

Fund. The Fund denies liability alleging the respondent lacked knowledge of the employee's handicap condition as is required by K.S.A. 44-567. The respondent counters alleging that claimant knowingly misrepresented his preexisting condition and this knowing misrepresentation would require that knowledge on the part of the employer be presumed conclusively under K.S.A. 44-567(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The respondent has failed to prove by a preponderance of the credible evidence that the claimant knowingly misrepresented the facts of his condition which would allow the respondent a conclusive presumption of knowledge of his handicapped condition pursuant to K.S.A. 44-567(c).

The claimant, a street superintendent for the City of Winfield, first began working for the respondent in 1977. Claimant worked his way up through several jobs ultimately becoming street superintendent, a job he held for several years. On March 1, 1991, claimant stepped into a hole causing injury to his back. Following this injury claimant sought no medical care. On March 18, 1991, claimant slipped on a clod, falling, causing injury to his low back and left leg. Subsequent to this injury claimant was referred to Dr. Robert L. Eyster, M.D. who, following a period of conservative care, performed a decompression laminectomy at L2-3, L3-4. As a result of this injury and claimant's inability to return to his former employment, claimant was awarded a seventy percent (70%) work disability by Assistant Director Shufelt. This issue has not been appealed and is affirmed.

The respondent bases its allegation of intentional misrepresentation on the fact claimant underwent a fusion at the L4 level through S1 level in 1971. Subsequent to that surgery claimant worked heavy manual labor for several years, apparently experiencing no difficulty.

At the time of his hire in 1977, the claimant's wife filled out an Application for Examination dated May 23, 1977, wherein the following question was asked, "Have you any disease or physical disability, defect, or infirmity that would effect your work performance?" To this question the claimant's wife answered, "No." At some later date claimant reviewed and signed the document in question. He testified that, had he filled out the answer to that question, his answer would not have varied from that of his wife. The claimant felt he had no disease or physical disability, defect or infirmity that would in any way effect his work performance. He had been performing heavy physical labor since the 1971 surgery and felt he could continue to do so. The Appeals Board finds no intentional or knowing misrepresentation by the claimant with regard to this document.

The respondent further bases its contention of intentional misrepresentation upon a medical history questionnaire completed by the claimant in 1981. In this questionnaire the claimant was asked whether he had made a claim for workers compensation or other injury benefits and whether he had suffered an injury on the job. To both of these questions claimant answered "broken ankle," followed by the word "Windblad," indicating the doctor who apparently provided medical benefits at the time of this injury. It is noteworthy that claimant's back injury in 1971 was not the result of a work related injury and, thus, the surgery to the back would not fall under the explanation sections of these

two questions. Claimant was also asked whether he had ever had surgery, been in the hospital for treatment, been treated for back pain, had broken any bones, or had disorders of the spine joints, collar or other bones for which he answered, "Yes" to each question. Claimant also answered in the affirmative when asked whether he had ever had an electrocardiogram, x-ray or other diagnostic tests, consulted a doctor or had a physical check-up within the past five years. Claimant affirmed that he was presently seeing a doctor, taking medication, smoked, had a disability and had difficulty lifting or performing other physical labor. On this form, marked as Respondent's Exhibit 2 to the regular hearing, there was an explanation column to the right of the yes and no boxes for these questions. Except for claimant's discussion regarding his broken ankle, claimant provided no explanation for any other positive answer provided on this form.

Claimant was interviewed by Mr. Terry Gray, personnel director the City of Winfield, shortly after completing this form. Mr. Gray admitted to having questioned claimant regarding this form but also admitted to not having asked for an explanation regarding the several positive answers provided by claimant on the form. The respondent alleges that the claimant's knowing misrepresentation stems from his failure to provide an explanation after these positive answers. However, the respondent, when presented with an opportunity to inquire about these positive answers failed to so inquire.

Whether an employee has made a knowing misrepresentation of his condition requires a determination whether the employee intended to misrepresent and conceal his condition at the time of the alleged misrepresentation. The key is the mental state of the claimant when he answered the employer's questions. Collins v. Cherry Manor Convalescent Center, 7 Kan. App. 2d 270, 640 P.2d 875 (1982).

It is significant that the concealment must be knowing. An employee who misrepresents the condition of his health to his employer solely by reason of accident or mistake without any awareness that he has done so cannot be said to have knowingly made the misrepresentation contemplated by K.S.A. 44-567(c). Krauzer v. Farmland Industries, Inc., 6 Kan. App. 2d 107, 626 P.2d 1223 (1981).

While the Appeals Board recognizes the fact that the provisions of the statute imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees, this liberal construction is not afforded to an employer unless such liberal construction would advance the legislative aim of encouraging the employment of handicapped persons. Safeway Stores, Inc. v. Workers' Compensation Fund, 3 Kan. App. 2d 283, 593 P.2d 1009 (1979). The Appeals Board finds no such benefit in this instance.

The omission by claimant to "explain" next to his affirmative answers on the medical history questionnaire, does not establish a knowing misrepresentation by the claimant. The positive answers on the medical history questionnaire alerted the respondent and its agent, Mr. Gray, to the possible need to inquire further, an opportunity which was waived by the respondent. One must conclude that the claimant's omissions were not knowing but merely the result of insufficient information from the claimant followed shortly thereafter by incomplete inquiry by the respondent.

AWARD

WHEREFORE, it is finding, decision and order of the Appeals Board that the Award of Assistant Director David A. Shufelt denying the respondent the right to recovery against

the Kansas Workers Compensation Fund and holding that respondent had not met its burden of proof in attempting to establish that the claimant knowingly misrepresented his preexisting condition is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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