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

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| **STEVEN C. HOCKMAN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket Nos. 1,010,971; |
| | ) | 1,012,108; & 1,026,199 |
| **INTERNATIONAL MULTIFOODS CORP.** | ) | |
| **and BEST BRANDS** | ) | |
| Respondents | ) | |
| AND | ) | |
| | ) | |
| **FEDERAL INSURANCE CO.** | ) | |
| **and TRAVELERS INDEMNITY CO.** | ) | |
| Insurance Carriers | ) | |

## ORDER

International Multifoods Corporation and its insurance carrier, Federal Insurance Company, appealed the June 21, 2006, Order entered by Administrative Law Judge Kenneth J. Hursh.[1] The Board placed this appeal on its summary calendar for disposition without oral argument.

## APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Jeff S. Bloskey of Overland Park, Kansas, appeared for International Multifoods Corporation (Multifoods) and its insurance carrier, Federal Insurance Company (Federal). Stephen P. Doherty of Kansas City, Missouri, appeared for Best Brands and its insurance carrier, Travelers Indemnity Company (Travelers).

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[1] The June 21, 2006, Order was entered under docket numbers 1,010,971; 1,012,108; & 1,026,199. International Multifoods Corporation and Federal Insurance Company appealed the Order under docket numbers 1,010,970; 1,010,971; and 1,012,108. It appears docket number 1,010,970 was listed in error on the application for review.

## RECORD AND STIPULATIONS

The transcript of the June 19, 2006, hearing before Judge Hursh and the exhibits presented at that hearing comprise the record on appeal.

## ISSUES

Claimant requests medical treatment for his low back. The issue presented to the Judge was whether claimant's present need for medical treatment arose from a new accidental injury claimant sustained while working for Best Brands or whether it arose as a natural consequence of earlier accidents claimant sustained while working for Multifoods, which was later purchased by Best Brands.

The request for medical treatment from Multifoods in docket numbers 1,010,971 and 1,012,108 is post-award because agreed awards were previously entered in both of those claims. But the request for medical treatment from Best Brands in docket number 1,026,199 is a preliminary hearing matter. Nevertheless, all three claims were combined for purposes of claimant's present request for medical treatment and the parties agreed the June 19, 2006, hearing before Judge Hursh would be conducted as a preliminary hearing.

In the June 21, 2006, Order, Judge Hursh determined claimant's low back injury was aggravated by the repetitive nature of his job, which he performed first for Multifoods and later for Best Brands. Nevertheless, the Judge ordered Multifoods to provide the medical treatment for claimant's low back injury. The Judge held, in part:

> In the present matter, the claimant and respondent, Multifoods, agreed to treat the claimant's back injury as a work injury occurring on August 12 *[sic]*, 2002 and July 18, 2003. The parties were aware of the progressive nature of the claimant's back injury, and the probability that it would eventually progress to require surgery, before those cases were settled by agreement, and before the employer changed to Best Brands (see Dr. Sandow's June 28, 2004 independent medical examination for a thorough history of the claimant's injuries and treatment to that point).
>
> Since there are agreed accident dates for the subject back injury, the injury shall be treated as occurring on those dates. To now start treating this matter as a repetitive injury would invite numerous problems, and serve no good purpose in administering the workers compensation act for the parties. There is presently no definable accident date for this case under the case law rules predating the 2005 amendment to K.S.A. 44-508. Since the claimant's alleged series of accidents spans the period both before and after enactment of the "new" K.S.A. 44-508, it is unclear whether

> the new law on repetitive injury accident date would apply to this case. Suffice it to say, without a long and ultimately irrelevant discussion, that in this court's opinion the new law would not apply.[2]

Multifoods and Federal contend Judge Hursh erred. They note claimant began working for Best Brands on February 18, 2005, performing the same job duties he performed for Multifoods until the change of ownership in the facilities where claimant was working. They further note claimant was continuing to perform that work through the date of his June 2006 hearing. Moreover, they argue the heavy lifting and physically demanding repetitive work that claimant performed injured or aggravated his back. And whether one utilizes the pre- or post-July 1, 2005, amendment regarding the date of accident, Multifoods and Federal contend the date of accident for claimant's repetitive back injury falls upon Best Brands. Consequently, Multifoods and Federal request the Board to reverse the June 21, 2006, Order.

Best Brands and Travelers contend the June 21, 2006, Order is correct. They first argue Multifoods and Federal failed to allege Judge Hursh exceeded his jurisdiction and, therefore, the Board lacks jurisdiction to review the June 21, 2006, Order. And if the Board reviews that order, Best Brands and Travelers argue the evidence establishes that claimant's back progressively worsened and, therefore, claimant's present back condition is the natural and probable consequence of claimant's earlier August 14, 2002, and July 18, 2003, accidents, both of which occurred when he was employed by Multifoods.

Finally, claimant contends his most recent job activities while working for Best Brands permanently aggravated his low back. But claimant also believes the Judge appropriately exercised his discretion in assessing the award against Multifoods and Federal and, therefore, the Board should affirm that decision. In the alternative, claimant requests the Board to assess the award against Best Brands and Travelers.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the June 21, 2006, Order?

2. Is claimant's present need for medical treatment the natural consequence of the earlier injuries he sustained working for Multifoods or the result of a new injury he sustained while working for Best Brands?

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[2] ALJ Order (June 21, 2006) at 2.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes the June 21, 2006, Order should be modified.

The Board concludes it has jurisdiction to review the preliminary hearing findings under K.S.A. 44-534a as the issue in the preliminary hearing against Best Brands was whether claimant sustained personal injury by accident arising out of and in the course of his employment. In addition, the Board has jurisdiction to review the post-award findings under K.S.A. 2005 Supp. 44-551(b) and the specific language of K.S.A. 2005 Supp. 44-510k(a).

Over the last 26 years claimant worked for Best Brands or its predecessors, Winchell's and Multifoods, first performing sanitation work and later unloading trucks and railcars. The job is physically demanding as it entailed climbing, stooping, bending, moving hoses weighing 25 to 100 pounds, and moving heavy machinery. Claimant described his job, in part:

> I'm the primary bulk unloader during the day time. I sample, climb up on top and sample rail cars and trucks, I deal with the railroad, I go up and down stairs a lot taking readings of bins.
>
> . . . .
>
> Climbing, stooping, bending over, hauling hoses around, unloading hoses, and moving heavy machinery.[3]

While working for Multifoods, claimant sustained at least two work-related accidents that involved his low back. Claimant initiated claims for workers compensation benefits for both accidents. And he later settled both of those claims, while reserving his right to request additional medical benefits. One of the doctors claimant saw for those injuries, Dr. Beatty, diagnosed stenosis in claimant's back, which the doctor told claimant would progressively worsen and cause increased pain. Claimant testified:

> He [Dr. Beatty] told me that, I don't remember medical terms very well, something about stenosis and that I would need surgery to correct it. And that he said that I could have surgery now or just wait. And I said, "Well, what will I wait on?" He said, "Well, the pain will get progressively worse and then eventually you'll know that you

[3] P.H. Trans. (June 19, 2006) at 8, 9.

> can't keep going and you will need surgery." And he says you can -- he says, "I can do it now or I can do it later."[4]

Following his workers compensation settlements, claimant continued working for Multifoods performing his regular job duties until sometime in February 2005, when Best Brands took over the business operations. Despite the change in ownership, claimant retained his position as the coordinating bulk unloader. And although he was able to continue performing his job, claimant would experience increasing back and leg symptoms as the workweek progressed.[5]

In mid-October 2005, claimant's left ankle gave out while he was setting a brake on a railcar. Claimant caught himself on the rung of a ladder of the railcar and briefly hung there suspended by his left arm. Claimant reported the incident to his employer and was sent to the company doctor. Although claimant was primarily seeing the doctor for his left ankle, claimant also reported symptoms in his left arm, low back and legs.[6]

Best Brands did not immediately authorize low back treatment. But eventually they authorized claimant to see Dr. Thomas L. Shriwise who, in turn, referred claimant to Dr. Mark Bernhardt. Both doctors recommended low back surgery. Despite the need for medical treatment and his progressively worsening symptoms, claimant continued to work for Best Brands and continued to perform his regular job duties through the date of his June 19, 2006, hearing.

In short, claimant's back and leg symptoms have worsened since he settled his earlier workers compensation claims. And although he notices his increased symptoms "a whole lot more with . . . activities at work,"[7] claimant does not know whether his work is aggravating his back or whether his symptoms are merely naturally progressing.

At this stage of the litigation, there is very little expert medical opinion that addresses the issue now before us. Dr. Shriwise's January 12, 2006, letter indicates claimant has lumbosacral spondylolisthesis that might be best treated with an L5-S1 fusion. But the doctor does not address whether claimant's present need for medical treatment is a natural consequence of his earlier accidents or whether it stems from repetitive trauma

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[4] *Id.* at 20-21.

[5] *Id.* at 9.

[6] *Id.* at 11.

[7] *Id.* at 22.

to his back claimant has sustained due to his regular work duties. Likewise, Dr. Mark Bernhardt's April 18, 2006, letter does not directly address the issue. According to Dr. Bernhardt, claimant's present need for surgery is due to a combination of his preexisting spondylolisthesis, aging, and *his activities beginning around 2000*. Dr. Bernhardt wrote, in pertinent part:

> After reviewing your letter and these records, it is my opinion that Mr. Hockman's spine problems predate the accident of October 17, 2005. It is my opinion that his need for surgery at this time is due to a combination of factors: His prior back condition (the spondylolisthesis), his activities beginning around 2000, and continued aging problems.
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> I do not think the need for the surgery I have recommended to him was caused by his accident of October 17, 2005. This accident may have contributed to his current symptoms, but I think the need for surgery would not have been present but for his pre-existing problems and aggravations.[8]

Unfortunately, Dr. Bernhardt does not share what activities were contributing to claimant's need for surgery.

Considering the physical nature of claimant's work, the Board finds it is more probably true than not that claimant has sustained repetitive trauma to his back while continuing to work following his earlier settlement hearings. And that repetitive trauma has continued throughout his employment with Best Brands. Consequently, at this juncture the Board finds and concludes Best Brands and its insurance carrier should be responsible for claimant's medical treatment. Accordingly, the June 21, 2006, Order should be modified to assess responsibility against Best Brands and Travelers.

**WHEREFORE**, the Board modifies the June 21, 2006, Order entered by Judge Hursh and assesses the benefits awarded against Best Brands and Travelers Indemnity Company.

**IT IS SO ORDERED.**

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[8] *Id.*, Cl. Ex. 1.

Dated this ____ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Jeff S. Bloskey, Attorney for Multifoods and Federal
Stephen P. Doherty, Attorney for Best Brands and Travelers