

was attributable to his original September 1, 1993 accident. This determination was based upon the medical testimony of Drs. Philip Mills and Murati who both opined that “but for” claimant’s initial 1993 injury, claimant would not have sustained his subsequent shoulder dislocation on January 31, 2004 in the slip-and-fall incident that occurred while claimant was at home. In addition, the SALJ awarded claimant \$4,185.90 against respondent as fees and expenses, although respondent has voiced no objection to this aspect of the SALJ’s Order.

Respondent appeals the SALJ’s post award Order contending that claimant’s present need for treatment is not the natural and probable result of his underlying compensable accident back in 1993. Rather, respondent maintains that the slip-and-fall that occurred on January 31, 2004 was a new and distinct injury. As a separate and noncompensable accident, respondent believes it has no responsibility to provide the requested medical treatment.

Claimant submits that the correct rule of law applicable to this case is that “every natural consequence that flows from underlying injury, *including a new and distinct injury*, is compensable if it is a direct and natural result of the primary injury.”² Here, claimant argues that the medical testimony clearly shows that “but for” his 1993 accident, he would not have sustained the injury that occurred on January 31, 2004. Accordingly, claimant requests that the SALJ’s Order be affirmed in all respects. Claimant’s attorney further requests he be awarded additional fees for defending respondent’s application for review in this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties’ briefs, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on November 1, 1993 in a compensable injury to his left shoulder while in respondent’s employ. That claim was resolved and claimant’s right to future medical was left “open”, giving him the right to pursue further benefits should the need for additional treatment arise. Since August of 1995, claimant had not required any further treatment although he testified that he noticed his shoulder was not “up to par” and on a monthly basis he would experience problems.³

On January 31, 2004, claimant slipped and fell at his home. Although he landed on his right shoulder, he instinctively flung his left arm out in an effort maintain his balance,

² Claimant’s Brief at 1 (filed Nov. 2, 2004).

³ P.A.H. Trans. at 12.

and in doing so, he dislocated his left shoulder. Claimant experienced a significant onset of pain. His shoulder will go back into place but continues to dislocate.

Two physicians have evaluated claimant and both have testified that “but for” the underlying accident, claimant would not have sustained this shoulder dislocation. Dr. Mills testified that the slip-and-fall was a “trivial” new event,⁴ and that he believed the claimant’s shoulder dislocation was a “natural and probable” result of the 1993 accident.⁵ Likewise, Dr. Murati viewed the 2004 left shoulder dislocation as an event that would not have occurred had he not sustained the underlying shoulder injury in 1993. He further testified that claimant’s ongoing symptoms reveal that claimant had not completely healed from the 1993 accident.

Every natural consequence of a compensable injury is also compensable, even a new and distinct injury, if it is a direct and natural result of the original compensable injury.⁶ A subsequent reinjury of a compensable injury is not compensable if it results from a new and separate accident.⁷ The Board must, therefore, determine whether claimant’s injury resulted from a new and separate accident or, in the alternative, were a direct and natural result of the original compensable injury to claimant’s left shoulder injury in November of 1993.

The Board finds it difficult to discern, from the appellate decisions, consistent criteria for making this distinction. It seems to be a factually driven decision, turning upon both factual criteria as well as medical opinion testimony. While it is true that claimant sustained an unexpected accident while at home, the uncontroverted medical evidence indicates that his 1993 accident was undoubtedly a precipitating factor. Both physicians testified that “but for” the shoulder injury in 1993, he would not have sustained a shoulder dislocation in 2004. Under these facts and circumstances, the Board finds that the greater weight of the evidence supports the SALJ’s conclusion. Thus, the Board affirms the post award Order granting claimant additional medical treatment with Dr. Murati.

There is no objection to that portion of the SALJ’s Order granting attorney’s fees and as a result, that portion of the Order is affirmed as well. As for the request for fees incurred in association with the appeal to the Board, that matter is remanded back to the SALJ for further consideration.

⁴ Mills Depo. at 6.

⁵ *Id.*

⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976).

⁷ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Vincent L. Bogart dated September 27, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Gary A. Winfrey, Attorney for Claimant
- Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
- Vincent L. Bogart, Special Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director