

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

KATHLEEN L. KALER)	
Claimant)	
)	
VS.)	
)	
HOME SWEET HOME CARE and LINK, INC.)	
Respondents)	Docket No. 250,297
)	
AND)	
)	
CLARENDON NATIONAL INS. CO., VIRGINIA SURETY INS. CO. and FIREMAN'S FUND INS. CO.)	
Insurance Carriers)	

ORDER

Respondent, Home Sweet Home Care, and one of its insurance carriers, Clarendon National Insurance Company request review of a preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller on September 5, 2002.

ISSUES

It is undisputed claimant suffered a work-related injury to both knees while employed by respondent Home Sweet Home Care (Home). As a result of those injuries claimant underwent surgery to each knee. When claimant later sought recommended knee replacement surgery it was denied by Home and its insurance carrier, Clarendon National Insurance Company (Clarendon). After a preliminary hearing, the Administrative Law Judge (ALJ) ordered Home and Clarendon to pay for claimant's knee surgeries and medical treatment with Dr. Vello Kass until having reached maximum medical improvement.

Home and Clarendon argue claimant's current need for medical treatment is the result of claimant's subsequent work activities for her current employer which aggravated her preexisting condition and resulted in an intervening accident.

Home and its insurance carrier, Virginia Surety Insurance Company (Virginia), argue that the Board does not have jurisdiction to hear the appeal pursuant to K.S.A. 44-534a(a)(2). In the alternative, they argue the ALJ's Order should be affirmed.

Even though there are two separate employers, respondent, Link, Inc.(Link), and its insurance carrier, Fireman's Fund Insurance Company (Fireman's), argue the Board does not have jurisdiction because the sole issue is the determination of a date of accident in order to ascertain which insurance carrier is liable to pay benefits. In the alternative, they argue claimant's current need for medical treatment is the natural and probable consequence of her injury suffered while employed by Home and accordingly, the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed by Home from approximately 1996 until December 31, 2001. Claimant was paid for 56 hours a week to provide home nursing care for her daughter. Claimant's job activities required her to transfer her daughter to and from her wheelchair to her bed or the toilet, prepare and administer medications including breathing treatments, tube feed, bathe, and daily launder the bedding. The various activities were performed numerous times during the course of a day.

On October 27, 1999, while lifting her daughter from the toilet and twisting to place her in the wheelchair, claimant's right knee gave out. Within days claimant also began experiencing problems in her left knee. Claimant complained of bilateral knee pain and was advised the left knee pain was the result of overcompensating for the right knee. Dr. Garcia performed surgery on claimant's right knee on July 26, 2000. After surgery claimant continued to experience a lot of problems with her right knee. Claimant also began to receive treatment for her left knee. On February 8, 2001, Dr. Vello Kass performed surgery on claimant's left knee. After surgery, claimant was referred for physical therapy which was discontinued because it was too painful.

Claimant continued to see Dr. Kass with complaints of knee pain after the surgery in February, 2001. Claimant was treated with Celebrex and Synvisc shots but suffered adverse reactions. In a medical note dated June 27, 2001, Dr. Kass recommended knee replacement surgery as the only remaining treatment option. Claimant noted the recommended knee replacement surgery was for the left knee first and then the right.

After the surgery on claimant's left knee, when claimant was released to return to work, Dr. Kass never imposed any restrictions. Claimant noted she did not want the doctor to impose restrictions because she wanted to continue to provide as much care for her daughter as possible. However, claimant noted after her last surgery her knee had given

out when she was removing her daughter from the bathtub and consequently, claimant no longer performed that lifting activity. Claimant noted that she began to self-limit her activities such as lifting her daughter, bathing her daughter and taking her outside.

On January 1, 2002, claimant began work with Link performing the same duties caring for her daughter that she had performed while employed by Home. Claimant testified that her knee problems did not worsen as she continued to provide care for her daughter after January 1, 2002.

Dr. Kass provided several letters which indicate that in his opinion claimant's continued work activities would aggravate and contribute to her symptoms. In his last letter dated June 7, 2002, Dr. Kass, in response to a letter from Home's attorney, opined claimant's job duties continue to aggravate, accelerate and worsen claimant's underlying degenerative arthritic condition.

Home and its insurance carrier, Virginia, as well as Link and its insurance carrier, Fireman's, argue the Board does not have jurisdiction to review this appeal from a preliminary hearing. It is argued that the sole issue for Board review is the determination of the date of accident in order to ascertain which insurance carrier is liable to pay benefits.

Is date of accident an issue that may be reviewed from a preliminary hearing order when it only pertains to which insurance carrier is responsible for providing preliminary hearing benefits?

Not every alleged error in law or in fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues, which are deemed jurisdictional:¹

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide both timely notice and written claim of the accidental injury?
- (4) Is there any defense that goes to the compensability of the claim?

Additionally, the Board may review those preliminary hearing orders where a judge has exceeded his or her jurisdiction.²

¹ K.S.A. 44-534a(a)(2).

² K.S.A. 44-551.

Date of accident is not one of the jurisdictional issues listed above and the Board concludes that when date of accident is an issue only because it pertains to which insurance carrier is responsible for providing preliminary hearing benefits, that finding is not appealable from a preliminary hearing order.

Claimant alleged she suffered a specific injury on October 27, 1999, and each and every day at work for Home through December 31, 2001. During that time Home was provided insurance coverage by Clarendon until January 31, 2000, and Virginia provided insurance coverage from February 1, 2000, through December 31, 2001. Whether injured as a result of the specific incident on October 27, 1999, or by repetitive aggravation of her condition through December 31, 2001, claimant's injuries would be the result of her work activities for respondent, Home. Accordingly, the Board would not have jurisdiction to address the date of accident to determine whether Clarendon or Virginia are liable to provide preliminary hearing benefits.

However, the analysis of whether the Board has jurisdiction does not end with that determination. Home and its insurance carrier, Clarendon, argue claimant suffered an intervening accident during her subsequent employment with Link.

"A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."³ Whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his prior employment with Home. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity for Link aggravated, accelerated or intensified the underlying disease or affliction.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

³ K.S.A. 44-534a(a)(2).

⁴ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁶

The dispositive issue for Board determination is whether claimant's continued work activities caring for her daughter after January 1, 2002, aggravated, accelerated and intensified her condition and need for surgery.

Claimant continued to have bilateral knee problems after surgery on each knee. After the last knee surgery in February 2001, claimant continued to experience problems and continued to receive additional treatment. When claimant returned to work sometime in March 2001, she began to self-limit her lifting and other activities such as bathing her daughter or taking her outside. On June 27, 2001, Dr. Kaler recommended knee replacement surgery. Home and its insurance carrier, Clarendon refused to pay for the surgery.

Although not clearly explained at the preliminary hearing, it appears from the administrative record that Home signed an Agreed Order for Medical Treatment dated November 7, 2001, which authorized additional treatment for claimant and designated Dr. Kass the authorized treating physician. As previously noted Home and Clarendon then refused to pay for the knee replacement surgery recommended by Dr. Kass.

It is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.⁷

It appears that Clarendon initially attempted to establish that Virginia was liable and then later expanded its questions to Dr. Kass to include claimant's continued work activities with Link and thereby shift liability to the subsequent employer.

Dr. Kass' letter of June 7, 2002, responded to questions from Home and Clarendon regarding claimant's continued work activities after January 1, 2002. But it cannot be ascertained from his response whether the doctor was aware claimant had self-limited some activities. Nonetheless, the Board finds more persuasive the doctor's initial response

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. 1084 (1996).

⁷ *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

dated January 31, 2002, that indicated the October 1999 injury, was the major contributor to claimant's current knee problems.

In this case, Home's liability had been established, knee replacement surgery recommended, and payment for such surgery denied all before claimant's employment was transferred to Link. Claimant testified that the condition of her knees remained the same and never worsened after January 1, 2002. Stated another way, her knees remained symptomatic with activity but the symptoms never worsened. Moreover, claimant neither worsened nor recovered after her initial injury and remained symptomatic after the surgeries to her knees. Accordingly, the Board concludes claimant's continued activities caring for her daughter after January 1, 2002, did not aggravate claimant's condition and her need for medical treatment is the natural and probable consequence of her work-related injury or injuries suffered while employed by Home.⁸ Accordingly, the Board affirms the ALJ's Order for Medical Treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated September 5, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2003.

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Robert J. Wonnell, Attorney for Home/Clarendon
Jeff S. Bloskey, Attorney for Home/Virginia
Roger E. McClellan, Attorney for Link/Fireman's
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation

⁸ As noted in the foregoing decision, the Board does not have jurisdiction to address the issue whether the date of accident was during the time coverage was provided by Clarendon National Insurance Company or Virginia Surety Company.