BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STACY G. STOREY Claimant VS. **ATWOODS** Respondent AND **NATIONAL AMERICAN INSURANCE CO.** Insurance Carrier	)	Docket No. 1,042,877
AND VS. **UNIFIED SCHOOL DISTRICT 260** Respondent AND **UNION INSURANCE CO.** Insurance Carrier	)	Docket No. 1,042,878

ORDER

Respondent, Unified School District 260 and its insurance carrier Union Insurance Co. (U.S.D. 260) request review of the January 22, 2009 preliminary hearing Order entered by Administrative Law Judge John D. Clark (ALJ).

ISSUES

In this consolidated claim the ALJ held that the claimant suffered a new and distinct injury to her right knee on October 20, 2008 while stepping over a tote bag in the class room where she was working. He concluded the injury arose out of and in the course of

her employment with U.S.D. 260 and ordered the payment of benefits and medical treatment. All benefits were assessed against U.S.D. 260.[1]

U.S.D. 260 requests review of this decision alleging the ALJ erred in concluding claimant's accidental injury arose out of and in the course of her employment with U.S.D. 260. U.S.D. 260 also alleges the ALJ "exceeded his jurisdiction by failing to apply the controlling case from the Kansas Court of Appeals, *Johnson*.[2] Accordingly, U.S.D. 260 asks the Board to reverse the ALJ's Order and deny claimant any benefits whatsoever.

Claimant argues that the ALJ should be affirmed.

Atwoods and its carrier, National American Ins. Co., the respondent in Docket No. 1,042,877, appeared at the preliminary hearing but has filed no brief in this matter. Presumably it would be their position that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

On May 26, 2008, claimant suffered a torn lateral meniscus while in the scope and course of her work for Atwoods. That claim forms the basis for Docket No. 1,042,877. Benefits were provided, claimant underwent surgery to repair the torn meniscus on June 11, 2008 followed by physical therapy. On October 16, 2008, she had one last injection in her knee in an effort to decrease her pain complaints. Her treating physician, Dr. Osland, advised her that he had nothing further to offer her, released her to regular work and further advised he would be issuing a permanency rating. Claimant had already begun working for U.S.D. 260 and was able to do all of her regular classroom duties without difficulty, albeit with some pain.

Thereafter, on October 20, 2008, claimant was walking through her classroom when she stepped over a bag on the floor. Although U.S.D. 260 makes much of claimant's "changed" characterization of this step, suffice it to say that claimant explained she was walking towards a student and while she was walking normally, she nevertheless had to step *over* this bag, raising her leg more than she would otherwise have done. According to her, the classroom was very "congested" and with the special education students located and their wheelchairs, backpacks, and equipment along with special mentors who helped

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[1] ALJ Order (Jan. 22, 2009).

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

the students and their belongings and materials.[3] As she placed her foot down, she experienced an immediate "pop" and pain.[4] Claimant describes this pain as far more significant than the pain she had before this event and in a different area of her knee.

Claimant was provided medical treatment and eventually sent back to Dr. Osland. Dr. Osland examined her and diagnosed a medial meniscal tear. Dr. Osland's report indicates the following opinions with regard to claimant's knee injury:

> Right knee pain with some arthritic changes and now a medial meniscal tear she did not have before...
>
> I think the medical meniscal tear is a new injury. The rest of the arthritis is not, but I do think this is probably new.[5]

Dr. Osland goes on to recommend a right knee arthroscopy with partial meniscectomy and a possible debridement. It is uncontroverted that claimant requires this treatment in order to relieve her current condition.

U.S.D. 260 does not argue that this torn medial meniscus is the natural and probable result of her earlier injury while employed by Atwood. Rather, U.S.D. 260's sole argument is that under the rationale set forth in *Johnson*, claimant's act of stepping over a backpack was an activity of day-to-day living. And as such, it is not compensable under K.S.A. 44-508(d).

Johnson involved a worker who had suffered earlier problems with her knee. And while at work, she pivoted to reach for a book on a shelf and suffered additional injury to her knee. The Court of Appeals noted that "injuries caused by or aggravated by the strain or physical exertion of work do not arise out of employment if the strain or physical exertion in question is a normal activity of day-to-day living."[6] But the *Johnson* Court also acknowledged that an injury is compensable if the "employment exposes the worker to an increased risk of injury of the type actually sustained."[7]

Although U.S.D. 260 adamantly maintains *Johnson* must apply in this instance, the ALJ disagreed as does this Board Member. U.S.D. 260 ignores a pertinent fact - namely

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[3] P.H. Trans. at 14.

[4] *Id.* at 17.

[5] *Id.*, Resp. Ex. 1 at 2 (Dr. Osland's Nov. 7, 2008 report).

[6] *Johnson,* 36 Kan. App. 2d at 790.

[7] *Id.* at 789, Quoting *Siebert v. Hoch*, 199 Kan. 299, Syl. ¶ 5, 428 P.2d 825 (1967).

that the classroom where claimant was working contained a number of obstacles she must clear in order to tend to her students. And in doing that activity, the very task she was hired to perform, she encountered an obstacle that required her to lift her foot higher than she otherwise would have as she was walking. That maneuver led to a meniscal tear in her right knee. This is a tear in a different area of the knee than was injured earlier in the year while working for Atwood. Dr. Osland has opined that this was an altogether new and different sort of injury, a finding that is corroborated by claimant's description of the type and location of the pain. No other physician has indicated otherwise. *Johnson* is, therefore, easily distinguished and does not apply.

The ALJ's findings of fact and conclusions of law are affirmed and the Order is, therefore, affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated January 22, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent, U.S.D. 260 and its Ins. Carrier
Ronald J. Laskowski, Attorney for Respondent, Atwoods and its Ins. Carrier
John D. Clark, Administrative Law Judge

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