

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

<b>JARED R. BOYD</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>FRITO-LAY</b>	)	
Respondent	)	Docket Nos. 237,057 &
	)	261,881
AND	)	
	)	
<b>CNA INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed Administrative Law Judge Brad E. Avery's Award dated June 29, 2001. The Board heard oral argument on January 15, 2002, in Topeka, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Paul D. Post, of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James C. Wright, of Topeka, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

At the request and agreement of the parties, these two docketed claims were consolidated for the purpose of litigation. The first claim alleges a March 22, 1998, accident date. This claim was assigned Docket No. 237,057. The second claim alleges a June 22, 1998, accident date. This claim was assigned Docket No. 261,881. Both claims alleged injury to claimant's lower back.

**Docket No. 237,057**

It was undisputed claimant suffered a work-related accident on March 22, 1998. The Administrative Law Judge determined the claimant suffered a temporary injury with no permanent impairment. Accordingly, the Judge awarded claimant only temporary total disability and medical benefits. The Judge also awarded claimant unauthorized and future medical compensation.

Claimant raises the issue of nature and extent of disability and argues that he is entitled to a work disability as a result of this injury.

Respondent argues the medical and temporary total disability compensation ordered in this docket were paid pursuant to a preliminary hearing order following the alleged second accident in Docket No. 261,881. Respondent further argues because compensation in the second docketed claim was ultimately denied, the Judge should have ordered those amounts reimbursed from the Workers Compensation Fund (Fund). Lastly, Respondent argues future medical compensation should be denied because the Judge determined this claim only caused a temporary injury which resolved with no permanency.

**Docket No. 261,881**

The claimant alleged a date of accident of June 22, 1998. The Administrative Law Judge determined the claimant did not suffer an accident arising out of and in the course of employment because the claimant's injury was caused by a personal risk due to his preexisting back condition.

Claimant requested review and raises the issue whether he suffered personal injury by accident arising out of and in the course of employment. If the claim is compensable, claimant additionally raises the issue of nature and extent of disability.

Respondent argues the Administrative Law Judge's decision that claimant did not suffer personal injury arising out of and in the course of employment should be affirmed. In the alternative, respondent argues there was no timely notice in this claim. Respondent repeats its argument that medical and temporary total disability compensation benefits ordered paid at the preliminary hearing following this alleged date of accident should be reimbursed to respondent from the Fund rather than awarded in Docket No. 237,057. Lastly, respondent contends that if there is any compensation awarded claimant under either docket, respondent is entitled to a reduction for a 5 to 7 percent preexisting impairment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant had a medical history of back problems. He had treated with a chiropractor in the 1990s for episodic back problems. In 1996, claimant suffered an injury to his back while playing basketball. An August 1, 1996, MRI revealed a herniated disk at L4-5, a bulging disk at L3-4 and degenerative disk disease. Claimant was treated with medications and epidural steroid injections but surgery was not performed.

The medical records indicate claimant had an episode of back problems in November 1996, and received medications, physical therapy and was kept off work. Another incident of back problems occurred in May 1997. Claimant indicated he had just turned wrong and complained of back pain with radiation down into his left leg. Claimant was again taken off work and treated with medications and epidural steroid injections. After each of the foregoing incidents the claimant was released without restrictions and was able to return to full duty.

In Docket No. 237,057, it is undisputed that on March 22, 1998, claimant suffered an accidental injury arising out of and in the course of employment. Claimant was picking up some boxes and felt a real sharp pop and pain in his back. He had to drop the boxes and stop working. The next day claimant saw Leighton York, a nurse practitioner, who placed the claimant on a 25-pound weight limit with no bending at the waist and gave the claimant some Relafen samples and a booklet regarding home exercises for the low back. Four days later, the claimant saw Douglas D. Frye, M.D., and was taken off work.

Claimant was provided physical therapy, medications and an epidural steroid injection. On April 13, 1998, Dr. Frye released claimant to return to light-duty work with a temporary lifting restriction of 15 pounds and a restriction of no repetitive bending. Claimant was to start working two hours a day and gradually increase the hours worked. Dr. Frye opined claimant had a rapid full recovery and was at full function after the March 22, 1998, incident. He further opined claimant did not need permanent restrictions nor did he suffer additional permanent impairment as a result of the March 22, 1998, incident.

Claimant testified that after he returned to work he was still having a lot pain in his lower back due to riding the forklift and he would occasionally stop, stretch and rest a little bit for a few minutes. Nonetheless, claimant worked 41.5 hours the week of April 18, 1998; 72.5 hours the week of April 25, 1998; 72.5 hours the week of May 2, 1998; 79 hours the week of May 9, 1998; 73 hours the week of May 16, 1998; 65 hours the week of May 23, 1998; 65.5 hours the week of May 30, 1998; 69 hours the week of June 6, 1998; 81 hours the week of June 13, 1998; and, 65 hours the week of June 20, 1998.

After claimant was released to work by Dr. Frye, he never sought additional medical treatment, never requested fewer hours and did not report any back problems to the respondent. The claimant requested the majority of the overtime that he worked.

On June 22, 1998, claimant had clocked out for his unpaid meal break. Claimant had left the premises and upon his return, as he proceeded to go back into the plant, he began to run because of an approaching thunderstorm. Claimant testified that as he took the first step to begin running into the plant he felt a pop in his back and pain in the same general area where he previously had problems. Claimant testified he was not late and therefore was not running because he needed to get back to the plant. Claimant testified he walked back into the building, stretched and then continued working.

After the incident on June 22, 1998, claimant returned to work and finished his shift. He didn't report it to his leadman or supervisor nor did he seek medical care. But claimant testified he had a conversation with Julia Self a day or so after the June 1998 incident and explained what had happened.

Julia Self, is a registered nurse and specializes in occupational health. Ms. Self was employed by CRA and placed in a position at Frito-Lay as an internal case manager. Ms. Self's duties included assisting employees with their medical care after a workers compensation claim was made and she also completed the OSHA log to assist Frito-Lay. She agreed she had a conversation where claimant had indicated he was sore because of the running incident, but she denied he gave notice or was making a workers compensation claim.

On August 25, 1998, Ms. Self had a voice message from the claimant requesting medical care relating to the injury that occurred in the parking lot and requesting Ms. Self notify Frito-Lay that he was going to be making a workers compensation claim.

Claimant sought treatment with his personal physician, Carol S. Ludwig, M.D., on July 1, 1998. Dr. Ludwig diagnosed recurrent low back pain. Dr. Ludwig referred the claimant to Kenneth Gimple, M.D., who took the claimant off work. Claimant had a second MRI on August 19, 1998, which revealed a herniated disc at L4-5 and a central herniated disc at L3-4. Ultimately, claimant was referred to Jeffrey T. MacMillan, M.D., and on February 3, 1999, Dr. MacMillan performed a L3-4 laminotomy and discectomy on claimant.

Claimant returned to work in April 1999 and worked in the warehouse department. He was later transferred to work as a quality control technician.

#### **Docket No. 237,057**

The Administrative Law Judge determined claimant suffered a temporary injury as a result of the March 22, 1998, injury.

After the claimant was injured on March 22, 1998, he was taken off work, provided medications, physical therapy and ultimately an epidural steroid injection. Upon his return to work claimant worked a significant number of hours of overtime each week. Claimant did not request fewer hours, did not seek additional medical treatment and did not complain to his employer of any problems.

The treating physician, Dr. Frye, concluded claimant had fully recovered from the March 22, 1998, injury. Claimant had indicated to the doctor that he had recovered from the March injury. The doctor further opined the March injury did not cause any permanent impairment or require any permanent restrictions.

Dr. MacMillan opined claimant's preexisting degenerative disk disease was not permanently worsened by the March incident because the episode matches his previous history of an incident followed by treatment which resolves the pain and claimant is able to return to a high level of activity. Dr. MacMillan further opined the March incident did not cause any increased impairment or require any additional restrictions of claimant's activities.

Peter Bieri, M.D., agreed that if claimant returned to work following the March incident and worked the number of hours indicated without complaint and without seeking medical care it would be an indication the March injury was more probably than not a temporary exacerbation. Based on those facts claimant would also not have any increased impairment or additional restrictions.

The Board adopts the Administrative Law Judge's determination that claimant suffered a temporary injury as a result of the March 22, 1998, work-related injury. However, having found claimant suffered a temporary injury, the award for future medical benefits should be reversed. Moreover, the award of temporary total disability compensation should be modified. After the March 22, 1998, injury claimant was taken off work by Dr. Frye on March 27, 1998, and returned to work on April 13, 1998. Accordingly, claimant is only entitled to 1.43 weeks of temporary total disability compensation.<sup>1</sup>

#### **Docket No. 261,881**

The Administrative Law Judge determined the June 22, 1998, incident did not arise out of the course of claimant's employment. The Board agrees and affirms that finding.

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

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<sup>1</sup> K.S.A. 44-510c(b)(1) excludes the first week unless the temporary total disability exists for three consecutive weeks.

right depends.<sup>2</sup> "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."<sup>3</sup>

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>6</sup> The record in this case, however, fails to prove that work caused an aggravation of claimant's preexisting degenerative condition. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.<sup>7</sup>

In Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972), the Kansas Supreme Court denied workers compensation benefits, finding Mr. Boeckmann's arthritic condition progressively worsened regardless of his activities. The Court said:

. . . there is no evidence here relating the origin of claimant's disability to trauma in the sense it was found to exist in Winkelman. No outside thrust of traumatic force assailed or beat upon the workman's physical structure as happened in Winkelman.<sup>8</sup>

The claimant merely took a step and felt pain in his back. He was not working. Dr. MacMillan testified:

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<sup>2</sup>K.S.A. 44-510(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).

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

<sup>4</sup>Brobst v. Brighton Place North, 24 Kan. App. 2d 766,771, 955 P.2d 1315 (1997).

<sup>5</sup>Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

<sup>6</sup>Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

<sup>7</sup>Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992); Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

<sup>8</sup>Boeckmann at 736.

A. The symptoms that Mr. Boyd complained of were not the symptoms of an active injury. He didn't fall. He didn't lift something heavy. This was an act of normal everyday living. Had the symptoms not occurred with starting to run across the parking lot, they would have occurred with him coughing or standing up off the toilet or trying to set the table at home. Those symptoms that occur without any obvious source of trauma are chronologic symptoms. The disc is ready to go and it blows. So this is an episode where Mr. Boyd, his time was up. Regardless of where he was and what he was doing at that point in time, he was doomed to get into trouble. Can we tell at that point in time that Mr. Boyd was going to need a surgery, the answer is no. In retrospect, he didn't recover in a timely fashion the way he had from all his prior episodes of pain. He didn't recover with the treatments employed in all his previous episodes. So you couldn't have predicted at the time of the injury that he would require a surgery, but because he fails everything else, he ultimately ended up with the surgery.<sup>9</sup>

From a review of the record as whole, the Board finds Dr. MacMillan's opinion to be the more credible and finds claimant has failed to meet his burden of establishing that he has suffered accidental injury arising out of and in the course of his employment with respondent.

The respondent may, pursuant to K.S.A. 44-543a(b), apply to the director for certification of overpayment of medical or temporary total disability benefits.

### **AWARD**

#### **Docket No. 237,057**

**WHEREFORE**, it is the finding, decision, and order of the Board that Administrative Law Judge Brad E. Avery's June 29, 2001, Award should be, and is hereby, modified as follows:

Claimant is entitled to 1.43 weeks of temporary total disability compensation at the rate of \$351 per week or \$501.93, which is all due and owing claimant and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are order paid by the respondent.

#### **Docket No. 261,881**

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<sup>9</sup>Deposition of Jeffrey T. MacMillan, M.D., dated May 22, 2001, at 32-33.

**WHEREFORE**, it is the finding, decision, and order of the Board that Administrative Law Judge Brad E. Avery's June 19, 2001, Award finding claimant, Jared Boyd, did not suffer an injury on June 22, 1998, arising out of his employment should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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

\_\_\_\_\_  
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Paul D. Post, Attorney for Claimant
- James C. Wright, Attorney for Respondent
- Brad E. Avery, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director