BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS ALLEN SIMRELL Claimant VS. **WESTAR ENERGY, INC.** Self-Insured Respondent	)	Docket No. 1,040,750
DOUGLAS ALLEN SIMRELL Claimant VS. **JF ELECTRIC, INC.** Respondent AND **LIBERTY MUTUAL INSURANCE CO.** Insurance Carrier	)	Docket No. 1,040,751

ORDER

STATEMENT OF THE CASE

Respondent Westar Energy, Inc., (Westar) requested review of the October 29, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. James R. Roth, of Wichita, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas, appeared for self insured respondent, Westar. Andrew D. Wimmer, of Kansas City, Kansas, appeared for respondent JF Electric, Inc., and its insurance carrier (JF Electric).

The Administrative Law Judge (ALJ) denied the request of Westar Energy, Inc., to order claimant's workers compensation benefits assessed against respondent JF Electric.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 28, 2008, Preliminary Hearing and the exhibits; the transcript of the August 12, 2008, Preliminary Hearing and the exhibits; and the transcript of the deposition of Douglas Allen Simrell taken July 23, 2008; together with the pleadings contained in the administrative file.

ISSUES

Westar argues that the claimant failed to sustain his burden of proving that his need for medical treatment and temporary total disability compensation was caused by an injury at Westar and requests that the Board find that claimant's need for treatment was caused by aggravations and a specific accident that occurred during his employment with JF Electric.

JF Electric argues that claimant was not fully healed from his injuries at Westar during the period he worked for JF Electric and any subsequent aggravation is a natural consequence of his original injuries. Accordingly, JF Electric requests that the preliminary hearing Order of October 29, 2008, be affirmed.

Claimant notes that no party has argued that he should not receive medical treatment, have his medical bills paid, or receive temporary total disability compensation and, therefore, only requests a quick decision holding the appropriate respondent responsible.

FINDINGS OF FACT

A previous preliminary hearing was held in this case on August 12, 2008, after which the ALJ found that claimant sustained an accidental injury that arose out of and in the course of his employment with Westar. Westar was ordered to pay claimant temporary total disability benefits, and Dr. Robert L. Eyster was authorized as claimant's treating physician. The ALJ's preliminary hearing Order of August 12, 2008, was appealed to the Board and was affirmed by a Board Member on October 27, 2008.[1] The findings of fact and conclusions of law set out in the Board's Order of October 27, 2008, are incorporated herein as though set out in full.

A second preliminary hearing was held on October 28, 2008, on Westar's request to have the responsibility for payment of the workers compensation benefits assessed against JF Electric, in whole or in part. No testimony was taken at the October 28 hearing, but Westar introduced two exhibits. One exhibit was a statement signed by Dr. Robert Eyster that states:

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[1] *Simrell v. Westar Energy, Inc.* and *JF Electric, Inc.*, Docket Nos. 1,040,750 and 1,040,751, 2008 WL 4857937 (WCAB Oct. 27, 2008).

> [I]t is my opinion that [claimant] suffered an aggravation of a preexisting condition to his low back and neck while performing the job duties of a lineman for JF Electric between May 21, 2008, to May 29, 2008. It is also my opinion that [claimant's] current need for medical treatment was caused by the aggravations/injuries he sustained while employed by JF Electric.[2]

Westar's second exhibit is a medical report of Dr. Paul Stein dated September 18, 2008. In that report, Dr. Stein opined that claimant sustained a work-related injury to his neck on February 24, 2006, while working for Westar, as well as a work-related injury to his lower back on January 27, 2007. Claimant told Dr. Stein that those symptoms never went away. Claimant left his employment with Westar and worked for other employers, the most recent being JF Electric. Dr. Stein stated:

> In terms of causation, the primary structural injuries occurred at Westar but there was symptomatic aggravation during employment in 2008 at JF Electric. I cannot determine that there was a structural change in his neck or lower back as a result of the activity at JF Electric. . . . The current need for treatment is primarily related to the injuries at Westar with some lesser component from the activity at JF Electric.[3]

The ALJ denied Westar's request to have claimant's workers compensation benefits assessed against JF Electric and continued to order payment of those benefits by Westar.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-508 states in part:

> (d) "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. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is

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[2] P.H. Trans. (Oct. 28, 2008), Resp. Ex. 1.

[3] P.H. Trans. (Oct. 28, 2008), Resp. Ex. 2 at 6-7.

> communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) "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.

In *Casco*,[4] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

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.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

ANALYSIS

While employed by Westar, claimant injured his neck and shoulder on February 24, 2006. He injured his low back on January 27, 2007. Claimant last worked for Westar on April 4, 2007. At that time, claimant was still symptomatic and being cared for by Dr. Eyster. In fact, Dr. Eyster had recommended a two-level cervical disc fusion as a possible treatment option. Claimant denies any worsening of his neck symptoms since leaving Westar, but claimant said he experienced an aggravation of his low back symptoms on May 28, 2008. However, Dr. Eyster's records of May 29, 2008, mention increased neck and left arm pain. The records do not mention increased back pain or foot numbness.

Now Dr. Eyster is relating claimant's current need for medical treatment for both the low back and neck to claimant's employment with JF Electric during May 21 to 29, 2008.

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[4] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

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

[6] K.S.A. 2006 Supp. 44-555c(k).

There is a contrary opinion. Dr. Stein believes claimant's current need for treatment is "primarily" due to claimant's injuries at Westar but with some contribution from claimant's subsequent work activity at JF Electric. According to Dr. Stein, however, this contribution is probably only as to claimant's symptoms and not as to the underlying structural problems. He noted that there was no change between the cervical MRI study of March 13, 2006, and that of June 23, 2008. Dr. Stein is claimant's current authorized treating physician as a result of the referral recommendation made by Dr. Eyster. The medical records are not entirely consistent with claimant's contention that his symptoms never improved after his accidents at Westar or that they did not get any worse. Nevertheless, the treatment claimant is seeking appears to be the same treatment that had been recommended while claimant was still working for Westar.

Based on the record presented to date, this Board Member is not persuaded that there has been a permanent change in claimant's underlying condition since his employment with Westar.

CONCLUSION

Claimant suffered personal injury by accident arising out of and in the course of his employment with Westar. There has been no subsequent intervening accident and injury which would relieve Westar of its duty to provide workers compensation benefits.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 29, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

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DUNCAN A. WHITTIER
BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Terry J. Torline, Attorney for Self-Insured Respondent, Westar Energy, Inc.
Andrew D. Wimmer, Attorney for Respondent JF Electric, Inc. and its Insurance Carrier
John D. Clark, Administrative Law Judge