

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

DENNIS A. BLACK)	
Claimant)	
VS.)	
)	Docket No. 248,354
NORRIS WELDING SERVICE)	
Respondent)	
AND)	
)	
PATRONS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from the November 19, 1999 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

Claimant was injured August 20, 1999 while working for respondent. This is not disputed. What is disputed is whether on Saturday, September 18, 1999, he suffered a reinjury or aggravation of his previous injury while pushing his eight month old baby in a stroller at the shopping mall. Judge Howard awarded claimant preliminary benefits. Respondent contends that claimant's current condition and need for medical treatment is not the result of the August accident, but instead is the result of a new injury, a subsequent and intervening injury. Claimant counters that the September aggravation was a natural progression of the original injury. Therefore, the issue is whether claimant's current need for medical treatment 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.¹

FINDINGS OF FACT

1. On August 20, 1999, claimant was injured in the course of performing his regular job duties for respondent, lifting and carrying pipe.

¹ K.S.A. 1999 Supp. 44-534a(a)(2) and K.S.A. 1999 Supp. 44-551(b)(1).

2. Claimant was provided authorized medical treatment that same day with Dr. Charles G. Parsons, a chiropractor, and subsequently with Drs. William D. Galvin, Maxwell J. Self and John M. Fox, who are all associated with the Mercy Physician Group. Claimant was treated for low back and left leg complaints and exhibited signs of disc herniation.

3. Claimant was placed on light duty restrictions. At claimant's request, Dr. Self released him to return to work his regular job with respondent on September 10 1999. He worked until Friday, September 17, 1999.

4. On Monday, September 20, 1999, claimant reported to his supervisor, Tom Norris, that he was having more back problems. He related having pushed his eight-month old in a stroller that weekend and now his symptoms were worse. Claimant denies this incident or any other weekend activity caused his symptoms to worsen. Instead, he attributes his increased pain to being out of the prescribed medication.

5. After leaving work, claimant was seen again by Dr. Fox who ordered an MRI. This was taken on September 21, 1999 and indicated a disc herniation at L5-S1. He was then referred to Dr. Mekki M. Saba who recommended surgery.

CONCLUSIONS OF LAW

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.² "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."³ 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.⁴

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.⁵ 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

² 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).

³ K.S.A. 1999 Supp. 44-508(g). See also In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 1999 Supp. 44-501(g).

⁵ Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

by an independent intervening cause.⁶ The Appeals Board finds that pushing his baby in a stroller was not an intervening accident and did not cause claimant's worsened condition. The current disc herniation injury is compensable as a direct and natural consequence of the original August 1999 work-related injury.

Claimant attributes his condition to his August 20, 1999 accident and also to an incident that occurred at work on either September 13 or 14, 1999. He denies having performed any strenuous activities at home or having sustained any subsequent injuries. Respondent presented evidence that suggests otherwise. Thus, credibility is at issue. It can be difficult to assess credibility when reading transcribed testimony. The ALJ, in evaluating the in-court testimony of the witnesses, has the advantage of being able to assess their demeanor. This does put the ALJ in a more favorable position than that of the Appeals Board in determining credibility. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Appeals Board finds it appropriate to take into consideration the ALJ's unique position in assessing the credibility of witnesses.

Based upon the record compiled to date, the Board finds claimant's testimony believable and affirms the ALJ's decision to award medical treatment benefits. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁷

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Steven J. Howard on November 19, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: Charles Gentry, Fort Scott, KS
Scott J. Mann, Hutchinson, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director

⁶ *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).

⁷ K.S.A. 1999 Supp. 44-534a(a)(2).