

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TONY PETER)	
Claimant)	
V.)	
)	AP-00-0484-236
CONKLIN CARS)	CS-00-0482-747
Respondent)	
AND)	AP-00-0484-235
)	CS-00-0482-864
)	
ACCIDENT FUND INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appeals the July 24, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Jan Fisher appeared for Claimant. Matthew Schaefer appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Claimant’s Deposition, taken July 12, 2024; and
2. Transcript of Preliminary Hearing, held July 15, 2024, with exhibits.

ISSUE

Case No. CS-00-0482-864 and AP-00-0484-235

Was an application for hearing for the August 31, 2018 accidental injury timely filed pursuant to K.S.A. 44-534(b)?

FINDINGS OF FACT

The facts of this case are not in dispute. Claimant has been employed with Respondent for 20 years as an auto body technician, performing body repair.

On August 31, 2018, Claimant injured his right shoulder when he was opening or closing a large garage door. He reported his accident and was referred to StatCare on September 4, 2018, for treatment. Claimant was then referred to Occupational Health Partners (OHP) for additional treatment on October 10, 2018, where he was provided medication, physical therapy, temporary restrictions and referred for an MRI. The MRI, performed on October 14, 2018 revealed a full-thickness tear of the rotator cuff of the supraspinatus.

Following the MRI, Claimant was referred to Gary Harbin, M.D., an orthopaedic surgeon, for treatment on October 22, 2018. Dr. Harbin recommended additional physical therapy, discussed surgery to repair the torn rotator cuff and asked Claimant to return in one month. At Claimant's request, his last physical therapy session was on November 19, 2018. He requested discontinuation of therapy due to his upcoming hip surgery.

During this time, Claimant suffered a non-work injury to his right hip when he jumped out of his truck. He fractured his hip, which resulted in a total hip replacement performed by Dr. Harbin, on November 30, 2018. Claimant was off work for approximately four months following his surgery. According to Claimant, after his time off work due to his hip surgery, his shoulder was no longer painful. While receiving treatment for his hip and during an appointment with Dr. Harbin, Claimant was asked how his shoulder was doing. Dr. Harbin checked Claimant's shoulder range of motion and advised him surgery would not improve his range of motion and therefore, surgery was not warranted.

The last physical therapy appointment authorized and paid by workers compensation was November 19, 2018. The last payment of medical compensation for the August 31, 2018, injury was on July 15, 2019.

Claimant returned to work for Respondent as an auto body technician, without restrictions for his right shoulder, following the four month recovery from hip surgery. Following Claimant's return to work, he experienced occasional, increased pain in his right shoulder, usually associated with a hard work day, which he treated with over-the-counter medications.

On January 10, 2024, Claimant was doing repair work on the roof of a car, which required him to do a lot of hand sanding. Claimant experienced an increase in his daily right shoulder pain. The pain affected his sleep. When the consistent, aching pain did not improve after a couple of days, Claimant reported his injury to Respondent.

Claimant was referred to OHP on February 22, 2024. He reported intermittent difficulty in his right shoulder since his 2018 injury, but this was the first time he sought treatment. The medical note reflects the cause of Claimant's problem was related to his work activities. Claimant was provided temporary work restrictions, which he declined. He was advised to use over-the-counter ibuprofen or Aleve, to apply ice, heat and topical analgesics as needed and perform range of motion exercises as demonstrated at least three times per day. Claimant was referred for an MRI for the right shoulder, which was performed on February 29, 2024. After reviewing the results of the MRI, Claimant was referred to an orthopedic surgeon for his right shoulder injury, which was reported as a rotator cuff and labral tear. According to Claimant, he returned to work performing his regular job duties, but used his left hand and arm more than before.

Claimant was evaluated by Michael J. Johnson, M.D., on April 2, 2024. Dr. Johnson reviewed the February 29 MRI and opined the findings were similar to the 2018 MRI revealing a full-thickness supraspinatus tear. He further opined the January 10, 2024, accidental injury resulted in symptomatic aggravation of the 2018 right shoulder injury and was not the prevailing factor for his current right shoulder diagnosis and continued need for medical treatment. Dr. Johnson provided Claimant with temporary work restrictions by a note dated, April 15, 2024.

On April 30, 2024, Claimant filed an Application for Benefits (E-1), alleging a repetitive use injury to his right shoulder on January 10, 2024. On May 6, 2024, Claimant filed an E-1, alleging an August 31, 2018, injury to his right arm and shoulder from lifting a manual garage door.

The ALJ denied Claimant's request for benefits, finding Claimant failed in his burden of proving he timely filed his E-1 in the first injury because no E-1 was on file with the division within three years of the August 31, 2018 date of accident, or within two years of the last payment of compensation on July 19, 2019. In so doing, the ALJ found:

Here, Peter did not have ongoing complaints in his right shoulder, and had not voiced any complaints of progressively worsening pain since his return to work (after an unrelated hip surgery) in 2019 through 2023. In January, 2024, Peter reported and alleged a new injury, triggering Conklin's responsibility to provide medical care pursuant to K.S.A. 44-510h(a). Benefits were paid for the newly claimed injury, and were not paid for the 2018 injury. Rendition of medical care for a newly reported

accident or claimed injury due to repetitive use does not, in and of itself, revive a time-barred claim.¹

Claimant appealed and argued under *Schneider v. City of Lawrence*, 56 Kan. App.2d 757, 435 P.3d 1173 (2019), any subsequent medical care provided for the same body part, at any time, for any reason, revives a time barred claim. Therefore, a new date of payment of compensation was established when Claimant was referred for medical treatment for the second accidental injury, rendering the E-1 filed on May 6, 2024 timely. Respondent maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The Board's authority to consider appeals of preliminary orders is limited to questions 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.² In general, preliminary hearing orders granting or denying medical benefits, TTD, payment of medical bills, reimbursement of medical mileage, out of pocket prescriptions, and unauthorized medical are not subject to Board review. The authority to make a determination regarding these benefits rests clearly within the authority granted to the ALJ by K.S.A. 44-534a.³ If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.⁴ The Board previously exercised jurisdiction under K.S.A. 44-534a to review whether a timely E1 was filed.⁵

The issue is whether Claimant timely filed an E-1, or whether he is prohibited from maintaining proceedings for compensation under K.S.A. 44-534(b). According to the Kansas Workers Compensation Act, no proceedings for compensation shall be maintained under the Act unless an application for hearing is filed with the Division of Workers

¹ ALJ Order (July 24, 2024) at 4.

² See K.S.A. 44-534a(a)(2).

³ See *Vizcarra v. Loan Smart, LLC*, No. 1,079,548, 2017 WL 5126039 (Kan. WCAB Oct. 18, 2017).

⁴ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁵ See *Lamonte v. Tutera Senior Living & Health Care LLC*, AP-00-0478-099, CS-00-0475-937, 2023 WL 8440386, at (Kan. WCAB Nov. 15, 2023).

Compensation within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later.⁶

The date of accident for the first injury is August 31, 2018. Three years from the date of accident is August 31, 2021. Claimant filed an E-1 with the Division on May 6, 2024 alleging an injury to his right shoulder from lifting a garage door on August 31, 2018. He filed an E-1 with the Division on April 30, 2024 alleging an injury to his right shoulder due to repetitive trauma on January 10, 2024.

It appears Claimant's E-1 was not timely filed, but the time to file an E-1 may be revived upon the Respondent's payment of compensation after the statute of limitations has run.⁷ An evaluation for an impairment rating or an independent medical examination does not constitute compensation, but the Appeals Board previously ruled an evaluation by a treating physician who made treatment recommendations and commented on work restrictions constituted medical compensation.⁸

The ALJ found Claimant did not timely file his E-1 and denied benefits. In so doing, he found *Schneider* did not apply to this matter because the factual differences were substantial and therefore did not apply to the facts of this case. This Board Member disagrees.

In *Schneider*, the Court of Appeals found the language of K.S.A. 44-534a was clear and unambiguous and as a result, the trier of fact was required to apply it as written. The ALJ distinguished *Schneider* from the facts of this matter because Claimant did not have ongoing complaints in his right shoulder, did not report any complaints of progressively worsening pain since he returned to work and he alleged a new injury. None of these factors are contained in the language of K.S.A. 44-534a. There is nothing in K.S.A. 44-534a that bars revival of the claim for these reasons. The trier of fact is not free to add something to the statute that is not found in the language of the statute.

Here, Claimant filed a claim for an alleged injury to his right shoulder in 2024 and requested medical treatment. Respondent sent Claimant to OHP who provided Claimant

⁶ See K.S.A. 44-534(b).

⁷ 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 (Kan. WCAB Jan. 16, 2020).

⁸ See *id.*

with restrictions, which he declined; recommended over-the-counter medications, ice, heat, topical analgesics and home exercises for pain; and, referred him for an MRI for his right shoulder. After providing the MRI, Claimant was referred to Dr. Johnson for an examination. Dr. Johnson was provided the 2018 MRI along with the new MRI to review. Following an examination and consultation with Claimant, Dr. Johnson provided his opinions regarding Claimant's current condition and need for medical treatment. In a subsequent note, Dr. Johnson provided Claimant with temporary work restrictions. The undersigned finds the referrals to OHP, the MRI and to Dr. Johnson constituted medical compensation. Respondent's scheduled and paid for these referrals, resulting in reviving the time for filing an E-1. Claimant has timely filed his E-1 for the August 31, 2018 work-related injury.

The preliminary hearing transcript, the ALJ's Order and Claimant's Application for Review list docket numbers for the 2018 (CS-00-0482-864 and AP-00-0484-235) and 2024 (CS-00-0482-747 and AP-00-0484-236) alleged work-related injuries. At the preliminary hearing, the ALJ went through stipulations for both injuries. The arguments made by the parties at the preliminary hearing and the Order issued by the ALJ clearly reflect the only issue addressed and determined was whether Claimant timely filed an E-1 for the 2018 injury. The parties' briefs to the Board also contained arguments toward the issue of whether the current need for medical treatment was the natural and probable result of the 2018 injury. This issue was not argued by the parties at the preliminary hearing or addressed by the ALJ at the hearing or in his Order. The Board's review is limited to the issues raised and considered by the ALJ based upon the evidence presented.⁹

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Bruce E. Moore, dated July 24, 2024, is reversed and remanded for proceedings consistent with this Order as it pertains to the 2018 work injury (CS-00-0482-864 and AP-00-0484-235) and any remaining issues under both alleged injuries, 2018 (CS-00-0482-864 and AP-00-0484-235) and 2024 (CS-00-0482-747 and AP-00-0484-236) are dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this day of September, 2024.

⁹ See K.S.A. 44-555c(a).

TONY PETER

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**AP-00-0484-236
CS-00-0482-747**

**CHRIS A. CLEMENTS
BOARD MEMBER**

c: Via OSCAR

Jan L. Fisher, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge