M. Roth dated October 19, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Mr. Lewis
Sarah N. Boston, Attorney for Respondent and its Insurance Carrier
Hon. Steven M. Roth, Administrative Law Judge