

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

DOUGLAS A. SIMRELL)	
Claimant)	
)	
VS.)	Docket No. 1,040,750
)	
WESTAR ENERGY, INC.)	
Self-Insured Respondent)	

DOUGLAS A. SIMRELL)	
Claimant)	
)	
VS.)	
)	
JF ELECTRIC, INC.)	
Respondent)	Docket No. 1,040,751
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Self-insured respondent, Westar Energy, Inc., requests review of the August 12, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained an accidental injury arising out of and in the course of employment on February 24, 2006, while working for Westar Energy, Inc. (Westar). The ALJ ordered Westar to pay temporary total disability benefits and authorized Dr. Robert L. Eyster as claimant's treating physician.

Westar requests review of whether the ALJ erred in finding that Westar, and not JF Electric, was liable for paying claimant's benefits. Westar argues that claimant's injury on February 24, 2006 resolved within a month and claimant was released back to regular

duties. Westar further argues that claimant suffered another accident on May 28, 2008, while working for JF Electric and therefore JF Electric is responsible for claimant's benefits.

JF Electric argues that claimant's current complaints are a natural and probable consequence of his injuries sustained at Westar. JF Electric further argues that claimant's injuries had never fully healed and any subsequent aggravation is a natural consequence of the original injury.

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:

On February 24, 2006, claimant was standing on a ladder when he fell 8-9 feet to the ground landing on his left elbow. He injured his neck and shoulder. Medical treatment was provided by Dr. Davis on the date of accident. Dr. Davis ordered x-rays, physical therapy and light-duty restrictions. Westar provided light-duty work to claimant for approximately two weeks. He was then released to full duty on March 16, 2006.

On January 27, 2007, claimant was walking in a back yard, slipped on ice and then tried to catch himself when he heard his back pop. He had instant pain in his low back. Claimant advised his supervisor of the incident and then sought medical treatment. He worked light duty and then was released to full duty on April 3, 2007. But claimant still had pain in his back and neck. Claimant's last day worked was April 4, 2007, when he resigned to go to work for a different employer.

On April 3, 2007, claimant was examined by Dr. Robert L. Eyster. The doctor noted that an MRI of claimant's cervical spine indicated significant degenerative change at C5-6 and 6-7. The doctor opined that there was probably neural foraminal impingement of the nerves that go into the neck and down the left arm. The doctor noted the treatment options were an epidural injection followed by physical therapy or a surgical procedure with fusion of the two disc levels involved. But claimant did not want surgery at that time.

After leaving respondent's employment, claimant worked as a foreman for a couple of months for Tiede's Line Construction. His job duties were mostly paperwork which claimant was able to do. Claimant testified his back and neck continued to hurt but didn't get any worse. He left Tiede's to go to work for JF Electric which lasted only two weeks. Claimant then went to work for Par Electric for about a year. He began working as a lineman but transferred to a foreman's job because he was not able to do the lineman's work. Claimant then returned to work for JF Electric on May 19, 2008.

While climbing a pole on May 28, 2008, claimant felt his back "pop" and experienced pain in his back with numbness into his foot. Claimant then again sought treatment with Dr. Eyster on May 29, 2008. It is interesting to note that no mention is made of back pain

or foot numbness in Dr. Eyster's record of the May 29, 2008 office visit. Instead the doctor noted claimant complained of increased neck pain referred to the left arm. But claimant testified that he was told not to worry about the back and instead to concentrate on the neck. The doctor noted claimant had repetitive flare-ups of the neck pain which had not responded to epidurals. The doctor took claimant off work and recommended referral to a neurosurgeon for a surgical evaluation.

Claimant testified that after his injuries while working for Westar his pain never improved and that he continued to take pain medication in order to continue working. And he did not want surgery because it scared him and he thought he was tough enough to avoid that treatment option. But his pain has worsened to the point that he now feels he has to have something done.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.¹ The Board acknowledges that where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause, it would not be compensable.²

In *Jackson*³, 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.⁴

¹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

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

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁴ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

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.

In *Gillig*⁵, 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*⁶, 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*⁷ 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 described injuries to his neck and back. Although claimant received treatment and was released it was because he thought he could tough out the pain as he continued working. And the physical therapy for his neck had caused increased pain so he was not pleased with the results of the treatment he was provided. However, he continued to take pain medication in order to continue working and for the most part he performed foreman jobs which enabled him to continue working for about a year. But as he continued working his pain reached the point that he returned for additional treatment with Dr. Eyster. Claimant noted he returned to Dr. Eyster because that doctor had initially treated him for his injuries at Westar and he felt his pain was due to those injuries and not any work he had done since that time.

Based upon the record compiled to date, this Board Member finds, simply stated, that claimant's underlying injuries suffered while working for Westar had not healed. Then as he continued working his neck and back pain worsened. This subsequent worsening

⁵ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁶ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

⁷ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

and aggravation is compensable as a natural consequence of the original injuries. Therefore the ALJ's Order is affirmed.

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.⁸ 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.⁹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 12, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Terry Torline, Attorney for Westar Energy, Inc.
Andrew D. Wimmer, Attorney for JF Electric, Inc. & Liberty Mutual Ins. Co.
John D. Clark, Administrative Law Judge

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2007 Supp. 44-555c(k).