

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

LARENE E. WENTZ)	
Claimant)	
)	
VS.)	
)	
LOGAN COUNTY HOSPITAL)	
Respondent)	Docket No. 1,041,768
)	
AND)	
)	
TRAVELERS INDEMNITY CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the October 8, 2008, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Pamela J. Fuller. Wendel W. Wurst, of Garden City, Kansas, appeared for claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay for medical treatment to claimant's knees with Dr. Abdul Haleem until further order or until claimant is certified as having reached maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 6, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's order, arguing that claimant's knee condition did not arise out of and in the course of his employment with respondent but, instead, was the result of a preexisting degenerative condition that has been aggravated by claimant's current strenuous job.

Claimant argues that he has met his burden of proving that it is more likely than not that his right knee condition and the recommended treatment of the same is a result of his September 15, 2006, work-related injury at respondent, which aggravated the preexisting arthritis in his knees.

The issue for the Board's review is: Is claimant's current knee condition and need for treatment a result of an accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as the head of the maintenance, laundry and housekeeping departments. On September 15, 2006, he injured his knees when he fell forward, hitting both knees on the broken edge of a cat walk. Both his knees were also hyper-extended. He was sent first to the emergency room and then saw Dr. Charles Zerr. He was off work three days. Claimant testified that he received treatment initially for his left knee and then for his right knee, testifying that he was told the insurance carrier would only treat one knee at a time.

Dr. Zerr referred him to Dr. Haleem, where in May 2007, he was given three Synvisc shots in his left knee. In July 2007, he was given a series of Synvisc shots in his right knee. He returned to Dr. Haleem on September 13, 2007. Dr. Haleem's records indicate that claimant told him he had a marked improvement of the symptoms in his right knee.

Claimant did not receive any more treatment to either knee until June 5, 2008. He said he waited that long because he was told he had to wait at least six months before he could get more Synvisc shots and also he was trying to tolerate the pain. However, in June 2008 he returned to Dr. Haleem because both of his knees were giving him problems. An MRI of the right knee showed a posteromedial meniscal tear. Dr. Haleem recommended arthroscopic surgery on his right knee.

Claimant is 55 years old. He admits he has had arthritis in his knees since he was 40 years old, but his pain had been controlled by medication before his accident. He has had no new injuries to his knees since September 2006. He testified that the pain in his knees for the two years since his accident has been fairly consistent, other than some minor relief from the Synvisc shots.

Claimant left his employment at respondent some time after his accident. He worked for a convenience store for a couple of months and then started work for Allied Cement in May 2007 as a cement truck driver. His primary job is to drive the cement truck, but he is also responsible for setting up the truck and cleaning it at the end of the day. At times, he is required to climb a ladder to open the lid on the truck, but he accommodates his knee problem so he only has to climb four steps to get to the top. He also has to climb a couple of steps to get up into the truck. He testified that his knees have been painful as

he gets in and out of his truck so he does not step up into the truck but, instead, pulls himself in with his arms. Claimant also helps load the bulk truck with additives which come in bags of 50, 80 or 100 pounds, although there were few 80 or 100-pound bags. He has help with this and usually handles only 20 to 30 bags personally.

After being shown photographs of the type of truck claimant drives at Allied Cement, Dr. Haleem wrote a memo in which he indicated:

. . . I can say that [claimant's] current right knee pain can be caused by the type of his current work situation.

It is important to note that [claimant] had previously told me that his right knee pain was aggravated due to injury that he sustained at work on his previous job.¹

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.² Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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 there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. 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 worker was at work in the employer's service.⁴

¹ P.H. Trans., Cl. Ex. 1 at 2.

² K.S.A. 2007 Supp. 44-501(a).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁴ *Id.* at 278.

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁵ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁶ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁷

In *Logsdon*,⁸ the Kansas Court of Appeals stated:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in 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.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,⁹ 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

⁵ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁶ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁷ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

⁸ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

⁹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

is considered to be compensable as the natural and probable consequence of the primary injury.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ 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 as it is when the appeal is from a final order.¹¹

ANALYSIS

There is no dispute that claimant has had degenerative arthritis in both knees for many years. There is likewise no dispute that claimant suffered compensable injuries to both knees on September 15, 2006, while working for respondent. Claimant received authorized treatment for his bilateral knee injuries through September 2007. Respondent authorized claimant to return to Dr. Haleem in June 2008. The MRI of the right knee obtained in July 2008 revealed a tear of the posterior horn and midbody of the medial meniscus.

The question is whether claimant’s current right and left knee symptoms and need for treatment, in particular the recommended right knee arthroscopic surgery for the torn meniscus, is a direct consequence of the September 15, 2006, accident. Claimant contends it is, whereas respondent argues that claimant recovered from the September 15, 2006, aggravation of his preexisting degenerative arthritis condition and his current condition is either a natural consequence of that preexisting arthritis condition or else claimant has suffered a new aggravation from the work he performs for a subsequent employer. In his current job with Allied Cement, claimant not only drives a cement truck which requires repeated climbing into and out of the truck, but also involves heavy lifting of bags weighing 50, 80 and 100 pounds.¹²

Although Dr. Haleem acknowledged that claimant’s subsequent work activities are of a type that "can" cause the current right knee pain, he does not opine that they did. Dr. Haleem does not dispute the history given to him by claimant that his right knee pain was caused by the injury claimant suffered at work with respondent.

¹⁰ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹¹ K.S.A. 2007 Supp. 44-555c(k).

¹² In its brief to the Board, respondent argues that "there can be no serious contention that claimant's activities for Allied Cement are sufficient to create a compensable aggravation of his pre-existing knee arthritis." (Respondent's brief at 8 [filed Nov. 24, 2008]). But it is assumed that respondent meant to say that there can be no serious contention that those activities are insufficient to cause such an aggravation.

Based upon the record presented to date, and in particular given the ongoing nature of claimant's knee symptoms, this Board Member finds claimant's current need for treatment is a direct consequence of his September 15, 2006, accident with respondent.

CONCLUSION

Claimant suffered personal injuries to his knees by accident on September 15, 2006, that arose out of and in the course of his employment with respondent. Claimant's current need for medical treatment is a direct and natural consequence of those injuries.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Medical Treatment of Administrative Law Judge Pamela J. Fuller dated October 8, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Wendel W. Wurst, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge