



contends benefits should be denied. Conversely, claimant contends that the Award by Judge Frobish should be affirmed in all respects.

The issue before the Appeals Board is whether claimant suffered personal injury by accident or accidents arising out of and in the course of her employment.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record, the Appeals Board finds that the Award entered by the ALJ should be affirmed. The Appeals Board agrees with the ALJ's analysis of the evidence as set forth in the Award. Therefore, the Appeals Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Respondent is in the business of making decals for cars and trucks. Claimant began working for respondent as a racker on February 22, 1988. She performed the racker job less than a year before moving to packaging for approximately 6 months. Claimant next was a thermal die cut operator (TDC). The TDC job required extensive movement of both upper extremities turning 400 to 800 sheets per day. She began having arm symptoms approximately 3 to 4 years after starting the TDC job. Claimant thinks she complained to her supervisor and the human resources person about the symptoms. Also during this time period, someone came to the company and did testing on those employees that requested it. According to claimant, these tests showed claimant to have carpal tunnel syndrome. Thereafter, on May 30, 1993, claimant was involved in a non-work related motor vehicle accident. Claimant was a passenger in a car that was rear ended suffering upper back and neck injuries. She received treatment at St. Joseph Hospital in Wichita and from her personal physician, Dr. Doris Butler, who eventually referred her to orthopedic surgeon Robert L. Eyster, M.D. Due to persistent right upper extremity symptoms, Dr. Eyster referred her to physiatrist Lawrence R. Blaty, M.D., who performed electromyography and nerve conduction studies (EMG/NCS). According to Dr. Blaty those studies showed mild carpal tunnel syndrome on the right side.

Claimant contends Dr. Eyster also diagnosed carpal tunnel syndrome and that Dr. Eyster related the carpal tunnel syndrome to her work. This argument is supported by

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<sup>1</sup> Claimant's form E-1 Application for Hearing alleged an October 8, 1993 date of accident. This was also the accident date alleged at the regular hearing and in claimant's submission letter to the Administrative Law Judge. However, in the Award Judge Frobish found "claimant's date of accident is her last day of employment, May 30, 1993." It is not clear from the record whether claimant actually worked on May 30, 1993. It was a Sunday. It was also the day claimant was injured in a non-work related automobile accident in Van Buren, Arkansas. Claimant's job was in Wichita, Kansas. Nevertheless, during oral argument to the Appeals Board, both counsel acknowledged that date of accident was not an issue for Appeals Board review. Accordingly, the Appeals Board adopts the date of May 30, 1993 as the ending date for the alleged series of accidents.

Dr. Eyster's October 8, 1993 office notes and by a letter wherein Dr. Eyster described the carpal tunnel syndrome as not being caused by the May 30, 1993 automobile accident.<sup>2</sup> However, in his deposition, Dr. Eyster testified that he did not diagnose a definite case of carpal tunnel syndrome and correlated claimant's right upper extremity symptoms to the automobile accident. He also did not agree with Dr. Blaty's diagnosis of mild carpal tunnel syndrome on the right side. Dr. Eyster was treating claimant for the automobile accident and resulting neck and shoulder symptomatology. He testified that he believed the cause of her neck, shoulder and referred arm pain was due to the car accident. Dr. Eyster explained his letter wherein he did not attribute the carpal tunnel syndrome to the car accident as meaning that he did not diagnose carpal tunnel syndrome. In order to make that diagnosis claimant would have to present with definite symptoms of carpal tunnel syndrome which he did not find.

On October 8, 1993, Dr. Eyster released claimant with restrictions for the carpal tunnel syndrome which limited claimant's use of her upper extremity to no pushing or pulling over 25 pounds and no repetitive activity over 50 times per hour. Respondent was not able to accommodate the restrictions and claimant was terminated. Thereafter, claimant did not work anywhere else. Approximately 6 years later claimant was examined by board certified physiatrist Pedro Murati, M.D. He diagnosed claimant with right hand pain secondary to carpal tunnel syndrome and ulnar cubital syndrome. Dr. Murati rated claimant under the AMA Guides to the Evaluation of Permanent Impairment, Third Edition Revised, as having a 10 percent upper extremity impairment for carpal tunnel syndrome of the right hand and a 10 percent upper extremity impairment for right ulnar cubital syndrome. He combined these two ratings to a 19 percent impairment of the right upper extremity. Although Dr. Murati conceded that car accidents can cause carpal tunnel syndrome, he related claimant's carpal tunnel syndrome and ulnar cubital syndrome to her repetitive use activities with respondent. In support of this conclusion, Dr. Murati pointed to the symptoms and complaints claimant had presented before the car accident together with the prior diagnosis of carpal tunnel syndrome, which was confirmed by the EMG/NCT performed by Dr. Blaty in 1993.

Despite the positive EMG/NCT, Dr. Eyster was not willing to make the diagnosis of carpal tunnel syndrome because of a lack of symptoms. The ALJ found that this missing component was supplied through claimant's testimony and the findings by Dr. Murati. The Appeals Board agrees. Claimant testified that before her May 30, 1993 automobile accident, she was experiencing hand symptoms and complained to her supervisor and was tested or examined in some fashion. Carpal tunnel syndrome was mentioned and claimant was given exercises to perform. At the time of her regular hearing testimony, claimant was still experiencing right upper extremity symptoms including cold and numbness in her hands and fingers, pain in her palm shooting up through her wrist and forearm, soreness

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<sup>2</sup> Eyster Deposition, Exhibits 2 & 3.

and swelling. "A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition."<sup>3</sup> Based upon the testimony of claimant, Dr. Murati and the EMG/NCT performed by Dr. Blaty, the Appeals Board finds claimant has proven she suffered personal injury by accident arising out of and in the course of her employment. The Appeals Board finds Dr. Eyster's testimony is not persuasive either as to the carpal tunnel syndrome diagnosis or its causal relationship to claimant's employment with respondent. Accordingly, the Award entered by Judge Frobish should be affirmed.

During oral argument to the Appeals Board, respondent raised for the first time an issue concerning whether claimant had proven that she had been disabled "for a period of at least one week from earning full wages at the work at which the employee is employed," citing K.S.A. 1992 Supp. 44-501(c).<sup>4</sup> In general, the Appeals Board does not consider issues or defenses that were not raised before or considered by the ALJ.<sup>5</sup> But in the interests of judicial economy should this case be appealed further and the issue be found preserved, the Appeals Board believes respondent's argument concerning K.S.A. 1992 Supp. 44-501(c) is without merit. Claimant was given work restrictions for her right upper extremity condition that made it impossible for her to return to the job she was doing before her injury. Accordingly, she was disabled for a period of at least one week from earning full wages at the work at which she was employed.<sup>6</sup>

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated June 12, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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<sup>3</sup> Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* \_\_\_ Kan. \_\_\_ (2001).

<sup>4</sup> See Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. 962 (1997); Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

<sup>5</sup> See K.S.A. 44-555c(a) and K.S.A. 44-551(b)(1).

<sup>6</sup> See Curran v. Lawrence Paper Co., 26 Kan. App.2d 949, 996 P.2d 358 (2000); Ferrell v. USD 229 & Kansas Association of School Boards, 26 Kan. App. 2d 797, 995 P.2d 881 (1999); Overstreet v. Mid-West Conveyor Co., Inc., 26 Kan. App. 2d 586, 994 P.2d 639 (1999).

Dated this \_\_\_\_ day of November 2001.

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BOARD MEMBER

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c: Thomas M. Warner, Jr., Attorney for Claimant  
Douglas D. Johnson, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director