BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER JAMES SHULTZ Claimant VS. **CITY OF GREAT BEND** Respondent AND **KS. MUNICIPAL INSURANCE TRUST** Insurance Carrier	))))))))))))	Docket No. **5,019,738**

CHRISTOPHER JAMES SHULTZ Claimant VS. **CITY OF HUTCHINSON** Self-Insured Respondent	)))))))	Docket No. **1,041,625**

ORDER

Self-insured respondent, City of Hutchinson, requests review of the February 6, 2009 Order by Administrative Law Judge Bruce E. Moore. Claimant's application for post-award medical treatment in Docket No. 5,019,738 and his application for a preliminary hearing in Docket No. 1,041,625 were consolidated for hearing. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Mitchell Rice of Hutchinson, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas appeared for the City of Hutchinson. Jeffery R. Brewer of Wichita, Kansas, appeared for the City of Great Bend and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and proceedings for preliminary and post award hearing as well as Dr. Paul S. Stein's court-ordered independent medical report.

ISSUES

The claimant had suffered a back injury on February 19, 2006, while employed as a police officer for the City of Great Bend. His claim for that injury was settled with the right to future medical treatment left open (Docket No. 5019,738). Claimant became employed as a police officer for the City of Hutchinson and alleges he suffered a work-related injury to his back on June 12, 2008, and each working day thereafter (Docket No. 1,041,625). Claimant filed an application for post-award medical (Docket No. 5,019,738) and an application for preliminary hearing (Docket No. 1,041,625) seeking medical treatment for his current back condition. The two cases were consolidated for hearing.

The issue before the Administrative Law Judge (ALJ) was whether claimant's current need for medical treatment for his back was the natural and probable consequence of the old back injury or was caused by a new injury to his back. At the conclusion of the consolidated hearing, the ALJ took the issue under advisement and entered an order for Dr. Paul S. Stein to perform an independent medical examination of claimant and offer opinions regarding the diagnosis of claimant's condition, treatment recommendations and whether claimant's current condition is causally related to his accidental injury of February 19, 2006, (Docket No. 5,019,738) or his subsequent work activities for respondent, City of Hutchinson (Docket No. 1,041,625).

Upon receipt of Dr. Stein's report, the ALJ issued an Order finding claimant was entitled to medical treatment. The ALJ further ordered the respondents to mutually provide claimant a list of three physicians from which the claimant could choose the designated treating physician. Finally, the ALJ assessed costs for the benefits equally between both respondents.

Respondent, City of Hutchinson, requests review of whether claimant suffered an injury by accident while working for the City of Hutchinson or even if he did, whether the new injury should be compensated as a natural consequence of the prior injury. Respondent, City of Hutchinson concedes claimant needs additional medical treatment. But it notes the court-ordered independent medical examiner opined the predominant cause of claimant's current condition is his preexisting injury. It argues the evidence establishes claimant's current need for medical treatment is a direct and natural consequence of the February 19, 2006 work-related injury for which respondent, City of Great Bend, is liable. Consequently, respondent, City of Hutchinson, requests the Board reverse the preliminary finding that the benefits be equally assessed and enter an order assessing the liability against the City of Great Bend.

Respondent, City of Great Bend, argues claimant's work activities for the City of Hutchinson aggravated and worsened his preexisting back condition. And because aggravation of a preexisting condition constitutes an accidental injury, the claimant suffered personal injury by accident arising out of and in the course of his employment with the City

of Hutchinson. Respondent, City of Great Bend, argues the ALJ has the authority to equally apportion liability under the facts of this case and requests the Board to affirm the ALJ's preliminary Order.

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:

Mr. Shultz was employed as a police office for the City of Great Bend from March 17, 2002 through September 22, 2007. He injured his lower back on February 19, 2006, while running across a street to break up a fight outside of a local bar. Following the injury, claimant was provided medical treatment with Dr. Douglas Burton. Dr. Burton ordered physical therapy for claimant as well as lumbar epidural steroid injections on May 11, 2006, and May 25, 2006. Dr. Burton released claimant and rated him with a 10 percent whole person functional impairment. Claimant returned to full-duty work as a police officer for the City of Great Bend. Claimant settled his claim with the right to review and modification as well as future medical left open.

Claimant testified that he had another episode of back pain in late spring of 2007. He notified the insurance carrier for Great Bend and additional treatment was authorized. Claimant again received lumbar epidural steroid injections on July 26, 2007, and August 9, 2007. The injections provided claimant with relief from his back pain.

On September 24, 2007, claimant started working as a police officer for the City of Hutchinson. He passed a pre-employment physical and was hired. His job duties included patrolling a certain area of the city, enforcing laws, conducting traffic stops and taking cases involving crimes. This required him to repetitively enter and exit his vehicle 10-20 times per a day. On June 12, 2008, claimant was getting in and out of his police vehicle, a Dodge Charger, numerous times and he noticed the onset of increasing back pain. The next day his back pain prevented him from getting out of bed. Claimant again called the City of Great Bend seeking authorization for additional medical treatment but his request was denied. Claimant then sought treatment with his personal physician and was provided lumbar epidural steroid injections on July 10, 2008, and July 24, 2008.

Claimant continued working without restrictions in his job as a police officer for the City of Hutchinson. The injections again helped his back pain for a few months but the pain returned. As previously noted, claimant sought medical treatment and on December 10, 2008, the ALJ held a hearing which consolidated claimant's request for medical treatment in Docket Nos. 5,019,738 and 1,041,625. Judge Moore ordered an Independent Medical Examination to be performed on claimant by Dr. Paul S. Stein. Dr. Stein's independent medical examination was to provide a diagnosis, treatment

recommendations and whether claimant's current complaints are causally related to the accidental injury on February 19, 2006, as opposed to his subsequent work activities with the City of Hutchinson.

Dr. Stein's report provided in pertinent part:

> Mr. Schultz sustained injury to the lower back in February of 2006 while working for the City of Great Bend, although there is one chiropractic record reflecting some lower back pain as early as 2002. Lumbar MRI scan showed multilevel degenerative disk disease consistent with back and right leg pain. He received conservative treatment for the lower back and improved greatly, particularly with epidural steroid injections in 2006. While still in the employ of the Great Bend Police Department, and without any specific injury other than getting in and out of his police car routinely, he had a flareup of back and leg pain in 2007 which was treated successfully with another series of two epidural steroid injections. He then went to work as a police officer for the City of Hutchinson and had a recurrence of back and leg pain in June of 2008 with the only potential contributing factor being getting in and out of his police car. While that particular activity might cause some increased pain in an individual with a bad back, I do not believe that it likely caused a structural injury or damage to the lower back that was not already present. The time line suggests that Mr. Schultz obtained about a year of relief with each series of epidurals and had flareups at about the same length of time after the last series. It is not uncommon for patients with degenerative disk disease, particularly once it has been activated by injury such as occurred in 2006, to have intermittent flareups. It is also not uncommon for epidural steroid injections to provide good relief for a period of time and then wear off. It is also not uncommon for epidural steroid injections to stop being helpful at some point. In my opinion, although getting in and out of the police car in 2008 may have been a symptomatic aggravation, the predominant cause of the current symptomatology is the preexisting injury and the natural course of the degenerative disk disease.[1]

At the conclusion of the hearing, the ALJ had noted that the facts of this case presented a mix of a situation where the condition is not only a natural and probable consequence of a preexisting condition but also a new work-related aggravation of the preexisting condition which is an accidental injury arising out of and in the course of employment. As noted, the ALJ equally apportioned treatment and expenses between both respondents.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] The test is not

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[1] Dr. Stein's IME at 5-6.

[2] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[3] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[4]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[5] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of 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 a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[6] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[7] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[3] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[4] *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[5] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[6] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[7] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber,*[8] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[9]

In *Logsdon*,[10] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen 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 a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[11] the Kansas Supreme Court stated: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

In this case the claimant had last received a lumbar epidural steroid injection on August 9, 2007, while employed by the City of Great Bend. He then passed a pre-employment physical and began working as a police officer for the City of Hutchinson. It was not until June 12, 2008, before he again sought any additional medical treatment for his back. The reason for the onset of back pain was directly related to his job as a police officer for the City of Hutchinson in that the job required him to repetitively get in and out

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[8] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[9] *Id.* at 728.

[10] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[11] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

of his patrol car. And an injury during such activity is compensable.[12] The Board concludes claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with the City of Hutchinson. Consequently, the ALJ's Order is modified to assess benefits against the City of Hutchinson.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated February 6, 2009, is modified to find claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment with respondent, City of Hutchinson. Consequently, the benefits are assessed solely against the respondent, City of Hutchinson, in Docket No. 1,041,625.

IT IS SO ORDERED.

Dated this _____ day of April 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned agree that claimant's work activities with the City of Hutchinson at least temporarily aggravated his preexisting back condition and could be compensated as a new series of accidents and injuries. However, in this case, claimant has a history of a specific traumatic injury in February 2006 followed by his receiving a series of epidural

[12] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

injection treatments every year since then. The expert medical opinion of Dr. Stein indicates that claimant's pattern of recurring symptoms and treatment is consistent with the natural course of his preexisting condition. Furthermore, as Dr. Stein also points out, the traumas that claimant describes as precipitating his most recent flare ups of symptoms, simply getting in and out of his patrol car, are not the type of activities that would cause injury to a normal healthy back. This is most likely a temporary symptomatic worsening without any new structural damage or injury. Accordingly, following the trend of our most recent Kansas appellate court decisions, the undersigned would find claimant's current injury is compensable in Docket No. 5,019,738 as a direct and natural consequence of claimant's February 19, 2006, work-related injury with the City of Great Bend.[13]

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BOARD MEMBER

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BOARD MEMBER

c: Mitchell Rice, Attorney for Claimant
Scott J. Mann, Attorney for the Self-Insured City of Hutchinson
Jeffery R. Brewer, Attorney for City of Great Bend and its insurance carrier
Bruce E. Moore, Administrative Law Judge

[13] See *Dodson v. Peoplease*, No. 1,042,494 2009 WL _____ (Kan. WCAB Apr. 10, 2009).