

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ERIC RHODES)
Claimant)
V.)
) AP-00-0464-351
WILDCAT CONCRETE SERVICES, INC.) CS-00-0444-243
Respondent)
AND)
)
TRUMBULL INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent appeals the March 10, 2022, Motion Hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Jordan Shaw appeared for Claimant. Dallas L. Rakestraw 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 November 10, 2020; Evidentiary Deposition of Vito Carabetta, M.D, taken November 18, 2020, with exhibits attached; Motion Hearing Transcript from September 30, 2021, with exhibits attached; Motion Hearing Transcript from February 24, 2022, with exhibits, attached and the documents of record filed with the Division.

ISSUE

Does the Board have jurisdiction to review an appeal filed from an Order on Motion to Terminate Benefits?

FINDINGS OF FACT

The ALJ's recitation of the facts and extensive procedural background in the decision dated March 10, 2022, is thorough and adopted by the Board.

There are facts in the record needing emphasis. Prior to the ALJ's decision of May 25, 2021, Claimant was examined by Dr. William Simon, at Respondent's direction. Claimant was then evaluated by Dr. George Flutter at Claimant's attorney's request. Claimant was evaluated by Dr. Chris Fevurly at Respondent's request.

Due to the conflicting opinions of the doctors, the parties entered into an agreed Order for Claimant to be examined by Dr. Vito Carabetta at the Court's request. After Dr. Carabetta's review of Claimant's medical records and his examination of Claimant he recommended an MRI of Claimant's lumbar spine and bilateral knees. The MRIs were performed. After reviewing the MRI results, Dr. Carabetta recommended a referral to an orthopedic surgeon for Claimant's bilateral knees and his lumbar spine injuries.

On May 25, 2021, The ALJ entered an Order finding Claimant sustained compensable injuries to his bilateral knees arising out of and in the course of Claimant's employment. The ALJ found Dr. Carabetta's opinions credible and supported by the evidence. Respondent was ordered to provide Claimant with a list of two orthopedic surgeons from which Claimant could select one for authorized medical treatment of his bilateral knees.

Respondent did not appeal the May 25, 2021, Order.

Claimant selected Dr. Justin Strickland. On July 22, 2021, Respondent's counsel sent Dr. Strickland a letter with copies of Claimant's relevant medical records. The letter stated:

The employer has been ordered to provide treatment for Mr. Rhodes' bilateral knees relating to his May 20, 2019 workplace accident. As such, Mr. Rhodes has chosen you to be his authorized treating physician and provide the necessary treatment.

Please evaluate Mr. Rhodes and review his medical records. Thereafter, please provide your expert opinion regarding diagnosis for injuries Mr. Rhodes relates to his workplace accident at Wildcat Construction on May 20, 2019. For each diagnosis rendered, please provide your expert opinion regarding causation. Specifically, advise if Mr. Rhodes' work at Wildcat Construction on May 20, 2019 is the prevailing factor ("the primary factor, in relation to any other factor") for Mr. Rhodes' current diagnosis and need for treatment, if any. After rendering diagnosis and causation, please provide your expert opinion regarding treatment recommendations and temporary restrictions, if any.¹

On July 28, 2021, Dr. Strickland evaluated Claimant. Dr. Strickland then opined:

¹ M.H. Trans. (Feb. 24, 2022), Cl. Ex. D at 3-4.

- 1) It is my opinion that the 2019 work injury caused a contusion to bilateral knees but the prevailing for his continued pain is severe osteoarthritis.
- 2) Currently I would not recommend any treatment to the knees as I do not feel treatment is warranted under worker's compensation.
- 3) No work restrictions are needed as his prevailing factor is severe osteoarthritis and not the 2019 work injury.
- 4) The patient will ultimately need total knee arthroplasty of both knees to cure his pain and symptoms and will need to seek treatment for this with his private insurance and not worker's compensation.

Respondent initially declined to authorize further medical treatment for Claimant's bilateral knees. However, Respondent eventually authorized Dr. Paul Pappademos to treat Claimant's bilateral knees in order to comply with the Court's May 25, 2021, Order.

Claimant selected Dr. Ciccarelli to treat his back. Respondent is unable to schedule Claimant to see Dr. Ciccarelli until he has reviewed Claimant's medical records. Claimant's medical records were not sent to Dr. Ciccarelli until early September. As of September 30, 2021, Claimant had not seen Dr. Ciccarelli or been scheduled for an appointment.

Claimant filed a Motion to Designate Dr. Pedro Murati as Authorized Physician. The Motion was heard on September 30, 2021. The Court issued an Order on October 12, 2021, designating Dr. Paul Pappademos to treat Claimant's bilateral knees. The Court further stated "Any changes to Dr. Pappademos' authorization requires Court approval." The Court further designated the first available spine surgeon at Abay Neuroscience Center to treat Claimant's lumbar spine condition. Any change to this authorization also required Court approval.²

On September 13, 2021, Respondent filed a Motion To Terminate Benefits. Respondent argued, in light of Dr. Strickland's opinion, Claimant's work was not the prevailing factor for Claimant's bilateral knee complaints and thus no medical treatment was required in light of Claimant's work place accident.

A hearing on this motion was heard on February 24, 2022. As result of this hearing, the ALJ issued an order on March 10, 2022, denying Respondent's Motion To Terminate Benefits. This order is the subject of this appeal. The ALJ, in her Order outlined the extensive history of this case. In denying Respondent's Motion, The Court found:

² ALJ Order (Oct. 12, 2021).

Dr. Strickland's opinions regarding the prevailing factor of Claimant's bilateral knee injuries do not outweigh the opinions of Dr. Carabetta, who was the Court-ordered neutral examiner. Although Dr. Carabetta agreed that Claimant had advanced arthritic changes in both of his knees, he also noted that Claimant had meniscus injuries that were associated with his work-related accident and opined that Claimant's work-related accident was the prevailing factor causing his bilateral knee injuries and need for treatment. As such, the Court maintains its prior finding that Claimant has met his burden to prove that his May 20, 2019, work-related accident is the prevailing factor causing his bilateral knee injuries and need for medical treatment. The Court further maintains its prior finding that Claimant is entitled to authorized medical treatment for his bilateral knee injuries.³

PRINCIPLES OF LAW AND ANALYSIS

Respondent appeals whether Claimant suffered a compensable injury by accident arising out of and in the course of his employment and whether Claimant's accident was the prevailing factor in causing his injury/medical condition.

Claimant asserts the Board lacks jurisdiction of the issue presented on appeal by Respondent because an Order stemming from a motion to terminate benefits does not fall within the preliminary scope of K.S.A. 44-534a. Claimant argues Respondent did not appeal the Court's Order from May 25, 2021, in which the Court preliminarily found Claimant met his burden of proof for a compensable claim and ordered a choice of two physicians, and instead, used the authorization of Dr. Strickland as another bite at the compensability apple by submitting a letter requesting his causation opinion and failing to include the Court's order in which the issue had already been preliminarily decided.

Claimant further argues the Act statutorily prescribes a process for which Respondent may rejudge an issue of compensability without delaying Claimant's treatment while maintaining eligibility for reimbursement from the Workers Compensation Fund pursuant to K.S.A. 44-566a. See K.S.A. 44-534a(a)(2) and 44-534a(b). Respondent's motion to terminate benefits and subsequent appeal attempted to circumvent the process. As such, Claimant requests this Board find the appeal untimely and allow the parties to fully adjudicate the claim without further delay to Claimant's medical treatment. Alternatively, should the Board find it does have jurisdiction over the issue at bar, Claimant requests the Order dated March 10, 2022, be affirmed because the ALJ did not exceed her jurisdiction in denying Respondent's request to terminate benefits.

The Workers Compensation Appeals Board has jurisdiction to review certain findings entered by an ALJ on preliminary hearing applications. The Board has jurisdiction to review findings with "regard to a disputed issue of whether the employee suffered an

³ ALJ Order (Mar. 10, 2022) at 7-8.

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 defense apply."⁴

K.S.A. 44-534a(a)(1) outlines the procedure for filing an application for preliminary hearing. Such an application can be made on the issue of furnishing or terminating medical treatment. This application for preliminary hearing requires the applicant to give seven days notice to the adverse party of intent to file a preliminary hearing application, with a specific statement of the benefits change being sought. If the parties do not agree to the change then the party seeking a change in benefits may file an application for preliminary hearing along with copy of the letter of intent.⁵

Respondent did not file an application for preliminary hearing requesting benefits be terminated because Claimant did not suffer a compensable injury arising out of and in the course of employment. Specifically Claimant's accident was not prevailing factor causing the injury. Instead Respondent filed a Motion To Terminate Medical Benefits regarding treatment for Claimant's bilateral knees.

The Board does not have jurisdiction over the issue of providing or denying medical treatment. The appropriate procedure to challenge compensability is to file an application for preliminary hearing. The creative shortcut to challenge compensability by Respondent is unacceptable and circumvents the spirit and intent of the law.

It is acknowledged an important objective of worker compensation law is avoiding cumbersome procedures and technicalities of a pleading so that a correct decision may be reached by shortest and quickest possible route.⁶ However, expeditious does not mean circumventing and ignoring statutory procedures in place to appropriately challenge orders. A preliminary hearing application is not any more cumbersome than the route Respondent took in filing a motion to terminate benefits.

It is found and concluded the Board does not have jurisdiction an Order on A Motion to Terminate Benefits. Respondent's appeal is dismissed. The ALJ's Order remains in full force and effect.

⁴ K.S.A. 44-534a(a)(2).

⁵ K.S.A. 44-534a(a)(1).

⁶ *Pyeatt v. Roadway Express, Inc.* 243 Kan. 200, 756 P.2d 438 (1988).

DECISION

WHEREFORE, it is the finding, decision and order of the Board Respondent's appeal is dismissed. The ALJ's Order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of June, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Via OSCAR

Jordan Shaw, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Hon. Ali N. Marchant, Administrative Law Judge