

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>TONNETT RUSCH</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0484-164
<b>MHM HEALTH PROFESSIONALS, INC.</b>	)	AP-00-0484-165
Respondent	)	CS-00-0482-362
AND	)	
	)	
<b>AMERICAN ZURICH INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (Respondent) requests review of the July 11, 2024, preliminary hearing Orders entered by Administrative Law Judge (ALJ) Bruce E. Moore. This appeal involves two applications for review of two separately issued preliminary Orders arising from a single preliminary hearing. Both Orders are being considered by the Board in this Order.

**APPEARANCES**

Jan L. Fisher appeared for Claimant. J. Scott Gordon and Colin Rohach 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 July 11, 2024, with exhibits attached, the documents of record filed with the Division, and the briefs submitted to the Board by the parties.

**ISSUES**

1. Does the Board have jurisdiction to review Respondent’s appeals?
2. If so, what is the prevailing factor causing Claimant’s current medical condition and resulting need for treatment?

3. Did the ALJ err by not requiring Claimant's testimony at the preliminary hearing?
4. Is Claimant entitled to temporary total disability benefits?

#### FINDINGS OF FACT

These appeals arise from two preliminary hearing Orders dated July 11, 2024. AP-00-0484-164 concerns an Order authorizing Dr. Hildebrand to proceed with left knee replacement surgery. AP-00-0484-165 concerns an Order reinstating temporary total disability benefits as of May 21, 2024.

Claimant has been employed as a nurse at Ellsworth Correctional Facility since 2001. The contracting agency Claimant works through changes periodically. The current agency is Centurion. Claimant's position is physical and requires her to run, walk, squat, climb stairs, kneel, stand, and sit.

Claimant has a history of left knee complications. In October 2019, she saw Dr. Hildebrand for left knee pain and instability. Following an MRI, Dr. Hildebrand diagnosed a lateral subluxation of the left knee and recommended surgery. Claimant underwent a medial patellofemoral ligament (MPFL) reconstruction on December 17, 2019. Dr. Hildebrand noted Claimant progressed well following surgery and returned to work without difficulty. Claimant returned to her normal, full-time job duties with no problems until December 2023.

On December 26, 2023, Claimant was sitting in her office at her desk. When Claimant reached down to retrieve papers from a shelf, her chair rolled and flipped from under her. Claimant twisted her left knee when she fell. She reported the injury and was sent to the emergency department at Ellsworth County Medical Center the same day. An MRI was ordered, and Claimant was referred to Dr. Hildebrand for evaluation.

Dr. Hildebrand reviewed the MRI at Claimant's visit on January 8, 2024:

Review of the MRI shows intact medial patellofemoral ligament as well as appropriate surgical positioning of the ligament. There is advanced patellofemoral arthritis, but relatively mild weightbearing for arthritis. There is also a lateral meniscus tear.<sup>1</sup>

Dr. Hildebrand determined Claimant's symptoms did not relate to the 2019 patellofemoral surgery and patellar stabilization, noting Claimant had no problems with her left knee for the four years preceding the work incident. Dr. Hildebrand recommended

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<sup>1</sup> P.H. Trans., Cl. Ex. 2 at 15.

Claimant undergo arthroscopic treatment for the lateral meniscus tear. He wrote, “We will not address her pre-existing arthritis in the patellofemoral joint and although there is some arthritis on x-ray and the MRI in the lateral compartment, that is not the source of her pain or the reason for the surgery.”<sup>2</sup>

On February 8, 2024, Dr. Hildebrand performed a left knee arthroscopy with medial and lateral meniscectomy. Dr. Hildebrand found two tears of the meniscus during surgery, which were debrided arthroscopically. When Claimant returned for a follow-up visit on February 21, 2024, she reported painful swelling and bruising of her left knee, worse than before the surgery. Claimant described the pain as severe, with grinding and popping sensations around her knee cap. Notes from Jessica Onken, PA-C state:

[Claimant] is struggling with some pain after left knee arthroscopy that she says is different than the type of pain that she had before surgery and she is experiencing painful popping and grinding sensations in the knee with any weightbearing or activity. I discussed operative findings with the patient today including areas of bare bone arthritis throughout the patella and a good portion. Discussed that symptoms with these knee scopes that arthritis will be exacerbated during the initial postop process. She was seen and examined by Dr. Hildebrand as well today who feels there are no significant findings on exam and he agrees that this is likely due to patient having postoperative pain.<sup>3</sup>

Claimant returned to Dr. Hildebrand on April 1, 2024, with no improvement. Dr. Hildebrand noted Claimant’s “advanced patellofemoral arthritis has exacerbated following a work-related fall, which resulted in a minor meniscus tear.”<sup>4</sup> He administered an injection to Claimant’s left knee and recommended a second opinion. Dr. Hildebrand also recommended another MRI of Claimant’s left knee should she have no improvement following the injection.

The injection did not provide Claimant relief, and an MRI was conducted on May 7, 2024. Dr. Hildebrand, at Claimant’s May 20, 2024, visit, interpreted the MRI:

I again viewed her MRI which shows bone edema consistent with degenerative changes in the weightbearing compartments and advanced patellofemoral arthritis. Evidence of medial and lateral partial meniscectomies, but no evidence of new meniscal pathology.<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 28.

<sup>4</sup> *Id.* at 31.

<sup>5</sup> P.H. Trans., Resp. Ex. A at 1.

Dr. Hildebrand further opined:

[Claimant] relates in terms of timing that her disability came about this or after this fall on her flexed knee in 12/2023, I told her that clearly there was some pre-existing advanced arthritis before this fall in 12/2023 and that is the source of her symptoms at this point. It is therefore my opinion that the prevailing factor regarding her need for knee replacement is this pre-existing arthritis. Regarding her chronic patellofemoral pathology that was aggravated but not caused by her fall at work.<sup>6</sup>

Dr. Hildebrand recommended a left total knee replacement.

Dr. Rosenthal conducted an examination of Claimant on June 4, 2024, at Claimant's counsel's request. Dr. Rosenthal reviewed Claimant's history and medical records, including the MRIs from December 27, 2023, and May 7, 2024. Dr. Rosenthal interpreted the MRIs:

I reviewed the MRI of the left knee done on 12/27/23 at Ellsworth County Medical Center that showed moderate medial and lateral compartment osteoarthritis and grade 2 patellar chondromalacia, mucoid degeneration of the anterior horn of the lateral meniscus with fraying/fibrillation of the free edge at the body lateral meniscus, which is likely degenerative, medial meniscus is intact and no meniscal flap tear or fragment identified, prior medial retinacular operative repair is noted and there may be a chronic injury [of] the lateral patellar retinaculum.

I reviewed the MRI of the left knee from 5/7/24 which showed tricompartmental, hypertrophic osteoarthritis with high grade patellofemoral chondrosis, post operative changes of prior medial and lateral meniscectomies without discrete, displaced meniscal tear and intact MPFL reconstruction.<sup>7</sup>

Dr. Rosenthal conducted a physical examination, diagnosing Claimant with lateral and medial meniscal tears of a left knee with degenerative joint disease. Dr. Rosenthal opined the prevailing factor causing Claimant's injury was the work incident on December 26, 2023. Specifically, Claimant's "work injury caused a material change in her left knee, the meniscal tears. She continues to have ongoing left knee pain which has worsened since having her left knee arthroscopic surgery on 2/8/24 and a left total knee replacement is the reasonable and necessary surgery for the work-related accident."<sup>8</sup> Dr. Rosenthal agreed Claimant should continue her ongoing sedentary work restrictions, using crutches for ambulation.

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<sup>6</sup> *Id.* at 2.

<sup>7</sup> P.H. Trans., Cl. Ex. 1 at 4.

<sup>8</sup> *Id.* at 6.

A preliminary hearing was held July 11, 2024. At the hearing, Respondent stipulated Claimant sustained personal injury by accident on December 26, 2023; the accidental injury arose out of and in the course of employment; and the accident was the prevailing factor causing the injury, medical condition, need for treatment, and resulting impairment or disability. Respondent's counsel, Mr. Rohach, indicated authorization for Claimant's surgery was denied based on Dr. Hildebrand's prevailing factor opinion. The ALJ, after some discussion, stated:

Well, I was just asking your position to see where we were since you stipulated prevailing factor I didn't know whether we still had a fight here on our hands or not. But clearly we do.

Do we need any testimony from the Claimant, Mr. Rohach?

MR. ROHACH: I don't know if testimony is going to help here, Judge.

...

THE COURT: ... All right. Let's go without Claimant's testimony for the time being. We will address arguments from the parties and then if at any point we decide we need testimony we'll pause and swear in the Claimant and continue with her testimony. Agreed?

MR. ROHACH: Agreed.

MS. FISHER: It's fine.<sup>9</sup>

Claimant was not requested or called to testify at the preliminary hearing.

The ALJ found Claimant is entitled to medical care and authorized Dr. Hildebrand to proceed with left knee replacement surgery. Further, the ALJ ordered temporary total disability benefits (TTD) reinstated as of May 21, 2024, and continuing until Claimant is released to return to work, is offered accommodated work within temporary work restrictions, or until further order of the court.

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

Respondent argues the ALJ erred by ordering additional medical treatment and TTD without taking Claimant's testimony and by disregarding the evidence provided by the authorized treating physician, Dr. Hildebrand. Respondent maintains Claimant's work injury is not the prevailing factor causing her need for treatment.

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<sup>9</sup> P.H. Trans. at 10-11.

Claimant contends the Board lacks jurisdiction to review Respondent's appeals. Alternatively, Claimant argues the ALJ's Orders should be affirmed. Claimant argues Respondent agreed, at the preliminary hearing, no testimony was necessary and never requested she testify. Claimant maintains the work accident is the prevailing factor in the need for a total knee replacement.

### **1. Does the Board have jurisdiction to review Respondent's appeals?**

This is an appeal from a preliminary hearing order. Not every alleged error is subject to review. The Board can review preliminary hearing orders in which an ALJ has exceeded his or her jurisdiction.<sup>10</sup> Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

1. Whether the employee suffered an accident, repetitive trauma or resulting injury,
2. Whether the injury arose out of and in the course of the employee's employment,
3. Whether notice is given, or
4. Whether certain defenses apply, shall be considered jurisdictional, and subject to review by the Board.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.<sup>11</sup>

The issue of Claimant's entitlement to TTD is not one of the jurisdictional issues listed in K.S.A. 2015 Supp. 44-534a and not subject to review from a preliminary hearing Order. Whether the work injury is the prevailing factor does, however, comprise a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

K.S.A. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. The Board has held that the term "certain other defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>12</sup>

Respondent argues, pursuant to K.S.A. 44-534a(a)(2), the Board has jurisdiction to review whether the alleged December 26, 2023, accident is the prevailing factor causing Claimant's medical condition. Whether Claimant's accident was the prevailing factor in

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<sup>10</sup> K.S.A. 44-551(l)(2)(A).

<sup>11</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

<sup>12</sup> See *Williams v. Durham School Services*, No. 1,027,861, 2006 WL 3891445 (Kan. WCAB Dec. 22, 2006); *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2013 WL 3368492 (Kan. WCAB June 18, 2013).

causing the medical condition is an issue over which the Board has jurisdiction under K.S.A. 44-534a.<sup>13</sup> The flaw in Respondent's argument is it did not raise the prevailing factor issue before the ALJ. When specifically asked by the ALJ, "[D]o you admit that accident was the prevailing factor, causing Ms. Rusch's injury, need for treatment, and resulting impairment or disability," Respondent answered "yes."<sup>14</sup> The Board, citing *Scammahorn*,<sup>15</sup> has frequently held that under K.S.A. 44-555c(a), issues not raised before the judge cannot be raised for the first time on appeal.<sup>16</sup> As this issue was not raised before the ALJ, the Board does not have jurisdiction to review this issue at this time.

The ALJ acted within his authority ordering medical treatment and TTD. Whether the ALJ required Claimant to testify at the preliminary hearing is not an issue listed in K.S.A. 44-534a under which the Board has jurisdiction to review. It should also be noted Respondent did not object to Claimant not testifying at the preliminary hearing.

### DECISION

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the appeal of the Orders of ALJ Bruce E. Moore, dated July 11, 2024, is dismissed for lack of jurisdiction. The Orders issued by ALJ Moore, dated July 11, 2024, remain in full force and effect.

**IT IS SO ORDERED.**

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

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SETH G. VALERIUS  
BOARD MEMBER

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<sup>13</sup> See *Wilson v. Triangle Trucking, Inc.*, No. 1,063,281, 2013 WL 6920087 (Kan. WCAB Dec. 20, 2013); *Kornmesser v. State of Kansas*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013); *Katz v. USD 229*, No. 1,068,293, 2014 WL 4976744 (Kan. WCAB Sept. 12, 2014).

<sup>14</sup> P.H. Trans. at 4.

<sup>15</sup> *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

<sup>16</sup> See *Miller v. General Motors Corp.*, Nos. 1,048,350 & 1,048,351, 2013 WL 1384377 (Kan. WCAB Mar. 13, 2013); see also *Woodward v. Beach Aircraft Corp.*, 24 Kan.App. 510, 949 P.2d 1149 (1997).

**TONNETT RUSCH**

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CS-00-0482-362**

c: Via OSCAR

Jan L. Fisher, Attorney for Claimant

J. Scott Gordon, Attorney for Respondent and its Insurance Carrier

Hon. Bruce E. Moore, Administrative Law Judge