

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL ERSKIN)	
Claimant)	
V.)	
)	AP-00-0481-172
WAL-MART ASSOCIATES, INC.)	CS-00-0472-286
Respondent)	
AND)	
)	
AIU INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (Respondent) request review of the February 6, 2024, preliminary hearing Order Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Robert R. Lee, II, appeared for Claimant. Timothy A. Emerson appeared for Respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held January 11, 2024, with exhibits attached; the transcript of the Evidentiary Deposition of Michael Lance Erskin from December 6, 2023; the transcript of the Zoom Videoconference Evidentiary Deposition of Katrina Nuss, with attached exhibit; and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Does the Board have jurisdiction to review Respondent's appeal?
2. If so, did the ALJ exceed his jurisdiction by awarding temporary total disability benefits (TTD)?

FINDINGS OF FACT

On October 30, 2022, Claimant injured his low back and left leg in a slip and fall at work. Respondent referred Claimant to Dr. Buller, of McPherson Hospital, for treatment. Claimant was taken off work pending evaluation and treatment and was provided TTD. Claimant's treatment was initially conservative, with x-rays, medication, and physical therapy. He did not significantly improve. An MRI of Claimant's low back, taken November 21, 2022, revealed degenerative changes at multiple levels, with the most significant changes at L4-5.

Dr. Estivo, a board-certified orthopedic surgeon, examined Claimant at Respondent's request on January 25, 2023. Dr. Estivo interpreted the MRI to show preexisting degenerative disease with no acute changes. Dr. Estivo determined the October 2022 accident could have caused a lumbar spine strain, but this was an aggravation to Claimant's preexisting condition. Dr. Estivo opined Claimant had reached maximum medical improvement (MMI) in relation to the spine strain and did not require additional treatment or restrictions.

Respondent discontinued treatment upon receipt of Dr. Estivo's report but continued TTD until March 22, 2023. A preliminary hearing was held March 22, 2023, where the Court adopted the opinions of Dr. Estivo, finding Claimant had reached MMI.

Claimant still did not improve. Claimant attempted to return to work for one shift in March 2023, but he could not perform his regular job of unloading trucks. Claimant sought and was granted FMLA leave for a period of 12 weeks, ending May 25, 2023, though subject to renewal or extension.

Dr. Ciccarelli, a board-certified orthopedic surgeon, examined Claimant at his counsel's request on April 18, 2023. Dr. Ciccarelli also reviewed the November 2022 MRI, finding Claimant sustained an acute disc herniation at L4-5. Dr. Ciccarelli determined the prevailing factor causing Claimant's disc herniation was the accident at work and recommended surgical intervention. Dr. Ciccarelli imposed restrictions of no lifting more than 15 pounds, no repetitive bending or lifting, and alternate sitting and standing activity as needed throughout the workday. Dr. Ciccarelli opined his restrictions would have been appropriate throughout the treatment Claimant had received thus far.

Claimant's FMLA leave ended on May 25, 2023. On August 24, 2023, Respondent sent Claimant an End of Leave Letter, confirming his FMLA leave had ended on May 25, 2023, and providing him three days to contact Respondent. If Claimant did not respond within three days, he would be considered to have voluntarily terminated his employment. Claimant did not respond to the letter or provide Respondent with Dr. Ciccarelli's

restrictions. Respondent then issued a Separation Notice, indicating Claimant's employment was terminated effective September 3, 2023, due to the lack of response.

Claimant was asked questions regarding his termination from Respondent at his December 6, 2023, deposition. Claimant testified he did not believe he had received any paperwork from Respondent indicating he was terminated; he received an alert on his phone saying his schedule had changed. Claimant also explained he attempted to use his employee discount card, but it was suspended. He recalled receiving a letter about insurance because he had been terminated from Respondent, but he did not "remember getting an actual letter from [Respondent]."¹

In his Order, the ALJ wrote:

Although both [Claimant] and [Respondent] were represented by counsel, and there was active litigation on-going at the time, counsel do not appear to have been involved in the communications regarding [Claimant's] status at the end of his leave, or the decision to separate him from his employment. [Claimant] does not appear to have provided his attorney with either the "End of Leave" or "Separation Notice" letters from [Respondent]. It is unclear whether [Respondent's] attorney was aware of the communications.²

Following a preliminary hearing held June 14, 2023, Claimant was referred to Dr. Grundmeyer, a neurosurgeon, for a Court-ordered independent medical evaluation (IME). Dr. Grundmeyer conducted the IME on October 3, 2023. Dr. Grundmeyer reviewed the MRI and found it revealed an acute disc herniation at L4-5 resulting in severe stenosis. Dr. Grundmeyer opined the prevailing factor causing Claimant's disc herniation and resulting symptoms was the work accident. Dr. Grundmeyer noted Claimant is a good candidate for an L4-5 laminectomy with possible discectomy. Dr. Grundmeyer imposed temporary restrictions of no lifting over 10 pounds, no repetitive bending or twisting, and alternate sitting and standing activities as needed.

Dr. Grundmeyer became the authorized treating physician and performed lumbar surgery on Claimant on January 11, 2024. Dr. Grundmeyer took Claimant off work beginning that date through February 23, 2024. TTD resumed thereafter.

Claimant was not offered accommodated work at Respondent. Katrina Nuss, a front end coach for Respondent, testified Respondent could have accommodated Claimant's temporary work restrictions but for Claimant's separation from employment on September 3, 2023.

¹ Claimant Depo. (Dec. 6, 2023) at 29.

² ALJ Order (Feb. 6, 2024) at 2.

The ALJ found:

The court acknowledges that [Claimant's] failure to respond to the "End of Leave" letter **could** be construed as either a voluntary quit or a job abandonment, but has reservations about making that determination when those communications did not go through counsel of record. Those communications took place after the June 14, 2023 Preliminary Hearing, while the IME with Dr. Grundmeyer was pending. Arguably, had Claimant responded to the August 24, 2023, "End of Leave" letter, his employment could have continued. Respondent could have accommodated either Dr. Ciccarelli's restrictions or Dr. Grundmeyer's October 3, 2023, restrictions, but for Claimant's separation. TTD will be reinstated until September 3, 2023. TTD from September 3, 2023 to Dr. Grundmeyer's surgery on January 11, 2024 will be reserved as an issue for Regular Hearing for further evidence, arguments and authorities.

TTD is ORDERED reinstated at the rate of **\$479.20** per week from the date terminated in March 2023, and continuing until September 3, 2023.³

PRINCIPLES OF LAW AND ANALYSIS

Respondent maintains the ALJ exceeded his jurisdiction by finding attorney communication significant in reaching his conclusions. Respondent argues:

[Respondent] respectfully argues that attorney communication concerning Claimant's end of leave and eventual separation from his employment is irrelevant. To require such communication would add a cumbersome layer to prove or disprove an entitlement to statutory benefits. There is no requirement, statutorily or otherwise, that counsel of record confer on such employment matters.⁴

Claimant argues the Board lacks jurisdiction to review Respondent's appeal. Alternatively, Claimant contends the only authorized provider to treat him prior to the Court's Order of November 2, 2023, was Dr. Buller. Claimant argues he is entitled to TTD from that time until the Court authorized Dr. Grundmeyer on November 2, 2023.

K.S.A. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing

³ *Id.* at 3.

⁴ Resp. Brief (filed Feb. 16, 2024) at 9.

on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an 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 defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to specific jurisdictional issues: accidental injury, injury arising out of and in the course of employment, timely notice, and certain other defenses. The Court of Appeals, in *Carpenter v. National Filter Service*, stated “[b]ecause in 44-534a jurisdiction means coverage by the Act, ‘certain defenses’ are subject to review only if they dispute the compensability of the injury under the Act.”⁵ Where no jurisdiction is present, it is appropriate to dismiss the appeal.

Compensability is not an issue. Ordering Respondent to pay temporary total disability compensation is within the jurisdiction of the ALJ. Respondent is concerned the ALJ did not consider the termination for cause defense when ordering TTD. This exact issue was raised in *Moots v. Siemens Energy*,⁶ where a Board Member wrote:

Whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). The Board has consistently held that whether a claimant is entitled to TTD benefits due to a

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁶ *Moots v. Siemens Energy*, No. 1,080,815, 2018 WL 1176266 (Kan. WCAB Feb. 2, 2018).

termination for cause is not a jurisdictional issue listed in K.S.A. 2017 Supp. 44-534a(a)(2).⁷

Because no jurisdictional issues enumerated in K.S.A. 44-534a have been raised, and there has been no showing the judge exceeded his jurisdiction, the respondent's petition for review is dismissed for lack of jurisdiction. The TTD issue may be raised by Respondent at a regular hearing.

DECISION

WHEREFORE, the undersigned dismisses the respondent's petition for review for lack of jurisdiction. The preliminary Order remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March, 2024.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Robert R. Lee II, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge

⁷ See *Stockton v. Walmart Associates, Inc.*, Nos. 1,074,152 & 1,074,153, 2016 WL 7216922 at fn. 5 (Kan. WCAB Nov. 7, 2016).