

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

<b>DAVID C. SWART</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 225,729
<b>WENDY'S OLD FASHIONED HAMBURGERS</b>	)	
Respondent	)	
AND	)	
	)	
<b>KEMPER INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested the Appeals Board to review the preliminary hearing Order entered by Administrative Law Judge John D. Clark on September 24, 1997.

**ISSUES**

Respondent raised the issue of whether claimant's accidental injury arose out of his employment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

The Appeals Board is granted jurisdiction to review a preliminary hearing order when a party questions whether claimant sustained a work-related injury. See K.S.A. 44-534a, as amended.

Claimant fell on June 6, 1997, while performing his regular work activities for the respondent. Therefore, since claimant was in the employer's service when the accident occurred, there is no question the accident was in the course of claimant's employment with the respondent. See Siebert v. Hoch, 199 Kan. 299, Syl. ¶ 1, 303, 428 P.2d 825 (1967). The problem presented in this case is whether claimant's accidental injury arose "out of" the employment. In other words, was there a causal connection between claimant's right knee injury and the employment. See Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 4, 899 P.2d 1058 (1995).

The preliminary hearing record is clear, that before claimant fell at work on June 6, 1997, he had a congenital condition known as osteogenesis imperfecta. That condition causes a person's bones to be brittle and to easily break. The preliminary hearing record established that claimant, age 26 on the date of the injury, had fallen on numerous times during his life which had caused him to fracture various bones in different parts of his body. Those falls were suffered both at home and at work. In fact, the claimant, on the day before this accident, sought medical treatment with Naomi N. Shields, M.D., of the Advanced Orthopaedic Associates of Wichita, Kansas, for pain and discomfort in his right knee. Dr. Shields suspected chronically anterior cruciate ligament deficit and torn posterior medial meniscus. Dr. Shields opined that the anterior cruciate ligament deficiency was probably caused from a right knee injury that he received some five to seven years ago.

Claimant testified his fall at work was caused by water and grease on the floor. Claimant testified that his shirt and pants were wet from falling in the water. The fall resulted in claimant receiving a lateral tibial plateau fracture of his right leg. Dr. Shields, on June 13, 1997, performed an arthroscopically-assisted open reduction and internal fixation with bone grafting of lateral tibial plateau fracture.

Claimant's supervisor, Judy Mayberry, also testified in person before the Administrative Law Judge at the preliminary hearing. Ms. Mayberry testified she witnessed claimant's fall on June 6, 1997. She testified there was no water or grease on the floor where claimant fell. Ms. Mayberry described the floor surface as concrete but the surface where the claimant fell was covered by a rubber safety mat. Ms. Mayberry also testified that claimant kicked over a mop bucket full of water when he fell. The mop bucket contained four or five gallons of water and that was the reason claimant's shirt and pants were wet after the fall. Furthermore, Ms. Mayberry testified, after claimant fell, he told her the reason he fell was because his knee went out.

The Administrative Law Judge found claimant's right leg injury arose out of his employment and ordered respondent to provide medical treatment, payment of medical expenses as authorized medical expense, and payment of temporary total compensation. The respondent argues claimant's right leg injury had no casual relationship to his employment because the injury was caused by a risk personal to the claimant, i.e., his congenital osteogenesis imperfecta condition and not his work. Respondent cites Martin

v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980), as the case that supports its position that claimant's injury did not arise out of the employment relationship with the respondent. In Martin, the injured worker had a history of back problems and alleged he injured his back when he exited from his truck while at work. The Court of Appeals held the worker's preexisting back condition was a risk personal to the worker and any everyday activity would have a tendency to aggravate his condition. The Court concluded this risk was a risk personal to the worker and therefore, not compensable. 5 Kan. App. 2d at 299-300.

As previously noted, both the claimant and claimant's supervisor, Judy Mayberry, testified at the preliminary hearing in person before the Administrative Law Judge. Claimant testified water and grease on the floor caused him to fall at work. In contrast, Ms. Mayberry testified there was no water and grease on the floor because he fell on a rubber safety mat. The Appeals Board finds that some deference should be given to the Administrative Law Judge in this case because he was able to personally observe all the witnesses that gave testimony in this matter. In finding in favor of the claimant, the Administrative Law Judge had to be persuaded that claimant's testimony was more credible than the testimony of his supervisor, Judy Mayberry. Therefore, giving some deference to the conclusion of the Administrative Law Judge, the Appeals Board accepts claimant's testimony that he slipped due to the wet and greasy condition of the floor and not due to the personal risk of his knee giving out.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order dated September 24, 1997, entered by Administrative Law Judge John D. Clark, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

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BOARD MEMBER

c: Cortland Q. Clotfelter, Wichita, KS  
Frederick L. Haag, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director