

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

<b>RETHA L. JOHNSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,006
<b>U.S.D. 512</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appeals the Post Award Medical Order of Administrative Law Judge Kenneth J. Hursh dated September 17, 2004. Claimant was denied benefits for a claimed injury to her left knee after the Administrative Law Judge (ALJ) determined that claimant's left knee problems were not the result of an injury occurring on May 24, 2001, or a series of accidents resulting therefrom, while she was employed for respondent. Jeffrey K. Cooper was appointed as Board Member Pro Tem for the purposes of this appeal in place of Board Member Julie A.N. Sample, who recused herself from the proceedings, having been involved as an administrative law judge in this litigation prior to her appointment to the Board. The Board placed this matter on its Summary Docket.

**APPEARANCES**

Claimant appeared by her attorney, Dennis L. Horner of Kansas City, Kansas. Respondent appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the following record: The transcript of the deposition of Robert Winter taken December 12, 2003; the transcript of preliminary hearing held April 3, 2002, before the Honorable Julie A.N. Sample; the transcript of regular hearing held January 22, 2004, before the Honorable Kenneth J. Hursh; the transcript of settlement

hearing held June 3, 2004, before Special Administrative Law Judge Stacy Parkinson<sup>1</sup>; and the transcript of post award hearing held September 13, 2004, before the Honorable Kenneth J. Hursh. In addition, the Board has considered the exhibits attached to the transcripts of hearings and depositions above listed and the pleadings and documents filed with the Director of Workers Compensation in this matter. The Board does note the transcript of regular hearing held January 22, 2004, involved the taking of stipulations only, with no testimony included or exhibits attached. Claimant's brief in this matter was due October 15, 2004, but not received by the Board until January 31, 2005. Respondent objected to this untimely filing. Claimant's brief, being filed out of time, was not considered by the Board.

With regard to the stipulations, the Board adopts the stipulations contained in the transcript of regular hearing and contained in the transcript of settlement hearing, above listed.

#### ISSUES

Did the ALJ err in denying claimant post-award medical treatment for her knees and, more particularly, for her left knee?

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Post Award Medical Order of Judge Hursh should be affirmed.

Claimant originally suffered accidental injury on May 24, 2001, when, while working, she slipped, suffering injury to her right knee and low back. Claimant underwent extensive treatment with Donald B.W. Miskew, M.D., ultimately resulting in a right total knee arthroplasty being performed by Danny M. Gurba, M.D., in July of 2002. Claimant has, at this time, undergone bilateral knee arthroplasties, with a left total knee replacement being performed by Dr. Miskew. The bills for treatment of the right knee were submitted and paid for through workers compensation insurance, as they were related to the May 24, 2001 fall. Respondent has denied liability for the left knee from the outset. Payment for the left knee surgery was through claimant's health insurance carrier.

Claimant's history of injury to her left knee is significant in that she had ongoing difficulties with that knee as early as 1997, when she underwent an arthroscopic

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<sup>1</sup> There are two settlement transcripts, with the exception of the first page being different, they are identical. One shows the hearing was held on June 3, 2004, before Special ALJ Stacy Parkinson; the other (which is in the ALJ's file) shows the hearing was held on June 4, 2004, before Special ALJ Michael Wallace. The Board also notes that on page 2 of respondent's brief, it states that a settlement hearing was held on June 3, 2004 before Special ALJ J. Paul Maurin.

procedure, with Dr. Williamson shaving the femoral condyle at the lateral tibia. Claimant also underwent injections to the knee on two occasions.

Dr. Miskew, in his February 23, 2001 office note regarding his examination of claimant on that date, discussed both her shoulder, which is not part of this litigation, and her left knee, which he described as having been sore for years. He found valgus deformity in the knee, with x-rays displaying terrible medial joint compartment and significant patellofemoral compartment. He recommended at that time that the only treatment for claimant's knee would be a total knee replacement, advising that it would be provided whenever "she is ready for it. Advised her of such." This examination, which occurred on February 23, 2001, approximately three months before claimant's slip and fall, showed a clear history of ongoing knee problems, with significant preexisting deterioration in the knee. Dr. Miskew's recommendation of a possible total knee replacement three months prior to claimant's accident with respondent significantly undermines claimant's allegation of a work-related aggravation.

Dr. Miskew advised that claimant would probably have a left total knee replacement within one year of October 29, 2001. Additionally, in his January 28, 2002 report, he advised that the right knee surgery would be paid for through workers compensation, but that the left knee surgery would have to be paid for under commercial insurance. In a questionnaire provided to Dr. Miskew by claimant's attorney, dated March 5, 2002, Dr. Miskew, when asked whether claimant's left knee condition was related to the injury and/or surgical intervention required to treat her right knee, advised that it was "probably not."

Claimant was also seen by Danny M. Gurba, M.D., of Dickson-Diveley Midwest Orthopaedic Clinic, for an independent medical examination ordered by Judge Sample. In his report to Judge Sample of April 25, 2002, Dr. Gurba advised that "the right knee is a Workmen's Compensation-related injury and the left is not . . . ."<sup>2</sup>

Claimant underwent the left total knee arthroplasty in June of 2002, under the hand of Dr. Miskew. The Board acknowledges that Dr. Gurba, in his July 10, 2003 letter to Mr. Horner, indicates that the underlying osteoarthritis in the left knee was accelerated by the work-related accident, with the treatment being the ultimate arthroplasty. Additionally, claimant was referred to Edward J. Prostic, M.D., a board certified orthopedic surgeon, for an evaluation on March 28, 2003. Dr. Prostic also advised that claimant's left knee condition was accelerated by the problems with her right knee.

It is noted that at the time of the settlement hearing, held June 3, 2004, the parties resolved all issues, except claimant's rights to future medical and review and modification

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<sup>2</sup> P.A.H. Trans. (Sept. 13, 2004), Cl. Ex. 1.

which were left open. At that time, claimant described an injury to her right knee, with aggravation of her low back, resulting from the May 24, 2001 fall. Claimant made no claim during that settlement hearing of any work-related aggravation to the left knee. Even though both Dr. Prostic's March 28, 2003 report attached to the settlement hearing transcript and Dr. Gurba's July 10, 2003 letter mention potential aggravations of the left knee relating from the right knee injury, claimant proceeded to settle this matter despite respondent's ongoing contentions that the left knee condition was not work related.

The ALJ, in reviewing the long history of medical contained in the record, came to the conclusion that the treatment needed for claimant's left knee and her ongoing left knee problems were not work related. The Board, after reviewing the extensive medical reports stipulated into the record at the post-award hearing, agrees with the ALJ's determination. Claimant has a long history of left knee problems beginning as early as 1997. The left total knee replacement recommended by Dr. Miskew was being discussed in significant detail a full three months before claimant's May 24, 2001 accident. Additionally, claimant, after the fall, obtained treatment for her right knee and her low back, with no request for treatment to her left knee occurring for a substantial period of time. The Board finds, based upon a preponderance of the credible evidence, that claimant has failed to prove that her left knee condition is related to her work accident of May 24, 2001, or to any treatment provided to her right knee as a result of that injury. The Board, therefore, affirms the denial of benefits.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post Award Medical Order of Administrative Law Judge Kenneth J. Hursh dated September 17, 2004, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director