

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TIM TOBIN

Claimant

v.

L & W REPAIR LLC

Respondent

AP-00-0480-445

CS-00-0471-271

and

WESTERN AGRICULTURAL INSURANCE CO.

Insurance Carrier

ORDER

Respondent and Insurance Carrier appeal the December 8, 2023, Order issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

John C. Nodgaard appeared for Claimant. Matthew S. Crowley appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held October 11, 2023, including Claimant's Exhibits 1-12 and Respondent's Exhibits A-H, the pleadings and orders contained in the administrative file, and the parties' briefs.

ISSUES

1. Does the Appeals Board possess authority to review the Order at this time?
2. If the Appeals Board possesses authority to review the Order, is Claimant barred from receiving compensation under K.S.A. 44-534(b) for failing to timely file an application for benefits (E1)?
3. If the Appeals Board possesses authority to review the Order, is an intervening accident the prevailing factor causing Claimant's current injuries, medical condition and disability?

FINDINGS OF FACT

On June 8, 2018, Claimant, who owns Respondent, was swinging a sledgehammer as part of his work, and injured his right shoulder. The claim was accepted as compensable, and Claimant was referred to Dr. Neel for medical treatment. Claimant was diagnosed with a rotator cuff tear, which Dr. Neel surgically repaired. Claimant was paid temporary total disability compensation. At his final appointment of May 15, 2019, Claimant reported he still had problems using his arm and shoulder, and still struggled with activities. Dr. Neel declared Claimant at maximum medical improvement, released Claimant from active care, and advised he could issue an impairment rating. Dr. Neel later issued a report addressing Claimant's impairment.

Claimant continued to have problems with his right arm and shoulder. Through his insurance agent, Claimant requested additional medical treatment in August 2020. On August 25, 2020, the adjuster for Insurance Carrier advised Claimant a return appointment with Dr. Neel was scheduled for October 14, 2020.

Dr. Neel reevaluated Claimant on October 14, 2020. Dr. Neel performed a clinical examination, and had Claimant undergo repeat x-rays of the right shoulder. Claimant thought the purpose of the appointment was to address his request for additional treatment. Dr. Neel's office notes indicate Claimant had reduced range of motion of the right shoulder. Dr. Neel did not recommend additional treatment, but indicated Claimant may require a reverse total shoulder replacement procedure in the future. Dr. Neel's notes also indicate he intended to increase Claimant's prior impairment rating. On January 28, 2021, Dr. Neel issued another narrative report reiterating the recommendation of a reverse total shoulder replacement in the future, and rating Claimant's impairment.

Claimant underwent two right shoulder surgeries before June 8, 2018. Claimant subsequently injured his right shoulder in September 2022. The insurance carrier covering Respondent in 2022 referred Claimant to Dr. Prohaska for evaluation. Dr. Prohaska noted Claimant suffered numerous rotator cuff injuries in the past, and a reverse total shoulder replacement procedure was discussed. Dr. Prohaska did not believe the prevailing factor for Claimant's condition was a work-related accident occurring on September 23, 2022.

On November 10, 2022, Dr. Messamore evaluated Claimant. Dr. Messamore confirmed Claimant sustained a recurrent rotator cuff tear. A reverse total shoulder replacement was discussed.

On January 31, 2023, Claimant was evaluated by Dr. Murati at his counsel's request. Dr. Murati thought Claimant's medical conditions were caused by accidents occurring on June 8, 2018, October 5, 2020, and May 17, 2021. Dr. Murati issued an impairment rating. Dr. Murati also recommended future medical, including a total shoulder replacement of the right shoulder.

According to the pay records of Insurance Carrier, Claimant was last paid temporary total disability compensation for this claim on March 21, 2019. Insurance Carrier's medical benefit pay records indicate the last medical benefit for this claim was paid to Mymatrixx on July 30, 2019. The billing records of Pratt Regional Medical Center indicate the last payment it received occurred on November 21, 2019, and an "adjustment" of \$100 was made on January 24, 2022.

Claimant filed an E1 on October 13, 2022. Claimant sought additional medical treatment and prospective temporary total disability benefits under this claim. Respondent disputed the request, arguing the E1 was not timely filed and Claimant's current medical condition and need for treatment was caused by an intervening accident.

On December 8, 2023, ALJ Klein issued the Order. ALJ Klein found the October 14, 2020, appointment with Dr. Neel constituted medical treatment, and Respondent's payment for the appointment extended the two-year limitation for filing an E1. ALJ Klein concluded Claimant's E1 was timely filed. ALJ Klein also found Claimant's injuries were not caused by an intervening accident. ALJ Klein, however, did not grant or deny Claimant's request for medical treatment or temporary total disability compensation. Instead, ALJ Klein appointed Dr. Strickland to perform a Court-ordered independent medical examination addressing diagnosis, treatment recommendations, and to rate Claimant's impairment if he reached maximum medical improvement. These proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Order is erroneous because Claimant did not timely file his E1, and because the September 23, 2022, accident was an intervening event causing Claimant's current injuries and medical condition. Respondent argues this claim should be dismissed. Claimant argues the Appeals Board does not have jurisdiction to consider Respondent's application for review, and the E1 was timely filed.

The Appeals Board first addresses the jurisdictional issue. The Board possesses the authority to review preliminary orders on disputed issues of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether certain defenses apply.¹ "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.² If jurisdiction under K.S.A. 44-534a is not present, it is

¹ See K.S.A. 44-534a(a)(2).

² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

appropriate to dismiss the appeal.³ The Board does not possess authority to review orders appointing independent medical examinations under K.S.A. 44-534a because those orders are not preliminary awards of benefits, but interlocutory orders an administrative law judge may issue under K.S.A. 44-516.⁴

The Order does not contain a preliminary award of medical treatment or temporary total disability compensation to review. Instead, ALJ Klein appointed Dr. Strickland to perform a Court-ordered independent medical examination, which ALJ Klein is empowered to do. It appears ALJ Klein will rule on Claimant's request for benefits after Dr. Strickland's evaluation is completed. After ALJ Klein conducts another preliminary hearing, and issues a preliminary award either granting or denying Claimant's request for benefits, either party may seek review of that order under K.S.A. 44-534a. The Board does not possess authority to review an interlocutory order for a Court-ordered independent medical examination. In the absence of jurisdiction, the Board must dismiss Respondent's application for review. The remaining issues are moot at this time.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Appeals Board Member Respondent's application for review is dismissed. The Order issued by ALJ Thomas Klein, dated December 8, 2023, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

John C. Nodgaard
Matthew S. Crowley
Hon. Thomas Klein

³ See *id.* at 676.

⁴ See *Carthel v. Key Management Co.*, No. 1,017,386, 2008 WL 924541 (Kan. WCAB Mar. 12, 2008); see also *Austin v. Amazon.com Services, Inc.*, Nos. AP-00-0480-833 & AP-00-0480-834, 2024 WL 1993644, at *2 (Kan. WCAB Apr. 2, 2024).