

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CLAYTON BOLTON
Claimant

v.

LSI TEMPORARY SERVICES OF OMAHA LLC
Respondent

AP-00-0481-887
CS-00-0447-321

and

ZURICH AMERICAN INSURANCE CO.
Insurance Carrier

ORDER

Respondent and Insurance Carrier (Respondent) appeal the March 6, 2024, preliminary Order issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Roger A. Riedmiller appeared for Claimant. Dallas L. Rakestraw 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 Preliminary Hearing, held February 20, 2024, including Claimant's Exhibits 1-5 and Respondent's Exhibits 1-2; the transcript of Evidentiary Deposition of Steven Howell, M.D., taken January 25, 2024, including Exhibit 1; the narrative report of Dr. Howell's Court-ordered independent medical examination, dated October 2, 2023; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Is the Order erroneous because it authorizes medical treatment for a personal medical condition not caused by accidents arising out of and in the course of Claimant's employment with Respondent?

FINDINGS OF FACT

Claimant worked for Respondent as a welder. On September 27, 2019, and September 30, 2019, Claimant sustained burn injuries to the tops of both feet from accidents arising out of and in the course of his employment with Respondent. Claimant received an extensive course of medical treatment for his injuries. Claimant sought additional medical treatment.

The parties agreed to have Dr. Howell, an orthopedic surgeon, perform a Court-ordered independent medical examination. On August 21, 2023, ALJ Klein issued the Amended Agreed Order appointing Dr. Howell to evaluate Claimant, and to provide a narrative report addressing diagnosis, treatment recommendations, and whether Claimant required custom boots or some other accommodation to cure or relieve the work-related injuries to both feet.

Dr. Howell evaluated Claimant on October 3, 2023. Claimant reported he sustained severe burns to both feet six years ago, and experienced severe chronic pain, dysesthesia and nerve tenderness. Claimant also reported two months ago he noticed left knee pain and foot drop. Examination was notable for extreme tenderness to palpation over the dorsum of the right foot. Less tenderness was noted over the dorsum of the left foot due to involvement of the common peroneal nerve. Tinel's was positive at the fibular tunnel of the common peroneal nerve. Dr. Howell ordered a nerve conduction test. Dr. Howell also indicated the dorsal foot pain was related to the work accidents, but Claimant's foot drop was not. Dr. Howell stated if Claimant required surgery, treatment of the common peroneal nerve entrapment should be paid by Medicare, but other surgical procedures should be paid under workers compensation.

Claimant underwent the nerve conduction test, and returned to Dr. Howell on November 14, 2023. Dr. Howell interpreted the study as indicating severe compressive neuropathy of the left common peroneal nerve, and sensory and motor peripheral neuropathy of both lower extremities. Dr. Howell thought Claimant's foot drop was the most pressing problem, and he recommended a surgical decompression of the common peroneal nerve. Claimant wanted to proceed with the surgery.

Dr. Howell also testified by deposition on January 25, 2024. Dr. Howell diagnosed peripheral neuropathy, and compression of the left common peroneal nerve at the knee. Dr. Howell confirmed Claimant's left common peroneal nerve entrapment was not caused by the work-related accidents. Claimant's peripheral neuropathy, however, was caused by the work-related accidents.

Dr. Howell recommended three procedures to address Claimant's problems. First, Dr. Howell recommended decompressing the common peroneal nerve at the left knee and see if Claimant's nerve function or foot dysesthesia improved. Dr. Howell confirmed he

wanted to proceed deliberately and see whether Claimant could obtain normal nerve function from the decompression procedure before performing additional surgeries. If Claimant's nerve function or dysesthesia did not improve, Dr. Howell would administer a nerve block of the nerve going over the tops of the feet, and potentially remove or sever the nerve and bury it deep in tissue above the ankle to make the tops of the feet more comfortable. Dr. Howell confirmed the later two surgeries were necessitated by the work-related injuries. Dr. Howell also testified performing the first procedure would potentially result in the best outcome with respect to Claimant's burn injuries, and skipping the first procedure would reduce the chances of a successful outcome.

Claimant sought authorization of Dr. Howell's treatment under workers compensation. Respondent disputed Dr. Howell's first surgery would cure or relieve a work-related injury. A preliminary hearing took place on February 20, 2024. On March 6, 2024, ALJ Klein issued the Order granting Claimant's request for authorization of Dr. Howell's treatment. ALJ Klein found Dr. Howell's treatment plan was reasonable and necessary, and Dr. Howell was designated an authorized physician. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Order is erroneous because it authorized treatment to cure or relieve a non-work-related medical condition. Respondent contends the entrapment of the left common peroneal nerve is a personal health condition for which compensation is not payable. Claimant argues the Order was correctly issued because Dr. Howell must perform the initial surgery to cure or relieve the effects of the work-related foot injuries. By analogy, both parties cite Board decisions primarily involving authorization of gastric bypass surgeries or other weight-loss regimes.

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 appropriate to dismiss the appeal.³

Respondent contends the work-related accidents are not the prevailing factor causing Claimant's left common peroneal nerve entrapment and resulting need for surgery.

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).

³ See *id.* at 676.

The Board previously ruled it possessed legal authority to review whether a recommended treatment is related to a work injury because it pertains to compensability.⁴ The Board has jurisdiction to review the Order because it involves a compensability issue.

The Board next addresses the merits of Respondent's application for review. To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.⁵ The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.⁶ When an employee sustains a compensable injury, it shall be the duty of the employer to provide such medical treatment as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁷

In the Board decisions cited by the parties, the Board denied requests for medical treatment where the work-related accidents were not the prevailing factor causing a medical condition which would benefit from the treatment.⁸ On the other hand, the Board granted requests for medical treatment which would benefit preexisting obesity because the treatment was part of the overall regime to cure or relieve the effects of the work-related injury, as well.⁹

It is undisputed Claimant sustained compensable burn injuries to both feet. Dr. Howell's opinion Claimant's left common peroneal nerve entrapment at the knee is a personal health condition is also undisputed. Dr. Howell, however, did not recommend the decompression procedure solely to cure or relieve the nerve entrapment. Dr. Howell testified the decompression procedure was the necessary first step of treatment to cure or relieve the effects of the work-related injuries. Like the weight-loss modalities awarded in

⁴ See *Ratcliff v. Easyhome*, No. 1,057,822, 2012 WL 4040467, at *2 (Kan. WCAB Aug. 16, 2012); see also *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484, at *5 (Kan. WCAB Dec. 30, 2013).

⁵ See K.S.A. 44-508(d).

⁶ See K.S.A. 44-508(d), (g).

⁷ See K.S.A. 44-510h(a).

⁸ See *Williams v. Alorica, Inc.*, Nos. 1,072,228 & 1,073,319, 2015 WL 9672651, at *4 (Kan. WCAB Dec. 30, 2015); *Kornmesser*, 2013 WL 3368484, at *5.

⁹ See *Fischer v. Danko-Mes*, No. 1,073,488, 2017 WL 6275620, at *7 (Kan. WCAB Nov. 28, 2017); *Ratcliff*, 2012 WL 4040467, at *4; *Shipman v. Boeing Co.*, No. 1,025,046, 2010 WL 1445594, at *2 (Kan. WCAB Mar. 3, 2010).

Fischer, Ratcliff, and Shipman, the treatment recommended by Dr. Howell is related to curing or relieving the effects of compensable injuries, notwithstanding the benefit to Claimant's personal health condition. Therefore, Dr. Howell's treatment is payable by Respondent under workers compensation.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Thomas Klein, dated March 6, 2024, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Roger A. Riedmiller
Dallas L. Rakestraw
Hon. Thomas Klein