BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY W. MONIHEN Claimant	)	
VS.	)	
STATE OF KANSAS Respondent	)	Docket Nos. 1,037,538; 1,037,539; 1,039,292
AND	)	
STATE SELF-INSURANCE FUND Insurance Carrier	)	

ORDER

Respondent and Claimant requested review of the January 26, 2009 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on May 15, 2009.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties acknowledged that each docketed claim involves only a claim for functional impairment, two of them scheduled injuries and one of them involving the whole body.[1]

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[1] Docket No. 1,037,538 involves an alleged right knee injury. Docket No. 1,037,539 involves a body as a whole impairment. Docket No. 1,039,292 involves an alleged left ankle injury.

ISSUES

The ALJ found claimant was injured out of and in the course of his employment with respondent and awarded the following: in docket 1,037,538 (#538) 5 weeks temporary total disability (TTD) and a 12 percent impairment to the right lower leg for a right knee injury; in docket 1,037,539 (#539) a 5 percent whole body impairment[2] for a lumbar spine injury; and in docket 1,039,292 (#292) a 10 percent impairment to the left lower leg for a left ankle injury. The ALJ based her award on the opinions of Dr. Carabetta as she found his testimony to be more credible and consistent with the claimant's recitation of his present complaints.

The respondent requests review of the Awards in Docket Nos. 538 and 292 and asserts that in both claims, neither injury arose out of and in the course of claimant's employment. Rather, both the knee and ankle injuries resulted from activities of day-to-day living[3] or are injuries that are attributable to preexisting conditions. Respondent did not appeal the result in Docket #539 and suggests the ALJ's conclusion in that matter should be summarily affirmed.

Claimant also appeals the ALJ's decision. Claimant's primary argument stems from the fact that the ALJ adopted Dr. Carabetta's opinions with respect to claimant's functional impairment. Claimant argues that Dr. Zimmerman's opinions are just as credible as those offered by Dr. Carabetta, if not more so and that Dr. Zimmerman's impairment assessments should have been utilized for purposes of assigning claimant's award in each docketed claim.

In response to respondent's arguments, claimant maintains that his job conditions created an increased risk which contributed directly to his injuries. Thus, his injuries cannot be found to be the result of activities of daily living and are therefore compensable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

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[2] While the Award references a "work disability" the parties agree this claim involves only a whole body impairment and work disability is not an issue. Claimant has returned to work at a comparable wage. Thus, the reference to work disability was a typographical error.

[3] *K.S.A. 44-508(e).*

The Board finds that the ALJ's Award sets out the facts and circumstances surrounding the claimant's accidents and unless otherwise noted, that statement is adopted by the Board as its own as if specifically set forth herein.

Respondent's defense to Docket Nos. 538 and 292 are identical. In both instances respondent contends that claimant's accidents which injured his right knee and left ankle did not arise out of his employment as they were the result of activities that claimant does on a daily basis, whether at work or elsewhere.

As discussed by the ALJ, in order for a claimant to collect workers compensation benefits he must have suffered an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be 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.[4] By statute, 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.[5]

Respondent points to a recent case, *Johnson*[6], as support for its argument that both of claimant's alleged accidents, the first during the act of stepping down off a platform (#538) after cleaning a blackboard with a mop and the second several months later when pushing a wet vac on a flooded floor (#292), gave rise to injuries that were the result of normal day-to-day activities. Respondent maintains the *Johnson* Court made it clear 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." Thus, in the case of *Johnson*, a employee's act of twisting in her chair to reach for a book which resulted in a meniscal tear was not compensable. The *Johnson* Court noted that employee's history of knee problems and the medical testimony which indicated that it was only "a matter of time"[7] until this very sort of injury would happen.

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[4] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[5] K.S.A. 44-508(e).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. ___ (2006).

[7] *Id.* at 788.

Respondent points to claimant's testimony where (in Docket #538) he states that he stepped down off a platform, which was somewhere between 12 inches to 2 feet tall[8], and felt his knee give way causing him to twist and fall. In Docket #292 claimant testified he was pushing a wet vac on a floor that had been flooded with 5-6 inches of water. Respondent stridently argues that in both these instances, claimant's actions were the same as he would have performed even outside the work place. And because there is some evidence that claimant's knee had preexisting arthritic changes and because claimant had experienced other instances where his ankle had twisted before the accident at issue, this case is governed by the *Johnson* rationale and the ALJ erred in failing to conclude that both accidents did not arise out of claimant's employment with respondent.

The ALJ disagreed with the respondent's characterization of the claimant's accidents. She explained:

> Claimant did have some pre-existing conditions related to his ankle and knee. However, both medical experts who testified in this case, found that [c]laimant's conditions were worsened, aggravated and accelerated by the accident that occurred on the job and increased his disability. The present case is distinguishable from the *Martin*[[9]] case where the medical evidence was less than convincing that [c]laimant's condition was worsened by work conditions and increased his disability. In the present case, it is clear that [c]laimant's disability increased in regards to his ankle and his knee by conditions of the job. First of all, [c]laimant suffered two clearly indicated traumas that resulted in surgery having to be done to his ankle and his knee. Secondly, [r]espondent's argument that [c]laimant's knee injury could have resulted in surgery being performed on [c]laimant's knee could have just as easily been caused by stepping off a curb or going up and down steps. The court disagrees. Claimant stepped off at least a six inch platform while at work and injured his knee to the extent that it required surgery. Clearly, this is a worsening or acceleration of [c]laimant's knee condition. Claimant's ankle was injured to the extent that it required surgery after [c]laimant slipped while working in four inches of water. Working in four inches of water is not an activity of daily living and is an increased hazard related to the job.[10]

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[8] The testimony on the height of this platform varies widely. Respondent's counsel notes that claimant initially testified that the platform was 1-2 feet tall. (R.H. Trans. at 14). Claimant told Dr. Carabetta that the platform was 18 inches tall. (Carabetta Depo. at 16). Dr. Carabetta assumed the platform was only 6-12 inches in height. (Carabetta Depo. at 16-17). Respondent attempts to argue that "it is unlikely the university requires its professors to step up twelve inches to a teaching platform; university professors are not universally noted for their agility." (Respondent's Submission Brief at 2 (filed Jan. 13, 2009).

[9] *Martin v. CNH America*, 40 Kan. App. 2d 342, 195 P.3d 771 (2007), *rev. denied* 170 P.3d 443 (2008).

[10] ALJ Award (Jan. 26, 2009) at 7.

The Board has considered the parties' arguments along with the record as a whole and concludes the ALJ's conclusion that both accidents in Docket Nos. 538 and 292 arose out of the course of his employment should be affirmed. If respondent's argument and the characterization of the accidents at issue herein are to be accepted, very few accidental injuries that occur in the workplace would be compensable. In essence, the exception would have swallowed the rule.

More importantly this argument also fails to take into consideration the fact that when claimant stepped off the podium in the classroom where he was cleaning the blackboard, he was holding a mop in his hand. Certainly claimant had stepped down off such platforms in his off-work hours, but in this instance he was cleaning blackboards and turned to exit the platform while carrying a broom. The platform was, according to claimant, at least 12 inches tall and possibly as tall at 2 feet. Claimant is the only witness who is familiar with the area where his accident occurred. And he testified the platform was 12-24 inches high. Although respondent's counsel blithely offered his own speculation about the agility of college professors in the hopes of minimizing the height of this podium (and therefore making it more like a step that anyone might encounter during any given day whether at work or at home) and then even got Dr. Carabetta to engage in the same game of speculation, the greater weight of the evidence suggests that the podium where claimant was cleaning was *at least* 18 inches tall and maybe even as much as 24 inches tall. The height of this podium exceeds that which one would to expect during the course of day-to-day activities. These distinguishing facts, the act of carrying the mop and stepping down from the 12-24 inch podium make the *Johnson* rule inapplicable.

Moreover, there is no testimony in this record that suggests that claimant's meniscal tear was a foregone conclusion as in *Boeckmann*.[11] Dr. Carabetta was asked the following question:

> Q: Would Mr. Monihen not had this [knee] injury but for his pre-existing degenerative disk disease?
> A: We're speaking of the knee?
> Q: Yes.
> A: With the mechanism he described he may have with that situation possibly had the meniscal tear, but if it wasn't for the degenerative changes, the chondromalacia component really would not have been applicable.[12]

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[11] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[12] Carabetta Depo. at 60. This question was posed in connection with questions relating to the claimant's *knee*, not his back. This appears to be a misstatement during respondent's counsel's questioning as it appears he meant to say "arthritic changes".

Claimant's injury involved a compound torn meniscus. While performing surgery, the arthritic changes to a separate area of the knee, the chondromalacia, was noted and surgically addressed. Dr. Carabetta's testimony makes it clear that the tear was a consequence of the accident, but that the arthritic changes existed regardless of the accident.

While claimant had some degeneration in his knee that preexisted the accident, he had not had the ongoing problems that the claimant in *Johnson* had experienced. Claimant had been doing his janitorial work with no extended difficulties up until the date of his accident when, as he was required to do, he was cleaning the blackboards and stepped off the rather high podium and suffered an injury that required surgery. Although it might be tempting to apply the *Johnson* rationale, it is inconsistent with the purpose of the Workers Compensation Act and intent of the Legislature to deny compensation to an individual who is performing his job in the manner required under the theory that because he would have bent his knee stepping down at some point in time outside his normal work hours he no longer qualifies for compensation.

Likewise, when claimant twisted his ankle he was walking through several inches of water pushing a wet vac. He was engaged in an activity that was specific to his work for respondent. This activity can hardly be seen as an activity that one would do in their normal daily activities outside of work. Claimant had been called in on Christmas Eve to clean up rooms that had flooded. This required him to use a wet vac, pushing the machine down the hall against the weight of the water. It was a work event that directly gave rise to an injury to his ankle.

In both instances, the Board finds that the *Johnson* rationale does not compel a conclusion that claimant's disability was the result of day-to-day activities. Accordingly, the ALJ's finding that claimant's accidents in Docket Nos. 538 and 292 arose out of his employment should be affirmed.

As for respondent's argument that *Nance*[13] and *Logsdon*[14] have some applicability in this matter, the ALJ concluded they did not and the Board affirms this finding. Claimant suffered a clear and distinct injury to his right knee and although the physician identified some preexisting degeneration in the knee, there is no medical testimony within this record that would suggest that his knee injury was the natural and probable consequence of that earlier preexisting knee condition. Similarly, there is no medical evidence causally connecting claimant's December 24, 2006 accident while wet vacuuming the floors to an

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[13] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[14] *Logsdon v. Boeing Co.*, 35 Kan. App.2d 79, 128 P.3d 430 (2006).

earlier incident when he turned or twisted his ankle. Thus, respondent's arguments relating to those cases are misplaced.

Turning now to the remaining issue of the nature and extent of claimant's impairment resulting from each of the three claims, respondent and claimant both have taken issue with the ALJ's approach. In her Award, the ALJ concluded that she was more persuaded by the opinions expressed by Dr. Carabetta and therefore she assigned a 12 percent impairment to the right lower extremity (knee), 10 percent to the left lower extremity (ankle) and 5 percent to the low back. She offered no further explanation as to why she considered Dr. Zimmerman's analysis of the impairment any less persuasive. But it is the methodology employed by Dr. Zimmerman that is at the heart of the dispute in this matter.

By statute, physicians who rate claimant's for purposes of a workers compensation claim must utilize the 4th edition of the *Guides* "if the impairment is contained therein."[15] Distilled to its simplest terms, claimant maintains Dr. Zimmerman was the most thorough evaluator and complied with the mandates of the *Guides.* Therefore, the ALJ should have followed his opinions for purposes of awarding permanency. Conversely, respondent maintains Dr. Carabetta's impairment analysis complied with the *Guides* and is statutorily sufficient for purposes of the workers compensation act. Respondent specifically argues that there is no room for ambiguity or *subjective fairness* when evaluating a claimant's permanent impairment. These parties' seem to suggest that the finder of fact must choose to follow only one of the physician's opinions and that there is no room for compromise or alternative findings.

When offering up his opinions as to claimant's impairment, Dr. Zimmerman was examined as to his methodology with respect to the *Guides*. He testified to the individual measurements and tests he performed while conducting his examination. He also explained why he resorted to the range of motion model to aid him in assigning an impairment rating over the *Guides* preferred method of rating, the Diagnoses Related Evaluation (DRE). According to Dr. Zimmerman, with respect to the knee, the *Guides* require the evaluator to measure the joint space interval of the knee and because claimant could not fully extend his knee, that measurement could not be taken. Moreover, the procedure used to repair claimant's knee altered the architecture of his knee, thus Dr. Zimmerman believed the range of motion model was more suitable over the DRE approach.[16] And in utilizing that approach, he assigned a 20 percent to the knee.

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[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.) (*Guides*). K.S.A. 44-510e(a).

[16] Zimmerman Depo. at -28-29.

The same dispute erupted with respect to the ankle claim (Docket # 292) and in the low back claim (Docket # 539). In the low back claim, both doctors testified that if the DRE approach was used, claimant's impairment was 5 percent to the whole body (Dr. Carabetta) or 10 percent (Dr. Zimmerman). But Dr. Zimmerman went ahead and after employing a number of different tests during his examination he utilized the range of motion model to assign a 17 percent. According to Dr. Zimmerman, the range of motion model is to be used if the DRE injury model is not applicable or if more clinical data on the spine is needed to categorize the individual's spine impairment.[17] In other words, the range of motion model is more of a diagnostic differential tool.

Likewise, in the ankle claim Dr. Zimmerman assigned a 25 percent impairment to the lower extremity, again using the range of motion model and employing a number of measurements to justify his conclusions. Whereas, Dr. Carabetta used the range of motion model with respect to the ankle but in his deposition, he failed to take into consideration a number of findings including atrophy. And he had no x-rays to aid him in his evaluation even though the *Guides* require such a tool when utilizing the range of motion to evaluate an ankle injury.

In short, the ALJ was presented with two different evaluations of the claimant's injuries. Given the diversity in approaches, the physicians offered differing impairment opinions from one another. The ALJ chose to follow Dr. Carabetta, no doubt because he purported to follow the *Guides*. The Board has considered the record as a whole and finds her approach to be well founded. The greater weight of the evidence indicates that the DRE method of evaluation is preferred by the authors of the 4th edition of the *Guides*. Physicians who become involved in workers compensation claims are compelled to use the *Guides.* And while the approach allows for some variability and an allowance for a difference of opinion as it pertains to how to categorize any given injury, it is clear that the intent of the *Guides* (and of the Legislature in adopting that tool) was to achieve some sort of conformity. That effort is exemplified by this case.

The ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated January 26, 2009, is affirmed in all respects.

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[17] *Id* at 27.

IT IS SO ORDERED.

Dated this _____ day of June 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge