

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

DUANE EDWARDS)	
Claimant)	
)	
VS.)	Docket No. 1,038,100
)	
CITY OF MANHATTAN)	
Self-Insured Respondent)	

ORDER

Self-Insured respondent requests review of the June 15, 2008 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

At the preliminary hearing held on June 11, 2008, the claimant requested that Dr. Joseph W. Huston be designated the authorized treating physician and that a medical bill for treatment claimant received after respondent denied him further treatment be paid by respondent. Respondent denied that claimant suffered accidental injury arising out of his employment on May 10, 2007.

The Administrative Law Judge (ALJ) found claimant suffered a compensable accident arising out of and in the course of employment, designated Dr. Huston to provide medical treatment for claimant's right upper extremity, and ordered respondent to reimburse claimant for the medical bill.

Respondent requests review of whether the ALJ erred in not finding claimant's current condition was caused by a subsequent accident. Respondent further argues claimant was being provided medical care and was scheduled for additional care at the time of the hearing. Finally, respondent argues the ALJ erred in ordering a medical bill to be paid for treatment which claimant received before the application for preliminary hearing was filed.

Claimant argues that he has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment. Claimant further argues the Board does not have jurisdiction upon appeal from a preliminary hearing to address the issues of the ALJ's order for payment of a medical bill or designation of a treating physician. Consequently, claimant requests the Board to affirm the ALJ's Order.

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 has worked full-time for approximately 10 years with the City of Manhattan's traffic department. On May 10, 2007, claimant suffered an accidental injury which he described as follows:

I seen a street name that was dangling a little bit, so I got my 12-foot ladder and tried to get it up there, but the wind blew and it twisted my arm up, and that's when the pain kicked in.¹

He notified his supervisor, Bill Dickenson, the same day and was referred for medical treatment at Mercy West. Dr. Joseph Schlageck recorded a history that claimant had rolled over in bed and been awakened by a pop in his elbow followed by pain. But the pain had gone away until claimant had picked up the ladder at work. Claimant also told the doctor that he thought the pain might be related to a prior work injury he had suffered in 2006. On cross-examination, claimant testified:

Q. Now, when you went in to see Doctor Schlageck, did you tell him that your primary problem was located in your right elbow?

A. Yes.

Q. Did you tell him that your pain was about six on a scale of ten?

A. Yes, I believe it was.

Q. Okay. Did you tell him that you rolled over in bed at home that morning and felt a pop in your right elbow followed by pain?

A. Not that morning. I don't really -- I don't remember.

Q. You don't remember saying that?

A. No, I don't.

Q. I guess my question to you is, before you moved that ladder earlier that day, had you had any pain in that right elbow?

¹ P.H. Trans. at 11.

A. No.

Q. Well, why is it that Doctor Schlageck would have thought that you rolled over in bed that morning and had pain and popping in your right elbow before that?

A. I couldn't say.

Q. Now, you're not denying that you said it, you just don't remember saying it, is that what you're telling the court?

A. I don't remember saying it.²

Dr. Schlageck recommended conservative treatment for claimant's right elbow pain but noted that the condition was not related to the work injury claimant had suffered in 2006. Ultimately, claimant received physical therapy as well as a steroid injection in his elbow. The injection reduced claimant's pain in his elbow and he was apparently released from treatment in July 2007.

The doctor had initially restricted claimant from lifting 12 foot or taller ladders. As the course of treatment continued the claimant was restricted from activities where he would extend his elbow with twisting motion activities such as shoveling, wrench torquing and dumping trash. But after the steroid injection provided claimant with some pain relief the doctor released claimant to his regular duties on June 18, 2007.

The last record from Mercy West dated July 9, 2007, noted that claimant's pain was mild and while not worsening, it was not improving. Claimant was advised to try to avoid repetitive activities and heavy lifting. The report prepared by Kami Albers, a physician's assistant, provided in pertinent part:

MEDICAL DECISION MAKING: His pain stays steady at a 2-3 although he says he continues to have exacerbations with repetitive activities lasting up to four hours or more. While the injury is not worsening it is not improving at this time either. He has had a lengthy course of OT, splints, medication, and a steroid injection with only partial improvement. His pain is mild and tolerable and may be able to be controlled by permanent work restrictions. The other option would [be] returning him to work and waiting for another exacerbation to occur or considering a consult with a specialist. The case will be discussed with Dr. Schlageck and the City before determining how to proceed. The patient will be notified of this decision once it is made. F/U will be PRN until then and he will continue Motrin and ice PRN discomfort. He should continue to try and avoid repetitive activities and ask for help with heavy lifting when needed.³

² *Id.*, at 23-25.

³ *Id.*, Resp. Ex. A at 12.

Claimant testified that he did not know if he was released from treatment with Dr. Schlageck because he never got better but he was not told to come back for treatment. Claimant further testified that he was told to take it easy on the right arm and use his left arm more if he could.

Claimant continued working and tried to follow the recommendation that he not use his right arm too much. As claimant continued working he noted his pain got a little worse. Finally the pain in his elbow increased to the level that he requested further medical treatment in November 2007. Claimant attributed the exacerbation to pounding sign posts and carrying items as well as using a ratchet. He testified:

Q. What was the reason that you had increased pain in your arm?

A. I believe from working out there pounding in posts and carrying. I never touched a 12-foot ladder anymore, but I was up there pounding the signs and using a ratchet all the time. I believe that's what it was.⁴

Respondent denied claimant's request for additional medical treatment and claimant was told his case was closed. Claimant then sought medical treatment with his personal physician and in December 2007 received another steroid injection in his right elbow which provided pain relief for about a month or two.

Claimant was referred to Dr. Huston by his attorney. The doctor examined and evaluated claimant on January 8, 2008. Dr. Huston diagnosed claimant as having extensor tendonitis and epicondylitis of the right elbow and forearm. The doctor recommended a cortisone injection with ultrasound and if conservative treatment fails, then surgical treatment might be considered. He further opined claimant's repetitive gripping and lifting with the right hand and arm should be limited.

Respondent argues claimant did not seek medical treatment nor have problems after he was released from treatment on July 9, 2007. Consequently, respondent further argues claimant had a separate discrete injury in November 2007 when he suffered a worsening of his condition while pounding sign posts into the ground. Conversely, claimant argues he had an initial accident with no relief from the pain and continued working wherein he aggravated his injury.

The claimant has met his burden of proof to establish that he suffered injury to his right upper extremity on May 10, 2007, when the ladder he was carrying twisted in the wind. Respondent, in its brief to the Board, does not dispute that injury but argues claimant suffered a new distinct injury while pounding sign posts into the ground in November 2007.

⁴ *Id.*, at 35.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*⁵, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.⁶

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.⁷

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*⁸, the Court attempted to clarify the rule:

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In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁶ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁷ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

⁸ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig*⁹, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*¹⁰, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In *Logsdon*¹¹ the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

The claimant testified that although the pain in his right elbow subsided after the steroid injection, nonetheless, it would be exacerbated by work activities. As he continued working the pain in his right elbow, which had lessened after the shot, returned and increased which led claimant to again seek treatment. The medical records from Mercy West corroborate claimant's testimony that work activities exacerbated his condition. And the final medical record dated July 9, 2007, specifically noted that although the condition was not worsening it was not improving. And it was further specifically noted that one treatment option would be for claimant to return to work and wait for another exacerbation. That is what ultimately occurred. Claimant noted that as he continued working his condition stayed the same with a little worsening. Consequently, it cannot be said his condition ever fully healed.

There is often a fine line between mere exacerbation of symptoms and an aggravation such that there would be a new accidental injury for purposes of workers compensation. This Board Member finds that claimant's continued employment, though perhaps a factor in claimant's increased symptoms, was not an intervening injury. Claimant's condition simply had never fully resolved and, therefore, is compensable as a direct and natural consequence of his original injury. Accordingly, respondent should

⁹ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

¹⁰ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

¹¹ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

remain liable for claimant's ongoing medical treatment as a result of the work-related injury on May 10, 2007. The ALJ's Order finding claimant suffered a work-related accidental injury is affirmed.

Respondent next argues that the ALJ erred in ordering respondent to pay a medical bill that was incurred after respondent declined claimant's request for further treatment but before claimant filed his application for preliminary hearing.

This is an appeal from a preliminary hearing. At this juncture of the proceeding, the Board does not have jurisdiction to review that issue. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.¹²

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment and the payment of medical compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Accordingly, the issue of whether the ALJ erred by ordering authorized medical treatment and medical bills to be paid by respondent is not subject to review under the preliminary hearing statute, K.S.A. 44-534a. In addition, the issue is not subject to review under K.S.A. 44-551(i)(2)(A), which permits review of preliminary orders that exceed an ALJ's authority. Thus, the ALJ did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding medical compensation.

Respondent further argues it was an error to designate a treating physician when medical care had been provided claimant. This Board member disagrees. Claimant had been provided medical treatment with Dr. Schlagek. But when claimant sought additional

¹² See K.S.A. 2006 Supp. 44-551.

treatment in November 2007, his request was denied and he was told his case had been closed. Claimant then sought treatment on his own and filed an application for preliminary hearing seeking additional treatment.

Consequently, the ALJ's Order in this case does not exceed the ALJ's jurisdiction. K.S.A. 44-534a provides that the ALJ at a preliminary hearing may award medical treatment at respondent's expense. The authority to order medical treatment includes the authority to require that treatment be provided with a specific provider. Although the respondent does, in the first instance, have authority to designate the authorized treating physician, when the respondent does not do so and medical care is ordered as a result of a preliminary hearing, the ALJ may either direct that the respondent choose a physician or, in the alternative, may designate the physician requested by the claimant or from whom claimant has already obtained treatment. This Board Member finds respondent has not raised a jurisdictional issue and this portion of the appeal is dismissed.

This Board member is mindful that claimant was scheduled to meet with Dr. Fevurly at respondent's referral at a date after the preliminary hearing. But from this record it is unclear whether it was a referral for treatment or an independent medical examination. Moreover, respondent did not argue at the preliminary hearing that medical treatment was being provided, consequently the argument that respondent should designate the treating physician was not raised as an issue before the ALJ at the preliminary hearing.

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.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated June 15, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2008.

HONORABLE DAVID A. SHUFELT

¹³ K.S.A. 44-534a.

¹⁴ K.S.A. 2007 Supp. 44-555c(k).

BOARD MEMBER

- c: Jeff K. Cooper, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Administrative Law Judge