

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

TODD HIGGINS)	
Claimant)	
)	
VS.)	
)	
UNITED PARCEL SERVICE, INC.)	
Respondent)	Docket No. 1,032,172
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 21, 2007, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Mark E. Kolich, of Lenexa, Kansas, appears for claimant. Stephanie Warmund, of Overland Park, Kansas, appears for respondent.

The ALJ ordered respondent to pay claimant temporary total disability compensation and to provide medical treatment to claimant. The ALJ did not make any findings of fact or conclusions of law, but because he awarded benefits, by implication the ALJ found that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent.

The Board considered the same record as the ALJ. It consists of the transcript of the February 20, 2007, Preliminary Hearing and the joint Exhibit 1 introduced at that hearing, together with the pleadings contained in the administrative file.

By statute, preliminary hearing findings, conclusions and orders are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as

¹ K.S.A. 44-534a.

permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to having been determined by the entire Board, as it is when the appeal is from a final order.²

ISSUES

Respondent denies that claimant sustained an injury that arose out of and in the course of his employment. Claimant was simply walking when he pivoted from the sidewalk to the driveway, and he felt a pop in his right knee. Respondent argues that claimant's walking and pivoting are part of his normal activities of day-to-day living and, therefore, his injury was not directly caused by his employment.

Claimant argues that he was not merely walking when his injury occurred but that he had stepped down with his right foot in an awkward position. Further, claimant was wearing work boots which did not allow his ankle to rotate after the foot was awkwardly planted, imparting unnatural force to the knee. Accordingly, claimant contends his injury was incidental to his employment, and the Order of the ALJ should be affirmed.

The issue for the Board's review is: Did claimant's disability result from the normal activities of daily living?

FINDINGS OF FACT

Claimant began working for respondent as a delivery driver's helper on November 20, 2006. On November 22, 2006, claimant had made a delivery and was walking back to his truck, empty-handed. He walked down the sidewalk and, at the point where the sidewalk met the driveway, made a "transition" off the sidewalk.³ When making the transition to the driveway, he put his right foot down awkwardly. At that point, he felt and heard a pop and felt immediate pain in his right knee. There were no steps at the point where the incident occurred, no areas of concrete disrepair, and no ice or snow in the area. Claimant did not trip, slip, or fall.

Claimant had been told that work boots were required for the job and, on the day of his accident, he was wearing heavy duty work boots that extended two or three inches above his ankle. He believes that when he stepped down and tried to make the turn onto the driveway, the ankle did not move because it was supported by the boot, which caused the knee to pop. He now uses crutches periodically. Claimant has not worked since his injury.

² K.S.A. 2006 Supp. 44-555c(k).

³ P.H. Trans. at 8.

Claimant had surgery in 2000 for an irregular cartilage growth in his right knee. He had a good result from this surgery. When he started working for respondent, his knee was in good condition.

Claimant acknowledged that he walks outside of work, such as walking down the driveway to get the newspaper. When walking while not at work, he likewise turns, pivots, and transitions. He also admitted that he could not recall if he was told to wear work shoes or work boots, and that he did not purchase his boots for work but was wearing a pair he previously used to go bird hunting.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.⁶

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.⁷

In *Hensley*⁸, the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to Larson's *The Law of Workmen's Compensation*, Sec. 7.04, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work

⁴ K.S.A. 2006 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁶ See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

⁷ *Supra* note 5 at Syl. ¶ 4.

⁸ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

if claimant had not been working. Although in this case claimant did not have an unexplained fall, his accident could be described as falling into the same category of a neutral risk.

K.S.A. 2006 Supp. 44-508(d) defines “accident” in part:

"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 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. 2006 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 Kansas Supreme Court, in *Boeckmann*,⁹ denied workers compensation benefits, holding that

physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann’s disabling arthritis existed before his employment with Goodyear and that “the degenerative process will continue to progress long after his retirement.”¹⁰ The evidence was

that Mr. Boeckmann’s hip problems, or the disabilities arising therefrom, were caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant’s underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .

⁹ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl. ¶ 2, 504 P.2d 625 (1972).

¹⁰ *Id.* at 736.

....

. . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.¹¹

Similarly, in *Martin*,¹² the Kansas Court of Appeals held that “[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable.”

More recently, the Kansas Court of Appeals in *Johnson*¹³ held:

In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that “Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that “[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.”¹⁴

ANALYSIS

The foregoing statute which defines “injury,” excludes disabilities from being found to have been caused by the employment where they are the result of the natural aging process or the “normal activities of day-to-day living”.

Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-2006 Supp. 508(e) does not exclude “accidents” that are the result of such activity, but rather excludes injuries where the “disability” is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act. There is no evidence in this case that claimant's disability is the result of a personal risk as in *Boeckmann*, *Martin*, or *Johnson*.

¹¹ *Id.* at 738-39.

¹² *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

¹³ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

¹⁴ *Id.* at 788.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Boeckmann* and *Martin*.

Claimant's job is to make deliveries. It requires a significant amount of walking. The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.¹⁵ Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."¹⁶ The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

CONCLUSION

Here, claimant's accident arose out of and in the course of his employment with respondent. His injury and resulting temporary total disability are directly attributable to that accident. Claimant was not injured because of a personal risk and is not disabled due to a personal condition as in *Boeckmann*, *Martin*, or *Johnson*. Accordingly, his disability did not result from the normal activities of day-to-day living.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 21, 2007, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

¹⁵ *Supra* note 9 at 737.

¹⁶ *Supra* note 13 at 789.