

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

<b>PATRICIA M. JOHNSON</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>KENNEL-AIRE</b>	)	
Respondent	)	Docket Nos. 1,030,647
	)	1,031,621
AND	)	
	)	
<b>FIRSTCOMP INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the November 28, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

The Administrative Law Judge (ALJ) denied the claimant's request for medical treatment and temporary total disability benefits after he concluded the claimant's need for medical treatment was due to her May 1, 2006 accident which he determined did not arise out of her work activities. And although the claimant went on to suffer a subsequent injury to that same knee on October 5, 2006 which was apparently compensable, the ALJ determined claimant's need for treatment and restrictions stemmed from her earlier non-compensable injury. Therefore, the claimant was not entitled to the requested benefits.

The claimant requests review of this decision alleging that she sustained a work-related injury to her right knee on May 1, 2006 while walking down steps, and that she provided timely notice of that event to her supervisor. And independent of that accident, she sustained a second accident on October 5, 2006, which further aggravated her right knee condition and increased her symptoms. So, regardless of whether the ALJ was correct in his analysis regarding the initial May 1, 2006 accident, the second accident is compensable as it was an aggravation. Thus, claimant maintains the ALJ's Order should be reversed.

Respondent argues that the ALJ's order should be affirmed and the claimant's request for temporary total disability and medical treatment be denied. Respondent asserts that claimant's May 1, 2006 injury was not work-related as it occurred when she was merely walking back to her workstation following her lunch break. Respondent further contends the claimant failed to provide notice of that injury, and argues that claimant's alleged subsequent injury in October 2006 is made solely for retaliatory purposes.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant is a production worker in respondent's manufacturing facility. This job requires claimant to stand from 7:00 a.m. to 3:30 p.m., except during her regularly scheduled breaks and her lunch period. In May 2006, claimant's assignment was as a packer, which involved running a machine, taking items off of a conveyor belt, trimming the items and putting them on a pallet.

Claimant testified that on May 1, 2006 she was returning to work after her lunch break, and as she was coming down a flight of metal stairs from the break room, with one hand on the handrail and the other holding her water jug (which also held some of her work tools) she stepped off the last step and onto the ground turning and twisting her right knee.<sup>1</sup> She immediately felt a burning sensation in her right knee. She was able to work the remainder of her shift, but continued to feel a burning sensation and her knee began to swell. Claimant testified that she informed her supervisor, Jeff, but was neither offered, nor sought medical treatment at that time. This testimony is uncontroverted.

About two days later the claimant went to talk to Joan Fisher in Quality Control and informed her of what happened and showed Ms. Fisher her swollen knee. No paperwork was filled out, but the claimant was urged to see a doctor. No formal recommendation or referral was provided. Claimant continued to work. In mid June, the claimant called and talked to Lisa Simmons in human resources, who instructed her to come in and fill out some paperwork and was thereafter sent to the hospital. She was examined and given restrictions. Eventually she was referred to Dr. Kenneth Wertzberger, an orthopaedic surgeon. Following an examination, Dr. Wertzberger diagnosed a lateral meniscus tear as well as some degenerative changes and chondromalacia patellae. He recommended surgery and in the meantime, instructed claimant to limit her lifting to no more than 25 pounds and to do no repetitive bending, stooping, climbing, and no kneeling or squatting. These restrictions were not honored and claimant continued working full duty. Claimant

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<sup>1</sup> This accident forms the basis for Docket No. 1,030,647.

was notified that her injury was considered non-compensable and was denied by respondent's carrier.

While the claimant was waiting for her preliminary hearing, she alleges another injury occurred to the same knee on October 5, 2006.<sup>2</sup> While working her regular shift moving cereal boxes on a pallet, claimant stooped over and bent her knee. As she did this, claimant testified she felt and heard a snap in her knee followed by a burning in her knee. Claimant describes this pain as worse than it had ever been and since that time, it has continued to hurt and burn more than just the ache she had previously experienced after the May 1, 2006 accident. A day or so later claimant told a co-worker about this most recent accident and thereafter informed a supervisor. Claimant later filled out some paperwork and was sent to the hospital. She was evaluated by Dr. Gollier, who provided her with work restrictions. He also referred her to Dr. Geist who, on November 14, 2006, recommended surgery to address the torn lateral meniscus. Dr. Geist related claimant's need for surgery "most likely" to the May 1, 2006 accident, although he performed no new diagnostic tests and relied primarily upon claimant's recitation of events.

Respondent laid claimant off as of November 1, 2006 and she has not worked since that time.

The ALJ reviewed the evidence and denied claimant's request for benefits. He concluded that "[t]he claimant's need for medical treatment, and any work restrictions that the claimant may be subject to, are due to the May 1, 2006 lateral meniscus tear, which was not a work-related injury."<sup>3</sup> But he also acknowledged that the October 5, 2006 "incident may have caused a marginal increase in the claimants' right knee symptoms, but did not change the nature of the previous injury, or create a need for medical treatment that did not already exist from the previous injury."<sup>4</sup>

This Board Member has reviewed the record and concludes the ALJ's preliminary hearing Order should be reversed. As for the first injury, this Board Member believes claimant sustained a compensable injury.

K.S.A. 2005 Supp. 44-508(d) defines "accident":

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not

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<sup>2</sup> This accident forms the basis for Docket No. 1,031,621.

<sup>3</sup> ALJ Order (Nov. 28, 2006) at 2.

<sup>4</sup> *Id.*

to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2005 Supp. 44-508(e) defines “personal injury” and “injury”:

“Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The foregoing statute, which defines “injury” excludes “normal activities of day-to-day living” from being found to have been caused by the employment.

Unfortunately, the Act does not define the phrase “normal activities of day-to-day living.” Attempting to provide that phrase with a reasonable interpretation, the Board has previously held that K.S.A. 44-508(e) is a codification of the *Boeckmann*<sup>5</sup> decision where the Kansas Supreme Court denied benefits as Mr. Boeckmann’s arthritic condition progressively worsened regardless of his activities.

Here, claimant advances a persuasive argument that the initial injury on May 1, 2006 is fairly traceable to her work activities and otherwise not an activity of day to day living. Claimant was carrying a water jug and some work tools, while walking down a set of metal stairs which she was required to navigate each day she went to and from the break room. As she stepped from the last step onto the floor, she twisted her knee, suffering injury. Claimant testified that other than a few steps in and out of her home, she does not regularly go up and down stairs, other than this flight of stairs at work.

Under these facts and circumstances, this Board Member concludes that claimant’s May 1, 2006 knee injury did indeed result in an accidental injury that is related to her work activities. While claimant may, in certain situations, walk up and down a few steps outside of work, her uncontroverted testimony is that she was carrying a water jug *and work tools*, and *navigating a flight of metal steps she was required to use to access the lunch room*. These facts take this scenario outside the “day to day” living exception and confer the benefits of workers compensation. And as such, the ALJ’s preliminary hearing Order is reversed as to the finding that the May 1, 2006 accident was not compensable because it did not have a causal relationship to claimant’s work activities.

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<sup>5</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

The ALJ concluded that claimant provided timely notice of the May 1, 2006 accident and that finding is affirmed. As noted by the ALJ, “claimant did testify without contradiction that she reported the alleged injury in a timely fashion.”<sup>6</sup>

Turning now to the October 5, 2006 accident, the ALJ appears to have concluded that it was otherwise compensable, but because claimant’s diagnosis and treatment recommendations were the same as from the earlier accident, she was not entitled to any benefits under the Kansas Workers Compensation Act (Act). But the ALJ also acknowledged that claimant “may have” experienced “a marginal increase in the claimant’s right knee symptoms”.<sup>7</sup> Indeed, it is uncontroverted that claimant’s symptoms *did* increase markedly following the October 5, 2006 accident. And this Board Member has no difficulty concluding claimant suffered an aggravation of her condition on October 5, 2006.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>8</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>9</sup>

Here, claimant testified that her symptoms increased immediately following the October 5, 2006 accident. Although respondent characterizes this second accident as something claimant manufactured in the face of respondent’s denial of her first claim, this Board Member is not so persuaded. There is no suggestion in the record that claimant was doing anything other than her assigned job duties, or that the accident she described did not happen as she says. Given the factual conclusion that claimant sustained an aggravation of her right knee condition, claimant is entitled to the benefits under the Act. Thus, independent of the compensability of her first injury, she is likewise entitled to benefits for her second injury to that same body member.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>10</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

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<sup>6</sup> ALJ Order (Nov. 28, 2006) at 1

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>9</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

<sup>10</sup> K.S.A. 44-534a.

permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 28, 2006, is reversed and remanded for proceedings not inconsistent with the findings made herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2007.

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BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge