BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES W. BLUE	)
Claimant	)
VS.	)
	) Docket Nos.: 196,163 & 196,164
CONCRETE MATERIALS, INC.	)
Respondent	)
AND	)
	)
WAUSAU INSURANCE COMPANY	)
Insurance Carrier	)
AND	)
	)
KANSAS WORKERS COMPENSATION FUND	)

ORDER

Respondent requested Appeals Board review of the September 17, 1997, Award entered by Administrative Law Judge Steven J. Howard. The Appeals Board heard oral argument in Kansas City, Kansas.

APPEARANCES

Claimant did not appear as he had settled his claim against respondent on March 29, 1996. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Michael R. Wallace of Shawnee Mission, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Administrative Law Judge's Award. Also contained in the Division of Workers Compensation file was the deposition of William L. Vanderhoofven, taken on February 15, 1995. Both parties agree that this deposition is not part of the record.

ISSUES

Claimant commenced this proceeding for workers compensation benefits by filing two separate Application for Hearings on December 1, 1994. One application was assigned Docket No. 196,163 and alleged a date of accident of July 1987 to June 15, 1993. The other application was assigned Docket No. 196,164 and alleged a date of accident of July 1, 1993, and continuing. Both applications alleged accidents of extreme auditory insults resulting in claimant suffering bilateral hearing loss.

The respondent impleaded the Kansas Workers Compensation Fund (Fund) in both docket numbers on March 13, 1996. The respondent requested relief from the Fund for work-related injuries sustained by claimant who was knowingly retained by the respondent as a handicapped employee.

Thereafter, respondent and claimant settled both of the docketed claims in the March 29, 1996, settlement hearing held before Special Administrative Law Judge Donald C. Long. The Fund was represented at the settlement hearing and all issues between the respondent and the Fund were reserved for future determination.

The Administrative Law Judge's Award denied respondent's request for Fund reimbursement in both docketed claims. The Administrative Law Judge found in Docket No. 196,163 that respondent had failed to prove claimant suffered a work-related injury and further the Fund had no liability because claimant had not missed any work as a result of his injuries as required by K.S.A. 44-501(c). In regard to Docket No. 196,164, the Administrative Law Judge found a date of accident of October 21, 1994, and pursuant to K.S.A. 44-567 and K.S.A. 44-566a(e)(1), found the Fund had no liability for injuries to handicapped employees on or after July 1, 1994. The Administrative Law Judge also found the Fund had no liability because the claimant had not missed any work before October 21, 1994, as a result of his injuries as required by K.S.A. 44-501(c).

Respondent contends claimant's appropriate date of accident is June 30, 1994, and the provisions of K.S.A. 44-566a(e)(1) and K.S.A. 44-567 that eliminated Fund liability on or after July 1, 1994, do not apply. Additionally, respondent argues the provisions of K.S.A. 44-501(c) are not applicable because the holding in Boucher v. Peerless Products, Inc., 21 Kan. App.2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 911 (1996) was pending review by the Kansas Supreme Court and, therefore, was not established law when respondent settled its case with the claimant. Further, the respondent contends the Fund does not have standing to contest any of the jurisdictional or compensability issues the respondent had against the claimant in a proceeding between the respondent and the Fund for reimbursement.

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:

Claimant started working for the respondent in August of 1970. He started having hearing loss as early as 1985. Claimant was fitted with a hearing aid for his right ear at that time. Claimant's hearing loss deteriorated as he was exposed to the noise in the respondent's work environment. Claimant testified respondent forced him to retire on February 29, 1996, because of the hearing loss. Since 1985, respondent voluntarily provided claimant with eight hearing aids for his hearing loss.

Claimant and respondent settled claimant's claim for $35,000 and $757 of authorized medical expenses before Special Administrative Law Judge Donald Long on March 29, 1996. The Fund was represented by counsel and all issues between the Fund and the respondent were reserved for future determination. The Fund also objected to the total amount of the settlement. However, later in the settlement hearing, the Fund agreed that only $17,500 of the $35,000 settlement amount represented the settlement of the claimant's workers compensation claim. In the settlement hearing record, the Fund clarified that its objection to the settlement amount only related to the amount paid in excess of the $17,500 for the workers compensation claims.

Included in the March 29, 1996, settlement hearing transcript was the Form 12, Worksheet for Settlements, that is customarily prepared by the respondent or its insurance carrier. This worksheet specified claimant's date of accident for both docket numbers as "10/21/94; series of repetitive accidents."

The legislature amended both K.S.A. 44-566a(e)(1) and K.S.A. 44-567, effective July 1, 1993. Those amendments eliminated Fund liability for injuries occurring to handicapped employees on or after July 1, 1994. See Shain v. Boeing Military Airplanes, 22 Kan. App.2d 913, 924 P.2d 1280 (1996).

The Fund contends the respondent settled both of claimant's docketed claims for workers compensation benefits by stipulating that claimant's date of accident was October 21, 1994. Therefore, October 21, 1994, is the date of accident for purposes of establishing Fund liability under K.S.A. 44-567. Accordingly, the Fund argues, since claimant's date of accident is on or after July 1, 1994, pursuant to K.S.A. 44-566a(e)(1) and K.S.A. 44-567, it has no liability for injuries to the handicapped claimant in either docket number.

On the other hand, respondent contends that the October 21, 1994, date of accident was only used for the purpose of the compromise settlement between claimant and respondent. This date of accident is not binding on the respondent in proceedings between the respondent and the Fund for reimbursement. Respondent argues the record proves claimant had a 100 percent hearing loss in his right ear and an 80 percent hearing loss in his left ear before July 1, 1994. Therefore, the appropriate date of accident in this proceeding is June 30, 1994. Respondent further argues that the Fund is liable for all compensation benefits paid to claimant because the uncontradicted medical testimony established that "but for" claimant's preexisting hearing impairment, the resulting hearing disability would not have occurred.

The Appeals Board concludes, but for different reasons, the Administrative Law Judge's Award that denied respondent's request for Fund liability in both docket numbers should be affirmed. The Appeals Board finds respondent settled both of these docketed claims for one date of accident, i.e., a series ending October 21, 1994. The Fund has the right to assert this accident date as a defense in the proceedings brought by respondent against the Fund for reimbursement. After the legislature amended K.S.A. 44-566a(e)(1) and K.S.A. 44-567 to eliminate Fund liability for injuries to handicapped employees effective July 1, 1994, the claimant's date of accident became a critical issue in proceedings between the respondent and the Fund for reimbursement.

The Appeals Board, therefore, concludes claimant's date of accident for both docketed claims is October 21, 1994, as stipulated by the parties in the settlement hearing held on March 29, 1996. The Appeals Board finds because there is no evidence that respondent made the date of accident stipulation improvidently or mistakenly then the respondent should not be relieved from the stipulation. *See* Morrison v. Hurst Drilling Co., 212 Kan. 706, Syl. ¶ 2, 512 P.2d 438 (1973). Fund liability was eliminated for injuries to handicapped employees effective on or after July 1, 1994. Accordingly, Fund liability is denied and the respondent is responsible for all workers compensation benefits paid to the claimant in both of the docketed claims.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's Award entered on September 17, 1997, is affirmed and respondent is denied reimbursement from the Fund for any and all workers compensation benefits and costs paid in this case.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Gary R. Terrill, Overland Park, KS
Michael R. Wallace, Shawnee Mission, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director