

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

<b>JAMES LUCERO</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>STATE OF KANSAS</b>	)	
Respondent	)	Docket No. 214,388 and
	)	247,147
AND	)	
	)	
<b>STATE SELF INSURANCE FUND</b>	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the January 3, 2011, Post-Award Medical Award entered by Administrative Law Judge Rebecca A. Sanders. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent. This case was placed on the Board's summary docket for determination without oral argument.

**ISSUES**

This is a post-award request for additional medical treatment, which includes a total left knee replacement. In the January 3, 2011, post-award order, ALJ Sanders found that claimant's proposed left knee replacement procedure was related to his work-related injury. Accordingly, the ALJ held that claimant was entitled to that surgical procedure at respondent's expense. The ALJ reasoned, in part:

Respondent is not authorizing the left knee replacement for Claimant because according to Respondent Claimant has not met the burden of proof that the need for Claimant's left knee replacement is related to his original injury. Respondent points out that Dr. Knappenberger cannot say with any certainty what percentage of individuals develop arthritis in their knee after having an injury and arthroscopic surgery like Claimant. However, Dr. Knappenberger's opinions were given within a reasonable degree of medical certainty and statistically Claimant's condition in his left knee will more than likely result in the need for a left knee replacement. The original injury that eventually resulted in an award of benefits for Claimant's left knee, right knee and lumbar spine resulted from an injury to Claimant's left knee. Respondent

has presented no medical evidence to contradict Dr. Knappenberger's testimony. Based on the uncontroverted opinion of Dr. Knappenberger and the nature of Claimant's original injury, Claimant is entitled to left knee replacement paid for by Respondent. Claimant's need for the left replacement is a natural and probable consequence of his original injury.<sup>1</sup>

Respondent challenges the ALJ's findings and disputes that claimant's present need for a left knee replacement is related to his December 1995 injury at work. Respondent maintains Dr. Kurt Knappenberger's testimony "clearly shows it is impossible to attribute the need for a knee replacement to a 1995 accident"<sup>2</sup> and, therefore, the Board should deny claimant's request for additional medical treatment. Respondent asserts that claimant's proposed knee replacement is due to osteoarthritis but there is only speculation that the arthritis is attributable to claimant's work injury as "the causes of osteoarthritis are multifactorial, and he [Dr. Knappenberger] was unable to say that any one factor was more probable than not."<sup>3</sup> In summary, respondent states, "To speculate that the work injury *might* result in arthritis, and that it *might* be being manifested now, falls short of the claimant's burden of proof."<sup>4</sup>

Claimant requests the Board to modify the Post-Award Medical Award by designating Dr. Kurt Knappenberger as the authorized physician. Claimant argues the proposed left knee replacement is a natural consequence of his initial injury. Claimant maintains that Dr. Knappenberger, who has treated claimant since his injury and who was the only medical expert to testify, specifically testified that within a reasonable degree of medical certainty the arthritis in claimant's left knee and his present need for the left knee replacement is a natural and probable consequence of the original injury. Claimant adroitly summarized his position as follows:

In short, the only doctor to testify in the record has stated that the procedure being asked for is directly related to the accident and that the need for the procedure is caused by arthritis that is simply a continuation of the injury. This evidence is uncontroverted, reliable, and should be followed.<sup>5</sup>

Accordingly, claimant contends he has satisfied his burden of proof.

The only issues before the Board on this appeal are (1) whether the record establishes that claimant's proposed left knee replacement is a natural consequence of his

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<sup>1</sup> ALJ Post-Award Medical Award (Jan. 3, 2011) at 4.

<sup>2</sup> Respondent's January 20, 2011, letter to the Board.

<sup>3</sup> Respondent's Submission Brief at 3, filed with the Board (Jan. 21, 2011).

<sup>4</sup> *Id.*

<sup>5</sup> Claimant's brief at 5 (filed Jan. 28, 2011).

December 1995 work-related accident and (2) whether Dr. Knappenberger should be designated as the authorized physician.

#### PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'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."

K.S.A. 2010 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2010 Supp. 44-510k(a) states:

At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds as follows:

At a May 2000 settlement hearing, claimant received a running award for a 56 percent permanent partial general disability. The running award did not compromise claimant's right to seek additional medical treatment. Neither the Special Administrative Law Judge (SALJ) nor the parties mentioned the date or dates of accident or injuries that were the subject to the settlement. But the worksheet attached to the settlement hearing transcript, which lists both docket numbers included in the caption above, cites July 9, 1996, as the date of accident.<sup>6</sup> The settlement worksheet also indicates the parties agreed that Dr. Knappenberger was to be claimant's authorized physician.

Dr. Knappenberger's records indicate the date of accident was January 21, 1996, as the doctor's office notes reflect the following:

Yeah. Here we go. I have a copy of my office notes of March the 20<sup>th</sup> of 1996, and my note then was that he had an injury on January the 21<sup>st</sup> of '96. There was some ice and he was getting out of a truck and he planted and turned and twisted his foot like, and he had pain in his knee at that time and a possible pop in the knee.<sup>7</sup>

The Form E-1, Application for Hearing, filed by claimant with the Division of Workers Compensation on July 18, 1996, and assigned Docket No. 214,388, states the date of accident is a "series of traumas and micro traumas starting in November of 1995, culminating with disability on 7-9-96, and continuing thereon"; described the accident as "Fell off truck; worked on knee for several months, fell off stool on July 9, 1996"; and indicated that claimant had injured his left knee, body, and related body parts. And the Form E-1, Application for Hearing, filed by claimant with the Division of Workers Compensation on August 11, 1999, and assigned Docket No. 217,147, set forth a similar date of accident; namely, a "series of micro traumas starting 11/95 and currently ending 8/99; but continuing each and every day that claimant continues employment with continued disability." The latter Form E-1 also describes claimant's injuries as "aggravations of prior docketed bilateral knee and back injury."

The worksheet also indicates that medical reports from Dr. Zita J. Surprenant and Dr. Kurt R. Knappenberger were to be attached for consideration by the SALJ. Dr. Surprenant's September 2, 1998, report was attached, but Dr. Knappenberger's report was not. Dr. Surprenant's attached report addresses three accidents – the first, in December 1995, injured claimant's left knee when he slipped and fell on ice at work. In addition, the doctor wrote that claimant developed an altered gait following left knee surgery and he then developed both low lumbar discomfort and right knee symptoms.<sup>8</sup> The second accident

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<sup>6</sup> Claimant's attorney represented at page 6 of Dr. Knappenberger's October 2010 deposition that the July 9, 1996, date represented the ending date of a series of accidents.

<sup>7</sup> Knappenberger Depo. (Oct. 26, 2010) at 11.

<sup>8</sup> At the September 17, 2010, Post-Award hearing, claimant's attorney referred to the date of accident as being in 1996. See pages 6 and 10. Nonetheless, it appears all references to claimant's left knee injury involve one accident, namely, a slip and fall on ice.

mentioned by the doctor occurred in the fall of 1996 when claimant felt a knife-like ripping sensation in his right shoulder while trying to break apart two hydraulic lines. And finally, the third accident occurred in January 1996 when a tire exploded in claimant's face and he was thrown into a wall. The parties, however, specifically agreed at the May 2000 settlement hearing that the tire incident was not part of the settlement proceedings.<sup>9</sup>

In any event, the parties represent (or at a minimum respondent does not challenge) in this post-award proceeding that the May 24, 2000, settlement included claimant's knees.

Claimant, who worked for respondent as a heavy equipment mechanic, is puzzled by respondent's refusal to pay for a recommended left knee replacement. Since the May 2000 settlement, claimant has received from Dr. Knappenberger regular left knee injections every three months at respondent's expense. Moreover, in 2003 respondent without objection provided claimant with a total right knee replacement as part of this claim. Claimant presently takes both Celebrex and Hydrocodone for his left knee, which is also an expense borne by respondent. Nonetheless, respondent now refuses to provide the left knee replacement that Dr. Knappenberger first recommended in May 2010.

Dr. Knappenberger testified by deposition in this post-award proceeding. He is a board-certified orthopedic surgeon who is well-versed in knee replacements as he performs on average about four per week. The doctor is quite familiar with claimant's left knee injury as he began treating claimant for that malady in early 1996. According to Dr. Knappenberger, the periodic injections to claimant's left knee and the recommended knee replacement are due to progressive arthritis, which the doctor relates to claimant's accident at work. The doctor testified in pertinent part:

Q. (Mr. Brumley) Okay. And do you have an opinion as to what – as to whether the need for that procedure [knee replacement] relates to the original work injury?

A. (Dr. Knappenberger) Yes, I do.

Q. And what is that opinion?

A. Well, due to the fact that the original operative note, and I had mentioned that he had a chondral fragmentation of the lateral femoral condyle, which again is due to an injury, that will, over time, lead to arthritis.

Q. Okay. And because of that why is it he needs the knee replacement?

A. He just had progressive arthritis develop in his knee and it's become less responsive to conservative treatments.

Q. And is that arthritis a natural and probable consequence or a continuation from the work injury?

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<sup>9</sup> Settlement Hearing Trans., May 24, 2000, at 6.

A. Yes. It's a continuation of the original injury.

Q. Okay. Doctor, have all the answers to my questions been within a reasonable degree of medical certainty?

A. Yes.<sup>10</sup>

Respondent argues that claimant's right knee was replaced due to arthritis but that Dr. Knappenberger did not believe the arthritis in that knee was due to claimant's initial slip and fall on ice. Accordingly, respondent argues that claimant is unable to prove the left knee replacement is related to that accident. The doctor testified, in part:

Q. (Mr. Benedict) How do you separate out that the need for the [left knee replacement] surgery today is related to the work accident as opposed to merely the progression of osteoarthritis?

A. (Dr. Knappenberger) It's very difficult to do. He had [*sic*] did have an injury with the condyle fragment, so statistically he will have problems with arthritis later on, but there are other factors as well.<sup>11</sup>

But the doctor did not indicate what those other factors were.<sup>12</sup>

The Board notes that respondent's argument is premised on the doctor's belief that claimant's right knee replacement was not related to the slip and fall accident merely because the right knee was not initially injured at the time of the slip and fall. The doctor was not asked if the right knee replacement was due to the altered gait that claimant developed as a result of that accident or from overcompensating for the injured left knee injury, both of which would link the right knee replacement to claimant's accident at work. Nevertheless, the doctor indicated there was an element that distinguished the injuries to the right and left knees; namely, that claimant had significant preexisting arthritis in the right knee before the slip and fall at work. More importantly, Dr. Knappenberger testified claimant developed the degenerative joint disease in the left knee, which has created the need for knee replacement, after undergoing the arthroscopy to remove the chondral fragment.

Despite respondent's skillful cross-examination, Dr. Knappenberger did not retreat from his opinion that the recommended left knee replacement is a natural consequence of claimant's slip and fall at work.

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<sup>10</sup> Knappenberger Depo. (Oct. 26, 2010) at 7-8.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> Perhaps one of the other factors was claimant's weight, as claimant testified he weighed between 185 and 200 pounds at the time of the accident but later gained to more than 300 pounds.

Kansas law is clear that every direct and natural consequence flowing from a compensable accidental injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*<sup>13</sup>, the court held:

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.

And in *Stockman*<sup>14</sup>, the Kansas Supreme Court further explained how an injured worker's gradual increased injury or disability was compensable under the *Jackson* rule.

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

And the above basic rules were repeated in *Nance*<sup>15</sup> in which the Kansas Supreme Court held:

Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable under the Kansas Workers Compensation Act so long as the worsening is not shown to have been produced by an independent nonindustrial cause.

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen 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 a primary injury.

The Board, like the ALJ, is persuaded by Dr. Knappenberger's uncontroverted testimony that claimant's need for the left knee replacement is a direct and natural consequence of his work-related accident. Accordingly, the ALJ's determination that respondent is responsible for claimant's left knee replacement should be affirmed.

Claimant asks the Board to specifically name Dr. Knappenberger as the authorized treating physician. That is not necessary at this juncture. The settlement worksheet prepared by respondent and introduced at the settlement hearing indicates the parties stipulated that Dr. Knappenberger was to be the authorized treating physician. The record does not establish that such stipulation has been modified. Accordingly, at this juncture the

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<sup>13</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

<sup>14</sup> *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

<sup>15</sup> *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶3, 4, 952 P.2d 411 (1997).

record does not disclose any justiciable controversy or any issue ripe for adjudication pertaining to the authorized physician.

In summary, the ALJ's post-award Order should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge Rebecca A. Sanders dated January 3, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant  
Bryce D. Benedict, Attorney for Respondent  
Rebecca A. Sanders, Administrative Law Judge