BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LLOYD V. BELL, JR.	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 206,209;217,659;
N. R. HAMM QUARRY, INC.	)	220,619; 222,694;223,055
Respondent	)	& 223,539
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on April 27, 1999. The Appeals Board heard oral argument on September 21, 1999.

APPEARANCES

Gregory J. Bien of Topeka, Kansas, appeared on behalf of claimant. Wade A. Dorothy of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Docket No. 206,209

This docketed claim involves injuries to claimant's knees that occurred on October 8, 1994 when claimant jumped from a truck to avoid being struck by an auger. Claimant testified that when he landed, both of his knees struck concrete. The ALJ awarded permanent partial disability compensation for the right knee injury based upon Dr. Kenneth E. Teter's 35 percent rating. The ALJ did not reduce this impairment rating for preexisting impairment because that percentage was not proven in accordance with the AMA Guides. But the ALJ denied a permanent disability award for the left knee injury finding claimant had failed to prove any permanent aggravation of his preexisting

impairment. On appeal, claimant alleges the ALJ erred in not finding a permanent impairment to the left knee from the October 8, 1994 accident and, thus, failing to award compensation based upon a general body disability. Claimant further alleges he is entitled to an award of work disability in excess of his functional impairment. The nature and extent of claimant's disability is the sole issue for review in this docketed claim.

Docket No. 217,659

This docket number involves injuries to claimant's knees, back, hips, neck, groin and left shoulder resulting from an October 22, 1996 motor vehicle accident. The parties' stipulations included an agreement that claimant's accidental injuries arose out of and in the course of his employment with respondent. The ALJ found that claimant suffered no permanent impairment as a result of this accident. Claimant seeks review of the ALJ's findings concerning the nature and extent of the injuries sustained on October 22, 1996, and specifically, the ALJ's determination that claimant did not suffer any additional permanent impairment from this accident.

Docket No. 220,619

Claimant testified that in December of 1996 he injured his right wrist at home when his right knee gave out or buckled causing him to fall off his porch. The ALJ found that the fall was a natural and probable consequence of the right knee injury in Docket No. 206,209 and that therefore the right wrist injury was compensable under that docketed claim. The ALJ further found that there was no permanent impairment to the wrist and limited claimant's compensation to his medical treatment expenses only. Claimant describes the issue on appeal as "Whether the court erred in its determination that the claimant's right knee did not give out in December of 1996 as a natural and probable consequence of the injuries sustained in either October, 1994 or October, 1996, and that claimant sustained permanent injuries as a result of the fall which occurred." As stated, however, the ALJ did find the December 1996 accidental injury was compensable as a natural and probable consequence of the October 1994 accident. Therefore, the Board considers the issue for review to be whether claimant sustained permanent injury as a result of his fall.

Docket No. 222,694

Claimant alleges he injured his left knee on March 24, 1997 when he fell off a curb at school. The ALJ described this claim as "a reprise of the Claimant's theory that he developed an altered gait due to his right knee injury, thereby injuring his left knee." The ALJ reiterated his conclusion that there was neither a new accident to claimant's left knee nor a left knee injury which was a natural and probable consequence of the right knee injury. On appeal claimant describes the issue in this docketed claim as "Whether claimant developed an altered gait because of the injuries to his right and left knees as of March 24, 1997, as a result of the work-related injuries of October, 1994 and October,

1996." From this description of the issue, the Board will treat the claim alleged under this docket number to be an allegation of an aggravation of the injuries to both the right and left knees as a natural and probable consequence of the accidents alleged under Docket Nos. 206,209 and 217,659. Therefore, claimant is not alleging a new work-related accident under Docket No. 222,694.

Docket No. 223,055

This docketed claim, like Docket No. 220,619, involves a fall that occurred away from work as a result of claimant's right knee giving way. On May 8, 1997 claimant was at home in the shower when he fell. The ALJ found that claimant's testimony that he fell because his right knee gave way was unrebutted. The ALJ again concluded that the giving way of the right knee was a natural and probable consequence of the October 1994 injury and, therefore, this claim was compensable under Docket No. 206,209. But, the ALJ also found that there was no evidence that any permanent impairment resulted from this fall. Therefore, benefits were limited to the medical treatment expenses. Claimant describes the issue as "Whether the court erred in its determination that the claimant's right knee did not give away [sic] in May of 1997 as a nature [sic] and probable consequence of the injuries sustained in either October, 1994 or October, 1996, and that claimant sustained permanent injuries as a result of the fall which occurred." Again, as stated, the ALJ did in fact find the accident compensable as a natural and probable consequence of the October 1994 injury. As claimant does not allege a new work-related accident, the Board will determine the nature and extent of disability issue raised in this docketed claim under Docket Nos. 206,209 and 217,659.

Docket No. 223,539

This claim originally alleged a series of accidents through July 11, 1996. The ALJ found that because the claim alleged a series each and every working day it should be treated as a claim for injuries through the last day claimant worked which was in December 1996. This claim alleges work-related aggravations of injuries to both knees, hips, back and right eye. The ALJ denied benefits finding claimant had failed to prove any injuries separate from the October 8, 1994 and October 22, 1996 accidents which are the subject of Docket No. 206,209 and Docket No. 217,659 respectively.

Claimant describes the issue as "Whether the court erred in its determination that the claimant did not meet with a series of accidents from October 8, 1994, through December, 1996, and sustained permanent injury as a result of these accidents." Accordingly, the issues for Appeals Board review in this docketed claim are: (1) whether claimant suffered personal injury by a series of accidents each and every working day through his last day worked; and, if so, (2) the nature and extent of any permanent disability.

Finally, "with regard to all of the docket numbers, claimant raises these issues:

"1. Whether the court erred in its determination that the claimant was terminated for malfeasance or in retaliation for complaining that his work restrictions were not being followed.

"2. Whether the court erred in its limitations of the payment of medical expenses and mileage related to treatment."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the ALJ's Award should be affirmed.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'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."[2] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[3]

When the primary injury under the Workers Compensation Act is shown to arise out of and in 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 the primary injury.[4]

Not only had claimant suffered prior knee injuries, but claimant also had significant degenerative conditions in both knees before the accidental injuries alleged in these docketed claims. The ALJ relied primarily upon the testimony of the treating orthopedic surgeon, Kenneth E. Teter, M.D., in finding the only permanent worsening of claimant's condition from the numerous traumatic injuries alleged was to the right knee. The ALJ likewise adopted Dr. Teter's 35 percent impairment rating to the right leg and awarded

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[1] K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 44-501(g).

[4] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972).

permanent disability benefits for a 35 percent scheduled injury to the leg pursuant to that rating. The Appeals Board agrees that Dr. Teter's opinions are the most credible. Unlike Dr. P. Brent Koprivica and Dr. Glenn M. Amundson, Dr. Teter was a treating physician and therefore had the benefit of having examined claimant on multiple occasions over a considerable period of time. Dr. Teter also performed the claimant's right knee surgery. Dr. Amundson, while court ordered, examined claimant on only one occasion and appears not to have had a complete understanding of claimant's medical history. Dr. Koprivica, who is board certified in emergency medicine and occupational medicine and specializes in disability evaluations, was hired by claimant. Dr. Koprivica had the opportunity to examine claimant on two separate occasions but again did not have the breadth or depth of experience with claimant as did Dr. Teter. Dr. Doug Frye, whose specialty is occupational medicine, treated claimant beginning October 23, 1996 following the motor vehicle accident which is the subject of Docket No. 217,659. Dr. Frye did not attribute any additional impairment to claimant as a result of the injuries claimant suffered in the motor vehicle accident of October 22, 1996. That claimant was able to return to what he described as unaccommodated work, supports this conclusion.

Although its brief requested the Board affirm the ALJ's award in all respects, during oral argument respondent contended it was entitled to a 15 percent reduction of Dr. Teter's 35 percent impairment rating for claimant's preexisting impairment. But the Board agrees with the ALJ that if functional impairment under K.S.A. 44-510e must be "established by competent medical evidence and based on the third edition, revised, of the American Medical Association Guidelines for the Evaluation of Physical Impairment [sic]", then the amount of the current 35 percent rating that is determined to be preexisting under K.S.A. 44-501(c) should likewise be a rating arrived at pursuant to the same edition of the AMA Guides. There is no such rating in evidence in this case.

Because claimant is being compensated for his permanent disability based upon a scheduled injury[5] we do not reach the question of work disability or otherwise get into the circumstances surrounding claimant's termination.

With regard to the issue of whether the ALJ erred in his award of medical expenses and mileage related to treatment, we find little explanation in the record and the briefs as to specifically what expenses were limited or disallowed other than for payment of treatment for claimant's eye. As to the alleged eye injury or alleged work-related aggravation of claimant's preexisting eye condition, the Board agrees with the finding by the ALJ that a causal connection between claimant's eye condition and his work was not proven.

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[5] K.S.A. 44-510d.

The Board agrees with and adopts the findings and conclusions stated by the ALJ in his Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Awards entered by Administrative Law Judge Bryce D. Benedict in Docket Nos. 206,209 and 217,659 should be, and are hereby, affirmed. The denial of benefits in Docket Nos. 220,619; 222,694; 223,055; and 223,539 separate and apart from those awarded under Docket Nos. 206,209 and 217,659 is also affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I disagree with the majority's award because it includes the amount of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides, inter alia, that:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered from a preexisting degenerative process and had a prior injury to his right knee in 1971. He had even received a permanent functional impairment rating for that prior injury. That the claimant had some preexisting functional impairment is clear. What is not clear is how much of claimant's current functional impairment is new, that is to say how much is a result of his October 8, 1994 accident, and

how much preexisted. I agree with the majority that respondent has not proven a 15 percent preexisting impairment to the right knee. But it is claimant's burden to prove all of the various conditions upon which his entitlement to compensation depends. This includes proving what the nature and extent of his disability is from the alleged work-related accident. Claimant bears the burden of proving how much of his present impairment is from the work-related accident. K.S.A. 44-501(a) clearly places the burden of proof on the claimant. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

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BOARD MEMBER

c: Gregory J. Bien, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director