

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

TERESA THOMPSON)
Claimant)

VS.)

HALLMARK CARDS, INC.)
Respondent)
Self Insured)

Docket No. 244,719

ORDER

Claimant appealed the December 22, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Director appointed Stacy Parkinson to serve as Appeals Board Member Pro Tem in place of Appeals Board Member David Shufelt who recused himself from this case. The Appeals Board heard oral argument on June 13, 2001.

APPEARANCES

Claimant appeared by Chris Miller of Lawrence, Kansas. Respondent appeared by John D. Jurcyk of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations listed in the Award. In addition, the parties stipulated to an average weekly wage of \$632.30 and a compensation rate of \$366.00.¹

Furthermore, although respondent's Brief to the Appeals Board contains references to testimony allegedly contained in a Discovery Deposition of Teresa Lynne Thompson, there is no transcript of a discovery deposition in the administrative file. The Board does not find a stipulation to include a discovery deposition in the record and neither party listed a discovery deposition of claimant as part of the record in a submission letter to the ALJ.² The ALJ's Award does not list a discovery deposition of claimant as part of the record. Thus, the ALJ apparently did not consider claimant's discovery deposition testimony, if any, and neither did the Board.

¹ Evidentiary Stipulation filed December 26, 2000.

² See K.A.R. 51-3-5.

ISSUES

Although he failed to make a specific finding in the Award concerning the date of accident and the date claimant gave notice, Judge Avery found claimant had failed to prove she gave respondent timely notice of her accidental injury. On appeal, claimant seeks review of the following issues:

1. On what date or dates was claimant injured?
2. Did claimant provide respondent with notice of her accidental injury within 10 days and, if not, was there just cause to extend the time for giving notice to 75 days?
3. Is claimant entitled to temporary total disability compensation?
4. What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant began working for Hallmark October 6, 1996. Her jobs required constant standing or walking on a concrete floor and frequent twisting and turning of her body.
2. Claimant alleges she suffered a series of accidents beginning February 1, 1999. Approximately early February 1999, claimant began noticing symptoms in her left knee. She described this as a "crunching feeling" in her knee and a weakness or instability. "I didn't feel the necessary support to – to stand on my foot."³
3. Initially, claimant's symptoms were intermittent. But it wasn't long before claimant aggravated her condition when she tripped on a pallet. This was also in February 1999. From that point on claimant's symptoms were constant. She continued working, however, and her symptoms continued to worsen.
4. She began using a knee brace and taking over-the-counter pain medications. She did not report an accident to her employer because she did not consider her condition to be serious and thought it would go away. Although claimant also says she did not report her injury initially because she did not know it was work related, claimant acknowledged that when she tripped over the pallet, she knew she had injured her knee. "I felt that something tore at that time."⁴ Claimant was aware of the company policy to immediately report all accidents and injuries, no matter how minor. Nevertheless, she did not

³ July 6, 1999 Prel. H. Trans. at 8.

⁴ July 6, 1999 Prel. H. Trans. at 17.

specifically tell her employer that her knee injury was work related until on or about April 26, 1999 when she telephoned the company nurse, Kathy Smith.⁵

5. By April 14, 1999 claimant's knee symptoms reached the point where she was dragging her leg when she walked and she could not lift any more boxes. She told her supervisor, Scott Pollock, that she could not do her work and she needed to go home. Claimant admits she did not tell Mr. Pollock that she had injured her knee at work but, arguably, this should have been notice to her supervisor that her work was at least aggravating her symptoms.

6. Claimant first sought medical treatment on March 31, 1999 with Dr. Wendt. Claimant continued to perform her regular job until about April 14, 1999, when Dr. Wendt restricted her to working half days. Claimant discussed these restrictions with the company nurse, Kathy Smith, on April 14, 1999.

7. On May 4, 1999, Dr. Wendt performed surgery on claimant's knee. She was off work until June 3, 1999, when Dr. Wendt released her to light duty. Claimant's testimony that she was taken off work by Dr. Wendt for this period of time is uncontradicted. Therefore, the Board finds claimant is entitled to temporary total disability compensation for this time period, as requested.

8. Although the record is not clear, April 26, 1999 appears to have been the last day claimant worked before her surgery.⁶ Therefore the Board finds claimant's date of accident to be April 26, 1999.⁷ After her surgery, claimant missed 4.29 weeks of work before being released with light duty restrictions.⁸ She returned to light duty and worked for respondent until July 6, 1999, when claimant changed jobs. Claimant testified she did not believe she could perform her regular (former) job with respondent because of her injury.

9. Based upon an April 26, 1999 date of accident, claimant's April 26, 1999 notice to respondent was timely.

10. Claimant was examined by board certified orthopedic surgeon Edward J. Prostic, M.D., at the request of her attorney. Dr. Prostic rated claimant's permanent impairment at 20 percent to the leg pursuant to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. In addition, claimant was examined at the

⁵ July 6, 1999 Prel. H. Trans. at 12-13.

⁶ Regular Hearing Transcript, Claimant's Exh. 1.

⁷ Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

⁸ Evidentiary Deposition of Michael Poppa, M.D. [sic], Exh. 2.

request of respondent by Michael J. Poppa, D.O., who is board certified in occupational and preventative medicine. Dr. Poppa opined that claimant's permanent impairment to her leg was 10 percent. Claimant argues that Dr. Poppa's impairment rating is less credible in part because it was not given pursuant to the Guides. However, claimant is incorrect in this regard as the last paragraph of Dr. Poppa's October 6, 2000 report provides:

The above medical opinions are based on a reasonable degree of medical certainty and are consistent with The Guides to the Evaluation of Permanent Impairment, Fourth Edition.⁹

11. The Appeals Board finds the opinions of both Dr. Prostic and Dr. Poppa regarding claimant's permanent impairment of function to be credible and that their impairment ratings should be given equal weight. Accordingly, the Board finds claimant's permanent impairment of function to be 15 percent to the leg.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated December 22, 2000, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Teresa Thompson, and against the respondent, Hallmark Cards, Inc., for an accidental injury which occurred April 26, 1999, and based upon an average weekly wage of \$632.30 for 4.29 weeks of temporary total disability compensation at the rate of \$366.00 per week or \$1,570.14, followed by 29.36 weeks at the rate of \$366.00 per week or \$10,745.76, for a 15% scheduled injury to the leg, making a total award of \$12,315.90, which is all due and owing and ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to \$500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

⁹ Evidentiary Deposition of Michael Poppa, M.D., [sic] Ex. 2.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Appino & Biggs Reporting Service, Inc. Regular Hearing Transcript	\$278.25
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Nora Lyon & Associates, Inc. Preliminary Hearing Transcript	\$123.95
Gene Dolginoff Associates, Ltd. Deposition of Edward J. Prostic, M.D.	\$258.50
Metropolitan Court Reporters Evidentiary Deposition of Michael Poppa, M.D.	\$223.10

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
John D. Jurcyk, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director