

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

LESTER MARTIN)	
Claimant)	
VS.)	
)	Docket No. 152,124
MONFORT, INC.)	
Respondent)	
AND)	
)	
CITY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals an Award entered by Administrative Law Judge Bruce E. Moore on February 18, 1999, an Award made in response to a remand by the Kansas Court of Appeals. The Appeals Board heard oral argument August 4, 1999.

APPEARANCES

Beth Regier Foerster of Topeka, Kansas, appeared on behalf of claimant. Bradley C. Ralph of Dodge City, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant suffered a heart attack and resulting brain injury while at work for respondent. This appeal is the second occasion for Appeals Board review of this case. In the first appeal, the Board ruled that claimant's heart attack was not caused by heat as alleged. Claimant appealed that ruling, and the Court of Appeals affirmed the Board's decision. The Court of Appeals then remanded the claim to the ALJ for decision on other issues. Specifically, the remand order stated:

Martin also contends that under the Workers Compensation Act, he is entitled to compensation where a medical care provider, who is a co-employee, accidentally increases his injury. Martin points out that the plant nurse undertook medical care at the plant when he had his heart attack. He argues the nurse's actions aggravated the oxygen deprivation to his brain due to the fact that an oxygen tank was not available.

It is noteworthy that Martin's argument was made to the ALJ in his submission letter. However, neither the ALJ nor the Board specifically made any factual findings or legal conclusions on this contention. Consequently, we are required to remand the case to the ALJ for a determination on this issue.

On remand, claimant argued that even if the heart attack was not caused by the heat, the anoxic brain injury was made worse by the heat because the heat accelerated the brain injury process. Claimant also argued that claimant's coworkers accidentally increased the injury because: (1) the nurse was delayed in reaching claimant by the fact the phone system was not working; and (2) the oxygen otherwise available to help claimant had been used earlier that day for the victims of another accident.

The ALJ ruled: (1) the evidence did not establish that the anoxic brain injury was made worse by the heat; (2) the evidence did not establish any breach of duty by the plant nurse or other personnel; (3) the evidence did not establish that the nurse was delayed by the status of the phone system; (4) the evidence did not establish that the timing of the nurse's arrival contributed to any injury; and (5) the evidence did not establish that the absence of the oxygen contributed to claimant's anoxic brain injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be affirmed. The Board so finds for the reasons stated in the findings and conclusions by the ALJ which are hereby adopted by the Board as its own.

Claimant has challenged those findings on appeal first by arguing that in a workers compensation proceeding it is not necessary to show negligence or breach of a standard. While this certainly is generally true, the Board believes there is an exception when the claim alleges a failure in the treatment of an otherwise noncompensable injury. A similar issue was addressed in *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996). The Court of Appeals there held that an employee's lost chance of survival resulting from negligent treatment by a co-employee after suffering a noncompensable heart attack is to be treated as an accidental injury which arose out of and in the course of employment. As the Board construes the *Scott* decision, negligence is required. And the Board believes several of claimant's allegations in this case are analogous to the claims in the *Scott* case. Claimant contends claimant's injury was made worse because the nurse did not arrive sooner and because oxygen was not available. But

the initial injury was not compensable. In our view, treatment provided by a coworker for a noncompensable injury cannot be considered the accidental cause of injury or of any worsening of the injury unless it is shown that the treatment breached a duty or violated a standard of care required. And the Board finds claimant has not established such a failure in this case.

Claimant also argues on appeal that the evidence does in fact support the allegations that the heat, delay in the nurse’s arrival to administer CPR, and the delay in giving oxygen made claimant’s injury worse. But as we view the evidence, it rises only to the level of showing that these factors can hasten brain damage. We agree with the conclusion by the ALJ that claimant has not shown by a preponderance of the credible evidence that any of these alleged factors did in fact make claimant’s injury worse.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on February 18, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Beth Regier Foerster, Topeka, KS
- Bradley C. Ralph, Dodge City, KS
- Bruce E. Moore, Administrative Law Judge
- Philip S. Harness, Director