BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOANN O'CONNOR	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 247,558 & 251,128
WESTERN SUMMIT CONSTRUCTORS	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the October 20, 2000 preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

Claimant injured her right knee on either November 10 or 17, 1998, while working for respondent.[1] This injury, which is Docket No. 247,558, is not disputed, at least for purposes of this review. What is disputed is whether claimant's subsequent accident that occurred at her home on August 22, 1999 was a direct consequence of her previous work-related injury. Judge Foerschler denied claimant's request for medical treatment for her subsequent left foot injury, which is also the subject of Docket No. 251,128. Claimant contends that her current condition and need for medical treatment is a direct and natural consequence of the original injury. Respondent counters that claimant's current condition and need for medical treatment is not the result of the November 1998 accident, but instead is the result of a subsequent and totally unrelated accident and intervening injury. Therefore, the issue is whether claimant's current need for medical treatment for her left foot injury is due to an accidental injury that arose out of and in the course of claimant's employment with respondent. This issue is considered jurisdictional and is subject to review by the Board on an appeal from a preliminary hearing order.[2]

---

[1] The claim was filed alleging a November 10, 1998 date of accident, but at page 4 of the transcript of the October 12, 2000 Preliminary Hearing, counsel for claimant stated the correct accident date was November 17, 1998.

[2] K.S.A. 44-534a(a)(2) and K.S.A. 44-551(b)(1).

FINDINGS OF FACT

1. In November 1998, claimant injured her right knee when she stepped off a concrete form in the course of performing her regular job duties as a laborer for respondent.

2. Claimant was provided authorized medical treatment for that injury with an orthopedic surgeon, Charles E. Rhoades, M.D., who eventually performed surgery to repair a torn anterior cruciate ligament on the right knee.

3. Claimant was initially returned to light duty work in respondent's office where she did well, but in June of 1999 she was released to regular duty and returned to outside construction work with restrictions of no repetitive deep squatting and kneeling.

4. After her release to regular duty by Dr. Rhoades, claimant said she had problems with her knee giving out and reported these problems to her supervisor and to her foreman. Claimant does not allege that her knee condition was made worse by any subsequent accident or activity nor does she allege that she specifically requested but was denied additional medical treatment for her knee. She does say that she may have told her supervisor that she needed to go to a doctor or that maybe she should have something else done for her knee. Claimant also testified that she missed work in late July 1999 due to difficulties she was having with her knee.

5. During this time claimant learned she was diabetic and began taking insulin. She experienced side effects from the insulin of feeling "shaky", but said this lasted only about two weeks after she started taking the insulin in June of 1999.

6. On August 22, 1999 claimant was about to sweep her porch when her right knee gave out causing her to fall off the edge of the porch to the ground approximately 1 foot below.

> I know my leg give out, my foot hit on the side of the porch, which I came down and my knee apparently must have hit the ground, and I fell back on my bottom.[3]

7. Claimant sought treatment at the Anderson County Hospital. X-rays were taken and showed a fracture to the fifth metatarsal on the outside of her left foot. A cast was applied.

8. There is some disagreement about what the handwritten Anderson County Hospital emergency room records show. The ALJ interpreted those records as indicating claimant denied any history of falling due to the right knee giving out. Claimant's counsel contends those records show instead that claimant said her right knee has never felt right, has been

---

[3] Transcript of October 12, 2000 Preliminary Hearing at 35-36.

giving out and this time she fell down. From the Board's review of the handwritten entry, it appears that claimant's interpretation may be correct or, it may be that claimant only denied actually falling down before from her right knee giving out.

9. Dr. Rhoades considers it unlikely that claimant's right knee gave out as a result of continued instability following her reconstruction surgery if "she was standing absolutely still and not in the process of turning or stepping" at the time.[4] But claimant testified she was walking and turning to start sweeping when her knee gave out. Consequently, Dr. Rhoades' opinion is of little value.

10. Claimant was also examined by Dr. P. Brent Koprivica, who opined:

> As a direct and probable consequence of the permanent injury to the right lower extremity including the residual weaknesses that followed that injury, it is my opinion that Ms. O'Connor has sustained a fracture of her left fifth metatarsal.[5]

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[6] "'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."[7]

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.[8] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

---

[4] Respondent's Exhibit B to Transcript of October 12, 2000 Preliminary Hearing.

[5] Claimant's Exhibit 1 to Transcript of October 12, 2000 Preliminary Hearing.

[6] K.S.A. 1998 Supp. 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).

[7] K.S.A. 1998 Supp. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

by an independent intervening cause.[9] The ALJ found that claimant's subsequent injury was caused by an intervening accident. Accordingly, he found the foot injury was not compensable as a direct and natural consequence of the original November 1998 work related injury. The Board disagrees. The record shows that the surgery did not restore claimant's knee to its full strength and stability. Claimant testified that she had a history of her knee giving out after she returned to regular duty work. Although Mr. Gardner disputes this, he was not in the best position to know. Claimant's foreman did not testify. Claimant's supervisor, Mr. Henderson, testified by affidavit that claimant "did not make any complaints of pain or weakness in her knee" and "did not ask to go back to see the doctor".[10] Nevertheless, claimant testified that she fell due to her knee giving out. The Board finds claimant's testimony credible and there is no credible evidence that directly contradicts her testimony in this regard.

Based upon the record compiled to date, the Board finds the greater weight of the credible evidence supports the claimant's contentions. Therefore, the ALJ's decision not to award preliminary benefits should be reversed and the claim is remanded for a decision on claimant's request for medical treatment. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[11]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Robert H. Foerschler on October 20, 2000 should be, and the same is hereby, reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

_____
BOARD MEMBER

c: Ryan T. Linville, Kansas City, MO
Patricia A. Wohlford, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director

---

[9] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App.2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[10] Respondent's Exhibit A to Transcript of October 12, 2000 Preliminary Hearing.

[11] K.S.A. 44-534a(a)(2).