

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BREANNA BRANDT)
Claimant)
V.)
) AP-00-0461-951
WALMART ASSOCIATES, INC.) CS-00-0458-806
Respondent)
AND)
)
AIU INSURANCE CO.)
(NATIONAL UNION FIRE OF PITTS PA))
Insurance Carrier)

ORDER

Claimant requests review of the October 22, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample. Adam Brillhart appeared for Claimant.¹ Michael Kauphusman 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 transcript of Preliminary Hearing from October 20, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Was Claimant's accidental injury to the right shoulder on April 26, 2021, the prevailing factor for Claimant's medical condition and need for treatment.
2. Did the ALJ err in not ordering an independent medical evaluation?

FINDINGS OF FACT

Claimant is 17 years of age, and on April 26, 2021, suffered injury to her right shoulder while at work for Respondent. This was not Claimant's first injury to her right

¹ Mr. Brillhart filed a Motion to Withdraw as counsel on this case on November 15, 2021. That motion has not yet been addressed by the ALJ.

shoulder. Since 2017, Claimant has suffered multiple dislocations of the right shoulder and undergone three surgical procedures.

On December 6, 2017, Claimant sought treatment of her right shoulder with Scott Mullen, M.D. at the KU Medical Center. Approximately two weeks prior, Claimant injured her right shoulder when diving for a basketball and jamming her shoulder into a wall. Dr. Mullen diagnosed right shoulder instability related to multidirectional instability. He ordered occupational therapy 1-2 times a week for 6 weeks and the use of an immobilizer. Conservative treatment was ineffective. Dr. Mullen performed a right shoulder arthroscopic, anterior and posterior capsulorrhaphy on December 14, 2017.

Claimant's right shoulder instability continued. Claimant was evaluated by Dr. Mullen on September 5, 2018. Dr. Mullen noted even with a gunslinger brace for an extended period of time, Claimant's shoulder would not stay reduced. Examination of her shoulder demonstrated good range of motion and rotator cuff strength. She appeared to have anterior inferior subluxation of her humeral head. She was neurovascularly intact distally. She prefers to keep her right arm crossed across her chest in an internally rotated position to prevent it from sliding out.

Dr. Mullen diagnosed multidirectional instability and persistent right shoulder instability. He noted Claimant failed conservative treatment and would benefit from a revision right shoulder capsulorrhaphy. The surgery was performed on September 18, 2018. Dr. Mullen added anchors to address the recurrent right shoulder instability; repaired a labral tear; and closed the capsule.

Unfortunately, Claimant's right shoulder instability issues continued. She reported to Dr. Mullen multiple dislocations since 2018 and dislocations with minimal activity. The majority of the time, Claimant is able to reduce her dislocated shoulder on her own. Other times, she has to go to the emergency room. Based on the results of a May 27, 2020, MR arthrogram, Dr. Mullen performed a third surgery on July 23, 2020. The surgery added anchors all the way around the shoulder socket; repaired another labral tear; and, again, closed the capsule. Claimant was ultimately released, without restrictions, other than she should not participate in sports.

On April 26, 2021, Claimant moved a package of water bottles across the scanner. Claimant described her "arm got caught and it fell out of socket." Claimant reported her injury, filled out an accident report and was instructed to go home or to an emergency room.² Claimant sought treatment at St. John Hospital emergency room. She was diagnosed with anterior right shoulder dislocation at the glenohumeral joint, which was reduced, and placed into an immobilizer.

² P.H. Trans, Resp. Ex. 2 (Cl. Discovery Depo. (Sept. 20, 2021) at 24-25).

Claimant was referred to Douglass Stull, M.D., for an evaluation on June 1, 2021. Claimant reported sustaining a shoulder dislocation while working for Respondent. She reported going to the ER when she was not able to put the dislocation back in place on her own. Dr. Stull found Claimant had right recurrent dislocations and recommended arthroscopic surgery and labral repair.

Claimant was referred by Respondent to Michael Dempewolf, M.D., for a second opinion on July 12, 2021. Dr. Dempewolf noted a significant history of shoulder instability before and after the April 26, 2021, dislocation. He opined Claimant's injury to the shoulder on April 26, 2021, was an aggravation of the preexisting shoulder condition. He did not relate the April 26 injury to the need for medical treatment. Specifically:

In my opinion, with a reasonable degree of medical certainty, her work injury from 4/26/2021 is not the prevailing factor for her current symptoms of ongoing instability. It is well-documented that she has had multiple stabilization surgeries involving her right shoulder and a longstanding history of instability. Although her work injury of April did cause an instability episode, I do not believe this is the primary factor in her ongoing symptoms.

There is significant history of pre-existing condition involving her right shoulder. Although she did suffer a injury on 4/26/2021, I believe this is more of an aggravation of this pre-existing condition the need for medical treatment, diagnostic imaging, physical therapy, and/or surgery is not directly related to the 4/26/2021 date of injury.³

Claimant's counsel referred Claimant to Daniel Zimmerman, M.D., on August 11, 2021, for an evaluation. Dr. Zimmerman did not perform a physical examination of Claimant's shoulder for fear of injuring Claimant. He opined Claimant suffered multiple shoulder dislocations over the years, but the "prevailing factor for the recurrent right shoulder dislocation is the accident that occurred on April 26, 2021, at her place of employment."⁴ He opined Claimant was not at maximum medical improvement and would require an operative procedure. "I don't see any other option for Miss Brandt at this time except an operative procedure. The choice of the operation is the issue."⁵

The ALJ found "while there is no doubt Claimant sustained an injury on April 26, 2021, she has a long and well-documented history of right shoulder dislocations, all in the same anterior portion of her shoulder. The structure of her shoulder is so loose that her shoulder would dislocate spontaneously, even before April 26, 2021 . . . According to

³ *Id.*, Resp. Ex. 1 at 3. (Dr. Dempewolf's Jul. 12, 2021, report).

⁴ *Id.*, Resp. Ex. 2 at 5 (Dr. Zimmerman's Aug. 11, 2021, report at 4).

⁵ *Id.*, Resp. Ex. 2 at 6 (Dr. Zimmerman's Aug. 11, 2021, report at 5).

Claimant, her surgeon told her she was destined to have a shoulder replacement in the future."⁶ The Court found Claimant's condition is an aggravation of her preexisting condition in her right shoulder, and not the prevailing factor in medical condition and need for treatment. Claimant's request for additional medical treatment and temporary total disability benefits was denied.

Claimant appeals, arguing the injury on April 26, 2021, was the prevailing factor for Claimant's medical condition and need for treatment. Claimant argues the ALJ erroneously concluded Claimant's injury was not the prevailing factor by giving more weight to Dr. Dempewolf's medical opinions than those of Dr. Zimmerman and Dr. Stull. Claimant also alleges the ALJ erred by not assigning an impartial doctor to conduct an independent medical evaluation. Respondent argues the ALJ's Order should be affirmed. Respondent also argues the ALJ did not err in not appointing an independent medical examiner.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant accident to the right shoulder on April 26, 2021, was not the prevailing factor in causing Claimant's injury, medical condition and need for treatment.

For Claimant's injury by accident to be compensable, she must have sustained something more than "solely" an aggravation, acceleration or exacerbation of a preexisting condition. The work accident must be the prevailing factor causing her injury, medical condition, impairment or disability. Whether prevailing factor is proven is based on all of the evidence and is not dependent on medical opinions.⁷ Proof of the prevailing factor requirement depends on the specific evidence in each case.⁸ The mere presence of a preexisting or degenerative condition does not always preclude compensability.⁹

The ALJ's decision is affirmed. The ALJ correctly found Claimant has a "long and well-documented history of right shoulder dislocations." The ALJ agreed with Dr. Dempewolf's opinion Claimant's accident on April 26, 2021, was an aggravation of a preexisting condition. Dr. Zimmerman opined the accident was the prevailing factor. In so

⁶ ALJ Order at 4.

⁷ See *Fish v. Mid America Nutrition Program*, No. 1,075,841, 2018 WL 3740430, at 5 (Kan. WCAB Jul. 12, 2018).

⁸ See *Estrada v. City of Hutchinson*, No. CS-00-0176-146, CS-00-0233-099, CS-00-0317-559, 2019 WL 118462, at 6 (Kan. WCAB Feb. 28, 2019).

⁹ See *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571, *rev. denied* 301 Kan. 1046 (2015).

doing, Dr. Zimmerman does not identify a change in the physical structure in the shoulder, and he does not provide any detail as to why Claimant's dislocation on this date differs, in any way, from the "long and well-documented" dislocations Claimant suffered in the past. The preponderance of the evidence establishes Claimant did not prove her work accident was the prevailing factor in her injury, medical condition and need for treatment.

2. The ALJ did not err in failing to order an independent medical evaluation.

An order for an Independent Medical Examination is an interlocutory order within the authority of the ALJ. It is not a finding of compensability or medical treatment. The Board is without jurisdiction to review an ALJ's order for an IME or their refusal to do so.¹⁰

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Julie A.N. Sample dated October 22, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2022.

CHRIS CLEMENTS
BOARD MEMBER

c: Via OSCAR

Adam Brillhart, Attorney for Claimant
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Julie A.N. Sample, Administrative Law Judge

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¹⁰ See 44-534a(a)(2).