

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

BEVERLY A. HARRIS)	
Claimant)	
VS.)	
)	Docket No. 159,606
W. H. BRAUM, INC.)	
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On May 9, 1997, the applications of the Kansas Workers Compensation Fund and the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on January 3, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Dale V. Slape, appearing for Kenneth M. Stevens, of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Kirby A. Vernon of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Scott J. Mann of Hutchinson, 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

Claimant and respondent settled this matter on September 9, 1992, with the only issue raised by claimant being the finding by the Administrative Law Judge that all medical expenses incurred by claimant after September 9, 1992, with Dr. Jose J. Monsivais and any of his referrals, constituted unauthorized medical treatment, and respondent is only responsible for \$350 unauthorized medical expense subsequent thereto.

The Kansas Workers Compensation Fund raises the following issues for consideration by the Appeals Board:

- I. Whether the claimant's left upper extremity injury was related to her employment with Braums?
- II. If the court finds that the claimant's left upper extremity injury was related to her employment with Braums, then whether this injury was a natural and direct result of her right upper extremity injury and not a result of a second work-related injury?
- III. If the court finds that the claimant's left upper extremity injury was related to her employment with Braums and if the court also finds that this injury was a result of a second work-related injury, then whether the respondent had knowledge of any alleged handicap to the claimant's right upper extremity?
- IV. If the court finds that the claimant's left and right upper extremity injuries were related to her employment with Braums and if the court also finds that the respondent had knowledge of the alleged handicap to the claimant's right upper extremity, then whether Fund liability should be limited to the amounts of temporary total disability benefits, medical and hospital expenses, and permanent partial disability benefits related to the left upper extremity?
- V. Whether the claimant should be entitled to the payment of medical and hospital expenses and any mileage expenses incurred incidental to such treatment following the deauthorization of Dr. Jose J. Monsivais as the claimant's treating physician?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant was the shift manager for W. H. Braum, Inc., at its store at 21st and Amidon in Wichita, Kansas on March 20, 1990, when she suffered accidental injury to her right upper extremity while dipping ice cream. Claimant described the incident as feeling like a "hot ball of fire" from the palm of her hand to her shoulder. She attempted to keep working but was having difficulties. Claimant is right hand dominant and the injury was only to her right hand at that time. Claimant informed the assistant manager and another worker of her problems but did not seek treatment until approximately May 1990.

Claimant continued to work but alleges she was forced to use her left hand to overcompensate for the problems associated with the right. This, claimant claims, caused problems to develop in her left hand. Both upper extremities continued to worsen through claimant's last day of work in June 1990.

In May 1990 claimant was referred to Dr. Robert Clark who placed claimant's right upper extremity in a splint and provided work restrictions. Dr. Clark also performed a ganglion block after which claimant missed approximately one week of work. At approximately the same time, claimant was transferred to a lower volume store which respondent contends was specifically intended to reduce the claimant's physical activity and prevent further injury. The Workers Compensation Fund disputes this claim alleging that claimant transferred to the lower volume store before respondent was aware that claimant had been provided medical restrictions. However, the Appeals Board finds, when considering claimant's testimony, that respondent was aware claimant had suffered an injury of some type to her right upper extremity prior to the store transfer.

Claimant terminated her employment with respondent in June 1990 when she married and moved to New Mexico. While in New Mexico, claimant was provided treatment through the respondent's authorized doctors and also obtained medical treatment from Dr. Jose J. Monsivais in El Paso, Texas. Respondent contends the treatment by Dr. Monsivais was never authorized. However, there is indication in the records that respondent was aware of and acquiesced to the ongoing treatment by Dr. Monsivais. A letter from claimant's attorney to respondent's attorney dated December 12, 1991, underscores this point.

Effective September 9, 1992, Dr. Monsivais and all parties were advised that Dr. Monsivais's authorization had been rescinded by respondent and any treatment provided thereafter would be unauthorized medical care. The Appeals Board finds that the treatment provided by Dr. Monsivais was authorized through September 9, 1992. The treatment provided by Dr. Monsivais after September 9, 1992, was unauthorized medical treatment.

Thereafter, claimant would be entitled to the maximum unauthorized medical allowance pursuant to K.S.A. 1989 Supp. 44-510.

The Workers Compensation Fund contends that claimant did not suffer accidental injury to her right upper extremity after March 20, 1990, while employed with respondent. The Workers Compensation Fund further contends that claimant's injury to her left upper extremity was either a reasonable and natural consequence of the original injury or did not occur. Claimant described a situation where she suffered injury to her right upper extremity and then, as a result of the problems with the right upper extremity began to overcompensate for the right and began to overuse the left upper extremity causing injury to the left upper extremity.

Claimant has been examined and/or treated by several doctors with a substantial amount of medical evidence presented in this record. Claimant's allegations that she suffered either an aggravation to her right upper extremity after March 20, 1990, and/or a separate injury to her left upper extremity through the last date of her employment are not supported by the record. Claimant acknowledges she did not tell respondent of any ongoing left upper extremity symptomatology prior to her termination of employment and the claimant sought no medical care for this left upper extremity with Dr. Clark, the treating physician. The first record of claimant's left upper extremity complaints occurs in April 1991 when she was being treated by Dr. Monsivais. In addition, the medical reports of Dr. Richard F. Preator on November 21, 1990, indicate that claimant suffered additional aggravation and injury to her right upper extremity while helping butcher a deer with her husband. Claimant was examined by Dr. Fields, Dr. Preator, and Dr. Monsivais into April 1991 without complaints to the left upper extremity. Dr. Ernest R. Schlachter, in evaluating claimant's injury complaints and history, opined that the fact the left upper extremity symptoms did not occur within the first year after claimant's date of accident would be an indication that these symptoms were not related to her work activities with respondent.

In addition, in November 1990 claimant accepted a job in a gift shop in New Mexico which required her to do repetitive activities with her hands. These activities could have caused an aggravation of her symptomatology per the opinion of Dr. Schlachter.

Liability will be assessed against the Workers Compensation Fund when the employer shows that it knowingly hired or retained a handicapped employee who subsequently suffers a compensable work-related injury. An employee is handicapped under the Workers Compensation Act if the employee is inflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980). The determination as to whether a handicap exists and whether the employer has knowledge of it is a question of fact and must be made on a case by case basis. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336, (1985). The employer has the burden of proving it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1989 Supp. 44-567(a) states in part:

Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

Claimant suffered a traumatic injury to her right upper extremity on March 20, 1990. Thereafter, claimant continued working for respondent alleging additional aggravation to her right upper extremity and alleging she suffered a new injury to her left upper extremity as a result of the overcompensation in protecting her right extremity. Claimant's injury to her right upper extremity constituted a handicap to her ability to obtain or retain employment and respondent was aware of claimant's handicap. Dr. Schlachter, who had the opportunity to examine claimant subsequent to her injuries, testified that "but for" claimant's preexisting right upper extremity problems the problems associated with claimant's left upper extremity would not have occurred.

However, Dr. Schlachter acknowledged that symptoms which arose a year after claimant's employment with respondent would not arise out of and in the course of her employment with respondent. The medical evidence does not support a finding that claimant suffered accidental injury to her left upper extremity while working for respondent and the most significant aggravation to claimant's right upper extremity appeared to occur while butchering a deer.

A specific requirement of K.S.A. 1989 Supp. 44-567 is that a claimant who is found to be handicapped in his or her ability to obtain or retain employment must suffer a subsequent compensable work-related injury. In this instance, the Appeals Board cannot find that claimant suffered additional work-related accidental injuries to either her right or left upper extremities after March 20, 1990. Therefore, the Appeals Board finds, based upon the facts in this case, that claimant suffered accidental injury on or about March 20, 1990, to her right upper extremity which said accident arose out of and in the course of her employment with respondent. Thereafter, the medical evidence does not support a finding that claimant suffered additional accidental injury and, as such, no liability can be assessed to the Kansas Workers Compensation Fund in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 3, 1997, should be, and is

hereby, reversed and an award is denied against the Workers Compensation Fund for the injuries suffered by claimant while employed with respondent, W. H. Braum, Inc.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services	
Transcript of preliminary hearing	\$74.60
Barber & Associates	
Transcript of preliminary hearing	\$201.05
Deposition of regular hearing	\$437.20
Deposition of Ernest R. Schlachter, M.D.	\$180.60
Keith & Miller Certified Reporters	
Deposition of Jose J. Monsivais, M.D.	\$1,923.00
Don K. Smith & Associates	
Deposition of Jerry Dean Hardin	\$474.50
Kelley, York & Associates, Ltd.	
Deposition of Rebecca S. Haas	\$171.00
Deposition of Sharon Bonewell	\$101.50

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dale V. Slape, Wichita, Kansas
- Kirby A. Vernon, Wichita, Kansas
- Scott J. Mann, Hutchinson, Kansas

John D. Clark, Administrative Law Judge
Philip S. Harness, Director