

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**TIM TOBIN**

Claimant

v.

**L & W REPAIR LLC**

Respondent

AP-00-0483-877

CS-00-0471-271

and

**WESTERN AGRICULTURAL INSURANCE CO.**

Insurance Carrier

**ORDER**

Respondent and Insurance Carrier (Respondent) appeal the June 28, 2024, Order issued by Administrative Law Judge (ALJ) Thomas Klein.

**APPEARANCES**

John C. Nodgaard appeared for Claimant. Matthew S. Crowley appeared for Respondent.

**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 February 5, 2024, IME report of Dr. Strickland; the pleadings and orders contained in the administrative file; and the parties' briefs.

**ISSUES**

1. Does the Appeals Board possess authority to review the June 28, 2024, Order?
2. Is Claimant barred from seeking compensation under K.S.A. 44-534(b) because he failed to timely file an application for benefits (E1)?
3. Did Claimant sustain an intervening right shoulder injury on or about September 23, 2022, cutting off Respondent's liability for additional compensation?

**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 from Insurance Carrier. 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 evaluated Claimant on October 14, 2020. Claimant thought the purpose of the appointment was to address his request for additional treatment. Dr. Neel performed a clinical examination. Dr. Neel's office notes indicate Claimant had reduced range of motion of the right shoulder. Dr. Neel indicated Claimant would require a reverse total shoulder replacement procedure in the future. Dr. Neel also intended to increase Claimant's prior impairment rating. Dr. Neel did not impose formal work restrictions. On January 28, 2021, Dr. Neel issued another narrative report reiterating the recommendation of a reverse total shoulder replacement in the future, rating Claimant's impairment, and stating no permanent restrictions were needed.

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.

According to emails between Claimant's counsel's office and Dr. Neel's office, a bill for \$100.00 was generated for the October 14, 2020, evaluation. Dr. Neel's office confirmed the appointment of October 14 was an "office visit" and a rating was issued on January 16, 2021.<sup>1</sup> Insurance Carrier's file notes indicate a bill from Pratt Regional Medical Center for an October 14, 2020, date of service was received. It is unknown when the bill was paid. A file note dated November 16, 2020, references "Pratt Regional Bills" with no further description.<sup>2</sup> The billing records of Pratt Regional Medical Center indicate the last payment it received occurred on November 21, 2019, and an "adjustment" designated as "other" of \$100.00 was made on January 24, 2022.<sup>3</sup>

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.

Respondent sought review of the December 8, 2023, Order. A single Board Member dismissed the application for review because the Appeals Board does not possess authority to review orders for Court-ordered medical examinations under K.S.A. 44-534a. The merits of the application for review were not addressed. The Board Member also stated the Board would possess authority to review whether a timely E1 was filed, or

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<sup>1</sup> PH Trans. Claimant's Ex. 7.

<sup>2</sup> PH Trans. Respondent's Ex. G.

<sup>3</sup> PH Trans. Claimant's Ex. 8.

whether Claimant proved he sustained a compensable injury, upon issuance of a preliminary order awarding compensation under K.S.A. 44-534a.

On February 5, 2024, Dr. Strickland performed the Court-ordered independent medical examination of Claimant. Dr. Strickland reviewed Claimant's history of a prior rotator cuff injury in 2011 necessitating a rotator cuff repair, a revision rotator cuff repair performed in 2012, another rotator cuff repair following the June 8, 2018, injury, and subsequent repetitive trauma to the right shoulder. Dr. Strickland diagnosed post-multiple right shoulder rotator cuff repairs with an un-repairable rotator cuff tear, and multiple workers compensation injuries. Dr. Strickland thought Claimant's current medical condition was related to the June 8, 2018, injury, and recommended additional medical treatment.

It appears a telephone conference among ALJ Klein and counsel occurred on June 26, 2024. No record of the proceedings was made. On June 28, 2024, ALJ Klein issued the Order. ALJ Klein ruled Respondent's setting Dr. Neel's evaluation of October 14, 2020, constituted the payment of compensation extending the time to file an E1. ALJ Klein concluded Claimant timely filed his E1. ALJ Klein also adopted the findings and conclusions of Dr. Strickland, and found Claimant's current problems were caused by the June 8, 2018, accident, although Claimant had prior unrelated restrictions. Respondent was ordered to provide a list of two health care providers, from which Claimant would select one as the authorized treating physician. TTD was also awarded if the authorized treating physician imposed restrictions. These review proceedings follow.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Respondent argues the Appeals Board has authority to review the June 18, 2024, Order, including the issue of whether a timely E1 was filed. Respondent contends a timely E1 was not filed because more than two years elapsed since the last payment of compensation before Claimant filed his E1. Respondent argues providing Dr. Neel's examination of October 14, 2020, does not constitute the payment of compensation. Respondent also argues Claimant injured his right shoulder in an intervening event on September 23, 2022, cutting off Respondent's liability for additional medical treatment. Claimant argues the Board does not possess authority to review the Order. In the alternative, Claimant argues he filed a timely E1.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>4</sup> The provisions of the Workers Compensation Act shall be applied impartially

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<sup>4</sup> See K.S.A. 44-501b(a).

to all parties.<sup>5</sup> The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.<sup>6</sup>

**1. The Appeals Board possess authority to review the Order dated June 28, 2024, under K.S.A. 44-534a.**

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.<sup>7</sup> “Certain defenses” are issues concerning the compensability of the injury under the Workers Compensation Act.<sup>8</sup> If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.<sup>9</sup> The Board previously exercised jurisdiction under K.S.A. 44-534a to review whether a timely E1 was filed.<sup>10</sup>

The Order is a preliminary award of medical treatment and TTD, which the Board may review, subject to the limitations of K.S.A. 44-534a. Respondent argues Claimant is barred from seeking compensation because he did not timely file an E1. Respondent also argues its potential liability for additional compensation is cut off because Claimant sustained an intervening injury to the right shoulder. Both of these issues pertain to compensability. The Board has authority to review both issues under K.S.A. 44-534a because they pertain to compensability.

**2. Claimant did not meet his burden of proving he filed a timely E1 based on the current record, and the preliminary award of compensation is reversed.**

The primary issue is whether Claimant timely filed an E1, or whether he is prohibited from maintaining proceedings for compensation under K.S.A. 44-534(b). According to the Act, no proceeding for compensation shall be maintained under the Kansas Workers

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<sup>5</sup> See *id.*

<sup>6</sup> See K.S.A. 44-501b(c).

<sup>7</sup> See K.S.A. 44-534a(a)(2).

<sup>8</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>9</sup> See *id.* at 676.

<sup>10</sup> See *Lamonte v. Tutera Senior Living & Health Care LLC*, AP-00-0478-099, CS-00-0475-937, 2023 WL 8440386, at \*1 (Kan. WCAB Nov. 15, 2023).

Compensation Act unless an application for hearing is filed with the Division within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.<sup>11</sup>

The date of accident for this matter is June 8, 2018, and three years from the date of accident is June 8, 2021. Claimant filed his E1 with the Division on October 13, 2022. Unless Claimant can prove he filed his E1 within two years from the last date compensation was paid, he is barred from maintaining proceedings for compensation under K.S.A. 44-534(b).

Claimant initially received medical treatment, which is a form of compensation, until May 15, 2019. Insurance Carrier's pay records indicate Claimant was paid TTD until March 21, 2019, and medical was paid until July 30, 2019.

Although it initially appears Claimant's E1 was not timely filed, the time to file an E1 may be revived upon an employer's payment of compensation after the statute of limitations has run.<sup>12</sup> An evaluation for an impairment rating or an independent medical examination does not constitute compensation. The Appeals Board, however, previously ruled an evaluation by a treating physician who made treatment recommendations and commented on work restrictions constituted medical compensation.<sup>13</sup>

Following Claimant's initial course of medical treatment, he requested additional treatment from Insurance Carrier's agent. Insurance Carrier authorized and scheduled a return appointment with Dr. Neel, Claimant's treating physician, for October 14, 2020. Claimant attended the appointment, and believed the purpose of the appointment was to determine if additional treatment was indicated. Dr. Neel performed a clinical examination. Dr. Neel told Claimant, and subsequently issued a narrative report, stating Claimant would require a total shoulder replacement in the future, did not require work restrictions, and merited a reassessment of his functional impairment. The undersigned finds this appointment constituted medical compensation because it was conducted by a treating physician who provided treatment recommendations and commented on work restrictions. Claimant believed he was being seen for treatment. The appointment was not a one-time independent medical examination or an examination solely for rating purposes. Respondent's payment for this examination can revive the time for filing an E1.

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<sup>11</sup> See K.S.A. 44-534(b).

<sup>12</sup> See *Schneider v. City of Lawrence*, 56 Kan. App. 2d 757, 768, 435 P.3d 1173 (2019).

<sup>13</sup> See *Schneider v. City of Lawrence*, CS-00-0323-620, AP-00-0446-667, CS-00-0365-115, AP-00-0446-668, 2020 WL 719927, at \*4 (Kan. WCAB Jan. 16, 2020).

The record, however, does not establish the date Respondent paid for Dr. Neel's October 14, 2020, appointment. ALJ Klein's Order concludes the E1 was timely filed based on the date of the appointment, rather than the date Respondent paid for the appointment. When the plain language of a statute is clear and unambiguous, a court must apply the statute as written.<sup>14</sup> The Court of Appeals ruled the language of K.S.A. 44-534 is clear and unambiguous.<sup>15</sup> The statute states an E1 must be filed within two years from the date of the last *payment* of compensation.<sup>16</sup>

According to the record, Dr. Neel's office generated a bill for the appointment, and Insurance Carrier's file notes confirm a bill from Dr. Neel's office for an October 14, 2020, date of service was received. Insurance Carrier's records, however, do not state whether the bill was paid or the date paid. Dr. Neel's office's billing records clearly indicate when payments are received, and there is no indication any payments were received for an October 14, 2020, date of service. The notation of "adjustment" and "other", with no explanation, is not evidence of receipt of payment by Respondent or Insurance Carrier. The date compensation was last paid cannot be determined without engaging in speculation. Because Claimant has the burden of proving all the elements of his claim for benefits, the undersigned concludes Claimant failed to prove he filed a timely E1 based on the current record. Therefore, Claimant is barred from seeking additional compensation under K.S.A. 44-534(b).

In light of this determination, it is unnecessary to address whether Claimant sustained an intervening injury to the right shoulder cutting off Respondent's liability for additional compensation. Pursuant to K.S.A. 44-534a, this is a preliminary determination subject to change upon presentation of additional evidence either in preliminary proceedings or in a full hearing.<sup>17</sup>

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order issued by ALJ Thomas Klein, dated June 28, 2024, is reversed. Claimant's request for compensation is denied.

**IT IS SO ORDERED.**

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<sup>14</sup> See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

<sup>15</sup> See *Schneider*, 56 Kan. App. 2d at 765-66.

<sup>16</sup> See K.S.A. 44-534(b) (emphasis added).

<sup>17</sup> See K.S.A. 44-534a(a)(2).

**TIM TOBIN**

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**CS-00-0471-271**

Dated this \_\_\_\_\_ day of August, 2024.

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**WILLIAM G. BELDEN**  
**APPEALS BOARD MEMBER**

c: Via OSCAR

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