

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

JACK W. ARBAUGH)
Claimant)

VS.)

FRANK ANCONA HONDA)
Respondent)

Docket No. 187,665

AND)

KANSAS AUTOMOBILE DEALERS)
ASSOC. WORKERS COMP. FUND)
Insurance Carrier)

ORDER

Claimant requested review of the Order dated January 16, 2004, entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Director appointed Jeff Cooper to serve as Appeals Board Member Pro Tem in place of Board Member Julie A. N. Sample who recused herself from this proceeding. The Board placed this case on its summary calendar for determination without oral argument.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Jeffrey S. Austin, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Appeals Board (Board) consists of the documents contained in the Division of Workers' Compensations administrative file including the January 14, 2004 transcript of the post award hearing and the exhibits attached thereto; the June 2, 2003 transcript of post award hearing and the exhibits attached thereto; the April 29, 1999 transcript of settlement hearing and the exhibits attached thereto, including the December 10, 1998 court ordered independent medical examination report by Dr.

Truett L. Swaim; the transcript of the December 22, 1997 preliminary hearing and the exhibits attached thereto; the transcript of the August 19, 1997 deposition of Christina Elizabeth Hamilton and the exhibits attached thereto; and the transcript of the July 21, 1997 preliminary hearing and the exhibits attached thereto.

ISSUES

This appeal arises from claimant's Post Award Application for additional medical treatment.¹ That application was precipitated by ". . . communication from Dr. Berger's office that the case manager has suspended authority for care and treatment of Mr. Arbaugh."²

Contemporaneous with claimant's application for additional medical treatment was respondent's application for an order terminating post-award medical treatment.³ That application was preceded by a "Notice of Intent" letter to claimant's counsel by counsel for respondent, advising of an intent to seek ". . . a preliminary hearing to alter and/or cease the unnecessary and unrelated medical treatment currently underway."⁴

Judge Hursh found ". . . that the pain management treatment is still directed primarily to the original work-related problems." He ordered that "[t]he recommended treatment. . . be allowed to proceed to its conclusion, which consists of one more epidural block and an increase in the daily dose of Neurontin." But Judge Hursh further found that the treatment was providing no benefit to claimant and, therefore, "[a]fter this last epidural block, the respondent will have fulfilled its duty of providing reasonable and necessary medical treatment."⁵

The issue before the Board is whether claimant is in need of additional medical treatment for his work-related injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' briefs the Board finds and concludes as follows:

¹ K-WC E-4 Application for Post Award Medical (filed Oct. 7, 2003).

² Letter from Dennis L. Horner to Jeffrey S. Austin. (Sept. 9, 2003).

³ K-WC E-3 Application for Preliminary Hearing (Oct. 3, 2003).

⁴ Letter from Jeffrey S. Austin to Dennis L. Horner (Sept. 9, 2003).

⁵ Order (Jan. 16, 2004).

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.⁶ “‘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.”⁷ The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.⁸

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁹ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.¹⁰ Causal relation is a necessary element in establishing liability under a workers’ compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence.¹¹

Claimant suffered a series of accidents and injuries beginning in January 1992 and continuing through July 1994.¹² Respondent argues that claimant’s cervical condition and neck complaints are new and unrelated to his work-related accident. However, both the claimant’s testimony at the settlement hearing and the medical records introduced at that hearing show the contrary. At the April 29, 1999 settlement hearing claimant’s injuries were described as follows:

Q. (Mr. Horner) We have had both shoulders, both elbows, and both wrists operated on and on a couple of them multiple operations.¹³

⁶ K.S.A. 44-501(1); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

⁷ K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁸ K.S.A. 44-501(g).

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

¹⁰ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, rev. denied 261 Kan. 1082 (1996).

¹¹ See *Drake v. State Department of Social Welfare*, 210 Kan. 197, 499 P.2d 532 (1972).

¹² S. H. Trans. at 7 (April 29, 1999).

¹³ *Id.* at 4.

....

Q. (Judge Parkinson) Have we generally discussed the totality of your injuries with regard to your workers' compensation claim? Did you have problems with your neck or your back or your legs?

A. (The Claimant) At present, yes. I have problems with I get a large knot in my neck as the pain in the shoulder increases. The main thing is the shoulder. The hands and the elbow, the left elbow, I had to have it redone because the procedure that the doctor who originally did it as he told me he screwed up. And so this - - as far as the hand and the elbow I've been told that there's nothing that can be done because of the damage that was done and the length of time, because it took almost a year to get it redone after the surgery on the elbow.¹⁴

The court-ordered independent medical report by Dr. Swaim includes a description of claimant's neck complaints and a recommendation for additional testing of the cervical spine.

Examination of the neck reveals the patient can extend 50 degrees and flex 55 degrees. His right lateral bending is 55 degrees. Left lateral bending is 50 degrees. Rotation to the right and left is 60 degrees. The examinee does have tenderness in the paraspinous musculature of the neck. Spurling sign is positive on the left L'hermittes's sign is negative.¹⁵

....

Additionally, this gentlemen's multiple neurologic complaints and the fact he has continued to have complaints of his neck and has been found to have some muscle spasm of the trapezial region and positive Spurling's sign, I feel he should be evaluated with an MRI scan of his cervical region to rule out pathology in this area.¹⁶

An MRI was eventually obtained. Gary Berger, M.D., describes the results of that study along with his opinion concerning claimant's need for additional treatment in his letter of November 25, 2003 to claimant's counsel.

Dr. Aks ordered the MRI scan of Mr. Arbaugh and it was not normal. It did show a central disc protrusion at C6/C7 and also there were osteophytes at the foramen of C6/C7. Mr. Arbaugh did have a C7 radiculopathy on his EMG. As I told you, I believe he has a reflex sympathetic dystrophy. He was sent to Dr. Aks for

¹⁴*Id.* at 5 and 6.

¹⁵ S. H. Trans. Work Sheet for Settlements Attachment report of Truett L. Swaim, M.D. at 8 (Dec. 10, 1998).

¹⁶ *Id.* at 10 and 11.

evaluation and a trial of injections to deal with this. I have not seen Mr. Arbaugh since July 11, 2003, but my plan was and is as stated above. I do not believe that he is a [sic] maximal medical improvement.¹⁷

The Board considers the opinions of the treating physicians, including Drs. Berger and Aks, to be more credible and reliable than the opinions of Drs. Wheeler and Hendler who each saw claimant on only one occasion. Furthermore, even Dr. Wheeler recommended “. . . an outpatient evaluation by pain management for possible stellate ganglion versus bier block.”¹⁸ In addition, Dr. Hendler agreed with earlier recommendations for a psychological evaluation. It appears this recommendation has never been approved nor implemented. He also recommended continued use of antidepressant and pain medications and noted Dr. Berger was monitoring claimant's blood tests for liver function in connection with the use of such medications. Neither Dr. Wheeler nor Dr. Hendler had seen the results of the recent electrodiagnostic studies which Dr. Berger noted showed the C7 radiculopathy consistent with the disc protrusion disclosed by the MRI examination. Finally, a final report from Dr. Aks has not been obtained as his recommended course of treatment has not been completed. This may provide additional insight into claimant's response to treatment.

The recommendations for additional medical treatment may not be directed toward a cure, but there is no question that claimant is continuing to suffer from chronic pain and is in need of treatment that will afford at least some palliative relief from that pain. Accordingly, Respondent's Motion to Terminate medical treatment is denied. The ALJ's Order discontinuing treatment is reversed. The ALJ's previous Order dated, June 5, 2003, remains in effect.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated January 16, 2004, is reversed.

IT IS SO ORDERED.

¹⁷ P.A.H. Trans. Cl. Ex. 1.

¹⁸ P.A.H. Trans. Resp. Ex. A.

Dated this _____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Horner, Attorney for Claimant
Jeffrey S. Austin, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director