BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GORDON NOBLITT	)	
Claimant	)	
VS.	)	
	)	Docket No. 253,197
DRYWALL CONSULTANTS, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from the February 28, 2001 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant was injured May 18, 1999 while working for respondent.[1] This is not disputed, at least for purposes of this review. What is disputed is whether claimant suffered injury to his right arm in addition to the admitted neck and left arm injuries. Judge Barnes awarded claimant preliminary benefits by her Order of February 28, 2001, "including all treatment of right arm" and named Dr. George Lucas to continue as the authorized treating physician. Respondent contends that claimant's right upper extremity condition and need for medical treatment is not related to the original injury. Claimant counters that his current condition and need for medical treatment is a direct result of the May 18, 1999 accident, and denies any preexisting condition or subsequent accident and intervening injury. Therefore, the issue is whether claimant's current need for medical treatment for the right upper extremity condition is due to the 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]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

---

[1] Claimant's Application for Hearing alleges an accident date of May 14, 1999, but he testified at page 17 of the February 27, 2001 Preliminary Hearing transcript that the accident happened on May 18, 1999.

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

In Respondent and Insurance Carrier's Brief on Appeal (p. 2-3), the facts are described as follows:

> For purposes of this appeal, respondent does not dispute that claimant sustained a work-related injury on May 18, 1999. Claimant loaded drywall on that day and then woke up the next morning with severe pain in his neck radiating into the left arm. He was initially seen by his family doctor, Dr. Charlie Joslin, for pain in his left shoulder and arm. (Prelim. Hearing, p. 17).
>
> Claimant treated with Dr. Joslin as well as Dr. Gluck and Dr. Smith. He was then referred to Dr. Paul Stein, a neurosurgeon. Dr. Stein felt that claimant had a cervical problem that required a cervical discectomy at C5-6 and C6-7. This surgery was performed by Dr. Letcher in Tulsa on November 9, 1999. (Prelim. Hearing, p. 5).[1]
>
> Following his surgery, claimant continued to have problems with his neck and left arm. He ultimately returned to Dr. Stein who did not feel that the problems in the arm were coming from the neck but, rather, were the result of an ulnar nerve entrapment. Dr. Stein sent claimant to Dr. Lucas, a orthopedist who specializes in the upper extremities. (Prelim. Hearing, Respondent's Exhibit 1 [4/26/00 Stein note]).
>
> After examining the claimant, Dr. Lucas came to the conclusion that he had "double crush syndrome" meaning that he had both an ulnar nerve entrapment and cervical radicular disease emanating from the C8-T1 level of the spine. Dr. Lucas recommended a left ulnar nerve transposition and decompression to address the entrapment. (Prelim. Hearing, Claimant's Exhibit 1 [5/9/00 Lucas note]). After a hearing before the ALJ, this procedure was authorized. It was performed on June 1, 2000.
>
> While he was recovering from his ulnar nerve surgery, claimant underwent an MRI in July of 2000. According to Dr. Lucas, this test revealed no bulge or herniation of any cervical disc. There was "some mild change at the C6 level and changes postoperatively from C5 through C7" but "the T1 area is intact." (Prelim. Hearing, Claimant's Exhibit 1 [7/21/00 Lucas note]).
>
> Dr. Lucas next saw the claimant on August 11, 2000. At that time he was complaining of increased symptoms in his right arm. Claimant had, for some time, experienced some discomfort in the right arm but it was largely overshadowed by the more severe problems with the left arm. Claimant expressed concern about neurologic disease but Dr. Lucas assured him that there was no evidence of this on the testing and that "(w)e have previously ruled out any significant lesion at the T1 area". It thus appeared that

> claimant's extremity symptoms were unrelated to his original cervical injury. (Prelim. Hearing, Claimant's Exhibit 1 [8/11/00 Lucas note]).
>
> In subsequent examinations by Dr. Lucas, on September 21, 2000 and November 9, 2000, claimant's symptoms were almost completely limited to his left arm. On January 17, 2001, however, the focus returned to the right arm. According to Dr. Lucas's notes, claimant had been seen by a neurologist, Dr. Grelinger, who felt that "he probably does have some cervical nerve root involvement as well as compression of the ulnar nerve in the ulnar groove on the right side." Dr. Lucas recommended that the claimant undergo an ulnar nerve decompression procedure on the right side. (Prelim. Hearing, Claimant's Exhibit 1 [1/17/01 Lucas note]).

[1] Because the preliminary hearing which resulted in this appeal focused on a fairly narrow issue, a good deal of the background was related to the ALJ through the undisputed statements of both counsel.

Dr. Frank S. Letcher and Dr. Paul S. Stein do not attribute claimant's right upper extremity condition to the work-related accident, whereas, Dr. George L. Lucas and Dr. Bart A. Grelinger do. Dr. Lucas' January 17, 2001 office note reads in part:

> The patient has been to see Dr. Grelinger and additional studies [have been] carried out. These studies indicate that he probably does have some cervical nerve root involvement as well as compression of the ulnar nerve in the ulnar groove on the right side. . . . Although the patient does appear to have a double crush syndrome, I think he would be benefitted by a decompression of the ulnar nerve on the right.[3]

In a letter dated January 25, 2001 to Charlie G. Joslin, M.D., Dr. Grelinger wrote:

> The patient underwent follow-up electromyogram nerve conduction studies on 12/21/00. This study suggested bilateral chronic radicular involvement at the region of C7-8 and T1 on the left and C8-T1 on the right. There is also a significant right ulnar entrapment across the region of the elbow. In addition, there was diffuse left ulnar disease; however, no clear focal lesion could be identified. The patient, however, had had an ulnar release in the region of the [left] elbow in June of 2000. Given this information, I felt the patient likely did suffer a form of double-crush phenomenon.[4]

In his February 13, 2001 letter to claimant's attorney, Dr. Lucas states:

---

[3] Claimant's Ex. 1 to 2/27/01 Prel. H. transcript.

[4] Claimant's Ex. 1 to 2/27/01 Prel. H. transcript.

> In terms of the causality of this, it is difficult to say, but the temporal relationship to his neck injury and neck surgery suggests that there is a relationship to his original injury. I do not think that this has anything to do with overcompensation, however, and I think is related to the original injury as indicated. Precisely how that happens, I am unable to state, however.[5]

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.[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] 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.[8]

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.[9] 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 by an independent intervening cause.[10] Claimant must prove that an injury occurred as a result of an accident at work.[11] The term "substantial evidence" when applied to workers' compensation proceedings refers to evidence possessing of substance and capable of inducing conviction, or furnishing substantial basis of fact from which an issue can be reasonably resolved.[12] "Causal relation is a necessary element in establishing

---

[5] Claimant's Ex. 1 to 2/27/01 Prel. H. transcript.

[6] 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).

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

[8] K.S.A. 44-501(g).

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

[10] 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).

[11] Hoover v. Ehrsam Co., 218 Kan. 662, 544 P.2d 1366 (1976).

[12] Drake v. State Dept. of Social Welfare-Larned State Hospital, 210 Kan. 197, 499 P.2d 532 (1972).

liability under a workers' compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence."[13]

Based upon the opinions of Dr. Lucas, the Board finds claimant's work-related cervical injury to be the most likely cause of both the left and the right upper extremities conditions. Whether claimant's upper extremity problems are the result of a double crush syndrome or are instead a result of the subsequent cervical discectomy and fusion surgery, claimant's current right upper extremity complaints are compensable as a direct and natural consequence of the May 18, 1999 work-related injury.[14]

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 to award preliminary benefits should be affirmed. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[15]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Nelsonna Potts Barnes on February 28, 2001, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

_____
BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
William L. Townsley III, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

---

[13] Smith v. Allied Mutual Casualty Co., 184 Kan. 814, 818, 339 P.2d 19 (1959).

[14] *See* Frazier v. Mid-West Painting, Inc., 268 Kan. 353, 995 P.2d 855 (2000).

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