

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

CYNTHIA MCCRAY)	
Claimant)	
VS.)	
)	Docket No. 1,003,456
SWIFT-ECKRICH, INC.)	
Respondent,)	
Self-Insured)	

ORDER

Respondent appealed the July 14, 2003 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Claimant contends she injured her right foot and ankle working for respondent.¹

At the conclusion of the first preliminary hearing, which was heard in August 2002, Judge Benedict ordered respondent to provide claimant with treatment of the right lower extremity. In May 2003, seeking an order terminating that medical treatment, respondent requested another hearing. On June 25, 2003, Judge Benedict conducted a hearing on respondent's request to terminate medical treatment. And on July 14, 2003, the Judge entered an order denying that request.

Respondent contends the Judge erred. Respondent argues claimant has failed to prove that her present need for medical treatment to the right foot and ankle is related to the work that she performed for respondent. Accordingly, respondent requests this Board to terminate respondent's obligation to provide claimant with medical treatment.

Conversely, claimant contends the July 14, 2003 Order should be affirmed. Claimant argues that she developed right foot symptoms while working for respondent and that those symptoms have now persisted for approximately two years.

¹ Claimant's application for hearing filed with the Division of Workers Compensation indicates a period of accident from October 1, 2000, to October 18, 2001. But claimant testified at the June 25, 2003 preliminary hearing that she did not commence working for respondent until September 12, 2001.

The only issue before the Board on this appeal is whether claimant's present need for medical treatment is related to the work that she performed for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. In September 2001, claimant began working for respondent. Within a month, claimant began experiencing sharp pain in her right leg and sharp pain and swelling in her right ankle. Before working for respondent, claimant's right foot and ankle were symptom-free.
2. Claimant attributes her symptoms to the constant standing and repetitive leaning that she did performing her job duties as a production worker for respondent. During the period that claimant's symptoms developed, claimant worked more than 60 hours per week and sometimes worked 11- to 12-hour shifts. And claimant stood most of that time.
3. Claimant's symptoms progressed to the point that in October 2001 she reported the symptoms to her supervisor and sought treatment from respondent's plant nurse.
4. On approximately February 4, 2002, claimant terminated her employment with respondent due to her right ankle problems. Shortly afterwards, claimant began working as a certified nurses' aide at a nursing home, where she worked until early August 2002. In September 2002, claimant began working for another nursing home, where she worked until early April 2003.
5. Claimant does not believe her work as a certified nurses' aide worsened her condition as her symptoms have remained relatively constant since leaving respondent's employment. Also, claimant worked less than 40 hours per week at the first nursing home and intimated at the June 25, 2003 preliminary hearing that she also worked less than 40 hours per week at the second nursing home. Moreover, claimant testified at the August 21, 2002 preliminary hearing that while working at the first nursing home she made rounds every two hours and sat down between rounds. Furthermore, in May 2003 claimant told Dr. P. Brent Koprivica that she was able to sit and elevate her foot, if necessary, while working at the nursing homes.
6. Despite not working for approximately two months, when claimant testified at the June 25, 2003 preliminary hearing she was continuing to experience right ankle symptoms and, therefore, was requesting appropriate treatment.

7. On February 20, 2003, claimant saw Dr. Greg Horton for evaluation of her right foot and ankle. Based upon that evaluation, Dr. Horton diagnosed posterior tibial tendinitis and insufficiency of the posterior tibial tendon. Based upon having a limited employment history that claimant worked as a certified nurses' aide, the doctor initially concluded that more likely than not claimant's foot problem was either caused or significantly aggravated by her employment. But in a later letter to respondent's attorney dated April 22, 2003, Dr. Horton wrote that there is nothing about claimant's employment with respondent that would have caused, contributed, or accelerated the ultimate need for treatment. The doctor also concluded that any aggravation caused by her work as a certified nurses' aide was probably only temporary in nature. But it is not apparent from Dr. Horton's letters that he had an accurate or complete history of claimant's work activities.

8. In May 2003, at her attorney's request, claimant saw Dr. Koprivica. The doctor diagnosed claimant as having chronic posterior tibialis tendinitis, which he attributed to the work that claimant performed for respondent. In Dr. Koprivica's May 30, 2003 letter to claimant's attorney, the doctor wrote, in part:

Contrary to Dr. Horton's conclusions, it is my opinion that Ms. McCray's aggravating injury from the standing and walking requirements during her employment at Armour Swift-Eckrich [respondent] have resulted in a permanent condition. I am in agreement with Dr. Horton that she has some congenital deformity involving a valgus deformity of her hindfoot that resulted in posterior tibial tendon insufficiency. However in this situation, Ms. McCray was asymptomatic prior to her employment at Armour Swift-Eckrich. I believe the amount of standing and walking required during the time frame of September of 2001 through February of 2002 represent activities that were unique in terms of extent compared to her activities away from work. It is unique compared to her other employment activities where she was allowed postural breaks and has continued to be allowed postural breaks. It is also something to which the general population is not exposed.

Although there is the potential that this could represent only a temporary exacerbation of her hindfoot situation, Ms. McCray has had chronic posterior tibialis tendinitis with chronic pain since leaving employment at Armour Swift-Eckrich on February 4, 2002. If this was only a temporary situation, one would have expected resolution of her complaints when the exposure, in terms of standing and walking, was removed.

9. Based upon the above, the Board concludes that claimant has established it is more probably true than not that the long hours claimant spent standing and leaning while working for respondent aggravated a congenital deformity in her right foot, which, in turn, has created the present need for medical treatment. At this juncture, the Board is not persuaded that Dr. Horton had a complete history of claimant's work activities while working for respondent. On the other hand, the Board is persuaded by Dr. Koprivica's expert medical opinion regarding the cause of claimant's right foot and ankle injury. Accordingly, claimant is entitled to receive workers compensation benefits for that aggravation and injury. The July 14, 2003 preliminary hearing Order should be affirmed.

WHEREFORE, the Board affirms the July 14, 2003 Order entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

- c: George H. Pearson, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director