

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

DEMA COLLEEN GALCON)	
Claimant)	
VS.)	
)	Docket No. 170,693
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On December 3, 1996, the application of respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark dated June 17, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Tom E. Hammond of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through attorney, Chris Cole appearing for James R. Roth of Wichita, Kansas. Thereupon, claimant's and respondent's attorneys advised that claimant and respondent had entered into an amicable settlement of this matter on June 24, 1994, and, as such, claimant's attorney would not participate in oral argument before the Appeals Board. 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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The claimant has alleged accidental injury beginning in July, 1992 through October 12, 1992 to her cervical spine. Claimant had previously injured herself on two separate occasions. Medical records indicate claimant suffered a slip and fall in December, 1987 when she fell on the ice in the company parking lot. The reports of the medical doctors dispute the significance of this fall. Dr. Chandler S. Bethel the treating physician felt that claimant had suffered no permanent injury as a result of this fall and returned claimant to work with no restrictions. Dr. Bethel felt the claimant was in no way handicapped as a result of the 1987 injury.

Dr. Kenneth D. Zimmerman, testifying on behalf of the respondent felt that x-rays taken in January of 1988 indicated mild scoliosis, reversed mild curvature and degenerative arthritis of the cervical spine. He felt claimant was a handicapped employee for the purpose of Workers Compensation Fund liability.

Dr. Ernest Schlachter felt the claimant suffered only a minor cervical sprain in 1987 resulting in no permanent impairment. The Appeals Board, in reviewing the medical evidence, finds the opinions of Dr. Schlachter and Dr. Bethel to be the more credible regarding claimant's condition subsequent to the 1987 injury. As such, the Appeals Board finds the claimant was not a handicapped employee as result of those injuries.

Claimant did experience additional symptomatology in 1989. At that time she was diagnosed with a significant worsening of her degenerative process. Dr. Schlachter felt claimant had a herniated disk as of 1989 and went on to say that "but for" the 1989 findings claimant's problems in 1992 would not have occurred. Dr. Bethel supported this finding noting neck complaints by claimant on May 17, 1989 with a C5-6 neurothopy diagnosed. There is no indication in the record that Dr. Zimmerman or the respondent were made aware of claimant's 1989 symptomatology until after the 1992 injuries occurred.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered

by these employees. K.S.A. 44-567(b); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work related accident. An employee is handicapped under the act if the employee is "afflicted 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).

K.S.A. 1992 Supp. 44-567(b) provides in part:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this instance, the Appeals Board is not persuaded that claimant was a handicapped employee as defined by K.S.A. 44-566 in 1987. The medical evidence supports the finding that claimant's injuries in 1987 were temporary at best and that claimant was returned to work with no permanent injury and no restrictions.

The Appeals Board is persuaded however, that claimant was a handicapped employee as defined by K.S.A. 44-566 in 1989 at which time the symptomatology had increased significantly and the C5-6 neuropathy was diagnosed. However, there is no evidence in the record to show that respondent was made aware of the 1989 symptomatology suffered by claimant prior to claimant's injuries suffered in 1992. In order for liability to be transferred to the Workers Compensation Fund, the employer must show that it had knowledge of this pre-existing impairment prior to the claimant suffering the injury in question. The Appeals Board finds that the respondent has failed to meet its burden of proving that it knowingly retained a handicapped employee within the definition of K.S.A. 44-566 and that this lack of knowledge of claimant's handicap fails to satisfy the requirements of K.S.A. 44-567.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 17, 1996, assessing the

entire Award against the respondent and none against the Kansas Workers Compensation Fund should be, and is hereby affirmed.

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

Ireland Court Reporting	
Transcript of preliminary hearing	\$ 64.38

Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	\$221.50
Deposition of Chandler S. Bethel, M.D.	\$201.50

Court Reporting Service	
Deposition of Ernest R. Schlachter, M.D.	\$215.60

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Tom E. Hammond, Wichita, KS
- Frederick L. Haag, Wichita, KS
- Chris Cole, Wichita, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director