

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment for the period January 1991 through February 1992.
- (2) The nature and extent of claimant's injury and/or disability.
- (3) The liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of facts and conclusions of law:

Claimant began working for respondent Koch Chemical in 1990 as an operator mixing chemicals. His job required him to be on his feet 12 hours a day walking from tank to tank.

The amount of time claimant spent on his feet is significant considering the fact that claimant suffered polio as a child resulting in a deformed left foot. This deformity caused claimant's foot to turn inward, forcing him to walk on the outside edge of his left foot and causing the sole of his foot to turn toward the inside of his right ankle. Claimant walked with a pronounced limp but was still able to participate in baseball and football as a child and into his teenage years. Claimant continued playing softball up until the time he became employed with respondent.

At the time claimant was hired, Mr. Wayne Hines, a representative of respondent, interviewed claimant and questioned him regarding the obvious limp claimant suffered and claimant's childhood polio. Respondent knew full well of the deformity to claimant's left foot but hired him subsequent to a pre-employment physical and after receiving assurance from the doctor that claimant was physically capable of performing the job tasks assigned.

In April or May of 1991 claimant developed a callus on his left foot. When he picked the callus away he found a large, infectious hole in his foot. Claimant went to his family physician Dr. Stephen Bazzano who referred him to Dr. James T. Hamilton, a podiatrist in Joplin, Missouri. Dr. Hamilton initially treated claimant conservatively but eventually had to resort to surgery in order to resolve the infection problems which had developed in claimant's foot. On April 2, 1992, Dr. Hamilton performed surgery, removing a portion of the bone in claimant's foot at the base of the fifth metatarsal. This treatment was necessary to clear up the infection and the osteomyelitis which had also developed. The Appeals Board finds that a preponderance of the medical testimony indicates the infection and ulceration stem from a combination of claimant's preexisting deformity and from the requirement that claimant be on his feet 12 hours a day.

The burden of proof is upon claimant to establish his right to an award for compensation by proving all the various conditions upon which his right to a recovery depends. This must be established by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 44-508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 44-501(a) states in part:

"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."

The claimant must establish that he sustained an accident and an injury arising out of and in the course of his employment. These are separate elements which must be proven in order for the claim to be compensable. The phrase "out of" the employment point to the cause or the origin of the accident and requires some causal connection between the accident 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 their resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates 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. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984). The preponderance of the evidence in this case supports claimant's contention that he suffered accidental injury to his left foot arising out of and in the course of his employment with respondent. The constant walking on hard surfaces clearly caused the callus and ulceration with the resulting infection after claimant walked through water. Dr. David A. McQueen, a board-certified orthopedic surgeon involved in the surgery on claimant's foot, found claimant had suffered a 4 percent functional impairment to the left lower extremity as a result of this particular injury.

Subsequent to the April 1992 surgery, Dr. Hamilton referred claimant to Dr. Jerry Maxwell for reconstructive surgery on claimant's left foot. The medical evidence supports a finding that this surgery, while following the surgery by Dr. Hamilton, was an elective procedure intended to correct the deformity suffered by claimant from the childhood polio condition. The medical evidence does not support a finding that this surgery was a direct result of the work-related injury suffered by claimant. Even Dr. Edward J. Prostic, a board-certified orthopedic surgeon testifying on behalf of the claimant, acknowledged that claimant's second surgery became an elective surgery intended to cure the deformity in claimant's foot caused by the poliomyelitis, once the infection problem was resolved.

Subsequent to claimant's injury and during the ongoing treatment, he also began developing problems in his low back. The doctors agree the low-back symptoms developed as a result of claimant's limp which became more pronounced after the elective surgery. The medical evidence supports a finding that claimant's low-back condition, connected to his poliomyelitis and foot deformity, did not occur as a result of the callus or the infection. This condition resulted from the long-standing problems suffered by claimant combined with the elective reconstructive surgery. The Appeals Board acknowledges that when a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977). However, the primary injury suffered by claimant involving the callus and the infection resulted only in the first surgery. The second elective surgery and the back problems ultimately experienced by claimant resulted from

the poliomyelitis condition and foot deformity suffered by claimant as a child. As such, the Appeals Board finds additional compensation to claimant for the reconstructive surgery and for the resulting impairment from that surgery and from the poliomyelitis condition should be, and is hereby, denied.

The Appeals Board finds that claimant is entitled to a 4 percent permanent partial impairment to the left lower extremity for the scheduled injury to claimant's foot for the work-related injuries suffered while claimant worked for respondent.

In reviewing the Award, the Appeals Board finds that the Administrative Law Judge properly set forth both findings of fact and conclusions of law in some detail regarding the liability of the Kansas Workers Compensation Fund. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein as to the liability of the Kansas Workers Compensation Fund. It is clear from the deposition of claimant and from the deposition of Mr. Wayne Hines respondent was fully aware of claimant's preexisting condition to his left foot. It is also clear from the medical evidence that claimant's impairment constituted a handicap to his ability to obtain or retain employment. The medical depositions of Dr. Prostic and Dr. McQueen support a finding that but for claimant's preexisting condition he would not have developed the foot ulcerations and resulting infections. Therefore, the Appeals Board finds that the Special Administrative Law Judge's award of 100 percent of the liability in this matter to the Kansas Workers Compensation Fund is supported by a preponderance of the evidence and is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 14, 1995 should be, and is hereby, modified and the claimant, Tommy G. Tackett, is granted an award against the respondent, Koch Chemical Company, and its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund for an accidental injury occurring January 31, 1992, and based upon an average weekly wage of \$561.74 for 61.57 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$17,793.73, followed by 5.14 weeks permanent partial functional impairment for a 4 percent scheduled injury to the lower extremity at the rate of \$289.00 per week in the sum of \$1,485.46 for a total award of \$19,279.19.

As of August 23, 1996, the entire sum is due and owing to claimant, minus any amounts previously paid.

Future medical is awarded to claimant upon proper application to and approval by the Director.

Unauthorized medical expenses of up to \$350.00 are ordered paid on behalf of claimant upon presentation of an itemized statement verifying same.

All compensation, medical expenses and administrative costs are to be borne wholly by the Kansas Workers Compensation Fund with the Fund to reimburse respondent for any monies expended in this matter to date.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed to the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Preliminary Hearing	\$109.10
Martin D. Delmont Transcript of Regular Hearing	\$ 84.90
Deposition Services Deposition of David A. McQueen, M.D.	\$191.80
Hostetler & Associates Deposition of Edward Prostic, M.D.	\$256.45
Patricia K. Smith Deposition of Tommy G. Tackett	\$313.90
Deposition of Michael K. Lala	\$229.90
Deposition of James T. Hamilton, D.P.M.	\$252.80
Deposition of Wayne Hines	\$116.80

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Douglas C. Hobbs, Wichita, KS
Steven L. Foulston, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director