

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

<b>TED YARNELL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,146
<b>CUSTOM CAMPERS, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant requested Appeals Board review of Administrative Law Judge Jon L. Frobish's February 14, 2002, Post Award Medical Award. The Appeals Board placed this case on its summary docket for decision without oral argument.

**APPEARANCES**

Claimant appeared by his attorney, Garry W. Lassman of Pittsburg, Kansas. Respondent, a qualified self-insured, appeared by its attorney John I. O'Connor of Pittsburg, Kansas.

**RECORD**

The Appeals Board (Board) considered the record listed in the original September 4, 1998, Award and also considered the record as listed in the February 14, 2002, Post-Award Medical Award.

**ISSUES**

The original Award was entered in this matter on September 4, 1998. Claimant was awarded a 10 percent permanent partial general disability for a July 26, 1996, work-related low back injury. Included in the Award was an order that consideration of future medical treatment would be upon proper application to the Director of Workers Compensation.

On June 18, 2001, claimant filed an Application for Review and Modification of the September 4, 1998, Award.<sup>1</sup> The application requested additional medical treatment with Michael P. Estivo, D.O., an orthopedic surgeon located in Wichita, Kansas.

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment concluding that claimant's current need for medical treatment was neither the natural and probable consequence of his original low back injury nor the result of a new injury. Instead, the ALJ found claimant's current need for medical treatment was the result of the natural aging process and claimant was not entitled to additional medical treatment.

On appeal, claimant, however, contends he proved through his testimony and the testimony of both Dr. Estivo and Dr. Randall L. Hendricks, the only physicians to testify in this proceeding, that his current need for medical treatment was the natural and probable consequence of his original low back injury.

In contrast, respondent requests the Board to affirm the ALJ's Award. Respondent argues claimant's current need for medical treatment is either the result of a new injury occurring while working for claimant's current employer or is the result of claimant's natural aging process not related to his original low back injury.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments contained in their briefs, the Board makes the following findings and conclusions:

Claimant suffered a low back injury while performing his regular work duties for respondent. Respondent is a manufacturer of fifth wheel campers. At the time of claimant's low back injury, he was a working supervisor in the metal department. His work duties consisted of hanging heavy plywood and metal panels; climbing up and down ladders and scaffolding; working in awkward body positions that included working on his hands and knees and flat on his back; and lifting up to 100 pounds. Claimant established that those work activities starting in the fall of 1995 and continuing through the last time claimant was taken off work on July 26, 1996, caused claimant to suffer a strain and sprain of his low back.

Claimant received conservative treatment for his low back condition through orthopedic surgeon David O. King, D.O. of Chanute, Kansas. Dr. King prescribed pain and anti-inflammatory medication for claimant's injury. He took claimant off work on two

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<sup>1</sup> At the time claimant filed his request for post-award medical treatment, the legislature had enacted K.S.A. 44-510k effective July 1, 2000. The Board, therefore, will consider claimant's request for post-award medical treatment as being made in accordance with K.S.A. 44-510k instead of in accordance with the review and modification statute found at K.S.A. 44-528.

occasions, the first from April 14, 1996, until June 5, 1996, and the second from July 25, 1996 until September 20, 1996.

The ALJ's September 4, 1998, Award was based on a September 30, 1997, examination and evaluation performed by Edward J. Prostic, M.D. at the request of claimant's attorney. Dr. Prostic opined that claimant had sprained and strained his low back while performing heavy and awkward work while employed by the respondent. The sprain and strain injury superimposed upon claimant's preexisting low back degenerative disc disease resulted in claimant suffering a 10 percent permanent functional impairment.

At nearly the same time that claimant was suffering a low back injury while employed by respondent, he was also receiving treatment for bilateral avascular necrosis of the hips which was not related to claimant's work. Claimant first saw Thomas W. Kneidel, M.D., an orthopedic surgeon of Wichita, Kansas on October 29, 1996, for his bilateral hip condition. On December 17, 1996, Dr. Kneidel replaced one of claimant's hips and on February 13, 1997, he replaced the other hip. Dr. Kneidel returned claimant to work in April 1997 to a light job in the cage repairing hand tools, extension cords and replacing saw blades. Claimant did not have any restrictions as a result of his low back injury, but he was restricted from jumping, running and squatting due to his hip replacements.

Claimant continued to work for respondent until March of 2000, when he changed employment. He then went to work for Fastenal. Claimant's job at Fastenal was also a light job which only required him to hand out small supply items to employees at NuWa also a manufacturer of fifth wheel campers. A large part of claimant's work day was keeping track of inventory on a computer. The only part of claimant's job that could be considered more than a light category of work required claimant to stock inventory items from a pallet loaded waist high to storage shelves. Some boxes of items weighed 20 to 30 pounds. But this only occurred on an average of 1.5 times per week and claimant spent about 20 minutes unloading the pallet and stocking the shelves. Claimant was asked if the work at Fastenal was a little lighter than the work he performed while employed by the respondent. He replied, "Yes".<sup>2</sup>

Claimant claims his current need for medical treatment is the natural and probable consequence of his compensable 1996 low back injury. The respondent, on the other hand, argues that claimant's current need for medical treatment is instead the result of his current work duties while employed by Fastenal or is the result of claimant's natural aging process as found by the ALJ.

When a primary injury under the workers compensation act arises out of and in the course of the employment every natural consequence that flows from the injury is

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<sup>2</sup> Post Award Medical hearing, September 5, 2001, p.19.

compensable, if it is the direct and natural result of the primary injury.<sup>3</sup> The natural and probable consequence rule also applies where claimant's worsening condition results from the natural aging process acting upon claimant's underlying compensable injury.<sup>4</sup> The natural consequence rule applies where claimant's disability gradually increases from a preexisting compensable injury and not when the increase in disability results from a new and separate accident.<sup>5</sup>

There often is, as this case demonstrates, a fine line between whether claimant's current need for medical treatment is the result of the compensable primary injury, the worsening of a compensable injury by the natural aging process, or a new and separate accident. Here, claimant established he had continuing worsening low back and bilateral leg pain since he testified at the regular hearing held on June 10, 1998. Claimant has not suffered any specific accident resulting in further injury to his low back since the original award was entered. Also, claimant's symptoms have not increased any more while working than while performing normal daily living activities.

Both physicians who saw claimant for his worsening low back condition in 2001, opined, based on claimant's history of continuing worsening symptoms since the original accident, that claimant's current symptoms and need for medical treatment was the natural and probable consequence of claimant's primary 1996 low back injury. Dr. Estivo, who saw claimant first on April 10, 2001, and the last time on May 24, 2001, answered, "Yes" when asked would claimant's degenerative disc disease continue to deteriorate if the work related 1996 accident had aggravated his preexisting degenerative disc disease and made it symptomatic.<sup>6</sup> Dr. Hendricks saw claimant on one occasion on October 8, 2001, at the request of respondent. Dr. Hendricks, before he examined the claimant, had the benefit of claimant's previous medical treatment records to review. Dr. Hendricks clarified his position on causation in his October 8, 2001 Independent Medical Evaluation report when he opined, "At this point in time, I do believe causation had to do with the previous injury. He probably had some preexisting spondylotic changes that were mild and since the injury in 1996 his back has deteriorated now causing his problem."<sup>7</sup>

Both physicians also opined, based on hypothetical questions from respondent's attorney, that claimant either aggravated or exacerbated his low back injury while working for Fastenal. But the Board finds respondent's attorney's hypothetical questions were not

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<sup>3</sup> See Gillig v. City Service Gas Co., 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

<sup>4</sup> See Nance v. Harvey County, 263 Kan. 542, 550, 952 P.2d 411 (1997).

<sup>5</sup> See Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

<sup>6</sup> Dr. Estivo's deposition, November 15, 2001, p. 42.

<sup>7</sup> Dr. Hendrick's deposition, December 19, 2001, Exhibit 2.

accurate as the questions did not contain the fact that claimant testified his low back continued to worsen at least from the time of the original award until the present. The hypothetical questions were also inaccurate as to the description of the job that claimant was performing while working for Fastenal.

The Board concludes that claimant's current worsening low back symptoms and need for medical treatment are the natural and probable consequence of his primary original work-related low back injury that occurred while employed by the respondent. The more persuasive evidence contained in the record establishes that claimant's degenerative disc disease in his lower back became symptomatic as a result of the low back sprain and strain caused by claimant's heavy and awkward work activities while employed by respondent. Thereafter, those symptoms then progressed over the years and worsened as a result of the natural aging process acting on claimant's compensable low back degenerative disc disease condition.<sup>8</sup>

At the Post Award Medical hearing, claimant requested medical treatment through Dr. Estivo, who recommended surgery and a three level fusion at L3 through S1. But after claimant was examined by Dr. Hendricks and the doctor recommended further diagnostic testing and possibly more conservative treatment rather than surgery, claimant requested treatment through Dr. Hendricks.

The Board, therefore, finds Dr. Hendricks should be appointed claimant's treating physician and authorizes any referrals he may determine appropriate for treatment of claimant's low back injury until Dr. Hendricks determines claimant has met maximum medical improvement.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that Administrative Law Judge Jon L. Frobish's February 14, 2002, Post Award Medical Award is reversed and respondent is ordered to provide medical treatment for claimant's low back injury through Randall L. Hendricks, M.D., including any referrals, until released as having met maximum medical improvement.

All fees and expenses of administration of the Workers Compensation Act are assessed against respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2002.

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<sup>8</sup> See Nance at p. 550.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Garry W. Lassman, Attorney for Claimant  
John I. O'Connor, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director