

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

**SCOTT S. KILLINGSWORTH** )

Claimant )

VS. )

**PREMIER STUDIOS** )

Respondent )

AND )

**FIREMAN'S FUND INSURANCE COMPANY** )

Insurance Carrier )

AND )

**KANSAS WORKERS COMPENSATION FUND** )

Docket No. 189,097

**ORDER**

Claimant requested Appeals Board review of Administrative Law Judge Steven J. Howard's September 22, 1997, Award and his October 6, 1997, Nunc Pro Tunc order. The Appeals Board heard oral argument in Kansas City, Kansas on February 17, 1998.

**APPEARANCES**

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Steven J. Quinn of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney, J. Paul Maurin III, of Kansas City, Kansas. There were no other appearances.

**RECORD**

The Appeals Board has considered the record listed in the Administrative Law Judge's Award. Additionally, the evidentiary record also consists of the deposition of Daniel Downs, M.D., taken April 22, 1997, which the Administrative Law Judge inadvertently failed to list in his award.

**STIPULATIONS**

The Appeals Board has adopted the stipulations listed in the Administrative Law Judge's Award.

**ISSUES**

The Administrative Law Judge limited claimant's recovery to a 14 percent permanent functional impairment of his right lower extremity as listed in the schedule of injuries at K.S.A. 44-510d(a)(16). Claimant appeals and contends he is entitled to a whole body work disability and an additional 3.43 weeks of temporary total disability benefits.

Respondent agrees with the Administrative Law Judge and requests the Appeals Board to affirm the Award. Respondent also filed, on January 21, 1998, a Motion For Judgment On The Briefs. The claimant, who is the appealing party, failed to file his brief in accordance with the Appeals Board's briefing schedule. The respondent, who complied with the briefing schedule, argues the Appeals Board should decide the appeal without granting claimant oral argument or a further opportunity to file a brief.

Although the Appeals Board has statutory authority to grant or refuse compensation, or increase or diminish any award of the Administrative Law Judge, there is no statute or regulation authorizing a penalty for the parties' failure to timely file a brief. See K.S.A. 1997 Supp. 44-551(b)(1). However, the Appeals Board would like to emphasize the importance it places on the parties timely complying with its briefing schedule. The purpose of the briefing schedule is to inform the adverse parties and the Appeals Board of that party's position on the specific issues on appeal. Thus, all parties and the Appeals Board are given an opportunity to become familiar with the issues and each party's position on those issues before oral argument. The Appeals Board then has a much better opportunity to render a just and timely decision. However, the respondent's Motion For Judgment On The Briefs is denied as the Appeals Board has no statutory authority to grant such motion.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

**Nature and Extent of Disability**

On February 7, 1994, claimant was employed by respondent as a traveling glamour photographer. Claimant was unloading photographic equipment at a motel in Coldwater, Michigan, when he slipped and fell on the ice. Claimant injured his right knee in the fall.

He received initial medical treatment from a local medical assist facility and then from a local orthopedic surgeon.

Claimant worked the day after the accident although he suffered pain, swelling, and discomfort in the right knee. Because of that continued pain and discomfort, the glamour photography appointments for the following day were cancelled. He was able to hobble around and work for three more days but the pain and swelling increased to the point the claimant had to quit working and return to his home in Topeka, Kansas.

In Topeka, claimant sought medical treatment from orthopedic surgeon, Michael J. Schmidt, M.D., of the Orthopedic Clinic of Topeka, P.A. Claimant had treated with this medical group since 1973. Dr. Schmidt had personally treated claimant for various injuries since 1984. Claimant's past conditions included injuries to his right knee and low back.

Dr. Schmidt first saw claimant for this right knee injury on February 28, 1994. The doctor took claimant off work commencing March 7, 1994. After performing two surgical procedures on claimant's right knee, Dr. Schmidt released claimant with permanent restrictions and a 14 percent permanent impairment of function of the right knee on June 9, 1995.

Claimant returned to Dr. Schmidt with low-back complaints plus bowel and bladder problems on January 17, 1997. At that time, the doctor ordered an MRI examination of claimant's low back that indicated lumbar disc bulging but no herniated discs or significant spinal stenosis. Dr. Schmidt again released claimant from his care on March 7, 1997.

Two other physicians testified in this case, neurosurgeon Revis C. Lewis, M.D., and orthopedic surgeon Daniel M. Downs, M.D. Dr. Lewis saw claimant once in September of 1995 at claimant attorney's request. Dr. Downs also saw claimant once on April 30, 1996, as a result of an Administrative Law Judge ordered independent medical examination.

Dr. Lewis had previously examined and evaluated claimant in 1991 and 1992 for a July 1991 low-back injury. After a physical examination, Dr. Lewis diagnosed claimant with a chronic lumbosacral problem aggravated by an abnormal gait as a result of claimant's right knee injury. Dr. Lewis restricted claimant and believed claimant's right knee and low-back injuries had resulted in a whole body permanent functional impairment. Dr. Lewis did not think claimant was exaggerating his symptoms. However, the doctor's chronic lumbosacral diagnosis was based on claimant's subjective complaints and not on any objective findings.

Dr. Downs also found claimant's low-back problems resulted from degenerative disc disease aggravated by an abnormal gait caused by claimant's right knee injury. This diagnosis was also made from claimant's subjective complaints with no objective findings. Dr. Downs' permanent impairment of function rating was a whole-body rating of 26 percent

with 7 percent related to the knee injury and 20 percent to the low-back. Of the 20 percent low-back rating, Dr. Downs attributed 15 to 18 percent as preexisting.

Respondent has not challenged the fact that claimant suffered a right knee injury when he fell on February 7, 1994, while working for the respondent. Respondent, however, does challenge claimant's claim that his right knee injury has caused a limp and this abnormal gait aggravated claimant's preexisting low-back condition. Claimant asserts when a new and distinct disability occurs in a non-scheduled part of the body, such disability is treated as a non-scheduled general body disability and not a scheduled disability. See Reese v. Gas Engineering and Construction Co., 219 Kan. 536, 548 P.2d 746 (1976). Claimant urges the Appeals Board to reverse the Administrative Law Judge's scheduled injury award and to enter a work disability award of 72.75 percent.

Claimant in the past had suffered other injuries to his low back. In fact, as a result of a work-related 1991 low-back injury, claimant received a workers compensation settlement in the amount of \$40,000. Following the February 7, 1994, accident, the first time claimant made a complaint to his treating physician, Dr. Schmidt, concerning low-back symptoms was some time in February of 1995, one year after his accident. Dr. Schmidt provided no treatment for claimant's low-back complaints and did not rate or restrict claimant as a result of those complaints. The doctor testified he believed claimant tended to exaggerate his symptoms and did not believe claimant had low-back pain.

The Appeals Board finds, as did the Administrative Law Judge, that the most important factor in the determination of the issues in this case is claimant's credibility. At the time of the regular hearing, claimant painted a picture of his right knee and low-back injuries having left him severely disabled. Claimant testified he had difficulty walking, standing, squatting, and sitting because of the pain and discomfort in his right knee. Furthermore, he testified his low back problem was aggravated by any type of activity. He testified his low back suffers sharp muscle spasms, pain radiates down his leg, and he also has some bowel and bladder incontinent problems. Additionally, claimant testified his condition had deteriorated to such an extent he was required to walk with the assistance of a cane at all times.

The respondent's insurance carrier conducted videotape surveillance of claimant's activities on January 24, 1997, February 25, 1997, March 12, 1997, March 13, 1997, and May 12, 1997. Those surveillance videotapes were admitted into evidence through the deposition testimony of the two investigators who conducted the surveillance. The Administrative Law Judge viewed those videotapes and concluded the activities claimant performed on the videotapes contradicted claimant's testimony. The Appeals Board has also viewed the surveillance videotapes and agrees with the Administrative Law Judge's analysis.

The Administrative Law Judge also had the opportunity to observe the claimant testify in person at the regular hearing. In weighing the evidence and considering the

credibility of the claimant, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the claimant testify in person. The Administrative Law Judge had the unique opportunity to judge the claimant's demeanor and assess his credibility. The Administrative Law Judge found claimant's testimony unreliable and not believable. Giving some deference to the conclusions of the Administrative Law Judge and based upon our review of the record as a whole, the Appeals Board finds the Administrative Law Judge's Award limiting claimant to a scheduled right lower extremity injury should be affirmed.

#### Additional Temporary Total Disability Benefits

The Administrative Law Judge also found claimant had failed to prove he was entitled to 3.43 additional weeks of temporary total benefits from the date of his accident of February 7, 1994, until he was taken off work by Dr. Schmidt on March 7, 1994. As previously indicated, claimant worked four days during that period after his accident. However, the Appeals Board finds there is no medical evidence in the record that claimant was unable to work the remaining days during that period. Dr. Schmidt was not asked and his medical records do not indicate claimant was unable to work. Furthermore, claimant did not establish through his testimony that he was unable to work after he returned to Topeka and before Dr. Schmidt, on March 7, 1994, took claimant off work. Therefore, the Appeals Board finds the Administrative Law Judge's Award that denied claimant additional temporary total disability benefits is affirmed.

#### Unauthorized Medical Expense

The Administrative Law Judge also awarded claimant the statutory maximum unauthorized medical expense to be applied for chiropractic treatment claimant received from a Dr. Miller. However, the record indicates that the only treatment the claimant received from Dr. Miller was for low-back complaints. Therefore, since the Appeals Board has found claimant's low back injury was not work related, the unauthorized medical expense award should be denied.

Furthermore, the Appeals Board finds the Administrative Law Judge's Award sets out findings of fact and conclusions of law that are detailed and supported by the record. It is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the Administrative Law Judge's findings and conclusions that are not inconsistent with this order as its own as if specifically set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's Award dated September 22, 1997, and Nunc

Pro Tunc order dated October 6, 1997, should be, and is hereby, affirmed except for the order entitling claimant to unauthorized medical expense for chiropractor, Dr. Miller, which is reversed.

All other orders contained in the award section of the September 22, 1997, Award and October 6, 1997, Nunc Pro Tunc order are adopted by the Appeals Board as if specifically set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: James E. Martin, Overland Park, KS
- Steven J. Quinn, Kansas City, MO
- J. Paul Maurin III, Kansas City, KS
- Steven J. Howard, Administrative Law Judge
- Philip S. Harness, Director