

Consequently, respondent argues the need for treatment, if any, for the left knee was caused by an intervening accident and should be assessed against the insurance carrier who provided coverage at that time. Respondent requests the Board to reverse the ALJ's Order.

Claimant notes that he injured both his shoulder and his left knee in the August 3, 2001 accident. Surgery for both the shoulder and left knee were recommended but the first surgery performed was for the shoulder. The shoulder was given time to heal and then claimant proceeded with the left knee surgery. Claimant argues that he did not suffer an intervening accident when he returned to light-duty work after the shoulder surgery and the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board affirms the ALJ's determination that the need for the left knee surgery was caused by the August 3, 2001 accident.

This is respondent's appeal from the ALJ's preliminary hearing determination not to terminate benefits because claimant's left knee surgery was related to his August 3, 2001 accident and not the result of any intervening repetitive trauma accidents.

Claimant was employed as a heavy equipment mechanic for respondent. On August 3, 2001, claimant was working on a track loader when he slipped and fell. Claimant injured his left shoulder and left knee. Claimant had rotator cuff surgery performed on his left shoulder in September 2002. Claimant returned to light-duty accommodated work for respondent on December 12, 2002, which lasted until February 28, 2003. In April 2003 claimant proceeded to have surgery performed on his left knee.

While performing the light-duty work which required walking on rough terrain claimant alleged injury to his right knee and filed a claim for that alleged work-related injury.

An Administrative Law Judge's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment is due to the admitted work-related

¹ K.S.A. 44-551(b)(2)(A).

² K.S.A. 44-534a(a)(2).

accidents or whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his prior employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

The dispositive issue is whether the need for surgery was caused by the claimant's work-related injury on August 3, 2001, or was caused by walking on the rough terrain while on accommodated duty after his shoulder surgery.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.³ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁴ Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

In general, however, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.⁵

Claimant said that he continued to have pain and discomfort in his left knee before his surgery. Claimant further noted that surgery had been recommended for his left knee before he returned to the light-duty work after his shoulder surgery. The claimant testified:

Q. Now, at what point in time did Dr. Mumford first suggest surgery to the left knee to you?

A. That was early on before December.

Q. Before you went back to work?

A. Before I went back to work, yes. This was right after we had the injury and before we had the left shoulder surgery. We talked about the knee problem and

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁴ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

⁵ See, *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

how we was going to approach it. That we decided to wait upon the knee surgery until the shoulder was totally healed so the shoulder could support the crutch.⁶

Based upon the current record, the Board finds that claimant's accommodated work for respondent, though a factor in claimant's increased symptoms, was not an intervening injury. His condition, therefore, is compensable as a direct and natural consequence of the original August 3, 2001 injury. Accordingly, the ALJ's Order is affirmed.

AWARD

WHEREFORE, it is the finding, of the Board that the Order of Administrative Law Judge Brad E. Avery dated July 9, 2003, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2003.

BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
 Paul D. Post, Attorney for Respondent
 Brad E. Avery, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director

⁶ Penalties Hrg. Trans. at 17.