

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

MERLIN E. CLARK)	
Claimant)	
VS.)	
)	Docket No. 228,617
RITE WAY MILK, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY))	
Insurance Carrier)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on January 15, 1998.

ISSUES

The appealed Order requires respondent to provide medical treatment to claimant, including an adjustable bed and temporary total disability benefits from October 28, 1997, until December 1, 1997. Respondent contends the Administrative Law Judge exceeded his jurisdiction in entering the Order because: (1) the only medical opinion supporting compensability was an opinion by R. Rex Lee, M.D., the father of claimant's counsel; (2) the injury was, according to respondent, caused by normal activities of daily living; (3) the order that respondent pay for an adjustable bed is not an order for medical treatment; (4) the record does not show a medical prescription for the adjustable bed; and (5) the evidence does not support a finding that claimant was temporarily and totally disabled during the period for which the benefits were ordered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the Administrative Law Judge should be affirmed.

Claimant, a 68-year-old truck driver with a history of circulation problems, became stuck in the truck he was driving for respondent during a snow storm on October 25, 1997.

Claimant testified that he was trapped in the truck for approximately 12-13 hours. Respondent contends that their records show that the time was only approximately 8½ hours. In either event, the claimant was stranded for a significant period of time.

Claimant's legs began to hurt and after returning to Wichita he sought medical treatment. Claimant was initially treated with medication and then hospitalized from October 30, 1997, to November 4, 1997.

The only medical report in evidence is a report from R. Rex Lee, M.D., the father of claimant's counsel. That report indicated that claimant suffers from bilateral venous thrombosis. Dr. Lee also states his opinion that the condition results from being stranded in the truck:

It is my opinion that Mr. Clark [sic] deep vein thrombosis on this occasion was precipitated by him being in a static position in his truck for a protracted period of time, as well as the period of time needed to drive in both directions.

Respondent contends that the Administrative Law Judge exceeded his jurisdiction in finding the claim to be compensable when the only medical evidence was the opinion of the father of claimant's counsel. Apparently respondent's counsel would have the Board automatically assume that the medical opinion is false because of the family relationship. The Board is not willing to make that assumption. There certainly is no evidence in the record to support the contention.

Respondent also suggests claimant was engaged in nothing more than activities of day-to-day living while stranded in the truck. The truck has a sleeper and claimant was able to move around. Claimant did not, therefore, have an injury as defined in K.S.A. 44-508(e). The Board concludes that the restriction from activity occasioned by prolonged driving and being stranded in a truck for an extended period is not, even if allowed to move into a sleeper, an activity of day-to-day living.

The Board finds claimant has established accidental injury arising out of and in the course of his employment.

Respondent also contends that the Administrative Law Judge exceeded his jurisdiction when he ordered respondent to provide an adjustable bed. Respondent relies, in part, on the decision by the Kansas Court of Appeals in Hedrick v. U.S.D. No. 259, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997), a decision in which the Court ruled that an order for a larger automobile was not medical treatment within the workers compensation statutes. The Board considers a prescription for an adjustable bed to treat circulation problems to be materially distinguishable from the larger automobile addressed in the Hedrick decision. The Board finds that, under the circumstances presented here, the adjustable bed is medical treatment.

Respondent next contends that claimant has failed to establish that the bed was prescribed by a physician. Respondent points out that claimant has not produced or introduced into evidence a written prescription for the bed. Claimant has testified, however, that Dr. Lee prescribed an adjustable bed so that claimant could elevate his leg at night. This testimony is uncontradicted. The Board finds that the adjustable bed was prescribed.

Finally, respondent contends the evidence does not support a finding that claimant was temporarily totally disabled during the period from October 28, 1997, until December 1, 1997. A finding that a claimant is or is not temporarily totally disabled is not a jurisdictional issue. This issue, therefore, is not one subject to review on appeal from a preliminary hearing order. K.S.A. 1997 Supp. 44-551 and K.S.A. 1997 Supp. 44-534a.

WHEREFORE, the Appeals Board finds that the Order entered by Administrative Law Judge John D. Clark, dated January 15, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Robert G. Martin, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director