

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AARONELL GARDNER)	
Claimant)	
V.)	
)	AP-00-0473-420
CERTAINTEED CORPORATION)	CS-00-0467-783
Self-Insured Respondent)	

ORDER

Claimant appeals the January 27, 2023, Motion Hearing Order entered by Administrative Law Judge (ALJ) Troy A. Larson.

APPEARANCES

Zachary Kolich appeared for Claimant. James Wolf appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from November 29, 2022, with exhibits attached; the transcript of Motion Hearing from January 10, 2023, the documents of record filed with the Division and the parties' briefs.

ISSUE

Did the ALJ have jurisdiction to consider Respondent's Motion for Nunc Pro Tunc and Reconsideration?

FINDINGS OF FACT

On December 6, 2022, ALJ Larson issued a preliminary hearing order in the case identified in Division records as CS-00-0467-783. The ALJ ruled Claimant's work accident of May 4, 2022, was not the prevailing factor for Claimant's right knee complaints. The ALJ's ruling cited the medical opinions of Dr. Stechshulte, who rendered his opinion at the request of the Court, and Dr. Khadavi, a doctor retained by Respondent.

Claimant appealed the ALJ's decision to the Workers Compensation Appeals Board on December 7, 2022. The appeal was accepted and docketed as AP-00-0472-457.

On December 7, 2022, Respondent filed “Respondent’s Motion for Nunc Pro Tunc Regarding Order from Preliminary Hearing Occurring on 11/29/2022” and “Respondent’s Motion for Reconsideration of the Evidence Regarding Order from Preliminary Hearing Occurring on 11/29/2022 to Correct Errors” on December 16, 2022. Respondent’s motions were filed because the ALJ’s Order cited the report of Dr. Khadavi as evidence supporting the finding Claimant’s work accident was not the prevailing factor causing Claimant’s right knee condition. Respondent’s expert in this case was Dr. Reeves. Dr. Khadavi testified in Claimant’s previous workers compensation claim.

Claimant filed objections to both motions and a request was made with the Workers Compensation Appeals Board to suspend the appellate briefing schedule, which was granted.

Included in the record for the November 29, 2022, Preliminary Hearing were the records of Dr. Khadavi and Dr. Reeves.

A hearing was held on January 10, 2023, on both motions.

An order was issued by ALJ Larson on January 27, 2023. The ALJ ruled a Nunc Pro Tunc order would not be appropriate because such orders only deal with clerical errors. However, the ALJ did find Respondent’s Motion for Reconsideration should not be ignored. The ALJ acknowledged Claimant’s argument the Workers Compensation Appeals Board should decide any alleged error. Ultimately, the ALJ ruled on Respondent’s Motion for Reconsideration. He acknowledged Dr. Khadavi had been retained as an expert in the previous workers compensation claim for an injury to Claimant’s right knee occurring on November 19, 2019. Since both Dr. Reeves and Dr. Khadavi’s reports were part of the record of this case regarding the right knee confusion resulted.

The ALJ reviewed the evidence again and found Dr. Reeves’ opinion concerning prevailing factor provided a “similar prevailing factor opinion to that of Dr. Stechshulte”¹ and ruled, again, Claimant’s work accident of May 4, 2022, was not the prevailing factor for Claimant’s right knee complaints.

Claimant timely appealed the Order of January 27, 2022, to the Workers Compensation Appeals Board.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ’s Order of January 27, 2023, should be reversed because the ALJ no longer had jurisdiction to consider either of Respondent’s motions beyond

¹ ALJ Order (Jan. 27, 2023) at 2.

merely overruling or denying each. In the alternative, Claimant argues this Order should be stricken from the record and not considered by the Board.

Respondent argues the ALJ acted within his jurisdiction in considering Respondent's motions for Nunc Pro Tunc and Reconsideration of Evidence, as these motions were filed to obtain clarification on his own Preliminary Hearing Order and it was within his authority to make a determination on whether to overrule or deny the motions.

The Kansas Workers Compensation system is a creature of statute.² Its operations must be within the confines of statutes. There is no provision for Motions for Reconsideration of Evidence contained within the Kansas Workers Compensation Act. Respondent's remedy for correcting the record or how the record was portrayed in a decision is within the purview of the Kansas Workers Compensation Appeals Board. The Kansas Workers Compensation Appeals Board has authority to correct any analysis of the ALJ's interpretation of the evidence.³ Both Dr. Reeves and Dr. Khadavi's records were part of the record before the Board. The ALJ erred in considering and granting Respondent's Motion for Reconsideration. There is no statutory authority for him to do so. The Order issued on January 27, 2023, is null and void.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Troy A. Larson dated January 27, 2023, is null and void, and therefore vacated.

² See *Jones v. Continental Can*, 260 Kan. 547, 920 P.2d 939 (1996)

³ See K.S.A. 44-551(l)(1)

IT IS SO ORDERED.

Dated this _____ day of May, 2023.

REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Zachary Kolich, Attorney for Claimant
James Wolf, Attorney for Self-Insured Respondent
Hon. Troy A. Larson, Administrative Law Judge