BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUSTIN BREWER Claimant	)	
VS.	)	
KINGSTON ENVIRONMENTAL SERVICES Respondent	)	Docket No. 1,035,212
AND	)	
COMMERCE AND INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 6, 2009 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard (ALJ).

ISSUES

The ALJ found that the increased instability to the claimant's left leg constitutes a compensable "aggravation and acceleration". Thus, he ordered respondent to provide the reconstructive surgery recommended by Dr. Jones.

The respondent has appealed this Order and alleges a number of errors. Distilled to their essence, respondent maintains that claimant injured his left knee in an earlier accident and that accident is the cause of claimant's present need for surgical treatment to his knee, not his accident on June 11, 2007. Alternatively, respondent argues that claimant's subsequent employment caused his need for knee surgery. Regardless of the reason, respondent asks the Board to reverse the ALJ's Order and deny claimant's request for medical treatment.

Claimant argues that the ALJ's Order is well reasoned and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

There is no dispute that claimant suffered a compensable injury to his left knee on June 11, 2007. There is also no dispute that claimant suffered a tear to his anterior cruciate ligament (ACL) and of the medial meniscus in the same knee following a motorcycle accident in 1997. But since the 1997 accident and in spite of one physician's suggestion (in 1998) that he undergo surgery to that knee, claimant experienced only infrequent problems with the knee, each time self-reducing the knee when it became immobile.

Following his June 11, 2007 accident, claimant had ongoing problems with his knee, including pain, swelling, and a more frequent locking sensation. Respondent provided both conservative treatment and ultimately surgery to repair a torn medial meniscus. According to claimant, the physician who performed surgery was authorized to repair the torn ACL as well as the meniscus but in order to treat claimant conservatively and avoid unnecessary surgery, he repaired only the meniscus, waiting to see if the ACL needed to be repaired.[1]

Claimant had physical therapy following his surgery, but more recently he has experienced pain, swelling, giving way and is unable to stand for any great length of time. Claimant's care was redirected to Dr. Lowry Jones who examined claimant on October 9, 2008.

Dr. Jones recommended that claimant undergo ACL reconstruction, a finding that is not disputed in this record. Dr. Jones has also offered the following explanation with respect to the causative aspect of claimant's condition:

> Justin has evidence of anterior cruciate instability, and mild medial instability based on a chronic anterior cruciate ligament tear and medial meniscal tear. The injury to the meniscus and ACL were well documented prior to his injury. The injury that he had on or about 6/11/2007 did result in additional tear of the medial meniscus resulting in displacement of the medial meniscus that was no longer reducible. This led then to medial meniscectomy. The resection of the medial meniscus has lead to additional instability of his left knee greater than the anterior cruciate instability alone.[2]

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[1] P.H. Trans. at 9.

[2] *Id.*, Resp. Ex. A at 14 (Dr. Jones' Oct. 9, 1008 report at 2).

The ALJ expressly concluded that the "increase in inability to the left leg constitutes an aggravation and acceleration of the member".[3] Thus, respondent was ordered to provide the requested medical treatment.

Respondent's argument makes much of the fact that claimant's knee was already injured and that surgery had been recommended. And while that is indeed true, that recommendation came in 1998. Claimant acknowledges that surgery was suggested but he also testified that his knee was getting along well and only gave him trouble sporadically. And in those instances claimant would self-reduce the knee, forcefully causing it to straighten out. He would then go about his activities with no further consequence. It was only after his June 11, 2007 accident that his knee problems became chronic and required treatment.

Respondent also argues that claimant's present work activities are somehow the source of his present knee complaints. Claimant's own testimony disputes that argument and there is no other evidence within the record to support that contention.

The treatment that was provided, in the form of surgery to repair the medial meniscus tear only addressed part of claimant's resulting knee problems. As noted by Dr. Jones, the meniscal repair gave rise to *additional* instability in the knee. It is that additional instability which is causing claimant ongoing pain, swelling and episodes of giving way while standing. And it is that instability that must be repaired. In other words, after claimant's June 11, 2007 accident he required two surgical procedures, one to repair the ACL tear and another to repair the meniscal tear. For whatever reason, the surgeon only repaired one aspect of the knee and not the other. That failure to do so led to claimant's additional instability and pain.

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.[4] 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.[5] The ALJ concluded that the additional instability constitutes an aggravation or an acceleration of claimant's underlying knee problems. This Board Member agrees.

For the reasons set forth above, the ALJ's Order is affirmed in all respects.

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[3] ALJ Order (Jan. 6, 2009).

[4] *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).

[5] *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).

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.[6] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(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 Steven J. Howard dated January 6, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

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