

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GARY L. BOLTON)
Claimant)
V.)
D & R MOWING) Docket No. 1,072,434
Respondent)
AND)
RIVERPORT INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent and insurance carrier (respondent), by Kirby A. Vernon, request review of Administrative Law Judge Gary K. Jones' October 23, 2015 preliminary hearing Order. John L. Carmichael appeared for claimant.

The appeal record consisting of the October 20, 2015 preliminary hearing transcript and exhibits, and the administrative pleadings, matches what was considered by the judge.

ISSUE

Is claimant's right ankle injury the direct and natural result of his right knee injury?

FINDINGS OF FACT

Claimant injured his right knee while working for respondent on January 16, 2014. He was cutting a tree limb that hit him in the chest. He injured his right knee when he tried to "catch" himself with his right leg and "it" just buckled.¹ Claimant had right knee surgery.

Eventually, claimant was seen by Peter V. Bieri, M.D., for a court-ordered independent medical evaluation (IME) on July 7, 2015.² The doctor's report contains a section titled, "Current Symptoms," which states:

¹ P.H. Trans. at 8.

² When questioned by his attorney, claimant agreed he was seen by Dr. Bieri. When questioned by respondent's counsel, claimant indicated he was not seen by Dr. Bieri, but by a Dr. Bishop. Dr. Bieri's report indicates the evaluation was conducted with Dr. Bishop's assistance under Dr. Bieri's supervision and direction. Dr. Bieri signed the report.

The patient has nearly continuous pain in the right knee. This is worse with standing. The pain ranges from 2/10 to 8/10. He notices swelling of the knee, which is provoked by activity. It is difficult for him to walk long distances. He [formerly] walked one mile at night for exercise and he can no longer walk one mile. He also has noticed immediately after his arthroscopy toes 2 and 3 are painful on his right foot. He has had some mild right ankle discomfort.³

Claimant testified he expressed all of his right knee symptoms when seen at Dr. Bieri's office. Claimant testified about his knee symptoms when he saw Dr. Bieri:

I still had some pain in it, and it was unstable. It would - - when I would put pressure on it, sometimes it would slip, and you wouldn't know when it was going to happen, it just - - you know, it just [gave] out.⁴

Dr. Bieri noted claimant walked with a definite limp. The report stated claimant's right knee had effusion and warmth and his right quadriceps and mid-thigh circumferences were slightly larger than his left leg. Dr. Bieri stated claimant had quadriceps atrophy visible to the naked eye. Claimant had no knee tenderness on palpation, but he had marked crepitation with motion and some decreased right knee range of motion. Also, claimant had right quadriceps weakness (3/5) and hamstring weakness (4/5).

On August 19, 2015, claimant injured his right ankle on his front steps. That day, he went to West Wichita Family Physicians (WWFP). His regular doctor, Michael G. Ludlow, M.D., was not available, so he saw Paul W. Huser, M.D. Claimant's right ankle was swollen and tender. The doctor's report indicated:

States . . . he twisted his right ankle this morning when he slipped on the step going off his porch at home. States he has a work comp knee injury on this side but it is his ankle that got injured this morning.⁵

Claimant had a right ankle x-ray on August 19, 2015. The reason for the exam was "Rolled ankle in the a.m."⁶

Claimant testified, "I was going down the front steps at my house, and I stepped on my right leg and it just - - the knee just give, and throwed me off balance, and I stepped on my ankle and it just rolled on me."⁷ Claimant testified he told Dr. Huser a history consistent with his testimony – that his knee gave out, he fell and injured his right ankle.

³ Bieri Report (July 7, 2015) at 2.

⁴ P.H. Trans. at 9.

⁵ *Id.*, Cl. Ex. 1 at 1.

⁶ *Id.*, Cl. Ex. 1 at 3.

⁷ *Id.*

Dr. Ludlow, in an August 25, 2015 report, stated claimant “[h]urt his right ankle when he was going down the stairs at home on 8/19/15.”⁸ Dr. Ludlow noted claimant had right ankle pain and swelling, consistent with a sprain. The report does not state claimant’s right knee gave out and caused his right ankle injury.

On August 27, 2015, Dr. Ludlow wrote a letter to claimant’s attorney. The letter stated:

I am writing on behalf of your request for a note stating that the ankle injury Mr. Bolton sustained on August 19, 2015, was a result of knee instability from his workers’ compensation injury. It is not clear to me from either Dr. Huser’s note or my visit that that was the case. It appeared that he slipped on his deck at home and that he perhaps exacerbated the existing injury in his right knee. It is my opinion that the workers’ compensation injury was not the cause for his fall. The note from Dr. Huser dated August 19, 2015, states that he slipped on the step going off of his porch at home which is what Mr. Bolton self-reported to Dr. Huser. I have checked with Dr. Huser, my partner, as well and he feels that this is not a workers’ compensation-related injury either.⁹

Claimant testified he learned from his attorney that Dr. Ludlow did not understand or did not believe his right ankle injury was related to his work-related right knee injury. However, claimant stated a nurse at WWFP told him he could fill out an accident or injury report that she would present to Dr. Ludlow for his consideration. Claimant testified he filled out such a report.

Dr. Ludlow wrote yet another letter on September 4, 2015, which stated:

I am writing on behalf of Mr. Bolton who has come in and filled out an injury statement detailing his fall. I have amended my note to reflect the way he sustained his injury based on what he has told me.¹⁰

Dr. Ludlow’s amended August 25, 2015 report stated:

Addendum: Patient called to report that I had the details of the injury wrong. He states that he was walking down the front steps of his house when his right knee which he had injured previously at work gave out on him causing him to fall. In the fall, he injured his right ankle and foot. He states that the fall was precipitated by his bad knee, and that it would therefore be work comp related.¹¹

⁸ *Id.*, Cl. Ex. 1 at 4.

⁹ *Id.*, Cl. Ex. 1 at 6.

¹⁰ *Id.*, Cl. Ex. 1 at 7.

¹¹ *Id.*, Cl. Ex. 1 at 8.

Dr. Ludlow's September 22, 2015 report stated:

DOI=8/19/15, Right knee gave out and caused him to fall on his deck at home injuring his right foot and ankle. Work comp related to previous knee injury.¹²

The judge ordered respondent to provide medical treatment for claimant's ankle and pay his related medical bills. The order stated:

In this case the Court concludes that the August 19, 2015, fall was the natural and probable consequence of the January 16, 2014, injury. The IME report from Dr. Bieri's office indicates the Claimant was still having considerable symptoms in his knee. The WWFP office notes and letter contradict the Claimant's testimony, but in this instance the Court finds the Claimant's sworn testimony to be more credible than the notes and letter. The primary focus of the doctor's interactions with the Claimant was not to determine the precise cause of the Claimant's fall, but that was the focus of the court testimony.¹³

Respondent requests the Order be reversed, arguing claimant's contemporaneous medical records demonstrated his right ankle injury had nothing to do with his right knee injury, at least until Dr. Ludlow revised his records at claimant's insistence. Respondent argues claimant's testimony is not credible and is at odds with the initial medical records. Further, respondent notes the medical records do not reflect claimant's right knee was unstable or prone to give away.

Claimant requests the Order be affirmed. He argues his right knee gave away due to instability and caused injury to his right ankle. Claimant argues Dr. Huser was confused regarding the cause of his ankle injury. Further, claimant argues the Board should defer to the judge's first-hand opportunity to assess his credibility.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.¹⁴ Claimant must prove his right to an award based on the whole record using a "more probably true than not true" standard.¹⁵

¹² *Id.*, Cl. Ex. 1 at 10.

¹³ ALJ Order (Oct. 23, 2015) at 2.

¹⁴ K.S.A. 2013 Supp. 44-501b(b).

¹⁵ K.S.A. 2013 Supp. 44-501b(c) & K.S.A. 44-508(h).

“When a primary injury under the Workmen's Compensation Act is shown to have arisen out of 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.”¹⁶ Whether an injury is a natural and probable result of previous injuries is generally a fact question.¹⁷

While Board review of a judge's order is de novo on the record,¹⁸ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.¹⁹ The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.²⁰

ANALYSIS

This is a close case. Despite claimant's testimony, the contemporaneous medical records weigh against finding claimant's right ankle injury compensable. Dr. Huser's initial report dated August 19, 2015, indicated claimant slipped on a step and twisted his ankle, not that his right knee gave out and caused his injury. The x-ray report from that same day indicated claimant rolled his ankle, not that his knee gave away and caused his ankle injury. Dr. Ludlow's August 25, 2015 report says claimant hurt his ankle going down stairs, but says nothing about claimant's injured knee being the cause. Dr. Ludlow's August 27, 2015 letter is straightforward that claimant's right ankle injury was not due to knee instability or a workers compensation matter, but was rather due to claimant slipping on stairs at home. Dr. Ludlow's 180° change – that claimant's right ankle injury was due to his right knee giving out – is unconvincing in terms of claimant meeting his burden of proof by a preponderance of the credible evidence.

Additionally, Dr. Bieri's report says nothing about right knee instability, contrary to claimant's testimony that he had such symptom when seen by the court-ordered physician. Claimant's right ankle injury was not the direct and natural result of his right knee injury. Respondent is not responsible to provide claimant with right ankle treatment.

¹⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹⁷ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

¹⁸ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁹ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

²⁰ It is “better practice” for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

CONCLUSIONS

WHEREFORE, the undersigned Board Member reverses the October 23, 2015 preliminary hearing Order.²¹

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: John L. Carmichael
john@fcse.net
dboutz@fcse.net

Kirby A. Vernon
cvernon@kirbyavernon.com
kvernon@kirbyavernon.com

Honorable Gary K. Jones

²¹ 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. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.