BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND NICKELL	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,032,491,
EXCEL MANUFACTURING, INC.	)	1,032,492 & 1,034,336
Respondent	)	
AND	)	
	)	
HARTFORD FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the June 23, 2009, Award of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded $1,200.00 in unauthorized medical benefits for three evaluations with George G. Fluter, M.D., for the evaluations on February 27, 2007, June 4, 2007, and September 4, 2007.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Sean Dumm of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on October 21, 2009.

ISSUE

Did the ALJ err in awarding claimant unauthorized medical payments for evaluations performed by Dr. Fluter in violation of K.S.A. 44-510h(b)(2)?

FINDINGS OF FACT

Claimant suffered multiple injuries to his upper extremities while working for respondent. Three separate accident claims were filed, and all three matters were settled as part of an agreed settlement held on April 8, 2009, before Special Administrative Law Judge John C. Nodgaard. The settlements were complete, with all issues being closed except a dispute regarding the payment of unauthorized medical expenses in each case. Claimant was claiming a total of $1,200.00 in unauthorized medical treatment and respondent objected, citing K.S.A. 44-510h(b)(2). Respondent alleges that the evaluations by Dr. Fluter were for the purpose of obtaining impairment ratings for claimant's injuries. Were this true, the evaluations would violate the specific prohibitions contained in the statute.

Dr. Fluter examined claimant on four separate occasions. The first three examinations, on February 27, 2007, June 4, 2007, and September 4, 2007, were for determining a diagnosis and the cause of the injuries and to reach a conclusion as to the necessary treatment and appropriate restrictions associated with claimant's injuries. Dr. Fluter provided no ratings from any of these examinations. Dr. Fluter charged $450.00 for the first examination and $375.00 each for the next two examinations. The total for all three examinations is $1,200.00.

A fourth examination of claimant was conducted by Dr. Fluter on July 16, 2008. During this examination, Dr. Fluter evaluated and rated each of claimant's multiple injuries. In reaching this determination, Dr. Fluter considered not only his first three evaluations, but also a multitude of medical records from other health care providers who had acted as both evaluators and as treating physicians for claimant. Dr. Fluter then determined the appropriate rating for claimant's many injuries, all pursuant to the fourth edition of the AMA *Guides*.[1]

These impairment ratings were, at least partially, the basis of the settlement entered into by the parties on April 8, 2009. The charges associated with this fourth examination are not listed in this record. The report is attached to the settlement hearing transcript from the April 8, 2009, settlement.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Respondent argues that claimant is in violation of the statutory prohibition against using the unauthorized medical examination allowance to obtain an impairment rating. Respondent cites *Deguillen*[2] in support of its position. In *Deguillen*, the claimant consulted Dr. Pedro Murati for an examination as to necessary treatment recommendations. Later, the claimant's attorney requested a rating opinion from Dr. Murati based on the information obtained at the initial examination. A second examination was not conducted by Dr. Murati. The Court ruled that this was an attempt by the claimant to circumvent the statute by artificially separating the examination from the requested rating report, thus gaining the advantage of the $500.00 allowance for a prohibited purpose. The Court held that, in order for an unauthorized medical examination to be eligible for the reimbursement under K.S.A. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record. The Court acknowledged that an employee's physician cannot provide an impairment rating without doing an examination. It is the use of the unauthorized medical allowance to pay for the prior examination and that examination then being used as the basis for the rating that results in the unauthorized medical allotment being used for an improper purpose.

Here, Dr. Fluter conducted four separate examinations. The first three were for the purpose of determining claimant's injuries, the cause of those injuries, the need for restrictions and the treatment required to alleviate those injuries. The statute prohibits none of those activities on the part of the health care provider. The only ratings provided by Dr. Fluter were from the fourth, totally separate examination. No request has been made for reimbursement of any funds paid by claimant for that examination. The Kansas Court of Appeals in *Deguillen* denied the claimant the unauthorized medical allowance because Dr. Murati was asked to provide an impairment rating based on the prior examination. The Court held that "in order for an unauthorized medical examination to

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[2] *Deguillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), *rev. denied* 286 Kan. ___ (2008).

be eligible for reimbursement under K.S.A. 2006 Supp 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed."[3]

The Board addressed the *Deguillen* issue in *Roets.*[4] In *Roets*, the claimant's expert, Dr. Edward J. Prostic, performed an evaluation for the purposes of determining the need for additional medical treatment. The unauthorized medical allowance was requested for that examination. Dr. Prostic examined claimant a second time for the purpose of providing an impairment rating. No request was made to use the unauthorized medical allowance for this examination. The Board distinguished *Deguillen* from *Roets*, finding in *Roets* that Dr. Prostic performed separate examinations for the purpose of determining the need for medical treatment as opposed to the request for an impairment rating. The use of separate examinations distinguished *Roets* from *Deguillen*. The current matter is on point with *Roets* and, thus, distinguishable from *Deguillen*. The Board finds that the determination by the ALJ that claimant is not in violation of the prohibitions contained in K.S.A. 44-510h(b)(2) is affirmed. Claimant is entitled to the unauthorized medical allowance in each of the filed cases.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has not violated the prohibitions contained in K.S.A. 44-510h(b)(2). The use of separate examinations to determine the need for treatment and the appropriate functional impairment rating satisfies the concerns raised in *Deguillen*.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

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[3] *Id*. at 756.

[4] *Roets v. Molded Fiber Glass Construction Products*, No. 1,024,365, 2009 WL 1996464 (Kan. WCAB June 30, 2009).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 23, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge