BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICK C. JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,031,495
SOUTHWEST BUTLER QUARRY, LLC	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the November 29, 2006, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

This is a claim for a September 29, 2006, low back injury. In the November 29, 2006, Order, Judge Clark found claimant injured his low back while bending over to untie his work boot after clocking out but while still on the company's premises. The Judge reasoned that it was claimant's personal choice whether to take his work boots off at home or in the company parking lot and, therefore, claimant's injury did not arise out of his employment with respondent. Consequently, the Judge denied claimant's request for benefits.

Claimant contends Judge Clark erred. Claimant admits the pop he felt in his low back while bending over to untie his work boots in the company parking lot occurred after clocking out. But claimant argues he was required to wear safety boots as a condition of his employment and, therefore, his low back injury is related to the nature and conditions of his work. Accordingly, claimant requests the Board to reverse the November 29, 2006, preliminary hearing Order and grant him benefits.

The only issue before the Board on this appeal is whether claimant's accident and resulting low back injury arose out of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

The evidence is uncontradicted that claimant felt a pop and immediate pain in his low back on September 29, 2006, when he bent over to unlace his work boot at the end of his workday. The issue presented to the Judge was whether the injury was traceable to claimant's work or more traceable to an activity of daily living. After considering *Johnson*[1] and *Anderson*,[2] the Judge found the facts were more akin to the former. The Judge reasoned:

> Two published opinions are controlling: Anderson v. Scarlett Auto Interiors, 31 Kans. App. 2d 5, and Johnson v. Johnson County, Kansas Court of Appeals 93,466.
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> In Anderson v. Scarlett Auto Interiors, the Claimant's job required him to get into and out of automobiles twenty to thirty times a day. He filed a claim when he injured his back entering a Chevrolet Suburban.
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> The Court of Appeals held:
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> > "Anderson's situation is distinct from that of the [claimants] in Martin and Boeckman[n], because his injury followed not only from his personal degenerative conditions but from a hazard of his employment, i.e., the requirement that he constantly enter and exit vehicles. The Kansas Supreme [C]ourt has stated that an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment. Siebert v. H[o]ch, 199 Kan. 299, 304, 428 P[.]2d 825 (1967). If Anderson had not been employed as he was, he would not have been equally exposed to the risk that ultimately caused his injury."
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> Anderson's claim was held to be compensable.

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[1] *Johnson v. Johnson County*, ___ Kan. App. 2d ___, 147 P.3d 1091, *rev. denied* ___ Kan. ___ (2006).

[2] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

In Johnson v. Johnson County, the Claimant injured her knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead.

The Court of Appeals in reversing the Workers Compensation Board held:

> "The Board held here that Johnson's [']injury [. . .] is distinguishable from both Martin and Boeckman[n][,'] but in our opinion these cases are persuasive authority to deny compensation. Martin and Boeckman[n] demonstrate the well[-]established rule that when an injury occurs at work, it is not compensable unless it is 'fairly traceable to the employment', as contrasted with hazards to which a worker 'would have been equally exposed apart from the employment'. Siebert v. Hoch, 199 Kan. 299.

An injury is compensable only if the employment exposed the worker to an increased risk of injury. Anderson v. Scarlett.

> "The language of K.S.A. 44-501(a) and K.S.A. [2002] Supp. 44-508(e) shows that injuries caused by or aggravated by the strain [or] physical exertion of work do not arise out of employment if the strain or physical exertion in question is [a] normal activity of day-to-day living. . .
>
> Substantial evidence did not support the Board's finding that Johnson's act of standing up from a chair to reach for something was not a normal activity of day-to-day living." Johnson v. Johnson County.

Anderson entered and exited vehicles twenty to thirty times a day. Johnson stood up to reach for something.

Patrick Johnson put his boots on prior to reporting to work for the Respondent and took them off after work. Whether he did this at home or in the company parking lot was a personal choice of his. Also, he did not put his boots on and off twenty to thirty times a day.

These facts are more akin to Johnson v. Johnson County than to Anderson v. Scarlett Interiors.

This Court finds that the Claimant's injuries did not arise out of the course of his employment with the Respondent.

The Claimant's request for benefits are denied.[3]

Based upon the evidence presented to date, the undersigned agrees with, and adopts, the Judge's analysis. In short, the risk claimant encountered to untie his work boot was not increased due to his work.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the November 29, 2006, Order entered by Judge Clark is affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2007.

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BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

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[3] ALJ Order (Nov. 29, 2006) at 1, 2.

[4] K.S.A. 44-534a.