

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES VILMER)	
Claimant)	
v.)	
)	
OMAHA TRACK, INC.)	AP-00-0468-608
Respondent)	CS-00-0447-898
and)	
)	
PREVISOR INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent requests review of Administrative Law Judge (ALJ) Steven Roth's preliminary hearing Order dated June 20, 2022. Claimant appeared through William Phalen and Bruce Levine 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:

1. The preliminary hearing transcript, held March 17, 2022, with exhibits attached;
2. The January 28, 2020, report of Pedro A. Murati, M.D., (exhibit 3, supporting medical evidence, filed June 18, 2020);
3. The June 9, 2020, report of Pedro A. Murati, M.D. (exhibit A1 to P.H. transcript dated August 27, 2021),
4. The evidentiary deposition of C. Craig Satterlee, M.D., taken May 13, 2021, with exhibit 1 attached;
5. Transcript of the preliminary hearing by deposition of Claimant, held May 25, 2022, with exhibits attached;
6. The preliminary hearing transcript, held August 27, 2021, with exhibits attached;
7. The parties' briefs and the documents of record filed with the Division.

ISSUES

1. Did Claimant sustain personal injury by accident arising out of and in the course of his employment with Respondent on November 11, 2019, including was Claimant's accident the prevailing factor causing his medical condition and need for treatment?
2. Did the ALJ err by appointing and authorizing a physician to provide treatment and order Respondent to reimburse Claimant \$500 for unauthorized medical?

FINDINGS OF FACT

This matter comes before the Board for a second time. In the first appeal, Claimant sought review of the ALJ's denial of his request for benefits in the September 8, 2021, preliminary Order. In denying Claimant's request for benefits, the ALJ found the prevailing factor opinion of C. Craig Satterlee, M.D., the Court-ordered evaluator, to be more persuasive. Following the denial by the Board and at his attorney's request, Claimant was evaluated by Lowry Jones, M.D., who opined the prevailing factor for Claimant's medical condition and need for treatment was the accidental injury of November 11, 2019. A preliminary hearing was held on March 17, 2022. Claimant was awarded medical treatment based on the opinions of Dr. Jones. This appeal follows.

Prior to this case, Claimant injured his left shoulder while working for Peerless Products in March 2015. He was evaluated by J. Clinton Walker, M.D. and Edward J. Prostic, M.D. Dr. Walker placed Claimant at maximum medical improvement without restriction on June 22, 2015. In March 2016, Dr. Prostic assigned Claimant a 10% functional impairment to his left upper extremity for weakness and crepitus in his shoulder. Claimant settled his claim in September 2016. According to Claimant, he fully recovered and did not have any physical limitations when he began work for Respondent in October 2019.

On November 11, 2019, Claimant heard his left shoulder pop while lifting and carrying a 150-175 pound brake beam with a coworker. Claimant was terminated later that day and sought medical treatment at his own expense. A CT scan dated December 13, 2019, showed acromioclavicular joint arthritis and no full thickness rotator cuff tendon tear.

At his attorney's request, Claimant was evaluated by Pedro Murati, M.D., on January 28, 2020. He noted Claimant denied any prior left shoulder injuries. Dr. Murati recommended additional treatment and opined the work accident was the prevailing factor for Claimant's medical condition and need for treatment.

At Respondent's request, Claimant was evaluated by J. Clinton Walker, M.D., on April 2, 2020. Dr. Walker noted Claimant denied any prior left shoulder injuries, which he knew to be untrue as he evaluated Claimant for his 2015 left shoulder injury. Dr. Walker opined, "I do not find any evidence that [Claimant] sustained any injury to his left shoulder or cervical spine as a result of his work at [Respondent]."¹

Following review of additional medical records provided by Claimant's attorney, Dr. Murati authored an addendum report dated June 9, 2020, stating the additional medical records did not change his opinions. Dr. Murati opined the medical records proved Claimant's condition was stable and required no treatment at the time of his November 2019 injury.

Following review of additional medical records provided by Respondent's attorney, Dr. Walker authored an email on July 2, 2020, stating the additional medical records "do not show any sign of a structural injury that he could have sustained as part of his work" and "they do not change my previous opinion in any way."²

On November 2, 2020, Claimant saw C. Craig Satterlee, M.D., a board-certified orthopedic surgeon, for a Court-ordered independent medical evaluation. He noted the only objective finding was left shoulder acromioclavicular joint arthritic change, which was not present on the 2015 MRI, but clearly seen on the 2019 CT scan. Dr. Satterlee diagnosed Claimant with left acromioclavicular joint osteoarthritis and recommended an acromioclavicular joint cortisone injection. Dr. Satterlee opined Claimant's left shoulder injury was an aggravation of his preexisting condition and stated the "preexisting acromioclavicular joint arthritis is the prevailing cause of his need for further medical treatment."³

Dr. Satterlee's deposition was taken on May 13, 2021. Direct examination by Claimant's attorney focused on cytokines, a biochemical substance causing inflammation and pain. Notwithstanding the discussion of cytokines, Dr. Satterlee did not waiver in his opinion the prevailing factor for Claimant's injury and need for medical treatment was the preexisting acromioclavicular joint arthritis and not the November 2019 injury.

The ALJ's September 8, 2021, Order denied Claimant's request for benefits, finding cytokines were not a work injury and adopted Dr. Satterlee's prevailing factor opinion. The Order denying Claimant's request for additional benefits, was appealed to a single Board Member, which affirmed the ALJ's Order.

¹ See P.H. Trans. (Aug. 27, 2021), Resp. Ex. B2 at 5.

² See *id.* Resp. Ex. B3.

³ See P.H. Trans (Mar. 17, 2022), Resp. Ex. B1 at 3.

Following the Board Member affirming the denial of Claimant's request for benefits, Claimant was evaluated, at his attorney's request, by Lowry Jones, M.D., on December 20, 2021. Dr. Jones diagnosed Claimant with scapular dyskinesia of the left shoulder, some winging of the shoulder and weakness of the left upper extremity. He opined the prevailing factor for Claimant's left shoulder medical condition and need for treatment was the November 11, 2019 work accident:

My opinion, within a reasonable degree of medical certainty, is that the injury that occurred on or about 11/11/2019, resulted in weakness of the left upper extremity, an MRI scan is quite normal in regards to rotator cuff. He has a degenerative SLAP tearing tear but no significant bicipital pain. He does have weakness and some scapular dyskinesia which I believe is the source of his pain. This is obviously new and not something that was present 2015.

Therefore, I believe that the injury date of 11/11/2019 has resulted in the development of a new injury, and his present complaints of weakness and pain.⁴

Dr. Jones recommended an EMG of the left upper extremity to evaluate Claimant's long thoracic nerve, consider an injection of the superior medial angle, and physical therapy.

After reviewing all the medical evidence, the ALJ found the opinions of Dr. Jones, of work-related scapular dyskinesia as "the most current and compelling."⁵ The ALJ found the prevailing factor causing Claimant's medical condition and need for treatment of his left shoulder is the scapular dyskinesia. He appointed Dr. Jones as the authorized treating physician and ordered Respondent to reimburse Claimant's unauthorized medical expenses of \$500.00. The ALJ stated:

The recent finding of Dr. Jones of scapular dyskinesia is a new diagnosis apparently not considered or discovered by other past doctors. The condition as described in Jones' report makes sense given the description of the accident and the persistence of symptoms which, according to the Claimant, started with the current accident notwithstanding past injuries and conditions in the shoulder. Lastly, scapular dyskinesia is an identifiable injury, unlike cytokines.

While Dr. Jones is a privately retained IME physician in this case, Dr. Jones' reputation for balance, objectivity, and professionalism is impeccable. The fact that he is aware of and has no major dispute with other doctors' diagnoses, but rather adds a new diagnosis, is compelling. Also compelling is his comparison of all Claimant's shoulder problems and his finding that work-related scapular dyskinesia

⁴ See *id.* Cl. Ex. A1 at 3.

⁵ See ALJ Order (June 20, 2022), at 6.

is the prevailing factor. In short, this new evidence supports there is more going on in Claimant's left shoulder than an aggravation of a preexisting condition.⁶

Respondent argues Dr. Jones' report is based on incomplete information and lacks credibility. Specifically, Respondent argues Dr. Jones' opinion is flawed because he did not possess or review Claimant's prior medical records from 2015. Respondent also argues the ALJ exceeded his jurisdiction in appointing an authorized treating physician and ordering Respondent to reimburse Claimant for the charges of Dr. Murati.

Claimant contends the ALJ's June 20, 2022, Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant proved his accident was the prevailing factor causing his medical condition and need for medical treatment.

To be compensable, an accident must be identifiable by time and place of occurrence, produce symptoms at the time of an injury and occur during a single work shift.⁷ The accident must be the prevailing factor in causing the injury. "Prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence."⁸ An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.⁹

The undersigned Board Member affirms the ALJ's decision. The ALJ and the board previously denied Claimant's request for benefits based on the evidence presented. Specifically, the Board Member found:

The Court-ordered physician, Dr. Satterlee, indicated Claimant's accident was not the prevailing factor causing Claimant's medical condition and need for medical treatment. The prevailing factor is the preexisting acromioclavicular joint arthritis in Claimant's left shoulder. Dr. Satterlee opined Claimant experienced an aggravation of his preexisting condition. Dr. Walker had the benefit of examining Claimant in conjunction with the 2015 injury to Claimant's left shoulder and after the

⁶ See *id.* at 5-6.

⁷ See K.S.A. 44-508(d).

⁸ See K.S.A. 44-508(d) and K.S.A. 44-508(g).

⁹ See K.S.A. 44-501(f)(2).

injury before the Board. Dr. Walker opined Claimant did not sustain any injury to his left shoulder or cervical spine as a result of his work with Respondent.¹⁰

Subsequent to the Board Member's Order, Claimant sought an evaluation with Dr. Jones. He opined Claimant was not at maximum medical improvement and made treatment recommendations for a medical condition not identified or diagnosed by any other physicians. Respondent argues Dr. Jones' opinions are flawed as he did not have or review the medical records from Claimant's 2015 injury. This is not entirely accurate. Dr. Jones report lists the records he reviewed, which included Dr. Satterlee's report and the reports of Dr. Murati. These reports include comments/opinions regarding the 2015 medical records. Dr. Murati's June 9, 2020, report gives a detailed account of each appointment for Claimant from March 31, 2015, through March 14, 2016. This includes the evaluations and treatment of Dr. Walker and Dr. Prostic.

The ALJ's rationale for adopting the opinions of a privately retained physician (Dr. Jones) over the previously adopted opinions of a Court-ordered evaluator are well-reasoned. The opinions of Dr. Jones are credible. It should be noted Dr. Jones was asked to provide an impairment rating which he did not do because he did not believe Claimant was at maximum medical improvement. The greater weight of the credible evidence establishes Claimant's accident was the prevailing factor in causing his medical condition (scapular dyskinesis) and need for medical treatment.

2. The Board is without jurisdiction to address Respondent's arguments regarding the authorization of a physician to provide treatment to Claimant and ordering Respondent to reimburse Claimant \$500 for unauthorized medical expenses.

The Board has previously ruled preliminary orders for medical expenses and designation of an authorized physician are not jurisdictional issues listed in 44-534a subject to review.¹¹ When the record reveals a lack of jurisdiction, the Board's authority extends to no further than dismissing the action.¹² Because the Board does not possess authority to consider the issues raised by Respondent at this time, Respondent's appeal on these two issues must be dismissed.

WHEREFORE, the Board affirms the June 20, 2022, Order issued by the ALJ.

¹⁰ *Vilmer v. Omaha Track, Inc.*, No. CS-00-0447-898, 2021 WL 5769469 (Kan. WCAB Nov. 5, 2021) at *9.

¹¹ *See Omar v. Tyson Fresh Meats, Inc.*, No. 1,035,559, 2011 WL 6122904 (Kan. WCAB Nov. 22, 2011)

¹² *See Bibbs v. Pawnee Mental Health Services*, No. 1,035,339, 2015 WL 6776991 (Kan. WCAB Oct. 16, 2015)

JAMES VILMER

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IT IS SO ORDERED.

Dated this _____ day September, 2022.

CHRIS A. CLEMENTS
BOARD MEMBER

c: (via OSCAR)
William Phalen
Bruce Levine
Hon. Steven Roth