

or resulted in a permanent aggravation of his preexisting condition. Therefore, the nature and extent of injury is the only issue for consideration by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge, as modified by the Award Nunc Pro Tunc of September 29, 2004, should be affirmed.

Claimant suffered accidental injury on July 8, 2001 when, while working as a machine operator, she injured her right knee while putting film into the machine. Claimant described in detail the physical activities required to load the film into the machine, including the bending and kneeling, and stress placed upon claimant's knee while working.

Claimant was examined by Anil Gosalia, M.D., on July 9, 2001, after respondent refused to provide medical care. X-rays were taken, and claimant was provided pain medication and a brace to wear over the knee. Dr. Gosalia continued treating claimant, ultimately returning her to work for respondent at the same job she was performing on the date of accident, although with some self-accommodation of her job duties.

Claimant was referred to Dr. McDonald by her attorney for an evaluation on September 20, 2003. Dr. McDonald found lateral collateral laxity on ligamentous testing, which he opined was the result of claimant's work activities, diagnosing a chronic ligamentous strain of the right knee. He assessed claimant a 17 percent impairment to the right lower extremity based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), describing the laxity as being of "moderate degree." He also went on to testify that the history of the job provided by claimant and the movements described would place varus stress on the knee, which would be the type of stress to cause the condition from which claimant suffered.

Dr. McDonald also noted that when Dr. Gosalia was treating claimant, Dr. Gosalia's note of July 13, 2001, indicated lateral collateral laxity. Claimant was referred to Dr. Poppa by respondent's attorney for an evaluation on April 22, 2004. Dr. Poppa diagnosed mild crepitus consistent with degenerative changes in her knee and a mild degenerative arthritis, and noted that claimant was overweight, which, in his opinion, could also lead to her ongoing knee complaints. He testified that claimant's right knee symptoms were temporarily aggravated by her work duties, but that her current complaints were not related to any work aggravation, acceleration or change in her preexisting condition. They were, instead, a result of claimant's long-term, non-occupational degenerative joint disease. However, Dr. Poppa did acknowledge that a temporary aggravation occurred during her employment, which, in his opinion, caused her preexisting condition to become temporarily symptomatic as a result of those work duties. He opined claimant suffered no permanent impairment as a result of her employment with respondent. He also noted that at the time of his examination, there was no evidence of any ligamentous or joint laxity in the knee.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹ In this instance, the Board finds that the opinion of Dr. McDonald is the more credible opinion. Both he and Dr. Gosalia noted lateral collateral laxity following the accident. The fact that Dr. Poppa was unable to find any laxity is not sufficient to outweigh the medical opinions of the other two doctors, especially Dr. Gosalia who had the opportunity to examine and treat claimant over a several-week period.

The Board, further, finds that Dr. McDonald's opinion that claimant's laxity was of moderate degree, as opposed to mild, thereby justifying the higher impairment, is supported by a preponderance of the credible evidence in this file. The Board affirms the finding by the ALJ that claimant has suffered a 17 percent impairment to the right lower extremity based upon the opinion of Dr. McDonald and awards claimant that 17 percent impairment based upon the 200 weeks contained in the schedule at K.S.A. 44-510d as corrected by the ALJ in the Award Nunc Pro Tunc of September 29, 2004.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 15, 2004, as modified by the Award Nunc Pro Tunc dated September 29, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

c: Timothy M. Alvarez, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director