BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELVIN W. HAWTHORNE	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,208 & 241,209
DIAMONT BOART, INC.	)	
BRILLIANT, INC.	)	
Respondents	)	
AND	)	
	)	
KEMPER INSURANCE COMPANIES	)	
CGU HAWKEYE-SECURITY INSURANCE CO.	)	
Insurance Carriers	)	

ORDER

Respondent Brilliant, Inc. requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's March 9, 2000, Preliminary Decision.

ISSUES

This appeal involves two docketed claims consolidated for litigation purposes. Docket No. 241, 208 is a claim against Diamont Boart, Inc. (Diamont) and its insurance carrier for alleged injuries to claimant's upper extremities caused by repetitive work activities that claimant performed from January 1998, and each and every day thereafter. The Administrative Law Judge denied claimant's request for preliminary benefits finding claimant's alleged accidental injuries did not arise out of and in the course of the employment with Diamont.

Docket No. 241,209 also alleged injuries to claimant's upper extremities from repetitive work activities but while working for Brilliant, Inc. (Brilliant) instead of Diamont. These injuries are alleged to have occurred from October 1998, and each and every working day thereafter. In this docketed claim, the Administrative Law Judge granted claimant's request for medical treatment and temporary total disability benefits as needed to be provided by Brilliant.

Brilliant appeals and contends claimant failed to prove his upper extremities injuries arose out of and in the course of the employment with Brilliant. Brilliant argues claimant's injuries occurred while he was working for Diamont before he started working for Brilliant. Brilliant also argues, if it is found that Brilliant is responsible for claimant's alleged injuries, then the claim fails because claimant failed to prove he provided Brilliant with timely notice of accident.

In contrast, Diamont contends the record establishes that claimant did initially injure his upper extremities while working for Diamont. But he permanently aggravated those injuries while working for Brilliant. Diamont requests the Appeals Board to affirm the Administrative Law Judge's Preliminary Decision assessing liability to Brilliant.

Claimant, on the other hand, contends he has proved his need of medical treatment for his upper extremities injuries occurred as a result of the repetitive work activities he had to perform either at Diamont or Brilliant. Claimant also contends the preliminary hearing record proves he gave timely notice of accident to both Diamont and Brilliant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained the parties' briefs, the Appeals Board finds that the Administrative Law Judge's Preliminary Decision should be affirmed.

Claimant started working for Diamont in 1977. In 1997, he started having problems with his hands and wrists while performing repetitive and hand intensive material processing work. Claimant testified and the medical records introduced into evidence at the preliminary hearing indicate that claimant was first treated for left wrist complaints on January 13, 1998, at Business and Industry Health Group located in Lenexa, Kansas. Those complaints were the result of a specific incident that occurred on January 7, 1998, while working for Diamont.

Claimant then had another specific incident at work on January 28, 1998, when he twisted both wrists. Claimant was again seen by the Business and Industry Health Group on January 30, 1998. Claimant was placed in a physical therapy program, but he continued to have pain and discomfort when he returned to his repetitive work activities. Because of those continued symptoms, the Business and Industry Health Group referred claimant to Brad W. Storm, M.D., a physician specializing in hand surgery.

Dr. Storm saw claimant on February 9, 1998, with pain, numbness and tingling primarily in his left hand and wrist. The doctor had claimant undergo electrodiagnostic nerve studies. Those studies found claimant with a very mild early case of left carpal tunnel syndrome. But after further examination, Dr. Storm's final conclusion was that claimant's problems were related to triscaphe arthritis instead of carpal tunnel syndrome. Dr. Storm placed claimant on light duty for two weeks, prescribed anti-inflammatories, and

a flexible wrist support for claimant's left wrist. After claimant returned to his regular work activities, he again experienced pain, discomfort, and numbness in his left hand and wrist.

Claimant questioned Dr. Storm's arthritis diagnosis and sought a second opinion on his own. On May 22, 1998, the claimant was seen by Kelly Yoxall, M.D. Dr. Yoxall diagnosed claimant with left carpal tunnel syndrome, prescribed ibuprofen for pain, and fitted claimant with another left wrist splint.

On June 1, 1998, claimant went to work for Brilliant performing essentially the same repetitive material processing work as he performed for Diamont. Before June 1, 1998, Brilliant had been a part of Diamont and after June 1, 1998, Brilliant began operating as separate corporation.

Claimant testified, after he went to work for Brilliant, he continued to have problems with both wrists and hands as he performed repetitive work activities. Claimant testified his right hand symptoms worsened as he overused his right hand in order to compensate for the pain and discomfort in his left hand. Claimant also had a specific accident in November 1998 where he injured his left shoulder. Claimant testified he notified both John Powell, vice-president of sales, and Nancy Zerillo, director of operations, for Brilliant that he had continuing problems with his hands and wrists and was in need of medical treatment. But Nancy Zerillo told claimant if he needed medical treatment he should obtain the treatment on his own during his scheduled vacation.

Claimant was scheduled for vacation during the first week of December of 1998. On December 4, 1998, about the second day of vacation, Craig Pickell, President and CEO of Brilliant, called claimant and terminated claimant's employment. Mr. Pickell told claimant the reason for his termination was that the company was going in a different direction.

Mr. Pickell also testified before the Administrative Law Judge at the preliminary hearing. He testified claimant had not notified him or Mr. Powell or Ms. Zerrillo that his work activities were causing problems with his wrists and hands.

After claimant's termination, he returned to Dr. Yoxall with continuing wrist and hand complaints. Dr. Yoxall then referred claimant to orthopedic surgeon Peter C. Boylan, M.D.

Dr. Boylan had claimant undergo another EMG and nerve conduction study. This study showed claimant had mild bilateral carpal tunnel syndrome instead of carpal tunnel syndrome only on the left. As a result of the positive nerve conduction study, Dr. Boylan recommended surgery for claimant's left carpal tunnel syndrome condition.

After the September 16, 1999, preliminary hearing, the Administrative Law Judge ordered Brilliant to find a hand surgeon to perform an independent medical examination of claimant. On December 10, 1999, claimant was examined by hand surgeon Lanny W. Harris, M.D. Dr. Harris reviewed claimant's medical treatment records, took a history from

the claimant, and performed a physical examination of claimant. The doctor diagnosed claimant with bilateral carpal tunnel syndrome most likely secondary to his employment at Diamont and continuing aggravation while he was employed by Brilliant. But Dr. Harris did not think that any significant additional aggravation or deterioration had occurred after September 26, 1998.

After the Administrative Law Judge received Dr. Harris' January 4, 2000, report , he entered the Preliminary Decision that is the subject of this appeal. He found claimant's appropriate date of accident was his last day he performed work for Brilliant. The Administrative Law Judge cited the recent Kansas Supreme Court case of Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999) as holding that the appropriate date of injury in a repetitive trauma claim is the last day the claimant worked at the job causing the injuries. The Administrative Law Judge then ordered Brilliant to provide claimant with medical treatment and temporary total disability benefits as needed.

Based on the current record, the Appeals Board finds the determination of whether claimant's bilateral carpal tunnel syndrome injuries should be the responsibility of Diamont or Brilliant is very close. But, at this juncture of the proceedings, the Appeals Board finds claimant's testimony, coupled with the medical treatment records and Dr. Harris' independent medical report, support the finding that claimant's left carpal tunnel syndrome condition was caused by repetitive work activities while he was employed at Diamont. But the repetitive work activities claimant continued to perform at Brilliant aggravated this left carpal tunnel syndrome condition. Then, because he overused his right hand to compensate for the pain and discomfort in his left hand, he developed carpal tunnel syndrome in his right hand.

The Administrative Law Judge, in his Preliminary Decision, did not specifically address whether claimant provided Brilliant with timely notice of accident. But implicit in the Administrative Law Judge ordering benefits to be provided claimant by Brilliant, the Appeals Board finds the Administrative Law Judge had to find that claimant proved timely notice of accident. The Appeals Board finds the preliminary hearing record does not provide any reason to question claimant's credibility. Therefore, based on claimant's testimony, the Appeals Board finds that claimant did provide timely notice to the respondent of his accidental injuries.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's Preliminary Decision filed on March 9, 2000, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

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BOARD MEMBER

c: Steven J. Borel, Kansas City, MO
Michelle Daum Haskins, Kansas City, MO
Gary R. Terrill, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director