

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

SHERRI L. DEMPSEY)

Claimant)

V.)

SAINT RAPHAEL NURSING)

SERVICES, INC.)

Respondent)

AND)

ULLICO CASUALTY COMPANY)

Insurance Carrier)

Docket No. 1,065,128

ORDER

Claimant requests review of Administrative Law Judge John D. Clark's April 8, 2014 preliminary hearing Order. Roger A. Riedmiller of Wichita appeared for claimant. Kirby A. Vernon of Wichita appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the April 8, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

The judge denied claimant's request for total knee replacement surgery based on K.S.A. 2011 Supp. 44-508(f)(2).

Claimant requests the Order be reversed. Claimant argues the judge erred in determining the prevailing factor in her need for surgery was not claimant's accidental fall. Claimant argues her accident did not solely aggravate, accelerate or exacerbate a preexisting condition or render a preexisting condition symptomatic. Claimant further argues respondent is obligated to provide the total knee replacement surgery to cure and relieve claimant of the effects of her injury. Respondent maintains the Order should be affirmed. Respondent argues claimant's need for a total knee replacement surgery is based on a sole aggravation, acceleration or exacerbation of a preexisting condition or the rendering of a preexisting condition symptomatic.

There is one issue for the Board's determination: Was the judge correct in denying claimant's request for total knee surgery based on K.S.A. 2011 Supp. 44-508(f)(2)?

FINDINGS OF FACT

Claimant worked between 35 and 40 hours a week as a home health aide and CNA for respondent. Her job duties involved traveling to different homes and assisting patients with baths, emptying trash, doing laundry, walking laundry up and down stairs, walking dogs, preparing meals and cleaning houses. Other than travel time, she spent the majority of her time on her feet. She would also kneel and squat while giving baths, putting lotion on the patient's body or cleaning the house. Claimant testified she worked a year for respondent performing these activities without difficulty.

In addition to her job for respondent, claimant also worked as a home health aide 20 hours a week for Ms. Garvey. Claimant assisted Ms. Garvey with walking, bathing and using the restroom which included transferring her back and forth between a wheelchair. Claimant denied any difficulties with her left knee during this time.

On January 13, 2012, claimant was leaving a patient's house after dark when she tripped over stepping stones on the patient's porch and fell, landing on both knees. She immediately experienced pain in her left knee. She denied any right knee problems. The following day, she noticed her left knee was swollen. While she is uncertain exactly what happened because it was dark, she believes her left knee struck a hard surface like concrete. Claimant denied seeking treatment or experiencing any problems with her left knee prior to the accident.

On April 27, 2012, claimant came under the care of John D. Osland, M.D., on referral from Romeo Smith, M.D. Dr. Osland examined claimant and recommended a left knee arthroscopy, partial meniscectomy and debridement.

Dr. Osland performed a left knee arthroscopic partial meniscectomy, partial synovectomy, chondroplasty of the patellofemoral joint and debridement on August 22, 2012. Following surgery, claimant underwent several aspiration procedures for recurrent swelling in her left knee. She was also prescribed medications and given injections to assist with swelling and pain. Dr. Osland noted in his December 11, 2012 report that claimant had persistent left knee soreness related to degenerative changes.

On March 14, 2013, Dr. Osland recommended a knee MRI. His May 7, 2013 report observed that x-rays showed collapse of the medial joint space and the MRI showed quite significant bone marrow changes due to arthritis, early osteophytes, and bone changes medially and in the patellofemoral compartment. Dr. Osland recommended a total left knee replacement. He further noted claimant reported being asymptomatic before her fall. Dr. Osland's impression was claimant had degenerative changes of the left knee.¹

¹ P.H. Trans., Resp. Ex. 1 at 13.

Thereafter, claimant scheduled a preliminary hearing to occur on September 24, 2013. No record was made, but in an Order that same day, Dr. Osland was authorized to provide claimant with conservative knee treatment, but a total knee replacement surgery was specifically not authorized. The judge also directed the attorneys to send Dr. Osland a letter inquiring about the prevailing factor giving rise to the need for knee replacement.

The parties submitted a joint letter to Dr. Osland. In response, Dr. Osland issued a letter dated October 2, 2013, stating:

Ms. Dempsey has arthritic changes in her left knee. She had had an injury to her knee that made her arthritis in her knee worse and her arthritis has continued to progress. My feeling is that she had a preexisting arthritis in her knee that has been made worse. The prevailing factor in her need for total knee replacement is a preexisting arthritis, but certainly the injury contributed to her needing it at this early time in her life.²

On February 20, 2014, claimant's attorney sent a letter to Dr. Osland requesting clarification. In response, Dr. Osland issued a letter dated March 3, 2014, stating:

. . . After reviewing [claimant's] history and in looking at all of her MRI studies, trying to determine her exact cause of arthritis is not completely straightforward.

My feeling is that she did have arthritis prior to her fall of January 13, 2012, but was not symptomatic at that time. The fall caused her knee to have a meniscus tear, swelling and effusion in her knee which led to her having an arthroscopy, injections, and therapy which has still not relieved her pain.

At this time, she needs a total knee replacement on this left side. We have done numerous treatments to her, and she has failed all of those treatments. She continues to have a large effusion in her knee that I feel is related to her arthritis. It appears that the fall caused her left knee, which had been asymptomatic, to now become symptomatic. If she had not fallen, I am not sure when or if ever she would have needed a total knee replacement. Because of the fall, it caused her arthritis to become symptomatic and now she needs a total knee replacement. It appears that the prevailing factor in her need for a total knee replacement is the fall that she sustained at work.

Even though it is well-documented that she did have arthritis in this knee prior to the fall, it was asymptomatic. Again, since the fall, it has become symptomatic. Therefore, the fall is the prevailing factor in her need for a total knee replacement.³

² *Id.*, Resp. Ex. 1 at 5.

³ *Id.*, Cl. Ex. 2 at 1.

The preliminary hearing giving rise to this appeal was held on April 8, 2014. At that time, claimant was 52 years-old. She denied any knee problems before her accident. Claimant testified she is no longer able to walk like she did before the accident and can not stand or sit for long periods of time. She testified she can only sit for 30 minutes and stand for 15-30 minutes before having to change positions, and can only walk between 15 and 30 minutes without having to change positions. She continues to experience numbness, burning and swelling from her left knee down to her foot for which she wears a knee and ankle brace. She also experiences pain from her left thigh down to her foot. Claimant testified she has been unable to return to her position with respondent or any other employment since the accident. Of note, Dr. Osland's records state claimant returned to work on September 4, 2012, and continued to work with restrictions.

Claimant testified that prior to her accident, she participated in several leisure activities such as running on an exercise machine, walking around the gym, playing volleyball, walking to the park, attending church programs, working for the elderly and feeding the homeless. She denied any difficulty with these activities.

The judge issued an April 8, 2014 Order stating:

The Claimant suffered a work-related left knee injury on January 13, 2012, which resulted in a surgical repair to the meniscus tear.

She now needs a left knee replacement.

Dr. John Osland states that it is well documented that the Claimant had preexisting arthritis in her knee that was asymptomatic prior to the fall, and the fall made it symptomatic.

"Again, since the fall, it has become symptomatic. Therefore the fall is the prevailing factor for the need for a total knee replacement."

K.S.A. 44-508(f)(2) states:

"An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

The Claimant's request for knee replacement surgery is denied.

The judge did not issue a ruling based on prevailing factor requirements. Claimant filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 states, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "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 unless a higher burden of proof is specifically required by this act.

ANALYSIS

While both parties make arguments or comment regarding whether the prevailing factor in claimant's need for a total knee replacement was her accident or her preexisting yet asymptomatic arthritis, the judge made no ruling regarding prevailing factor requirements. The ruling rested only on K.S.A. 2011 Supp. 44-508(f)(2), but was not based on whether claimant proved the prevailing factor in her need for a total knee replacement was her accident.

Dr. Osland stated claimant's previously asymptomatic left knee arthritis was made symptomatic as a result of her accidental fall. K.S.A. 2011 Supp. 44-508(f)(2) states an injury is not compensable "solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." Under the current record and facts as set forth in this case, the aforementioned statute precludes compensability.

CONCLUSIONS

WHEREFORE, the undersigned Board Member affirms the April 8, 2014 preliminary hearing Order.⁴

IT IS SO ORDERED.

Dated this _____ day of June 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable John D. Clark

⁴ 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. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.