BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTA A. GROMMET	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 183,171 & 213,096
THE FLESH COMPANY	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Judge Jon L. Frobish decided the above proceedings in a combined Award dated August 11, 1997. Claimant appealed the findings and conclusions entered in Docket No. 183,171. The respondent and its insurance carrier appealed the findings entered in Docket No. 213,096. The Appeals Board heard oral argument on January 28, 1998.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Appeals Board, the parties agreed that the depositions of claimant taken on February 7, 1994, and September 11, 1996, are included in the evidentiary record.

DOCKET NO. 183,171

ISSUES

In this proceeding, which involves an alleged low-back injury, Judge Frobish denied claimant's request for benefits after finding that claimant failed to prove she sustained personal injury by accident arising out of and in the course of her employment. Claimant requested the Appeals Board to review that finding as she contends her back injury was caused by the strenuous, manual labor that she performed for respondent. The only issue in this proceeding is whether claimant has proven it is more probably true than not that she injured her back while working for the respondent in either April 1993 or any of the other alleged dates.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Roberta A. Grommet began working for The Flesh Company, a printing company, in 1989.

(2) Ms. Grommet alleges she injured her low back while performing heavy lifting and strenuous work for the printing company. She has alleged several different dates of accident for this particular injury. Ms. Grommet initially alleged she injured her low-back between April 28, 1993, and June 4, 1993. At the regular hearing, Ms. Grommet amended the date of accident to "April 20, 1993 and each and every working day thereafter." Later, in Ms. Grommet's submission letter to the Administrative Law Judge, Ms. Grommet changed the date of accident to "Repetitive Use Injury culminating April 20, 1993." In the brief to the Appeals Board, Ms. Grommet argues that she injured her low back each and every day she worked at the printing company.

(3) The Appeals Board finds that Ms. Grommet has failed to prove that she injured her back while working for The Flesh Company. According to the history Ms. Grommet provided to Dr. Sonya K. Culver in October 1992, at that time she had experienced back pain that had waxed and waned for some 20 years.

(4) Ms. Grommet's back injury more probably than not occurred when she was bending over to light a bathroom heater. That is the history Ms. Grommet provided to Dr. William L. Dillon's office at her first visit on May 18, 1993. That history is similar to that she gave Dr. Chirund Lava on April 22, 1993, as shown in the doctor's office notes of that date.

(5) Other than working for several hours in July 1993, Ms. Grommet did not work from the first part of June 1993 until May 1994.

(6) In May 1994, Ms. Grommet returned to work for the printing company as a computer operator, a position that she held until her last day of work with the company on June 22,

1995. As indicated above, Ms. Grommet alleges she sustained injury to her back each and every day she worked.

(7) The Appeals Board finds that although sitting probably aggravated her back symptoms, the work did not cause Ms. Grommet to sustain additional injury or impairment. Dr. Dillon's testimony supports that conclusion as he testified that Ms. Grommet's condition when he saw her in November 1994 was the same as it was in July 1993 before she ever returned to work. A close reading of Dr. Dillon's testimony indicates that Ms. Grommet's work after May 1994 was only a temporary aggravation of symptoms and such work did not cause additional injury or permanent aggravation to her back.

(8) The Appeals Board adopts Judge Frobish's findings and conclusions to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

Because Ms. Grommet has failed to prove she sustained either a permanent injury or aggravation to her low back while working for The The Flesh Company, her request for benefits should be denied.

The Appeals Board notes that Ms. Grommet has requested to admit additional records into the evidentiary record that tend to prove notice, and to apply the principles of judicial estoppel. Based upon the finding that Ms. Grommet has failed to carry her burden to prove a permanent injury or aggravation, those requests are rendered moot. Therefore, the Appeals Board will not address the propriety of either request.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award denying additional benefits in this proceeding entered by Administrative Law Judge Frobish should be, and hereby is, affirmed.

DOCKET NO. 213,096

ISSUES

In this proceeding, which pertains to a claim for benefits for injuries to the neck, shoulders, and upper extremities, Judge Frobish awarded claimant a 50 percent permanent partial general disability. Respondent and its insurance carrier raised the following issues for Appeals Board review:

(1) Did claimant sustain personal injury by accident arising out of and in the course of her employment with the respondent?

(2) Did claimant provide timely notice of accidental injury?

(3) What is the appropriate date of accident for computing benefits?

(4) Did claimant provide timely written claim?

(5) What is the nature and extent of claimant's injury and disability?

(6) Is claimant entitled to additional temporary total disability benefits?

FINDINGS OF FACT

In addition to those findings as set forth above, the Appeals Board finds:

(1) In May 1994, after recuperating from her back problems, Ms. Grommet returned to work for The Flesh Company as a computer operator.

(2) Ms. Grommet continued to work for the company until June 22, 1995, when she experienced a sudden onset of pain down her left arm while sitting and working at her computer.

(3) Ms. Grommet contacted Dr. Dillon who in turn referred her to neurosurgeon Dr. Arthur Steven Daus. The latter operated on Ms. Grommet's neck in September 1995 and repaired a herniated cervical disc and fused it to cervical vertebrae. Before the surgery, an MRI of Ms. Grommet's cervical spine indicated a herniated disc at the C5-6 intervertebral level and stenosis at C6-7.

(4) The Appeals Board finds that claimant has failed to prove that her neck injury or her symptoms in her left upper extremity are the result of an accident that she sustained at work. That conclusion is based upon the opinions of Dr. Vito J. Carabetta and Dr. Daus. Dr. Carabetta, who is board-certified in physical medicine and rehabilitation, testified that Ms. Grommet's work activities as a computer operator were not consistent with a herniated cervical disc. According to Dr. Carabetta, a major traumatic event is generally required to herniate a cervical disc because of its protected location. In addition, Dr. Daus indicated that Ms. Grommet's arm symptoms were not from carpal tunnel syndrome but, instead, the result of the cervical disc herniation.

(5) Persuaded by Dr. Dillon's testimony that sitting should only temporarily aggravate but not change the underlying condition in any manner, the Appeals Board finds that Ms. Grommet's work activities as a computer operator did not cause or permanently aggravate, accelerate, or intensify her neck injury and the work, if anything, only caused a temporary flare-up in her symptoms.

(6) Based upon the above finding that Ms. Grommet failed to satisfy her burden of proof, the remaining issues are rendered moot.

CONCLUSIONS OF LAW

Because Ms. Grommet has failed to prove that she has sustained any permanent injury as the result of the sedentary activities she performed as a computer operator after returning to work for The Flesh Company in May 1994, the request for benefits in this proceeding should likewise be denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of benefits entered by Judge Jon L. Frobish should be, and hereby is, reversed; that claimant's request for benefits for neck, shoulder, and upper extremity injuries is denied.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director