

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

PEGGY SCOTT, DECEASED)	
Claimant)	
)	
VS.)	
)	
CLEAR CHANNEL COMMUNICATIONS)	
Respondent)	Docket No. 1,017,466
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 6, 2006 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on June 16, 2006 in Wichita, Kansas.

APPEARANCES

W. Walter Craig, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and the parties' stipulations listed in the Award. In addition, at oral argument the parties agreed that should compensability of this claim be resolved in claimant's favor, the Board shall decide the remaining substantive issues and no remand is necessary.

ISSUES

The ALJ denied claimant's surviving spouse's claim for death benefits after concluding claimant's death did not arise out of and in the course of her employment with the respondent. Because he concluded the claim was not compensable, he did not rule on the remaining issues as to timely notice and written claim.

Claimant's husband and sole survivor, John Scott, appealed this determination, asserting the ALJ erred in his legal conclusion as to the compensability of this claim. He maintains that decedent's job with respondent required her to support respondent's radio station promotional activities. And because she attended a promotional viewing of the *Passion of the Christ* with her fellow employees and consequently suffered a fatal cardiac event, her death is therefore compensable.

Respondent contends the ALJ's Award should be affirmed in all respects. Alternatively, should the Board find claimant's attendance at the movie was a work-related activity, the respondent contends the greater weight of the medical evidence suggests that claimant's pre-existing medical history was the more likely cause of her cardiac arrhythmia episode and subsequent death. And that the mere act of watching a movie does not constitute an external force as that term has been used under Kansas law.

The issues to be resolved by this appeal are as follows:

1. Whether claimant sustained an accidental injury arising out of and in the course of her employment with respondent;
2. Whether timely written claim was provided¹; and
3. Whether the emotional stress of seeing the *Passion of the Christ* constitutes an external force and therefore exempts this claim from the Heart Amendment, K.S.A. 44-501(e),

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, in addition to the stipulations, the Board finds the ALJ's Award should be affirmed in all respects.

On February 25, 2004, claimant attended an advanced screening of the *Passion of the Christ* in a local theater in Wichita, Kansas. This was a promotional event sponsored by respondent, planned by a team of local disk jockeys for the radio station known as B-98, and designed to include respondent's listeners.

Claimant, as a sales manager for two of respondent's local radio stations, neither of which includes B-98, did not plan this event. But because respondent owns several radio stations (including B-98) within this market and the business of marketing those stations is run from the same office, claimant, like many others in this office, knew of this advance screening and had expressed a desire to attend.

Several days before the screening, Dick Harlow, the station manager, agreed to allow salaried employees, like the claimant, to attend the movie as long as their workload permitted. While it is true that part of claimant's job duties was to support the station's promotional activities, this particular activity was planned and implemented without the

¹ While this issue was preserved, no argument was made either in its briefs or at oral argument.

input of the sales staff. The only individuals from the station that were required to be at this activity were the two disc jockeys and their producer. Tickets were given away to listeners and by all accounts, this promotional activity was intended to bring in listeners, not advertisers. More importantly, claimant was not responsible for advertising sales on B-98. No clients of any of respondent's radio stations were expressly invited to this promotional event as it was intended to draw in the listeners of the station and play upon the high degree of interest associated with what can only be described as a controversial movie.

Although claimant apparently led her husband to believe she had intended on attending the movie, her co-workers testified that they had to convince her to go to the movie with them. She indicated she had some work to do, but after some discussion, claimant was persuaded. Claimant and another woman worked as long as they could that morning, trusting another co-worker to save seats for them. The two then drove to the movie theater and walked in, just before the movie began. Sometime thereafter, while watching the movie and apparently at that point in the film when the primary character was being crucified, claimant suffered what appeared to be some sort of seizure. Claimant was not responsive and was gesturing with her hands and arms. A co-worker determined she had stopped breathing and those around her began to render assistance. Emergency personnel were called and in the meantime, a nurse and a physician were in the crowd and began life saving measures. Unfortunately, claimant never regained consciousness and died.

Following an autopsy, it was discovered that claimant's cause of death was cardiac arrhythmia. She also had an enlarged heart (cardiomegaly) and had a mitral valve prolapse, a condition claimant had been diagnosed with several years before.

Many of the employees present that day testified in connection with this claim and the ALJ had the unique opportunity to observe nearly all of this testimony. With one exception, each employee testified that attendance at this movie screening was voluntary. Tracy Cassidy, one of the B-98 disc jockeys testified that it was "uncommon" for others at the station to attend such promotions unless the activity was run by the sales department.² She further testified that only 3 people were required to be at this event, herself, Brett Harris, the other DJ, and Dondi Henak, the promotional manager. According to her, there was such an interest in this event both outside the station and within that she asked Dick Harlow, the Regional Vice President, if others at the office could attend. She understood that he agreed that others from the office could attend if it did not interfere with their work. More telling is the fact that she testified that having additional staff at this event was of no benefit.³ Dondi Henak, the producer/promotional manager for the B-98 team testified that this was her promotion so she had to be there but the claimant was given the "option" to attend.⁴

² Cassidy Depo. at 7-8.

³ *Id.* at 14.

⁴ R.H. Trans. at 23-24.

Lisa Fetter testified that it was “their choice”⁵ to attend. Dick Harlow testified that this was a listener promotion and not a client promotion. Thus, while he allowed some of the staff to attend, subject to their workload, it was not intended to be a client promotion.⁶ Kristi Christy, an accountant for respondent, testified that she helped “pressure” claimant into attending this event.⁷ She went on to indicate that going to this movie was not part of claimant’s job and that claimant’s decision to attend came at the last minute as this was a busy time for her. Ms. Christy testified that claimant did not talk to the other attendees and that the two of them went strictly to watch the movie.⁸

The only witness who presents a somewhat different version of events is Cathy McCumber, a sales/account executive for respondent. According to Ms. McCumber, she attended this movie as part of her job and that people such as claimant were required to support promotional events.⁹ She testified that she sat to claimant’s right during the movie and she believed at certain parts of the movie claimant was affected emotionally.¹⁰ Ms. McCumber went on to state that she believed claimant was physically reacting to the movie. None of the other witnesses describe such observations either with respect to any requirement that claimant attend this screening, nor as to her actions during the movie, up until the last moments.

At the moment of the crucifixion, claimant began waving her arms wildly. On this point all the witnesses agree. Claimant gestured and looked as though she was suffering from a seizure. She was nonresponsive and was not breathing. Medical personnel were in the audience and they lent assistance. But claimant was never revived as her heart was not properly pumping due to the arrhythmia.

After Ms. McCumber’s testimony, it came to light that she was romantically involved with claimant’s surviving spouse. This relationship developed sometime shortly after claimant’s death and according to the ALJ, she cannot be “considered to be a completely disinterested witness.”¹¹

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right

⁵ *Id.* at 9 (Fetter’s testimony).

⁶ *Id.* at 9, 11.

⁷ Christy Depo. at 7.

⁸ *Id.* at 9-10.

⁹ R.H. Trans. at 34.

¹⁰ *Id.* at 31.

¹¹ ALJ Award (Mar. 6, 2006) at 5.

depends." K.S.A. 44-508(g) defines burden of proof as follows: "'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."

In order to prevail claimant's decedent must establish that claimant's death arose out of and in the course of her employment. K.S.A. 2003 Supp. 44-508(f) provides:

The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

2 Larson's Workers' Compensation Law, § 22.01 (2000) at 22-2, lists three factors to determine whether recreational and social activities fall within the course of an employee's employment.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment.

In this instance, the accident occurred while claimant was involved in an employer sponsored showing of a movie and it took place during the normally scheduled work period. These sorts of promotional activities regularly occurred and it was within claimant's generic job description to support the promotional activities of respondent's radio stations. However, the greater weight of the evidence strongly suggests that claimant was not required to attend this event.

Claimant was not responsible for either this activity nor the financial aspect of the advertising sales for B-98, the station that was sponsoring this activity. This event was planned solely by Tracy Cassidy and Brett Harris, the morning air personalities for that station. Both those individuals testified that they alone, along with their producer, were responsible for putting that activity together. No one else from the radio station was required for the promotion. Rather, it was the nature of the film and all the associated publicity that compelled respondent's other employees to express an interest in attending.

According to Tracy Cassidy, this was a listener event. This event was not intended to foster further advertising goals. Claimant did not make contact with any customers while at this film, nor did claimant do anything but show up to watch the movie. Other than the benefit of seeing the movie in advance along with some other selected members of the public and occupying a seat, there appears to have been no benefit to claimant or respondent for participating in this activity. For lack of a better term, it appears to have been a "perk" of her job and nothing that could be seen as mandatory or required. To the contrary, most of the witnesses testified that this was something they were allowed to do,

something they chose to do and not something they were compelled to do. While Ms. McCumber has a different view, her personal relationship with the claimant's surviving husband cannot be overlooked.

Taking all the evidence into consideration, the Board finds the ALJ was correct. Claimant's attendance at the promotional showing of the *Passion of the Christ* was not an activity that arose out of and in the course of her employment with respondent. Accordingly, the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated March 6, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: W. Walter Craig, Attorney for Claimant
- Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
- John D. Clark, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director