

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALI RAZA)	
Claimant)	
V.)	
)	
AUTOZONE, INC.)	AP-00-0464-116
Respondent)	CS-00-0433-293
AND)	
)	
XL INSURANCE AMERICA INC.)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier (respondent), through Ryan Weltz, requested review of Administrative Law Judge (ALJ) Gary Jones' preliminary hearing Order dated March 8, 2022. Phillip Slape appeared for the claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript with exhibits, held March 7, 2022, the parties' briefs, and documents of record filed with the Division.

ISSUES

1. Is colon polyp removal reasonably necessary to cure and relieve the effects of the claimant's work injury?
2. May the Board hear respondent's argument the claimant failed to prove the work accident was the prevailing factor giving rise to the need for colon polyp removal, given no such argument was made to the ALJ and the ALJ made no decision regarding prevailing factor?

FINDINGS OF FACT

The claimant is a general manager for the respondent. On August 31, 2018, a customer's car pinned the claimant between the car and the respondent's building. The claimant sustained multiple injuries, including severely damaging a previously-transplanted kidney, necessitating removal of the kidney. As a result, the claimant was placed on the kidney transplant list. The respondent does not dispute the claimant needs a kidney transplant as a result of his work accident.

To stay on the transplant list, the claimant underwent a colonoscopy authorized and paid for by the respondent. A large polyp was discovered. The claimant needs a separate surgical procedure to remove the polyp because of the complexity involved.

The ALJ ruled the recommended polyp removal surgery was reasonable and necessary for the claimant to remain on the kidney transplant list and get a transplant to cure the effects of the work-related injury, and the respondent was ordered to pay for the surgery and other treatment to remove the polyp.

The parties agree the claimant needs a kidney transplant as a result of the accident and the claimant needs his polyp removed to stay on the kidney transplant list. However, the respondent argues the polyp is a medical condition that did not arise out of and in the course of the claimant's employment. The respondent asserts the polyp is a personal health condition and would need to be removed regardless of the work injury. The claimant maintains the Order should be affirmed, and *Ratcliff* controls.

PRINCIPLES OF LAW AND ANALYSIS

Under K.S.A. 44-501b: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment and (2) the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

1. Colon polyp removal is reasonably necessary to cure and relieve the effects of the claimant's work injury.

K.S.A. 44-510h(a) states, in part:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The claimant needs kidney replacement surgery due to his work-related accident. He cannot remain on the kidney transplant list absent the polyp being surgically removed. Removal of the polyp is reasonably necessary to cure and relieve the effects of the work injury. The ALJ's Order directing respondent to provide the polyp removal surgery is affirmed.

2. The Board will not hear respondent's argument the claimant failed to prove the work accident was the prevailing factor giving rise to the need for polyp removal, given no such argument was made to the ALJ and the ALJ made no decision regarding prevailing factor.

K.S.A. 44-555c(a) states, in part:

There is hereby established the workers compensation appeals board 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 respondent did not argue the issue of prevailing factor to the ALJ. The undersigned Board Member will not consider this argument for the first time on appeal.¹

WHEREFORE, the undersigned Board Member affirms ALJ Jones' Order dated March 8, 2022.

IT IS SO ORDERED.

Dated this _____ day of April, 2022.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Phillip Slape
Ryan Wertz
Hon. Gary Jones

¹ See *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).