

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

MARY K. MCDANIEL)	
Claimant)	
VS.)	
)	Docket No. 1,047,836
KELLOGG SNACK DIVISION)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the April 7, 2010, preliminary hearing Order of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded benefits in the form of unauthorized medical expenses of \$500.00 and authorized medical treatment with Dr. Mark Rasmussen for the injury to claimant's right knee. The Order does not say, but, impliedly, the ALJ found that claimant suffered accidental injury to her right knee which arose out of and in the course of her employment with respondent. Additionally, the ALJ apparently determined that the injury to claimant's right knee is not barred by the workers compensation settlement on December 15, 2008, to her left knee.

Claimant appeared by her attorney, John G. O'Connor of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, James P. Wolf 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 April 6, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent contends claimant's right knee

problems stem from the overcompensation for her left knee injury which was fully settled as to all issues, including future medical treatment. Claimant contends that her right knee, while affected by the left knee injury, also suffered additional traumas from the excessive walking, standing and stair climbing associated with her job. Therefore, she has proven that she suffered a new series of traumas to her right knee from March 2009 through October 2009 which arose out of and in the course of her employment with respondent.

2. Is claimant's entitlement to benefits for the injuries to her right knee barred by the full, final and complete settlement for the injuries suffered to her left knee?

FINDINGS OF FACT

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

Claimant worked for respondent as a packaging production employee. This job required that she be on her feet most of the day and involved a significant amount of walking. In 2006, claimant hyperextended her left knee. This injury led to surgery under the hand of orthopedic surgeon Daniel J. Stechschulte, Jr., M.D. This work-related injury was litigated and ultimately settled on December 15, 2008. The settlement was as to all issues and claimant was paid an additional \$2,000.00 to close future medical treatment. This, even though P. Brent Koprivica, M.D., warned that claimant would, in all likelihood, need a complete knee replacement in the future on the left knee. The settlement did not involve the right knee. After the settlement, claimant continued to work for respondent at her regular job.

In March 2009, claimant began experiencing additional problems with her right knee. Claimant had experienced some symptoms in the right knee while the left knee was being treated. Tests performed in 2007 identified arthritis in the right knee. Claimant testified that she was having to overcompensate with the right leg in order to assist the weaker left leg. This had a negative effect on the right leg. Claimant also testified that in early 2009, respondent began to restrict employees from using a freight elevator due to an increase in the need of the elevator for hauling freight. This caused claimant to have to walk more and she began using the stairs instead of the elevator. Both the added walking and the added use of the stairs negatively impacted claimant's right knee. On one occasion, in June 2009, claimant's right knee gave out. She reported this to her supervisor and an accident report was filled out. Claimant requested medical treatment, but it was refused. She was then sent to Dr. Koprivica by her attorney. Dr. Koprivica had examined claimant in the past and his report of April 4, 2008, was included in the record at the above discussed settlement hearing.

Dr. Koprivica examined claimant on February 18, 2010, diagnosing claimant with aggravations of the degenerative conditions in her right knee. He determined that the aggravations stemmed from both the overcompensation for the left knee condition and from the extended hours walking on hard surfaces and climbing stairs at work. He expressed concern that claimant had suffered a degenerative tear of the medial meniscus. Additional treatment, including therapy and an evaluation by an orthopedist, was recommended. He opined that an MRI of the knee would assist in determining the extent of damage in the knee.

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

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

¹ K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

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

³ K.S.A. 2009 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).

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

It is undisputed that claimant had experienced symptoms and had been diagnosed with arthritis in her right knee before the current series of traumas occurred. Were that the only cause of her right knee problems, respondent's argument that claimant is precluded from benefits would be more persuasive. However, claimant also suffered the added trauma of walking, standing and stair climbing associated with her job. Claimant testified that the right knee problems increased when the use of the freight elevator was denied her. The increased trauma on her knee stemming from these additional activities resulted in added daily trauma to the knee. Thus, the daily aggravation of the knee from those work-related activities results in a new series of traumatic accidents to the knee and a new entitlement to workers compensation benefits under the Kansas Workers Compensation Act. The award of the ALJ granting additional benefits for the right knee 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.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 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 she suffered added traumatic accidents to her right knee which arose out of and in the course of her employment with respondent. Claimant's entitlement to benefits is not precluded by the settlement of her left knee injuries.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated April 7, 2010, should be, and is hereby, affirmed.

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

⁶ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

HONORABLE GARY M. KORTE

c: John G. O'Connor, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge