

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL HARRIS)	
Claimant)	
VS.)	
)	Docket No. 1,005,224
WAL-MART)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the December 6, 2004, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on May 17, 2005, in Topeka, Kansas.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared on behalf of claimant. James B. Biggs of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the November 26, 2002, preliminary hearing transcript and the September 18, 2003, motion hearing transcript.

ISSUES

The parties agree claimant slipped and fell at work on December 11, 2001, injuring his left knee. Claimant contends the accident aggravated preexisting arthritis in his knee that resulted in a total knee replacement. Claimant also argues that he should be permitted to see his knee surgeon, Dr. Peter S. Lapse, on an annual basis for five years without first being required to apply to the Director of the Division of Workers Compensation.

Conversely, respondent and its insurance carrier contend the December 2001 accident only temporarily aggravated claimant's left knee. They argue claimant's November 2003 total left knee replacement was made necessary by the natural progression of an injury that claimant sustained in 1976. Therefore, they contend they should not be held responsible for either the costs of the knee replacement surgery or claimant's resulting permanent functional impairment. In the alternative, respondent and its insurance carrier argue claimant only sustained a 37 percent functional impairment to his left lower extremity.

In the December 6, 2004, Award, Judge Avery adopted the opinion of Dr. Mary Ann Hoffmann, whom the Judge had selected to conduct an independent medical evaluation. Accordingly, the Judge held claimant's December 11, 2001, accident both aggravated and accelerated the preexisting arthritis in claimant's left knee, which precipitated the total knee replacement. Consequently, the Judge found respondent and its insurance carrier were responsible for both the costs of the total knee replacement and permanent disability benefits under K.S.A. 44-510d for a 43.5 percent functional impairment to the left lower extremity. In addition, the Judge held claimant should apply for any additional medical treatment.

The issues before the Board on this appeal are:

1. Did the December 11, 2001, accident either aggravate, accelerate, or intensify the preexisting arthritis in claimant's left knee? In other words, are respondent and its insurance carrier responsible for the medical costs of claimant's total left knee replacement and for the resulting permanent impairment?
2. If so, what is the extent of claimant's permanent impairment as measured by the *AMA Guides*¹ (4th ed.)?
3. Did respondent and its insurance carrier prove the amount of any preexisting functional impairment in claimant's left knee, which would reduce claimant's permanent disability benefits under K.S.A. 44-501(c)?
4. Should claimant be required to apply for additional medical treatment or should claimant be authorized to consult his knee surgeon annually for a period of five years without applying to the Division of Workers Compensation?

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the December 6, 2004, Award should be modified to allow claimant to consult with his knee surgeon on an annual basis for five years without first applying to the Division of Workers Compensation.

Claimant fell and injured his left knee on December 11, 2001, while working for respondent. The parties agree the accident arose out of and in the course of claimant's employment with respondent.

In November 2003, claimant underwent a total left knee replacement, which claimant contends was the natural consequence of his December 2001 work-related accident. Consequently, claimant argues respondent and its insurance carrier are responsible for the knee replacement surgery and for his ultimate permanent disability.

But that was not the first major surgery claimant underwent on his left knee. In 1976 claimant fell from a cooling tower and underwent reconstructive knee surgery. Consequently, respondent and its insurance carrier contend the total left knee replacement was the natural consequence of the 1976 injury and, therefore, they argue they should not be held responsible for the costs of the knee replacement surgery or the resulting disability.

As indicated above, the principal issue in this appeal is whether claimant's December 11, 2001, accident either permanently aggravated the preexisting arthritis in his left knee or accelerated the need for a total joint replacement.

The history surrounding claimant's 1976 injury and his recovery is all-important. Following the 1976 accident, claimant missed approximately five or six months of work as the surgeon placed claimant's left knee in a cast, followed by a brace. Due to that injury, claimant ultimately developed arthritis and osteoporosis in his knee.

The brace was removed from claimant's left knee in 1977. Following the brace's removal, claimant did not have any ongoing problems with his left knee and did not see a doctor for that knee until the December 2001 accident at work, when he slipped and landed on the knee.²

Claimant immediately reported the December 11, 2001, accident to respondent. That same day, respondent referred claimant to Dr. Kim Schmid for treatment. In January

² R.H. Trans. at 7.

2002, Dr. Schmid recommended a knee specialist. Eventually, in October 2002, claimant saw an orthopedic surgeon, Dr. Kenneth A. Jansson.

When respondent and its insurance carrier declined to authorize Dr. Jansson to treat claimant, claimant requested a preliminary hearing. At a November 26, 2002, preliminary hearing, claimant described how his knee was symptom-free before his December 2001 fall but symptomatic afterwards with swelling, catching, and popping.

Following the November 2002 hearing, Judge Avery authorized Dr. Peter S. Lapse to treat claimant's left knee. And in May 2003, Dr. Lapse recommended left knee surgery.

After a motion hearing on September 18, 2003, Judge Avery denied a request by respondent and its insurance carrier to terminate claimant's benefits. Conversely, by Order dated September 19, 2003, the Judge authorized Dr. Lapse to perform any medical procedure the doctor deemed related to claimant's December 2001 injury. Consequently, on November 17, 2003, the doctor performed a total left knee replacement. In the meantime, however, respondent and its insurance carrier had appealed the Judge's September 19, 2003, Order to this Board. The Board determined the medical evidence compiled as of that juncture supported the motion to terminate claimant's benefits. Accordingly, after claimant had undergone the left knee replacement surgery the Board entered its order, reversing the September 19, 2003, Order.³

Claimant's employment did not remain static following his December 2001 accident. Shortly after the accident, respondent transferred claimant from its Emporia, Kansas, store to its Manhattan, Kansas, store. Claimant became dissatisfied with respondent and in March 2002 he terminated his employment. In approximately April 2002, claimant began working as a supervisor for another employer, Caterpillar, where he worked until sometime after the November 2002 preliminary hearing. Claimant then worked for another employer, McCullough Development, as an apartment maintenance man until about May 2003. And from August 2003 until July 2004, claimant worked as a custodian for the school district that includes Manhattan, Kansas. Claimant later left the school district to work for Kansas State University where he trained custodians and where he was employed at the time of the August 30, 2004, regular hearing.

Claimant's attorney hired orthopedic surgeon Dr. Sergio Delgado to evaluate claimant. The doctor examined claimant in early March 2004 and rated claimant as having a 37 percent left lower extremity impairment due to the left total knee replacement under the *AMA Guides* (4th ed.). Believing claimant did not have any significant problems with

³ *Harris v. Wal-Mart*, No. 1,005,224, 2003 WL 23172905 (Kan. WCAB Dec. 16, 2003).

his left knee following the 1976 surgery, the doctor did not believe claimant had any preexisting functional impairment in that joint before his December 2001 accident at work.

Nevertheless, at Dr. Delgado's deposition respondent and its insurance carrier produced a copy of a June 30, 1997, medical report authored by the doctor. That medical report reflected the doctor's findings from a June 1997 evaluation of claimant's back. But the report also mentioned occasional left knee swelling. The report reads in pertinent part:

He presently complains of persist [*sic*] low back pain with episodes of aching, stabbing and numbness in the back and occasional spasm. He complains of numbness into the legs above the knees. He complains of pain in the heel related to activities. **He has had a swollen knee in the past on the left. He had knee surgery 15-16 years ago for "ligament injuries" while at Penn Valley Community College and had his surgery at St. Luke's Hospital in Kansas City, Missouri.** He continues [to] take anti-inflammatories occasionally.

. . . **He continues to complain of knee swelling on the left on occasions.** . . .⁴
(Emphasis added).

It is not clear, however, whether Dr. Delgado meant claimant occasionally took anti-inflammatories for his left knee or for his back as the doctor concluded his report by recommending that claimant should occasionally take that type of medication whenever his back pain flared.

At Judge Avery's request, on May 17, 2004, orthopedic surgeon Dr. Mary Ann Hoffmann examined claimant for purposes of this claim. Dr. Hoffmann reviewed the X-ray Dr. Schmid took on the day of the accident and an X-ray taken 10 months later by Dr. Jansson. The latter X-ray showed the arthritis in claimant's left knee had progressed rapidly over the 10-month period between the studies. Based upon claimant's past medical records and his history, Dr. Hoffmann concluded the December 2001 fall aggravated the preexisting arthritis in claimant's left knee, making it symptomatic and requiring surgery. Included in the medical records that Dr. Hoffmann reviewed were the results from a December 10, 2001, examination by Dr. Lee Dorey, who noted claimant had neither swelling nor loss of motion in his left knee the day before the December 11, 2001, fall at work. In her May 17, 2004, report to Judge Avery, Dr. Hoffmann wrote in part:

It is my opinion that the patient did have a pre-existing problem with this knee, but that it was totally asymptomatic the day before his accident and up until his accident, and that after the accident the arthritis progressed rapidly to the point where he required a total knee replacement. Had the patient not slipped on the

⁴ Delgado Depo., Ex. 3 at 2, 3.

floor and aggravated this pre-existing problem he probably would not have undergone a total knee replacement at this early age. Therefore, it is my opinion that his permanent partial disability with regards to his knee is entirely as a result of the accident of December 11, 2001⁵

Moreover, Dr. Hoffmann concluded claimant sustained a 50 percent impairment to his left lower extremity as measured by the *AMA Guides* (4th ed.). In addition, the doctor thought claimant should be annually evaluated by his knee surgeon for the next five years.

Dr. Delgado testified that he agreed with Dr. Hoffmann's conclusions that claimant's left "knee replacement was causally related to and necessitated by his December 11, 2001 injury."⁶

To counter the medical evidence favoring claimant, respondent and its insurance carrier presented the testimony of Dr. Jansson, who is a board-certified orthopedic surgeon. Dr. Jansson, who only performs knee surgeries, saw claimant in October 2002 at respondent's insurance carrier's request. Based on X-rays the doctor had taken, Dr. Jansson concluded claimant needed a left knee replacement at that time as his left knee joint was bone on bone. The doctor reported to the insurance carrier that claimant had chronic arthritis that was probably related to his old injury. Additionally, the doctor reported that claimant's December 2001 accident did not contribute at all to the need for the total left knee replacement and that the accident did not cause any permanent impairment. Finally, Dr. Jansson advised the insurance carrier that claimant should have this matter handled outside the workers compensation system.

Board-certified orthopedic surgeon Dr. Fred Rice also testified in this claim. At respondent and its insurance carrier's request, Dr. Rice examined claimant in August 2003 and concluded claimant had moderately severe arthrosis primarily in the lateral compartment of the left knee that was entirely related to claimant's 1976 accident. Moreover, the doctor concluded claimant's December 2001 accident resulted in a direct injury to the anterior aspect of his knee and, therefore, that accident could not possibly account for more than a temporary aggravation of the preexisting arthritic condition in claimant's knee. In short, Dr. Rice agrees with Dr. Jansson's conclusions that claimant sustained a temporary contusion in the December 2001 accident that did not affect the preexisting condition in claimant's left knee. But, according to his August 13, 2003, report,

⁵ Hoffmann Depo., Ex. 1 at 3.

⁶ Delgado Depo. at 13.

Dr. Rice did not have the X-rays that were taken on the date of accident,⁷ nor the X-rays that were taken 10 months after the December 2001 accident to compare.⁸

Considering the various expert medical opinions, the Judge concluded claimant's December 2001 accident aggravated and accelerated the preexisting arthritis in claimant's knee. The Judge averaged the functional impairment ratings provided by Dr. Delgado and Dr. Hoffmann and concluded claimant sustained a 43.5 percent permanent disability to his left lower extremity. The Board, likewise being persuaded by Dr. Hoffmann's opinions regarding causation, agrees with the Judge's findings and adopts them as its own. The more credible evidence establishes that claimant had little, if any, problems with his left knee before the December 2001 fall. But afterwards, claimant's symptoms did not resolve and the arthritic condition in his left knee accelerated.

A basic premise under the Workers Compensation Act is that an accidental injury is compensable when the accident only serves to aggravate a preexisting condition.⁹ The test is not whether the accident caused the condition but, instead, whether the accident aggravated or accelerated a preexisting condition.¹⁰

In addition, the Board is persuaded by Dr. Hoffmann's opinion that claimant should be annually evaluated by his knee surgeon for the next five years. Consequently, the Award should be slightly modified to allow for those annual follow-up visits without application to the Division of Workers Compensation.

Finally, respondent and its insurance carrier failed to prove the amount of functional impairment claimant had due to his left knee before his December 2001 accident. Consequently, claimant's permanent disability benefits are not reduced as permitted by K.S.A. 44-501(c).¹¹

⁷ Rice Depo., Ex. 2 at 1.

⁸ Rice Depo. at 24, 25.

⁹ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

¹⁰ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

¹¹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

AWARD

WHEREFORE, the Board modifies the December 6, 2004, Award to grant the annual follow-up visits with claimant's knee surgeon as noted above. The remainder of the Award is affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jeff K. Cooper, Attorney for Claimant
- James B. Biggs, Attorney for Respondent and its Insurance Carrier
- Brad E. Avery, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director