

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

KAREN A. SWANSON
Claimant

VS.

USD 259
Self-Insured Respondent

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Docket No. 1,053,683

ORDER

STATEMENT OF THE CASE

Claimant requests review of the March 20, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Vincent A. Burnett of Wichita, Kansas, appeared for the self-insured respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 20, 2012, preliminary hearing and exhibits thereto; the transcript of claimant's deposition dated January 21, 2011; and all pleadings contained in the administrative file.

ISSUES

A preliminary hearing was scheduled in this claim on July 12, 2011. Although there was no hearing, the ALJ entered an order, dated July 12, 2011, appointing Dr. Vito J. Carabetta, a specialist in physical medicine and rehabilitation, to perform an independent medical examination (IME). Dr. Carabetta examined claimant on August 30, 2011, and issued a report to the ALJ bearing the same date.

After the IME, the matter was again scheduled for preliminary hearing on March 20, 2012. The hearing was held, at which claimant testified and various medical exhibits were introduced into evidence. Claimant requested medical treatment and temporary total disability benefits (TTD). The ALJ entered a preliminary hearing Order dated March 20,

2012, in which claimant's request for medical treatment was denied.¹ In so holding the ALJ relied on the opinions of Dr. Carabetta.

Claimant contends that the ALJ erred in denying the "compensability of claimant's injury based on Dr. Carabetta's conclusion that claimant's problems are pre-existing."²

Respondent maintains that the Board does not have jurisdiction to consider the issue raised by claimant. Respondent also argues that the ALJ correctly found that claimant's request for medical treatment should be denied. Respondent accordingly insists claimant's application for Board review should be dismissed for lack of jurisdiction or that the preliminary hearing Order should be affirmed.

The issues presented to the Board for review are:

(1) Does the Board have jurisdiction to review the issue raised by claimant at this stage of the claim?

(2) Did the ALJ err in denying the preliminary relief requested by claimant?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant is 41 years old and on the date of her alleged accidental injury she was employed by respondent as a classroom paraprofessional/substitute teacher. Claimant alleged she sustained personal injury by accident on September 16, 2010, when a 5-gallon container of water fell from a flat trolley and struck her right knee. She immediately experienced pain and swelling in the right knee.

At the preliminary hearing respondent's counsel advised the ALJ he was not denying that claimant sustained injury to the right knee.³ However, respondent did not admit that any treatment claimant required to the right knee was needed because of the injury. Respondent also denied that claimant sustained injury to the low back and hips, which claimant alleged developed as a consequence of her altered gait from the right knee injury.

¹ The preliminary hearing Order does not address claimant's request for TTD.

² Application for Review at 1.

³ P.H. Trans. at 3.

When claimant was approximately 13 years old and a freshman in high school she injured her right knee when she turned to pivot and her right knee “went out of place.”⁴ The problem recurred, following which claimant was treated surgically by Dr. Neonilo Tejano, an orthopedic surgeon. The procedure consisted of a right patellar tendon transfer. Despite a physically vigorous lifestyle, both in her employment and personal activities, claimant had no further problems with her right knee until the September 16, 2010, event. Nor did she receive any additional medical treatment for the right knee in the interim.

Claimant has seen a number of physicians for treatment and evaluation following the accidental injury.

On December 15, 2010, claimant was seen by Dr. David Hufford for “reassessment of right knee pain.”⁵ Dr. Hufford found right knee “bone on bone”⁶ patellofemoral arthritis. He recommended claimant consult with another member of his orthopedic group, Dr. Justin Strickland. Dr. Hufford noted, “In regard to causation, given [claimant’s] previous activity level and lack of impairment, this injury represents an aggravation of the pre-existing patellofemoral arthritis.”⁷

Claimant was initially seen by Dr. Strickland on November 21, 2011. He provided claimant with treatment for the right knee, consisting of injections and physical therapy. Dr. Strickland expressed in his February 28, 2012, report that his diagnostic impression was right knee patellofemoral arthritis. With regard to causation, Dr. Strickland concluded:

It is my opinion that [claimant’s] patellofemoral arthritis is not work-related. According to her history, she was asymptomatic before her injury and has become symptomatic since her injury. It is more probable than not that her injury has aggravated her pre-existing condition.⁸

Claimant’s counsel had claimant examined by Dr. George G. Fluter on May 16, 2011. In his narrative report, Dr. Fluter referred to an MRI scan taken of claimant’s right knee on September 20, 2010, which reportedly revealed evidence of prior patellar transfer surgery, patellofemoral osteoarthritis with osseous spurring, high-grade chondromalacia, and joint space narrowing. Dr. Fluter’s diagnoses were: (1) status post work-related injury on September 17, 2010; (2) right knee contusion/sprain; (3) possible right knee internal

⁴ *Id.*, at 13.

⁵ *Id.*, Cl. Ex. 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*, Cl. Ex. 2 at 1.

derangement; (4) possible complex regional pain syndrome affecting the right lower extremity; and (5) bilateral hip, upper back, and lower back pain. Regarding causation, Dr. Flutter concluded:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Swanson's current condition and the reported injury of 09/17/10.

Painful symptoms affecting the lower back, upper back and hips have been the result of altered walking mechanics caused by the reported injury of 09/17/10.⁹

As noted above, Dr. Carabetta examined claimant pursuant to the order of the ALJ on August 30, 2011. Dr. Carabetta's diagnostic impressions were: (1) status post right knee contusion; (2) underlying right knee osteoarthritis; and (3) low back pain. Dr. Carabetta's opinions regarding causation were:

The patient's principal complaint is at her right knee. She secondarily developed complaints in the lower back. Most likely, the low back symptoms are due to a pronounced limp that she displays as she ambulates. Her abnormal gait pattern is causing some mechanical stress on her lower back. Regrettably, impacting positively in her lower back is not going to be possible as long as she has this hugely abnormal gait pattern that she presents. Though the physical examination in terms of the lumbar region was inconsistent, there clearly is no underlying neurological defect. With regard to the right knee, the injury in question was one of a contusion. Unfortunately, she has some underlying osteoarthritis. This is quite substantial. She does not appear to be a good candidate for the pre-existing condition of osteoarthritis for injections with synthetic joint fluid preparations, due to allergic considerations. The big question is whether or not she is an appropriate candidate for knee joint replacement. She is rather young, but the changes in all three compartments are significant enough to merit some consideration. As this is an underlying condition of osteoarthritis associated with sports related activities in the past, this would perhaps best be addressed on a nonindustrial basis.¹⁰

At the request of respondent's attorney, claimant was examined by Dr. Paul S. Stein on May 24, 2011. In his narrative report, Dr. Stein noted that claimant "reports pain in her right knee, lower back and down the right lower extremity which she relates to the incident at work on 9/16/07 [*sic*]."¹¹ Dr. Stein concluded:

⁹ *Id.*, Cl. Ex. 3.

¹⁰ *Id.*, Resp. Ex. 1 at 4.

¹¹ *Id.*, Resp. Ex. 2 at 5.

In regard to the lower back and radiating right buttock and lower extremity pain, the patient indicates she discussed this with Dr. Hufford, the physical therapist, and Dr. Giovanni. I have found no reference to such pain in these treatment records. Physical examination is replete with indications of symptom magnification, to the extent that I cannot determine if there is a back injury, whatever the causation. Because of the patient's complaints, consideration should be given into [*sic*] a lumbar MRI scan but I cannot state, within a reasonable degree of medical probability and certainty, that such testing is secondary to a work injury. There is no documentation in the treatment records to substantiate injury to the lower back on 9/16/10.

I cannot make any statement regarding the right knee other than noting this patient's tendency toward symptom magnification. In this particular area, given the previous surgery and degenerative change, I defer to Dr. Prohaska or any other orthopedic consultation.¹²

Dr. Daniel J. Prohaska examined claimant at the request of respondent's counsel on March 8, 2011. Dr. Prohaska, who also noted significant symptom magnification, diagnosed moderate to severe pre-existing patellofemoral osteoarthritis. He opined regarding causation:

In regard to causation, I think she could have had an acute aggravation of pre-existing osteoarthritis which I would expect to resolve more to its base level. Her pain at this point does not, in my opinion, reflect that of an acute aggravation of patellofemoral osteoarthritis.

.....

In summary, I do not see any specific causation that would have caused the chronic osteoarthritis in her knee to become permanently symptomatic and have released her to p.r.n. follow-up.¹³

Claimant saw her personal care provider, Dr. Susan Giovanni, on April 19, 2011. Dr. Giovanni noted claimant ambulated with an antalgic gait because of *left* knee pain. Dr. Giovanni seems to confuse claimant's left leg for her right.

PRINCIPLES OF LAW

K.S.A. 2010 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

¹² *Id.*, Resp. Ex. 2 at 5-6.

¹³ *Id.*, Resp. Ex. 3.

right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 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 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.¹⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁵

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.¹⁶

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹⁸

¹⁴ K.S.A. 2010 Supp. 44-501(a).

¹⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹⁶ *Id.*, at 278.

¹⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

The Kansas Workers Compensation Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Act. The Board has jurisdiction to review preliminary hearing orders as to disputed issues of compensability as specifically set forth in K.S.A. 44-534a(a)(2). The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2010 Supp. 44-551(i)(2)(A) if it is alleged that the ALJ exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. Pursuant to K.S.A. 2010 Supp. 44-551(i)(1), the Board is provided with jurisdiction to review final orders, awards, or modifications of awards entered by an administrative law judge. Such jurisdiction does not generally extend to interlocutory orders.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²⁰

ANALYSIS

The Board has jurisdiction to consider the issue raised by claimant.

Respondent advances the position that the ALJ's Order was simply a denial of medical treatment which the Board has no jurisdiction to review at this stage of the claim. "Ms. Swanson – while she tries to wrap her appeal in the shrouds of a compensability issue – is really just seeking review of a denial of medical treatment."²¹ However, the ALJ's Order cannot fairly be characterized as simply a denial of further medical treatment. The Order does not find claimant has reached maximum medical improvement (MMI), nor does the Order find that additional treatment is unnecessary to cure and relieve the effects of claimant's accidental injury.

Rather, the ALJ based his decision on an opinion expressed by the court-ordered neutral physician, Dr. Carabetta, which was quoted verbatim in the Order and put in italics:

"As this is an underlying condition of osteoarthritis associated with sports related activities in the past, this would perhaps best be addressed on a nonindustrial basis."

¹⁹ K.S.A. 44-534a.

²⁰ K.S.A. 2011 Supp. 44-555c(k).

²¹ Respondent's Brief at 2 (filed May 3, 2012).

Presumably, Dr. Carabetta's use of the phrase "sports related activities" is a reference to claimant's knee surgery over 25 years ago. The Order states no other basis for the ALJ's decision than the quoted sentence from Dr. Carabetta's report.

On its face, the decision of the ALJ directly concerns the injuries claimant sustained as a consequence of her admitted accident and whether those injuries arose out of and in the course of her employment with respondent. The Board has specific authority pursuant to K.S.A. 44-534a to review disputed issues of "accidental injury" and whether an injury "arose out of and in the course of the employee's employment." The Board has consistently held such issues to be within the jurisdiction of the Board on review of preliminary hearing orders.²² The *Adesunbo*²³ case, relied on by respondent, is distinguishable from this claim because *Adesunbo* did not involve a disputed question of what injuries were suffered as a consequence of an accident and whether those injuries arose out of and in the course of employment. The issue in *Adesunbo* was whether the ALJ exceeded his jurisdiction in awarding medical treatment with a specific physician. No such issue is raised here.

There is ample evidence that claimant sustained personal injury by accident on September 16, 2010, which arose out of and in the course of claimant's employment with respondent. The opinions expressed by Dr. Hufford, Dr. Strickland, and Dr. Fluter, as well as claimant's testimony, support the conclusion that claimant's accidental injury served to aggravate or accelerate the preexisting condition of claimant right knee. There is no dispute claimant underwent previous surgical treatment to her right knee and that claimant thereafter developed moderate to severe osteoarthritis in that knee which was not caused by the September 16, 2010, event. However, the question is not whether the arthritic knee was caused by the accident. The issue is whether the prior condition was contributed to or aggravated by the accident.

Claimant's testimony that she recovered from the injury and surgery over 25 years ago without any significant sequella is undisputed, as is the evidence that she received no further medical treatment for the right knee until the date of accident in this claim. It is significant that claimant experienced no problems with the right knee between the surgery she had when she was 13 years old and the accident she suffered when she was approximately 39 years old despite what can only be described as a very physically active lifestyle.

Dr. Carabetta's opinion upon which the ALJ relied is ambiguous at best. Although he clearly concluded that claimant's right knee arthritis preexisted the accident, a premise

²² See, e.g., *French v. Universal Lubricants, LLC*, No. 1,051,457, 2010 WL 4449331 (Kan. WCAB Oct. 14, 2010); *Hansen v. Whole Foods Market*, No. 1,026,667, 2006 WL 2632025 (Kan. WCAB Aug. 2006).

²³ *Adesunbo v. York UPG Wichita*, No. 1,000,056, 2003 WL 22401203 (Kan. WCAB Sept. 12, 2003).

that is not in dispute, his opinion that claimant's claim should be addressed on a "nonindustrial" basis is immaterial. It is not within Dr. Carabetta's expertise as a medical expert to conclude that this claim, or any claim, should or should not be addressed on either an "industrial" or "nonindustrial" basis. It is significant that Dr. Carabetta did not say that claimant's accident did not aggravate, contribute to, or accelerate claimant's osteoarthritis. Nor did he explain why claimant's right knee was asymptomatic for a period of over two decades until the date of accident. Judging from their reports, Dr. Stein and Dr. Prohaska did not direct their professional attentions to the lack of knee complaints for 25 years until September 16, 2010.

Also troublesome are the opinions of Dr. Stein and Dr. Prohaska that they found indications that claimant was magnifying her symptoms. However, the evidence is undisputed that claimant suffered from moderate to severe osteoarthritis in her right knee and neither Dr. Stein nor Dr. Prohaska provide explanations of what level of symptoms they would expect from a substantially diseased knee made symptomatic by a 5-gallon container of water falling on it. There is likewise no explanation of how claimant could magnify the swelling in her knee.

Claimant sustained her burden of proof that her altered gait caused injury to her low back and hips. Dr. Giovanni found an antalgic gait. Dr. Fluter found claimant had back and hip pain caused by altered walking mechanics resulting from the right knee injury. Dr. Carabetta found low back pain caused by an abnormal gait pattern causing mechanical stress to the lower back. Dr. Prohaska noted claimant complained of low back and hip pain and diagnosed possible radicular pain. Dr. Stein recommended a lumbar MRI scan be conducted.

Although the evidence is conflicting regarding the extent to which claimant sustained injuries to the right knee, back, and hips as a consequence of the admitted accident, the preponderance of the credible evidence supports the conclusion that claimant suffered an aggravating injury to her right knee, as well as injuries to the back and hips, as a result of the accident of September 16, 2010. The undersigned Board Member finds that respondent shall forthwith provide medical treatment for claimant's right knee, back, and hips with an appropriate specialist or specialists of respondent's choosing. It is further found that the ALJ shall take up the issue of TTD, if necessary, in further proceedings consistent with this order.

CONCLUSION

(1) Claimant sustained a compensable accident on September 16, 2010, arising out of and in the course of her employment with respondent.

(2) As a result of the accident, claimant suffered injuries to her right knee, back, and hips for which she is entitled to medical treatment at respondent's expense with an appropriate specialist or specialists of respondent's choosing.

(3) The ALJ shall, if necessary, conduct further proceedings consistent with this order to take up the issue of TTD.

WHEREFORE, the undersigned Board Member hereby reverses the March 20, 2012, preliminary hearing Order entered by ALJ John D. Clark. Respondent shall forthwith provide medical treatment as specified in the conclusions above. The ALJ shall conduct, if necessary, further proceedings consistent with this order to consider the issue of TTD.

IT IS SO ORDERED.

Dated this ____ day of July, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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John D. Clark, Administrative Law Judge