

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

ROBERT J. SEWELL)	
Claimant)	
VS.)	
)	Docket Nos. 181,932
STATE OF KANSAS)	187,486; 187,487;
Respondent)	187,488; & 187,489
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund requested Appeals Board review of an Award entered by Special Administrative Law Judge Douglas F. Martin on April 1, 1996. The Appeals Board heard oral argument in Topeka, Kansas, on September 10, 1996.

APPEARANCES

Claimant appeared by his attorney, Mark W. Works of Topeka, Kansas. Respondent and its insurance carrier, State Self-Insurance Fund, appeared by their attorney, Scott M. Gates of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James B. Biggs of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and adopted the stipulations listed in the Award.

ISSUES

Respondent at the oral argument held before the Appeals Board raised the following issues:

- (1) Whether claimant suffered a personal injury by accident that arose out of and in the course of his employment with respondent.
- (2) Whether claimant served a timely written claim for compensation benefits on the respondent.

The Kansas Workers Compensation Fund (Fund) limited the issues on appeal at oral argument before the Appeals Board to the following single issue:

- (3) The liability of the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing the arguments of the parties, the Appeals Board finds as follows:

This multiple docketed case was consolidated for litigation purposes before the Administrative Law Judge at the request of the claimant. The claimant filed five separate original applications for hearing, Forms E1, plus various amendments to those applications all reflecting a change in the date of accident. The earliest docket number, 181,932, was the latest amended Application for Hearing filed on November 15, 1994, that pleaded a new date of accident of September 1992 through May 31, 1993. The remaining amended applications for hearing alleged dates of accident as follows: Docket No. 187,486, January 1992; Docket No. 187,487, November 9, 1991; Docket No. 187,488, July 21, 1992; and Docket No. 187,489, February 1992. All of the applications for hearing alleged injuries to claimant's neck and back. Furthermore, all the applications for hearing alleged a mechanism of accident of falling at work, except for Docket No. 187,488 which alleged claimant was injured when he was trapped in a manually operated electrical door at the El Dorado Correctional Facility.

During the time of these alleged accidents, claimant was employed by the State of Kansas as Chief Ombudsman. Claimant reported to the Governor's office through the Governor's attorney and the Governor's then chief of staff, Mary Holladay. Claimant's job required him to investigate administrative law and civil rights complaints from inmates and staff at the 17 prisons located throughout the State of Kansas. The job required the claimant to travel to various prisons three out of the five work days per week. Once at the prisons, claimant was required to walk approximately two miles per day visiting inmates and returning to administrative offices.

Claimant is a Vietnam veteran who was severely wounded on February 9, 1968. As a result of those severe wounds, claimant's right arm was amputated at the elbow and his left leg was amputated above the knee. Claimant had been fitted with a prosthesis for his right arm and left leg. The prosthesis for the left leg allowed him to ambulate without further assistance.

However, the left leg prosthesis made claimant more susceptible to falling. In fact, claimant testified that since he was wounded in 1968 he had fallen numerous times because of the prosthesis both at work and away from work. Furthermore, claimant testified that the falls he alleged occurred at work in January 1992 and February 1992 were not reported to anyone, he did not miss any work, and he did not require any medical treatment. After he was caught in the electric door at the El Dorado Correctional Facility, he testified he might have left work early the day of the incident, however, he missed no time from work the following day, he notified no one of the accident, and he required no medical treatment.

Claimant testified the first time he noticed any symptoms consistent with a cervical injury was in September 1992. At that time, he was assisting a friend away from work in the installation of an overhead light fixture. Claimant testified his left arm went numb like he had pinched a nerve which lasted several hours. Thereafter, claimant's symptoms worsened until he went to his family doctor who referred claimant in January 1993 to Dr. Fitzgerald, a neurologist, located in Topeka, Kansas. Dr. Fitzgerald then referred claimant to Dr. Ebeling, a neurosurgeon, who diagnosed claimant with significant cervical stenosis at C3-4 and C5-6. On March 1, 1993, Dr. Ebeling performed laminectomies and fusion at the C3 through C6 vertebrae.

Following surgery, Dr. Ebeling referred claimant to Sharon McKinney, D.O., for follow up rehabilitation treatment. Claimant testified he attempted to return to work approximately one week after surgery but was able to work only sporadically. Finally, on August 18, 1993, claimant requested and received a paid leave of absence. Claimant testified he had no endurance, his left arm was weakened, and his neck pain was worse following the surgery. Claimant, after receiving the paid leave of absence and taking all of his accrued sick leave and vacation, terminated his employment with the State of Kansas on June 17, 1994.

Dr. McKinney was the only physician to testify in this case. However, the Administrative Law Judge pursuant to K.S.A. 44-510e appointed Peter V. Bieri, M.D., on November 23, 1994, to perform an independent medical examination of claimant as the parties could not agree upon claimant's functional impairment. Therefore, Dr. Bieri's independent medical report dated January 13, 1995, is a part of the evidentiary record.

Dr. McKinney first treated claimant on May 21, 1993, and her medical records indicate the last time she saw claimant was on June 8, 1994. Dr. McKinney recommended in a report dated July 13, 1993, that claimant not continue to work because of his deteriorating conditions as a result of his surgery. Dr. McKinney testified the first time she knew claimant was attributing his cervical problems to his falls at work was after she received a letter from claimant's attorney on October 15, 1993. Until that time, Dr. McKinney testified claimant had not indicated to her that his cervical problems were work related. During claimant's visit to Dr. McKinney on June 8, 1994, claimant told her he had documented evidence of at least five falls prior to his surgery. Additionally, claimant related to Dr. McKinney that he had not become symptomatic until he was working overhead installing the light fixture in September 1992. The doctor opined in a letter to claimant's attorney dated May 10, 1994, that the falls damaged claimant's cervical spine and required the surgical removal of the disc impinging on his spine. Dr. McKinney went on to testify that she did not know whether the falls occurred at work or at home.

On the other hand, Dr. Bieri in his independent medical report dated January 13, 1995, was very specific in opining that claimant's falls occurred because of his preexisting amputation "but there is no convincing evidence that any of the 'injuries' (accidents) in question, sustained at home or at work, contributed in any way to the ultimate impairment of the cervical spine." Dr. Bieri further concluded claimant's current condition was consistent with degenerative disc disease and would have occurred regardless of his job duties or described accidents.

The burden is squarely placed on the claimant in a workers compensation case to establish his right to an award of compensation and to prove the various conditions on which his right depends. See K.S.A. 1992 Supp. 44-501(a). Claimant is charged with the responsibility of persuading the trier of fact by a preponderance of the credible evidence that his position on an issue is more probably true than not on the basis of the whole record. See K.S.A. 1992 Supp. 44-508(g). In the instant case, the first issue that the Appeals Board will review is whether claimant has met his burden of proof in regard to whether he suffered personal injury by accident that arose out of and in the course of his employment with respondent.

The Administrative Law Judge found claimant had met his burden on this threshold issue. The Special Administrative Law Judge relied on Dr. McKinney's testimony, her medical records, and reports in establishing a causal connection between claimant's falls

and his cervical problems. In finding claimant's cervical injury to be work related, the Special Administrative Law Judge quoted Dr. McKinney who stated "his inability to work now is due to the fact that he had the falls damaging his cervical spine and requiring the surgical removal of his disc impinging on his spine." This opinion was contained in a letter dated June 8, 1994, from Dr. McKinney to claimant's attorney and attached as Exhibit 4 to Dr. McKinney's deposition. The Special Administrative Law Judge also found Dr. McKinney's opinion on causation was not contradicted by any other medical testimony contained in the record.

Dr. McKinney was asked on cross-examination by the Fund's attorney whether there was a method to identify the source of the initiation of claimant's spondylosis condition. Dr. McKinney replied in the negative. Furthermore, on cross-examination, Dr. McKinney testified she did not document the falls that claimant related to her and she did not know whether the falls occurred while he was at work or not.

The Appeals Board disagrees with the Special Administrative Law Judge's finding that Dr. McKinney's opinion in regard to claimant's falls and their relationship to his cervical injury is uncontradicted in the record. The Appeals Board finds that Dr. Bieri specifically contradicted Dr. McKinney's opinion on causation when he opined that there was no convincing evidence that any of claimant's accidents whether sustained at home or at work, contributed in any way to the ultimate impairment of claimant's cervical spine. The Appeals Board also finds Dr. McKinney's testimony on cross-examination established that she did not know whether claimant's condition was due to claimant's falls at work, his falls away from work, or both. Dr. McKinney further testified the cause of claimant's spondylosis cervical condition could not be identified.

The Appeals Board concludes that claimant's own testimony did not relate his falls to his cervical or left arm pain. In fact, claimant admitted he had no neck or arm symptoms until the incident that occurred in September of 1992 when he was helping his friend install a light fixture.

The general principles to be followed when determining whether a worker has met his burden of proving his injury arose out of or in the course of his or her employment, have recently been reiterated in the case of Kindel v. Ferco Rental Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995) as follows:

"The two phrases arising 'out of' and 'in the course of' employment as used in our Workers Compensation Act, K.S.A. 44-501, *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration

of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of employment. The phrase 'in the course of employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. [Citations omitted.]"

The Appeals Board concludes claimant failed to prove by a preponderance of the credible evidence contained in the record of this case that his cervical condition and resulting surgery were causally connected with his employment. The Appeals Board finds the most credible and persuasive medical evidence is Dr. Bieri's independent medical opinion that claimant's cervical condition and subsequent surgery were a result of his preexisting degenerative disease with spinal stenosis and were not contributed to by the accidents claimant had at work. The Appeals Board also concludes claimant's own testimony is convincing that the accidents he described he had at work had no causal relationship to his cervical condition. Claimant denied he had any symptoms following those accidents. In fact, the symptoms related to his cervical condition only surfaced following a non-work related incident that occurred in September 1992. Furthermore, the Appeals Board finds claimant's injuries resulted from risks personal to the claimant, i.e., his amputations and degenerative disc disease, and therefore did not arise out of his employment. See Martin v. U.S.D. 233, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980). Accordingly, the Appeals Board finds claimant should be denied compensation benefits as the claimant failed to prove he sustained a work-related accidental injury.

(2)(3) The Appeals Board finds that it is not necessary to address the remaining issues as the foregoing finding renders those issues moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated April 1, 1996, should be, and is hereby reversed and the claimant, Robert J. Sewell, is denied an award of compensation benefits against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund.

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

Curtis, Schloetzer, Hedberg, Foster & Associates	
Deposition of Robert J. Sewell	\$134.70
Deposition of Sharon McKinney, D.O.	Unknown

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Deposition of Mary Holladay	\$237.90
Deposition of Michael Sparkman	\$ 91.25
Deposition of Don Stumbaugh	\$208.75
Appino & Biggs Reporting Service	
Deposition of Bud Langston	\$221.80
Regular Hearing	\$262.00
Special Administrative Law Judge Fee	\$150.00

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark W. Works, Topeka, KS
Scott M. Gates, Topeka, KS
James B. Biggs, Topeka, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director