



**ISSUES**

- (1) Did claimant suffer accidental injury to his back arising out of and in the course of his employment on the dates alleged?
- (2) Did claimant provide timely notice of accident for the injury alleged to his back?
- (3) What is the nature and extent of claimant's injuries and disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant, a long-term employee for respondent, spent over 25 years working as a pressman at respondent's facility. During this time, claimant suffered prior injuries, undergoing a two-level lumbar fusion and a cervical fusion at the C4-5 level in 1980. Claimant also suffered injuries to both knees, both upper extremities, his right shoulder, his left shoulder and his neck, with alleged injuries to his low back.

Claimant's job required him to prepare a large printing machine for printing jobs, which included inking, balancing the printing, loading paper into the press and changing the rollers on the press. These activities were repetitive and required substantial lifting and bending.

Claimant was being treated for upper extremity, shoulder and knee problems, including a rotator cuff surgical repair on his right shoulder in October 2000 with Dr. George Lucas. He was also diagnosed with bilateral carpal tunnel syndrome and left ulnar nerve problems, for which Dr. Lucas suggested surgical repair. Claimant was referred to Chris Miller, M.D., who performed arthroscopic surgery on his right knee on June 19, 2001, and arthroscopic surgery on his left knee on July 17, 2001.

Claimant ultimately came under the treatment of Philip R. Mills, M.D., board certified in physical medicine. Dr. Mills began treating claimant on January 25, 2001, when he was seen for a court ordered IME. Dr. Mills diagnosed claimant as having a two-level fusion in the early 1980s, with a cervical fusion also in the 1980s. Claimant did reasonably well after the cervical and lumbar fusions, although he did have some difficulties recuperating. He acknowledged that, at no time, was he ever one hundred percent pain free after the lumbar fusion.

Claimant worked light duty for respondent through March of 2000, with his last day worked being March 20, 2000. On March 27, 2000, claimant had a conversation with respondent's insurance carrier's claims adjuster, Brenda McDermott, at which time they discussed claimant's earlier workers compensation claim for his back injury and the fact that he had received medical treatment for the back. Claimant acknowledged, at that time, that he had experienced back pain from bending at work. At that time, claimant was asked by Ms. McDermott,

Q. (Ms. McDermott) Okay, you hadn't had a work comp claim for your back or anything, you had said something about that Dr. Parman had treated you for your back?

A. (Claimant) Well just back pain from the bending, but that's, gosh everybody has back pain.<sup>1</sup>

At the time of the regular hearing, claimant was having problems with his bilateral shoulders, his bilateral hands, his bilateral elbows, his bilateral knees (with the right being worse than the left), low back pain, sexual dysfunction and incontinence. He used both a cane and a walker, and had difficulties both standing and sitting. He was also taking pain medication for his various aches and pains, including the pain in his neck. Claimant applied for, and began receiving, Social Security. While respondent did accommodate claimant through March 20, 2000, claimant was ultimately notified that respondent no longer had work within his restrictions, which led to claimant's last day at work on March 20, 2000.

Dr. Mills was asked whether the difficulties associated with claimant's low back were related to claimant's current work, and he was unable to say within a reasonable degree of medical probability. He did, however, say that it was possible that claimant's ongoing back problems were related to his work. He acknowledged that claimant's bowel and bladder problems did stem from the back problem. When presented with a task list prepared by vocational specialist Dan Zumwalt, Dr. Mills opined that claimant was unable to perform eleven of the fifteen tasks on the list, for a 73 percent task loss. He earlier determined that claimant had suffered a 22 percent impairment to the body as a whole for the injuries suffered to his various body parts.

Dr. Mills did, at one point on cross-examination, acknowledge that claimant had aggravated his low back while working for respondent. However, he was unable to state within a reasonable degree of medical probability whether this aggravation was temporary or permanent. Dr. Mills referred claimant to Nazih Moufarrij, M.D., a neurosurgeon, who

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<sup>1</sup> P.H. Trans. (Feb. 19, 2002), Cl. Ex. 8 at 21.

performed lumbar surgery on claimant on May 20, 2002. Claimant was then referred back to Dr. Mills for physical therapy and rehabilitation, with Dr. Mills treating claimant from that point through March 24, 2003, at which time he determined claimant had reached maximum medical improvement.

Dr. Mills noted that his impairment ratings in the report of March 24, 2003, did not take into consideration claimant's shoulder or upper extremity difficulties. He diagnosed claimant with chronic pain syndrome, neurogenic bowel and bladder difficulties, sexual dysfunction, post partial medial meniscectomy and chondroplasty, spinal stenosis, chronic pain syndrome and remote surgery to the lumbosacral spine. He acknowledged that claimant is currently essentially realistically unemployable, but stated that if claimant's back problems were excluded, the resulting difficulties would allow claimant to perform work in the sedentary category. It was acknowledged by Dr. Mills, on cross-examination, that in his March 25, 2002 report, he opined that claimant had aggravated his low back problems from his work duties with respondent. Dr. Mills went on to state that if claimant's low back and knees were included in the rating, it would be a 35 percent impairment to the body as a whole.

Dr. Mills also was unable to state within a reasonable degree of medical probability whether claimant permanently aggravated his cervical spine problems, but stated "you couldn't rule it out though."<sup>2</sup> He acknowledged that based upon claimant's age and his entire work history, his chances of employability would be limited.

Claimant deposed Craig R. Parman, M.D., a family practitioner, who had been claimant's family doctor since 1992 or 1993. Dr. Parman felt that a good portion of claimant's difficulties were associated with his spine complaints. In his February 24, 2000 office note, he wrote that he did not believe claimant would be able to continue working much longer. Claimant's job activities involved a lot of bending and lifting activities, and Dr. Parman felt those work activities were contributing to claimant's musculoskeletal difficulties. Dr. Parman did state that he felt claimant's back problems were being aggravated by his work duties with respondent. He felt the lumbar and thoracic back problems were the most critical to claimant's condition, with the knee problems a close second. He indicated claimant's carpal tunnel syndrome was of less importance.

At the time of Dr. Parman's deposition, he continued as claimant's treating physician, treating his back, knees, shoulders, forearms, wrists and hands. When provided with the task list prepared by vocational specialist Jerry D. Hardin, which included seven tasks claimant performed over the previous fifteen years, Dr. Parman opined that claimant was incapable of performing any of those tasks because they all required constant

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<sup>2</sup> Mills Depo. at 22-23.

standing. He felt claimant would be incapable of standing more than four hours a day based solely on his knee problems. With regard to the remainder of claimant's musculoskeletal problems, he opined claimant would be unable to maintain and perform any job on an 8-hours-a-day, five-days-a-week basis.

Claimant was referred to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, independent medical evaluations and electrodiagnosis. He examined claimant on two separate occasions at claimant's attorney's request, with the first examination being on October 11, 2000. At that time, claimant was diagnosed with cervical strain, with loss of range of motion, status C4-5 fusion; lumbosacral strain with loss of range of motion, status L5-S1 fusion; left shoulder pain, secondary to impingement syndrome and moderate crepitus; right knee pain with probable meniscal tear; and bilateral ankle pain with swelling. Dr. Murati saw claimant again on May 1, 2003, at which time his complaints included not only the above listed, but also right knee pain secondary to status post partial medial meniscectomy and chondroplasty; left knee pain secondary to status post chondroplasty; bilateral wrist pain secondary to carpal tunnel syndrome; mild right ulnar cubital syndrome; bilateral elbow pain secondary to probable cervical radiculopathy; neck pain secondary to status post fusion at C4-5; low back pain secondary to fusion of L4-S1; right shoulder pain secondary to status post subacromial decompression with debridement and rotator cuff repair; and left shoulder pain secondary to an impingement syndrome and moderate AC crepitus.

Dr. Murati opined that due to claimant's knee, wrist, elbow, shoulder and back problems, claimant was essentially and realistically unemployable. Utilizing his multitude of ratings and the Combined Values Chart, he opined claimant had an 84 percent whole person functional impairment, pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Murati was asked, if the back was excluded from his opinion, essentially focusing on the problems to his knees, upper extremities and right shoulder, did he believe claimant was realistically employable, and he testified that claimant was not realistically employable, even when excluding the back problems from the scenario.<sup>3</sup> He also opined that the injuries described by claimant were aggravated by his employment with respondent, including, but not limited to, the low back complaints. Dr. Murati noted that approximately three years before his last day worked, claimant lost his helper and claimant was then required to do the heavy lifting, bending and stooping with the heavy paper and rollers without assistance.

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<sup>3</sup> Murati Depo. at 25 and 26.

Claimant testified that he told Paul Jensen, the production manager, shortly before Mr. Jensen's retirement, that his back difficulties were causing him problems and he did not believe he could handle the paper without an assistant. Mr. Jensen retired in 1998, but did testify in this matter. Mr. Jensen denied that claimant advised him of ongoing back problems associated with his work. However, he did acknowledge that he was aware that claimant had preexisting back problems and, in fact, had an operation on his back somewhere between 1980 and 1985. He agreed that claimant had a helper from 1992 to 1997. However, when the helper left in approximately 1997, no one was ever hired or assigned to replace him.

Claimant testified that he discussed his back problems with his former supervisor, Dick Morrison, beginning in 1998, telling him about the back pain he was having from loading paper into the press and from changing the rollers. This would have been during the time when claimant was working without an assistant. Unfortunately, claimant's supervisor, Mr. Morrison, died in October of 2001 without ever testifying in this claim. However, one of respondent's owners, Carolyn Black, testified that she spoke with Mr. Morrison before his death and that he was intending to testify that respondent "had no notice on the back."<sup>4</sup>

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

For a claim to be compensable, a claimant must establish personal injury by accident arising out of and in the course of his employment.<sup>6</sup> For a claim to arise "out of" employment, its cause or origin must develop out of the nature, conditions, obligations and incidents of employment."<sup>7</sup> The intent of this definition is to permit recovery only for those injuries which result from a hazard to which the employee would not have been equally exposed apart from the employment.<sup>8</sup>

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<sup>4</sup> P.H. Trans. (Feb. 19, 2002) at 38.

<sup>5</sup> K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Suppl. 44-508(g).

<sup>6</sup> K.S.A. 1999 Supp. 44-501(a).

<sup>7</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

<sup>8</sup> *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

An injury may be compensable, even if it only serves to aggravate or accelerate a preexisting condition.<sup>9</sup>

In this instance, respondent has acknowledged that claimant suffered numerous injuries to his hands, arms, shoulders, neck and knees. Respondent's contention is that claimant has failed to prove that he suffered permanent injury or aggravation to his low back. The Board finds, based upon the evidence presented, that claimant has satisfied his burden of proving that he suffered, at the very least, an aggravation of his ongoing low back problems as a result of his work duties with respondent through his last day worked.

K.S.A. 44-520 (Furse 1993) requires that notice of accident, stating the time, place and particulars, be provided to the employer within 10 days after the date of accident. Claimant, in this instance, testified to having contacted his immediate supervisor, Dick Morrison, and also discussing his ongoing difficulties with a representative from respondent's insurance company, Brenda McDermott, on approximately March 27, 2000, shortly after terminating his employment on March 20, 2000. During both conversations, there was discussion regarding the pain associated with claimant's bending difficulties at work. While it is acknowledged that Carolyn Black, one of respondent's owners, allegedly spoke to Mr. Morrison and testified that Mr. Morrison had indicated that respondent had received no notice with regard to the back injury, the Board finds claimant's testimony to carry more weight than that of Ms. Black. Mr. Jensen, the part-owner of respondent, acknowledged that he was aware of claimant's ongoing back difficulties and the fact that he had undergone surgery years before. He also acknowledged that claimant's job became much more difficult in 1997, when his helper quit and no one was hired to replace him. It is at approximately this time that claimant began discussing additional difficulties associated with his work. The Board finds that claimant provided timely notice of accident pursuant to K.S.A. 44-520 (Furse 1993) with regard to the injuries associated with his back.

With regard to the nature and extent of claimant's injury, the Board finds claimant has proven that he is permanently and totally disabled as a result of the multitude of injuries suffered while employed with respondent through his last day worked. Dr. Parman, claimant's long-term treating physician, acknowledged that in his office note of February 24, 2000, he questioned how much longer claimant could continue working. He was especially concerned about all the bending and lifting involved in claimant's daily activities at work. He felt claimant was aggravating his ongoing back problems as a result of those demanding activities.

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<sup>9</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984); *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

Dr. Murati testified that he felt claimant to be essentially and realistically unemployable, even if one were not to consider claimant's ongoing back difficulties. Dr. Mills, while testifying that claimant could perform sedentary work if the back were excluded, felt that if claimant had aggravated his back while at work, then claimant would be essentially and realistically unemployable.<sup>10</sup>

The Board finds, based upon a preponderance of the credible evidence, that claimant has proven, as a result of the injuries to his knees, shoulders, upper extremities, low back, hands and wrists, that he is permanently and totally disabled.<sup>11</sup> The Board, therefore, affirms the award by the ALJ that claimant is permanently and totally disabled.

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated April 26, 2004, should be, and is hereby, affirmed, and claimant is awarded permanent total disability compensation for an accidental injury sustained through March 20, 2000.

Claimant is entitled to 148 weeks of temporary total disability compensation at the rate of \$383 per week totaling \$56,684, followed by permanent total disability compensation at the rate of \$383 per week, for an award not to exceed \$125,000.

As of July 26, 2004, there would be due and owing to claimant 148 weeks of temporary total disability compensation at the rate of \$383 per week totaling \$56,684, followed thereafter by 79 weeks of permanent total disability compensation at the rate of \$383 per week totaling \$30,257, for a total due and owing of \$86,941, which is ordered paid in one lump sum minus any amounts previously paid.

Thereinafter, the remaining balance in the amount of \$38,059 shall be paid at the rate of \$383 per week, until fully paid or further order of the Director, subject to the \$125,000 maximum compensation benefits under K.S.A. 44-510f (Furse 1993).

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

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<sup>10</sup> Mills Depo. at 23.

<sup>11</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant  
Richard J. Liby, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director