

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

GHASSAN M. JAMALEDDINE)	
Claimant)	
VS.)	
)	Docket No. 1,012,140
MARCOS CANTINA, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Respondent appeals from the November 20, 2003 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was awarded benefits in the form of medical treatment, with respondent being ordered to furnish the names of three physicians for selection of one by claimant for treatment.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment?
- (2) Did claimant's injury of September 2002 occur as the result of normal activities of daily living?
- (2) Did the Administrative Law Judge err in ordering respondent to pay all medical expenses incurred by claimant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury in September 2002, when, while reaching for a pan located on a shelf in the kitchen, he dislocated his left shoulder. Claimant was taken to the emergency room at Via Christi Regional Medical Center, where his shoulder was reset. Claimant was later treated by Bernard F. Hearon, M.D., at Advanced Orthopedic Associates, P.A., and underwent an arthroscopic shoulder surgery on January 8, 2003. Claimant entered postoperative physical therapy and was later released by Dr. Hearon with restrictions in April 2003.

Claimant's history is significant in that, in February of 2000, while working at respondent's restaurant, claimant slipped on ice and snow on the back steps of the restaurant. Claimant fell down a flight of stairs, reaching with his left hand and catching himself during the fall. This caused a dislocation of the left shoulder. Claimant was referred to Via Christi Regional Medical Center emergency room at that time and, under sedation, had the shoulder repaired.

Respondent argues that after the February 2000 injury, claimant failed to follow the prescribed instructions to schedule an appointment with an orthopedic physician. However, claimant's testimony is uncontradicted that claimant's boss asked that he wait to see if the shoulder improved, without going to the prescribed health care provider. Claimant testified that he complied with his boss's wishes and did not seek medical treatment at that time, simply not going back to the doctor. It is apparent that, while claimant was instructed to go to a doctor, there was at least some discouragement provided by the employer.

Respondent further argues that the activities described by claimant in September 2002 were merely the normal activities of daily living. Respondent argues that claimant was merely reaching up with his hand, which is an activity which people do regularly throughout their lives. However, claimant's testimony is not clear as to whether he was only reaching or whether he was in the act of removing a pan from a shelf. Claimant, in his testimony at the preliminary hearing, when specifically asked whether he had anything in his hand, answered "I had a pan."¹ Either way, it is obvious that the act of reaching for the pan was an activity required by his employment.

Claimant was examined by physical medicine specialist Philip R. Mills, M.D., on July 2, 2003. Dr. Mills opined that claimant's medical situation was connected causally to the reported injury of September 28, 2002. However, in reviewing the history provided to Dr. Mills, the September 28, 2002 injury described by claimant was, instead, the February 2000 fall down the stairs. Therefore, the causation opinion by Dr. Mills is brought into question.

¹ P.H. Trans. at 11.

However, claimant was also examined by board certified physiatrist Pedro A. Murati, M.D., on October 15, 2003. Dr. Murati's history was the more accurate description of reaching with his left hand while attempting to remove a pan. Dr. Murati also opined that claimant's current diagnosis was the direct result of the work-related injury in September 2002 and each and every working day thereafter. Therefore, the Board finds that claimant has proven, for preliminary hearing purposes, that he suffered accidental injury arising out of and in the course of his employment. The injury described by claimant was not a normal activity of daily living, as there was some indication that claimant may have been pulling a pan from the shelf at the time of the injury or, at the very least, was certainly reaching for the pan when the injury occurred. The Board, therefore, finds that the Order of the Administrative Law Judge granting claimant medical benefits for the injury of September 2002 should be affirmed.

Respondent's argument dealing with claimant's entitlement to medical expenses is not an issue which is appealable from a preliminary hearing and, therefore, respondent's appeal on that particular issue is dismissed.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated November 20, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
James B. Biggs, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² K.S.A. 44-534a and K.S.A. 2002 Supp. 44-551.