

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

THOMAS NOONAN)	
Claimant)	
VS.)	
)	Docket No. 230,570
DILLON COMPANIES INC.)	
Respondent)	
Self-Insured)	

ORDER

Claimant appeals from the Award of Administrative Law Judge Jon L. Frobish dated February 1, 1999. The Administrative Law Judge denied claimant any permanent award, finding the opinion of Dr. John Estivo, that claimant has no permanent functional impairment as a result of the injuries on January 17, 1997, and December 31, 1997, to be the most credible.

APPEARANCES

Claimant appeared by his attorney, Russell B. Cranmer of Wichita, Kansas. Respondent, a self-insured, appeared by its attorneys, Scott J. Mann and E. Thomas Pyle, III, of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this Award.

ISSUES

What is the nature and extent of claimant's injury? Work disability is not at issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant alleges accidental injury to his low back on both January 17, 1997, and December 31, 1997, while working for respondent in Sedgwick County, Kansas. The parties stipulate, for convenience sake, the date of December 31, 1997, is the proper accident date in this litigation.

Claimant suffered accidental injury on December 31, 1997, while lifting a box of bleach weighing approximately 30 pounds. He felt pain in his back with radiculopathy into his left leg. He was referred to Dr. Ronald Davis, a board certified occupational medicine specialist, with the first examination on January 7, 1998. At that time claimant had pain in his low back, with radiculopathy into the left leg. Dr. Davis's findings during the physical examination of claimant on that date were normal, as were x-rays taken at that time. Dr. Davis diagnosed an acute lumbar sprain with no neurological involvement. Claimant was returned to work with restrictions, and provided physical therapy. Dr. Davis's examination of claimant on January 16, 1998, was again normal.

Claimant was referred to Dr. Jacob Amrani, who requested an MRI, which was read as normal. This was the second MRI performed on claimant. He had earlier undergone one on March 5, 1997, after the January incident. The March 1997 MRI was also read as being normal.

Dr. Davis next examined claimant on February 5, 1998, when the findings were again normal. Claimant's symptoms, by that time, had lessened substantially, and claimant was returned to work without restrictions. Claimant had no pain complaints, with only minor tenderness on palpation being found during the examination.

A May 20, 1998, examination found substantially different complaints. Claimant had sharp pain, with definite left leg radiculopathy. However, Dr. Davis's examination at that time was again normal, with only a slight alteration in claimant's pinwheel sensation at the L4 dermatome. He again returned claimant to work without restrictions. He had no explanation for claimant's new and substantial symptoms.

Claimant was scheduled for a return examination on June 30, 1998, but failed to show. Dr. Davis assessed claimant a 1 percent functional impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, based upon claimant's subjective complaints. He acknowledged claimant had no objective findings which would justify a permanent functional impairment under the AMA Guides. He returned claimant to work without restrictions, and opined that claimant was capable of working eight hours a day without limitation. At the May examination, claimant's range of

motion was normal, as were all other tests, with the exception of the pinwheel examination which continued to be slightly abnormal. There was no evidence of radiculopathy into claimant's left leg.

Claimant was referred by his attorney for an independent medical examination with Dr. Pedro Murati on April 30, 1998. Dr. Murati diagnosed resolving L4 radiculopathy with range of motion limitations. He reviewed the first MRI and found it to be of poor quality and unreadable. The second MRI he acknowledged was normal. Dr. Murati also reviewed a nerve conduction study and EMG done by Dr. Babikian. The NCT was normal but Dr. Murati stated the EMG suggested chronic L4 radiculopathy. When asked to explain, Dr. Murati stated that claimant had suffered a tear in the annulus at L4, which had leaked fluid into the spine. This was causing claimant to have a chemical radiculopathy which he described as resolving, meaning it could potentially improve. He felt claimant could return to work at Dillons, eight hours a day, without limitation. He was shown a videotape of the Dillons' job and felt that claimant could perform that work, although he did express concern with claimant having to stand for long periods on a regular basis. He felt periodic sitting on a stool, as was shown in the videotape, would be to claimant's benefit. He acknowledged that claimant's condition may entirely resolve at some time in the future. He assessed claimant a 10 percent functional impairment pursuant to the AMA Guides, Fourth Edition, for the L4 radiculopathy. He opined claimant's condition fell within DRE Category III.

Claimant was later referred to John Estivo, D.O., with the first examination occurring on November 17, 1998. This examination was for claimant's November 9, 1998, fall from a plastic chair while on break. That accident is not part of this litigation. Dr. Estivo found claimant to have minor muscle spasms in the lumbar spine with no radiculopathy. He examined claimant again on December 8, 1998, and felt claimant had a normal examination. He did refer claimant to physical therapy which, according to the physical therapy notes, claimant attended only sporadically. He last examined claimant on January 4, 1999. At that time, claimant exhibited no objective findings. The examination was entirely normal, and Dr. Estivo assessed claimant a zero percent functional impairment with no restrictions. He could find no basis for claimant's ongoing complaints. Dr. Estivo felt claimant was capable of working 40 hours a week without restriction. He reviewed the January 30, 1998, MRI and, like Dr. Murati, found it to be normal.

The medical records placed into evidence during Dr. Davis's deposition include a report from Dr. Brian P. Delahoussaye of Albuquerque, New Mexico. In that report of August 2, 1996, claimant was diagnosed as having a lumbar sprain after suffering a fall while working for a New Mexico employer. The findings during the examination are very similar to those exhibited by claimant in this litigation, including slight limitations of forward flexion, with an otherwise normal range of motion. The reflexes and sensation were essentially normal, with only back tightness resulting from a lumbar contusion as claimant

had been struck in the back by a board during the fall. Dr. Delahoussaye returned claimant to work without limitation and assessed a zero percent functional impairment.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is the claimant's burden of proof to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The only issue before this Board is whether claimant is entitled to a functional impairment resulting from the injuries suffered with respondent on December 31, 1997. Dr. Davis found little justification in awarding claimant a functional impairment. Dr. Davis had the opportunity to examine claimant several times over a period of approximately six months. Dr. Davis assessed claimant a 1 percent functional impairment, but acknowledged that this was based upon claimant's subjective complaints only. Under the AMA Guides, Fourth Edition, and based upon his lack of findings during his examinations, claimant has no functional impairment.

Claimant was examined on three occasions by Dr. Estivo. Dr. Estivo's findings were basically normal. Dr. Estivo returned claimant to work with no limitations and no functional impairment.

The only doctor to assess claimant a functional impairment pursuant to the AMA Guides was Dr. Pedro Murati. Dr. Murati found claimant to have a 10 percent whole body functional impairment pursuant to the AMA Guides, Fourth Edition, under DRE Category III. One of Dr. Murati's significant findings dealt with the limitations in claimant's range of motion. These range of motion limitations were not found in any other medical examination. In addition, in Dr. Murati's report of April 30, 1998, during the physical examination, he found claimant's straight leg raise to be negative bilaterally. In that same paragraph, he found claimant's straight leg raise to be positive at 54 degrees on the right, which is a positive finding. Dr. Murati explains this by saying the bilateral negative straight leg raise indication is a mistake.

Dr. Murati acknowledged that claimant's condition may entirely resolve at some time in the future. Dr. Murati's examination, which occurred in April 1998, was two months before Dr. Davis's last examination in June 1998, and nine months prior to Dr. Estivo's final examination in January 1999. The Appeals Board finds, based upon the opinions of Dr. Estivo and Dr. Davis, that claimant has failed to prove permanent functional impairment as a result of the injuries suffered on January 17, 1997, and December 31, 1997. Therefore, the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated February 1, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Russell B. Cranmer, Wichita, KS
- Scott J. Mann, Hutchinson, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director