

Respondent agrees the claimant's accident occurred in the course of his employment but respondent requests review of whether the claimant's accidental injury arose out of his employment. Respondent further argues the ALJ erred in ordering certain VA medical bills to be paid by respondent.

Conversely, claimant argues he was on an authorized break on respondent's premises when he was injured. Consequently, claimant argues that his accident arose out of his employment. Claimant further argues the medical treatment with the VA was obtained after respondent refused to provide further treatment. Claimant requests the Board to affirm the ALJ's Award in all respects.

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:

The facts are essentially undisputed. Harold E. Johnson Jr. began his employment as a certified nurse's aide (CNA) on March 18, 2000, with Cambridge Place. During a work shift the claimant is provided two 15-minute breaks and a 30-minute lunch break. Claimant is not required to clock out for the two 15-minute breaks but he does have to clock out for the 30-minute lunch break.

Each hall has approximately 15-20 residents and each resident has a separate call light. Even if on break the claimant is expected to answer the flashing call lights if it's an emergency.

While at work on April 13, 2001, the claimant went on a 15-minute break. Because he does not smoke, the claimant went to the resident's TV lounge inside the building and sat down in an easy chair to take his break. He propped his legs up over the arm of the chair and was relaxing.

Claimant provided two different versions of what occurred next. In a recorded statement taken a few weeks after the incident the claimant stated that he fell asleep and awoke with a start realizing he was ten minutes over his break time. As he jumped up from the chair his legs gave out and he fell onto his knees injuring his right knee. At regular hearing, the claimant testified that he was in the chair, not asleep and jumped up from the chair to respond to an alarm, fell and landed on his knees injuring his right knee.

Claimant was helped up and he continued to work the rest of his shift. By the end of his shift, the right knee had begun to swell. When the claimant got home from work he applied some ice to his knee. Claimant completed an incident report the same night of his injury which indicated as he got up from the chair his knee gave out and he fell.

When claimant was still limping a week later, the respondent advised claimant to seek medical treatment with the company physician, Dr. Ryan. Claimant was referred by Dr. Ryan to Dr. Bruce Miller, an orthopedic specialist. Dr. Miller ordered an MRI which was performed on April 19, 2001, and revealed a right knee medial meniscus tear with a discoid meniscus and articular damage. Dr. Miller then recommended surgery to repair claimant's right knee. The insurance company would not authorize the surgery because it concluded claimant's injury was not work related. Claimant then sought medical treatment with the Veteran's Administration (VA). Drs. Jackson J. Bence and Douglas P. McInnis performed the right knee arthroscopy on July 30, 2001.

On February 12, 2003, claimant was examined by Dr. Edward J. Prostic, an orthopedic surgeon. Dr. Prostic opined the claimant had a grade IV chondromalacia and he would experience pain and a grinding sensation in his knee. Dr. Prostic provided a 40 percent permanent partial impairment rating to the claimant's right knee.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.³

It is an undisputed fact that as claimant got up from a chair, where he had been resting while on break, he fell and injured his right knee. As a general rule, injury during

¹ K.S.A. 44-501(a) (Furse 2000).

² *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995)

a paid break on the employer's premises is considered to arise out of employment because the break is considered to be an incident of employment and for the mutual benefit of the worker and employer.⁴

The Board finds nothing in the claimant's conduct that would except it from this general rule. The break is a time the employee is allowed to spend away from the work generally doing something for the employee with the expectation that the break makes the employee's work time more productive. Accordingly, the employer benefits from the employee's break. And resting or even taking a nap is reasonable employee conduct during a break.

Respondent does not dispute that claimant's accident occurred "in the course of employment" but argues that the accident did not arise "out of" claimant's employment. Respondent argues that the personal comfort doctrine relied upon by the ALJ only applies to the determination of whether the accident arose "in the course of employment" but has no application in the determination of whether the accident arose "out of" the incidents of employment. The Board disagrees.

The general rule concerning the personal comfort doctrine is stated by Professor Larson:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered **an incident of the employment**.⁵ (Emphasis added)

This general rule clearly recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. As previously noted, activities which are an incident of employment are considered to arise "out of" the employment.

Respondent further argues that claimant's fall was due to a personal risk and not associated with his employment.

Claimant testified that he had not experienced problems with his knee before the incident at work. He further noted that as he rapidly got up from the chair his leg gave out and he fell. He agreed he did not trip over anything.

⁴ 2 *Larson's Workers Compensation Law*, § 21.01 (2003).

⁵ *Id.* at 21-1.

The majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.⁶ In *Hensley*⁷, the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

Moreover, although getting up from a chair could be described as a normal activity of day-to-day living, K.S.A. 44-508(e) (Furse 2000) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this case there was a specific onset of injury caused by an accident at work. There is no allegation in this case that claimant's disability resulted from the effects of the ordinary wear and tear common to acts of everyday living on a preexisting condition.⁸ Neither is this a case where claimant had a preexisting condition which was worsened or made symptomatic by a solely personal risk.⁹ The Board finds claimant's unexplained fall was a neutral risk and adopts the majority view that such falls arise out of and in the course of employment. Accordingly, the Board finds the injury that occurred to claimant while hurriedly getting up from the chair in order to return to work does constitute an injury that arose out of the employment.

The respondent cites *Martin*¹⁰, as a case with similar facts that supports its position that claimant's injury did not arise out of the employment relationship with the respondent. The worker in *Martin* had a history of back problems and alleged he injured his back when he exited his truck while at work. The Court of Appeals held that a worker's preexisting back condition was a risk personal to the worker and any everyday activity would have a tendency to aggravate his condition. The Court concluded this was a risk that was personal to the worker and, therefore, not compensable. The respondent argues that in the present case there is no evidence that a risk associated with the employment caused claimant's injury and thus claimant's injury is not compensable.

The Board disagrees with the respondent's reliance on *Martin* as support for its argument that the claimant's injury is not compensable. The claimant testified that he had no previous history of right knee problems before he injured his knee at work. Therefore, the claimant in this case did not have preexisting problems that would constitute a personal

⁶ 1 *Larson's Workers Compensation Law*, § 7.04[1] (2003).

⁷ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

⁸ See *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

⁹ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

¹⁰ *Id.*

risk to him as was determined in *Martin*. The Board concludes that since claimant's injury was not caused by a personal risk and the injury occurred while claimant was hurriedly jumping up from a chair in order to return to his regular work duties, the injury has a causal connection with his employment. Thus, the Board finds claimant's injury is compensable and affirms the ALJ's Award.

Respondent next argues there was no foundation for the VA medical billings and the ALJ erred in ordering it to pay such medical bills.

The claimant testified the VA bills offered as an exhibit to the regular hearing were for the treatment he received for his right knee. That testimony establishes foundation for the admission of the medical bills.

The claimant sought treatment at the VA after respondent refused to authorize the surgery recommended by the physicians respondent had initially authorized to treat claimant.

The Workers Compensation Act requires the employer to provide such medical services that may be reasonably necessary to cure and relieve an injured employee from the effects of an injury. The Act provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.¹¹

But if the employer refuses or neglects to provide medical treatment, the employee may obtain medical treatment and the employer is liable for that expense. The Act reads:

. . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. . . .¹²

¹¹ K.S.A. 44-510h(a) (Furse 2000).

¹² K.S.A. 44-510j(h) (Furse 2000).

The ALJ noted that Dr. Prostic testified the treatment claimant received was necessitated by his accident. The ALJ ordered respondent to pay for the billings from the VA subject to the Kansas Fee Schedule. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 27, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Roger D. Fincher, Attorney for Claimant
- Jackie L. Morant, Attorney for Respondent and its Insurance Carrier
- Bryce D. Benedict, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director