BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PASSION DAVIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,963
DOWNTOWN DAYCARE CENTER, INC.	)	
Respondent	)	
AND	)	
	)	
FIRSTCOMP INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 3, 2008, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded medical treatment with David W. Hufford, M.D., as the authorized treating physician. The ALJ determined that claimant's right knee injury arose out of and in the course of her employment, and the fact that she was walking at the time her knee went out was negated by the fact that claimant spent 85 percent of her time at work walking. Thus, claimant's walking was more frequent and intense than the same normal activity of walking performed at home.

Claimant appeared by her attorney, Garry L. Howard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 7, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

Did claimant suffer an accidental injury which arose out of and in the course of her employment? Or did the incident while claimant was walking a child to the bathroom constitute an activity of day-to-day living, rendering it non-compensable?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was an assistant teacher at respondent's daycare, working with children aged 3 1/2 to 4 years old. On June 24, 2008, while walking children to the bathroom, claimant's right knee gave out, claimant felt a pop in the knee and she experienced immediate pain. Claimant advised her supervisor and was sent to John B. Dopps, D.C., at the Dopps Chiropractic Clinic. Dr. Dopps advised claimant that her knee was very unstable and claimant needed to go to an orthopedist for an evaluation and treatment. Claimant was then referred to orthopedic surgeon David W. Hufford, M.D., for an examination. An MRI of claimant's knee was recommended, but the examination was delayed when respondent's insurance company contested the original injury, alleging that the injury was a normal activity of day-to-day living and not compensable under K.S.A. 2007 Supp. 44-508(e).

Claimant's injury history is significant in that in 2006, claimant slid on a toy while working for respondent and injured the same knee. However, after receiving medical treatment, she returned to work and continued to perform her normal job. She did testify that she would periodically have problems with the knee, but those problems were always temporary until the incident of June 24, 2008.

Claimant agreed that on the date of accident, she did not slip on anything and was just walking a young student to the bathroom when her knee just gave out. She did testify that being on her feet was normal in this job. She spent about 85 percent of her day on her feet, helping the children with various activities.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

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[1] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the 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 if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[5]

In *Hensley*,[6] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable

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[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2007 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[6] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[7]

Respondent argues that an accident resulting from claimant's act of simply walking justifies a denial of workers compensation benefits, citing *Johnson*. In *Johnson*, the Kansas Court of Appeals found that a woman who injured her knee while simultaneously turning in her chair and attempting to stand at work did not have a compensable claim simply because she happened to be at work at the time of her injury. The court in *Johnson* cited K.S.A. 2002 Supp. 44-508(e) in support of its ruling, noting,

> . . . the definitions of "personal injury" and "injury" are linked to work and include "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."[8]

The court noted that "some injuries are not 'deemed to have been directly caused by the employment....'"[9]

Claimant counters by citing *Anderson*,[10] wherein a claimant was awarded benefits after the court determined that a back injury suffered when opening a car door while at work was compensable. The court rationalized that the claimant in *Anderson* was required to open and close doors and get in and out of those cars 20 to 30 times per day. It was the nearly constant activity of entering and exiting vehicles that made the injury in *Anderson* compensable.

This Board Member finds this situation more analogous to *Anderson* than *Johnson*. While walking may be a normal activity of day-to-day living, having to be on one's feet 85 percent of the day is not normal. Therefore, the award of benefits by the ALJ should be affirmed as claimant's injuries arose both out of and in the course of her employment with respondent.

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

[8] *Id*. at 789.

[9] *Id*.

[10] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

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.[11] 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), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that her injuries suffered while walking a child to the bathroom on June 24, 2008, did arise out of and in the course of her employment with respondent. The award of benefits by the ALJ should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 3, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

_____
HONORABLE GARY M. KORTE

c: Garry L. Howard, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

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