

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

RONALD A. HANSON Claimant)	
)	
VS.)	
)	
FORD COUNTY FEED YARD, INC. Respondent)	Docket No. 137,965
)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On August 8, 1996, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish on March 21, 1996, came on for oral argument.

APPEARANCES

Claimant appeared not having resolved this matter with respondent prior to argument. Respondent and its insurance company appeared by and through their attorney, B. G. Larson of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Mark E. McFarland of Garden City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

This matter went to final award on March 10, 1994, at which time Administrative Law Judge Thomas F. Richardson found that there was no evidence to indicate the Kansas Workers Compensation Fund (Fund) had any liability for any portion of this award. This award was not appealed. In his March 21, 1996, decision, Judge Frobish cites Fleming v. National Cash Register Co., 188 Kan. 571, 363 P.2d 432 (1961) as support for the rule that a workers compensation case cannot be reopened to consider additional evidence and to adjust an award once the award has been made and the appeal time has run. This proper finding by Judge Frobish would for all time resolve the matter of Fund liability were this the only issue before the Appeals Board. However, a separate issue dealing with fund liability emerges from the language of K.S.A. 44-534a (Ensley) which states in part:

“(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer’s insurance carrier either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer’s insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566(a) and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer’s insurance carrier in accordance therewith.”

Respondent was originally ordered to provide medical care for treatment of claimant’s right upper extremity when claimant, after suffering an injury to a finger on his right hand, developed reflex sympathetic dystrophy. This condition necessitated many months of temporary total disability benefits and thousands of dollars in medical treatment. In the award of Judge Richardson of March 10, 1994, he found:

“There is no evidence anywhere in the file to indicate that the injury to Claimant’s little finger in any way exacerbated or aggravated the Claimant’s reflex sympathy dystrophy.”

Again that award was not appealed and is final. As a result of a prior preliminary hearing, respondent and its insurance carrier, St. Paul Fire & Marine Insurance Company, were ordered to pay temporary total disability benefits and to provide medical care for the treatment to claimant’s right upper extremity including the reflex sympathetic dystrophy. While respondent stipulated that claimant suffered an injury to his right hand, the

respondent contested the nature and extent of this injury alleging the need for treatment for the reflex sympathetic dystrophy did not stem from this injury. The finding in Judge Richardson's award verified the respondent's contention.

Respondent then requested reimbursement from the Fund through the director's office for both the medical and temporary total disability benefits paid for the treatment of claimant's reflex sympathetic dystrophy. The attachments to respondent's application show that it paid \$36,848.97 in medical and hospital expenses for the care and treatment of the reflex sympathetic dystrophy. Respondent also paid \$8,550.54 in temporary total disability compensation payments during this care and treatment. Judge Richardson, in his March 10, 1994, Award, did not order reimbursement from the Fund for these sums. A review of the 1994 Award indicates that the respondent failed to report the amount of temporary total disability compensation and medical expenses paid. The Fund argues that this failure by the respondent to provide specific amounts to Judge Richardson is fatal to respondent's request for reimbursement.

Apparently this argument was accepted by Judge Frobish, as Judge Frobish found no evidence of hospital and medical expenses and thus denied respondent reimbursement. In order for Judge Frobish's opinion to be proper, any respondent must, in any litigation, provide evidence of its entitlement to reimbursement and the specific amounts of reimbursement due and owing prior to the final award. K.S.A. 44-534a (Ensley) is not so demanding. The language of the statute merely requires that, if the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid, then reimbursement is appropriate. It goes on to state that "the director" shall determine the amount of compensation reimbursement due to the respondent or its insurance carrier. It does not state that this determination must be made at the time of the final award. The language of K.S.A. 44-534a (Ensley) appears to contemplate entitlement to a decision dealing specifically with the amount of reimbursement due and owing to the respondent and its insurance carrier. This decision was requested by respondent when its application for reimbursement from the Workers Compensation Fund was filed with the Workers Compensation Division. The hearing on respondent's application for reimbursement came on March 21, 1996, resulting in Judge Frobish's decision to deny reimbursement. Judge Frobish's denial was, in part, based upon a lack of evidence of expenses submitted at the time of Judge Richardson's decision in March 1994. Judge Frobish appears to hold that the evidence submitted by the respondent in its application for reimbursement is inadmissible evidence somehow violating the Supreme Court's rule in Fleming.

The Appeals Board finds the application of Fleming by Judge Frobish to be inappropriate. Respondent is not requesting a reopening of the record in order to consider the possibility that Fund liability may be appropriate under the rules set forth in K.S.A. 44-567 when dealing with a handicapped employee. The respondent is merely requesting that the language of K.S.A. 44-534a (Ensley) be enforced and respondent's entitlement to reimbursement for overpayments be ordered. Judge Frobish's ruling that no additional evidence can be submitted when dealing with this issue is in error. The language of K.S.A. 44-534a (Ensley) appears to contemplate a need for additional evidence in order for the director to make the decision regarding what amounts, if any, shall be certified to the insurance commissioner for reimbursement.

In reviewing the evidence contained in the file, the Appeals Board finds that respondent is entitled to reimbursement from the Kansas Workers Compensation Fund for overpayments under K.S.A. 44-534a (Ensley). The amounts submitted by respondent, including \$8,550.54 in indemnity payments and \$36,848.97 in medical payments, were paid by respondent for the purpose of providing treatment for claimant's reflex sympathetic dystrophy. Judge Richardson's finding in 1994 that the reflex sympathetic dystrophy does not stem from injury to the claimant's little finger on his right hand is a finding which is res judicata and binding upon the parties.

Therefore, the Appeals Board finds the respondent, Ford County Feed Yard, Inc., and its insurance carrier, St. Paul Fire & Marine Insurance Company, to be entitled to reimbursement under K.S.A. 44-534a (Ensley) for the above-listed sums from the Kansas Workers Compensation Fund.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated March 21, 1996, should be and is hereby reversed and respondent, Ford County Feed Yard, Inc., and its insurance carrier, St. Paul Fire & Marine Insurance Company, are granted reimbursement from the Kansas Workers Compensation Fund for the sum of \$45,399.51, including \$8,550.54 in indemnity payments and \$36,848.97 in medical payments.

IT IS SO ORDERED.

Dated this _____ day of August, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: B. G. Larson, Dodge City, KS
- Mark E. McFarland, Garden City, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director