

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

AUTO F. BOZARTH)	
Claimant)	
VS.)	
)	Docket No. 265,670
BOB BERGKAMP CONSTRUCTION CO., INC.)	
Respondent)	
AND)	
)	
ZURICH U.S. INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the January 3, 2002 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Claimant alleges the work he has performed for respondent as a mechanic and welder has aggravated the arthritis in his knees. Claimant filed this claim with the Division of Workers Compensation in May 2001, alleging an ongoing series of accidents involving his knees, right hip and back commencing February 12, 1999.

In the January 3, 2002 Order, Judge Clark denied claimant's request for benefits finding claimant failed to prove that he suffered a work-related injury and also finding the claim was "time barred."

Claimant contends Judge Clark erred. Claimant argues he initially experienced symptoms in his knees sometime in February 1999 when he used a sledgehammer to drive pins in the bucket of an excavator. Claimant argues that he aggravated and accelerated the arthritis in his knees each and every day that he continued working for respondent after the sledgehammer incident as he was working 60 hours per week, walking on concrete, climbing up on machinery, and bending and stooping underneath machinery. Accordingly, claimant requests the Board to award him workers compensation benefits for his alleged injuries.

Conversely, respondent and its insurance carrier contend claimant's knee problems resulted from the natural aging process and were caused by claimant's day-to-day activities as opposed to his work. Accordingly, they request the Board to affirm the January 3, 2002 Order.

The only issues before the Board on this appeal are whether claimant's work activities aggravated the arthritis in his knees and, if so, whether such aggravation either caused or contributed to claimant's present need for bilateral knee replacements.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. Claimant is 60 years old and has worked for respondent as a heavy equipment mechanic and welder for approximately four years. In repairing that equipment, claimant has to climb on the machinery as well as bend and stoop underneath it to make the necessary repairs. Claimant works approximately 60 hours or more per week.
2. Claimant first began having symptoms in his knees in February 1999 when he was using a heavy sledgehammer to drive pins in the bucket of an excavator. Following that incident, claimant's symptoms progressively worsened as he continued to work for respondent. In late 1999 or early 2000, claimant began experiencing symptoms in his right hip and back.
3. In September 1999, claimant sought medical treatment for his knees from a Dr. Egelhof. The record is not entirely clear, but it appears Dr. Egelhof referred claimant to a Dr. Mortenson, who saw claimant from approximately March 2000 through October 2000 and treated him with injections. Claimant also consulted a chiropractor for his back symptoms.
4. On August 15, 2001, claimant saw orthopedic surgeon Dr. Kenneth A. Jansson for an examination. Dr. Jansson diagnosed severe arthritis in both knees and determined claimant should be evaluated for total knee replacements. Claimant told the doctor about the 1999 sledgehammer incident, which the doctor did not find very significant. In his August 15, 2001 note, the doctor commented, in part:

I think it is very clear this gentleman has severe osteoarthritis of both knees with varus deformities and marked medial compartment erosions and bone on bone arthrosis. I have no doubt that he is in severe pain. I cannot conjecture that this was caused by any specific injury that he suffered two years ago. I think if he has not had pain before this, he was just very fortunate. I think the episode at work was not a significant exacerbating injury. I think any kind of activity with these kinds of

knees I would expect to cause some pain, but I think the need for further treatment is precipitated by his preexisting condition more so than any specific injury.

5. Dr. Jansson referred claimant to Dr. John R. Schurman, II, for evaluating whether claimant needed total knee replacements. In the history dictated by Dr. Schurman on August 15, 2001, the doctor noted that claimant's work had exacerbated his knee symptoms. The doctor wrote, in part:

Auto comes to see us today as a new patient. He is referred by Dr. Jansson. He is a pleasant 60-year-old male who has had long-standing difficulties with his knees. He has apparently had exacerbated symptoms of his knees over the past two-years consequent to his work, which involves heavy lifting and the use of a sledgehammer. He relates a story where two-years ago he was using a sledgehammer for several weeks. This subsequently resulted in an increase in discomfort in his knees particularly in the left, which has failed to resolve. He now has pain, pain at night, pain which is present with ambulation and weight bearing. He notes no specific mechanical symptoms but has significant dysfunction secondary to his discomfort. He has seen Dr. Mortenson in the past who has taken x-rays, drained fluid off his left knee, and gave him a Cortisone injection. He continued to have severe discomfort and he has had Synvisc injections, which have helped for approximately six-months. However, of recent his symptoms have worsened. This treatment has not been available to him due to insurance considerations. He is presently working without restrictions. He works as a heavy machine repairman and welder. . . .

Dr. Schurman believes claimant has severe osteoarthritis in the left knee and moderate osteoarthritis in the right knee. The doctor concludes his notes by stating that claimant's work may have aggravated the arthritis in claimant's knees but the work did not cause it.

6. The Judge conducted an initial preliminary hearing in September 2001 at which the parties introduced the medical notes from Doctors Jansson and Schurman. At the conclusion of that hearing, Judge Clark denied claimant's request for benefits ruling "that the Claimant has not sustained his burden proving that his knee problems are caused by his work with the Respondent."

7. Claimant did not appeal that initial denial of benefits but, instead, consulted orthopedic surgeon Dr. C. Reiff Brown. In confirming the appointment, claimant's attorney not only asked Dr. Brown for treatment recommendations but also asked the doctor to provide his opinion whether claimant's work at respondent's construction company aggravated or accelerated his condition. The letter did not request the doctor to specifically address the work that claimant performed following the February 1999 sledgehammer incident.

8. Dr. Brown examined claimant on October 9, 2001, and prepared his medical report the same day. In his report, Dr. Brown only addressed the February 1999 sledgehammer incident and did not address the question whether claimant's later work activities aggravated or accelerated the arthritic condition in his knees. The doctor wrote, in part:

This man has severe medial compartment degeneration of both knees. He has complete loss of joint surface as a result of this. His condition pre-existed the injury in question, however, was rendered symptomatic and was aggravated by that injury. Prior to the injury he had no pain whatsoever and since the injury he has developed sufficient pain, not only did it interfere with his work activities but to make him seek operative treatment in the form of total joint replacements. It is true that this type of surgical procedure might have been necessary sometime in the future had he not had the February 12, 1999 injury, however, it is certainly possible that he would have been able to work to retirement age had he not had the injury and at that point in time could have decreased his level of physical activity sufficiently to at least postpone or totally avoid the operation.

Dr. Brown concluded that claimant needed bilateral total knee replacements.

9. Claimant proceeded to a second preliminary hearing on January 3, 2002. With Dr. Brown's October 2001 report in hand, claimant requested the Judge to award him benefits. At that hearing, respondent and its insurance carrier raised the issue of timely written claim for the February 1999 sledgehammer incident as Dr. Brown had only addressed that incident. Other than Dr. Brown's report, the letter confirming the appointment and the check tendered to the doctor for the examination, no other evidence was introduced at the January 3, 2002 hearing.

CONCLUSIONS OF LAW

The January 3, 2002 Order denying benefits should be affirmed.

The Judge initially denied claimant's request for benefits after considering the medical notes from Doctors Jansson and Schurman. That denial was not appealed. Following that initial order denying benefits, there has been no additional testimony nor medical evidence presented that addresses whether claimant's work activities following the February 1999 sledgehammer incident aggravated or accelerated claimant's arthritic condition. Therefore, the Board must conclude that claimant has failed to prove that his work activities following February 1999 aggravated or accelerated his preexisting condition. Moreover, claimant has failed to prove that he served respondent with timely written claim for a February 1999 accident. Accordingly, at this juncture of the claim the Board must deny claimant's request for benefits.

WHEREFORE, the Board affirms the January 3, 2002 Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director