

RECORD

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

STIPULATIONS

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

ISSUES

- (1) Nature and extent of injury and disability.
- (2) Whether claimant is entitled to a healing period.
- (3) Whether claimant suffered a separate and intervening injury on May 4, 1992, while playing softball.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant, a correctional officer with respondent, injured his right knee on August 30, 1991 while participating in a training exercise. Dr. Duane Murphy performed surgery on claimant's knee repairing a lateral meniscus tear and diagnosing a Grade II hemorrhage in the anterior cruciate ligament. Subsequent to the surgery claimant was returned to work on April 24, 1992, with no specific work restrictions. The only precaution given to claimant by Dr. Murphy was that he wear a knee brace while participating in strenuous physical activities. Dr. Murphy assessed claimant a fifteen percent (15%) impairment of function to the lower right extremity subsequent to the first surgery.

On May 4, 1992, while participating in a nonwork-related softball practice, claimant reinjured his right knee suffering additional damage to the knee. As a result of this second injury claimant underwent a second surgery on July 30, 1992, comprising of a repair of the claimant's medial meniscus. Dr. Murphy again assessed claimant's anterior cruciate ligament as Grade II. On November 16, 1992, claimant underwent a third surgery wherein Dr. Murphy reconstructed claimant's anterior cruciate ligament, at that time rating claimant's anterior cruciate ligament at Grade III. Dr. Murphy assessed claimant a thirty percent (30%) functional impairment to the right lower extremity subsequent to the last surgery.

It is claimant's contention that the softball injury suffered May 4, 1992, is a natural consequence of the original injury and respondent should be liable for the additional medical costs and increased impairment suffered therefrom.

"When a primary injury under the Workmen's Compensation Act arises out of and in the course of employment every natural consequence that flows

from the injury is compensable if it is a direct and natural result of the primary injury." Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977).

Respondent, on the other hand, argues that this is not a natural consequence of the original injury but rather a new and separate accidental injury which did not arise out of and in the course of claimant's employment but rather stems from the softball practice attended by claimant.

The facts surrounding claimant's injury are undisputed in that claimant was involved in a softball practice not related to his employment. He was not on respondent's property, the team was not sponsored by the respondent and there was no work requirement that claimant attend this softball practice.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

The Appeals Board finds that, in this instance, claimant's injury of May 4, 1992, was a new and separate accidental injury suffered as a result of claimant's softball activities, and is not a natural consequence of claimant's accidental injury of August 30, 1991.

The Award of the Administrative Law Judge awarding claimant a fifteen percent (15%) permanent partial impairment of function to the lower extremity and denying claimant entitlement to a healing period is supported by a preponderance of the credible evidence and is affirmed by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated May 18, 1994, is affirmed in all respects and claimant is awarded a fifteen percent (15%) permanent partial impairment to the right lower extremity for the injuries suffered August 30, 1991.

Claimant is entitled to 4.86 weeks temporary total disability compensation at the rate of \$289.00 per week in the amount of \$1,404.54 followed by 29.27 weeks of permanent partial disability compensation in the amount of \$289.00 for a fifteen percent (15%) permanent partial scheduled injury to the right lower extremity making a total award of \$9,863.57.

As of March 31, 1995, the entire amount is due and owing minus any sums previously paid.

Medical expenses incurred by the claimant as a result of the August 30, 1991 accidental injury are awarded to be paid by the respondent. Claimant is further entitled to unauthorized medical up to the statutory limit upon presentation of an itemized statement.

Future medical is awarded upon proper application to and approval by the Director.

The fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Deposition Services	
Transcript of Regular Hearing	\$240.50
Deposition of Allen Dale	\$94.00
Deposition of Bradley R. Biltoft	\$70.00
Deposition of Thad L. Wilson	\$62.00
Deposition of Greg Fugate	\$74.00
Deposition of Phillip D. Tannehill	\$66.00
Alexander Reporting Co.	
Deposition of Duane Murphy, M.D.	\$222.84
Barber & Associates	
Transcript of Preliminary Hearing	Unknown

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Kelly W. Johnston, Wichita, Kansas
- Jeffrey R. Brewer, Wichita, Kansas

MARK A. HAYES

5

DOCKET NO. 166,205

Randall C. Henry, Hutchinson, Kansas
John D. Clark, Administrative Law Judge
George Gomez, Director