

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

The parties agree claimant sustained personal injury by accident when she slipped on blood on a ramp. Claimant fell to the ground injuring her knee and ankle.¹ She was treated by the in-house nursing staff and it appears that she was told to take over-the-counter medications.

On June 4, 2002, claimant sought treatment from Dr. John A. Hartwell, a podiatrist. The medical records from this first date reflect the following:

CHIEF COMPLAINT: This is a 32-year-old Spanish speaking female employee at IBP that complains of one a year history of numbness at the plantar aspects of both feet. This is particularly troublesome at night when she is trying to sleep, although it does hurt her during the day as well. She has the typical paraesthesia and other sensations of electric shocks. Denies... thyroid disorders, alcoholism, etc.²

Dr. Hartwell ordered a NCS/EMG which documented “[s]light slowing of the bilateral motor tibial nerves across the tarsal tunnels, right greater than left”.³ On July 25, 2002, Dr. Hartwell performed a tarsal tunnel release on the right foot. In the operative report Dr. Hartwell indicated “[a] very large congenitally abnormal abductor hallucis muscle was identified compressing on the tibial nerve. This was felt to be the etiology, at least in part, of the patient’s parasthesias to the plantar aspect of the right foot.”⁴

Claimant experienced post-operative complications including an infection. On September 17, 2002, a MRI was performed which revealed a “cystic structure on the medial side of the joint extends distally, favorable for a synovial cyst since there is lack of inflammatory tissues in the surrounding area. Less likely to suggest an inflammatory process such as an abscess.”⁵ This cyst was treated and she was released to return to work on November 4, 2002.

¹ P.H. Trans. at 10.

² *Id.*, Resp. Ex. 2 at 52.

³ *Id.*, Cl. Ex. 1 at 1.

⁴ *Id.*, Resp. Ex. 2 at 30.

⁵ *Id.*, Resp. Ex. 2 at 1.

In April 2003, claimant apparently began seeing a Dr. Kent Heady in Wichita for complaints to her ankle and knee. She continued to see him throughout 2003. His records, however, were not provided.

At her counsel's request, on May 8, 2003, claimant was evaluated by Dr. Pedro Murati. According to his report, claimant denied any prior right ankle or knee problems. He concluded her tarsal tunnel complaints in her right foot and knee pain were solely attributable to her April 17, 2002 accident.⁶ He further concluded she was at risk for overuse for the left lower extremity and low back problems.

The parties came before the ALJ on July 7, 2003 and it was agreed that the ALJ would appoint Dr. John W. Fanning to conduct an independent medical examination and issue an opinion as to the causation of claimant's present complaints, specifically whether her complaints were related to her April 17, 2002 accident. Dr. Fanning issued his report on October 10, 2003.

According to Dr. Fanning's report, claimant specifically denied any previous foot or ankle problems during this examination.⁷ Following his examination, Dr. Fanning diagnosed "posterior tibial nerve injury after complicated tarsal tunnel surgery along with arthrofibrosis of the ankle and hindfoot, chronic foot pain, low back and chronic knee pain."⁸ He found her to be at maximum medical improvement. With respect to her foot and ankle he concluded she was able to work, within the restrictions mandated by a FCE. He went on to state "I do feel like it is more likely than not her injuries are related to her work accident; according to her history, she did not seem to have problems prior to this."⁹

Following receipt of this report, a preliminary hearing was scheduled during which the claimant testified to the facts of her accident and her course of treatment. Claimant specifically denied telling Dr. Hartwell, the first physician to treat her, that she had experienced numbness for about a year.¹⁰ Claimant does not speak English however, during all of her medical appointments and during the preliminary hearing, an interpreter was present. There was no indication in this first office visit that claimant ever mentioned to Dr. Hartwell anything about her April 17, 2002 injury. The focus of her complaint on June 4, 2002 was bilateral foot numbness, with the right being worse than the left. Then,

⁶ *Id.*, Cl. Ex. 1 at 2-3.

⁷ *Id.*, Cl. Ex. 2 at 1.

⁸ *Id.*, Cl. Ex. 2 at 2.

⁹ *Id.*

¹⁰ *Id.*, at 12.

on July 11, 2002, there is a handwritten note that claimant complains of unbearable pain “that started 4/17/02 after a fall at work.”¹¹

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹² “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”¹³

“[A]n injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.”¹⁴ “Whether an accident arises out of and in the course of the worker’s employment depends upon the facts peculiar to the particular case.”¹⁵

In this instance, the parties presented evidence from three physicians as well as the claimant’s own testimony. Two of these physicians concluded claimant’s tarsal tunnel syndrome was related to her April 17, 2002 accident at work. However, claimant failed to advise these physicians of her previous longstanding complaints of numbness in both feet. Thus, their opinions are called into question. According to the medical records, claimant told Dr. Hartwell of her year long history of bilateral complaints of numbness, although she denies this. It seems unlikely that Dr. Hartwell would unilaterally insert such a notation particularly when he concluded, postoperatively on August 7, 2002, that claimant had findings of permanent nerve damage “probably from long standing tarsal tunnel syndrome.”¹⁶ There is no indication that Dr. Hartwell believes her tarsal tunnel syndrome was caused by her April 17, 2002 accident. Moreover, there is no persuasive evidence that her tarsal tunnel syndrome was aggravated, accelerated or intensified by her work-related event. Although claimant states there is no evidence “that her prior condition was

¹¹ *Id.*, Resp. Ex. 2 at 42

¹² K.S.A. 44-501(a)(2000 FURSE); *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

¹³ K.S.A. 2002 Supp 44-508(g); *In re Estate of Robinson*, 236 Kan. 431, 690 P. 2d 1383 (1984).

¹⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

¹⁵ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P. 2d 394, *rev. denied* 238 Kan. 878 (1985).

¹⁶ P.H. Trans., Resp. Ex. 2 at 26.

not aggravated by the fall on April 17, 2002,"¹⁷ this statement ignores the fact that it is claimant's burden to prove her entitlement to benefits under the Act.¹⁸

After considering the medical evidence and claimant's testimony, the ALJ concluded claimant had failed to establish her entitlement to benefits. Undoubtedly, the ALJ determined the claimant's bilateral tarsal tunnel syndrome pre-dated April 17, 2002, the date of claimant's accident and therefore denied claimant's request. The Board affirms the ALJ's decision.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated January 13, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁷ Claimant's Brief (filed Feb 4, 2004) at 3.

¹⁸ See footnote 12.