BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL E. DESAUTEL	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 262,971
MOBILE MANOR INC.	)	& 262,972
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 21, 2001 Award of Administrative Law Judge John D. Clark. Claimant was awarded a 7 percent permanent partial disability to the body as a whole after the Administrative Law Judge found claimant's two work-related accidents were the cause of his permanent impairment rather than an intervening injury suffered while in a scuffle with police. The Appeals Board (Board) held oral argument on April 12, 2002.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James M. McVay of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment? The parties acknowledge claimant's functional impairment is 7 percent to the body as a whole.

Respondent, however, contends claimant's impairment stems from a non-work-related confrontation with the police.

(2) Is claimant entitled to medical expenses, unauthorized and future?

(3) Should the entire cost of the independent medical examination of Pedro A. Murati, M.D., be assessed against respondent as an unauthorized medical expense or is that prohibited by K.S.A. 1999 Supp. 44-510(c)?

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.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

The Board finds convincing the testimony of the court appointed independent medical examiner, Philip R. Mills, M.D., a board certified physiatrist, who examined claimant on July 3, 2001. Dr. Mills is the only testifying physician who examined claimant after the incident with the police.

Dr. Mills attributed claimant's ongoing physical problems to his injuries suffered on August 14, 1998 and October 16, 1999, while working for respondent.

Even after being provided information regarding claimant's encounter with the police in December of 2000, Dr. Mills still went on to say that more probably than not the injuries claimant suffered were from the work-related injuries of August 14, 1998 and October 16, 1999.

In workers' compensation litigation, it is generally claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

However, where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.

The Board affirms the Administrative Law Judge's finding that Dr. Mills' opinion is the most credible, and awards claimant a 7 percent impairment of function to the body as a whole.

In finding that claimant's injuries arose out of and in the course of his employment, the Board also finds claimant is entitled to future medical upon proper application to and approval by the Director.

Claimant was referred to Pedro A. Murati, M.D., for an examination by his attorney. Dr. Murati's report was neither offered nor admitted into evidence and Dr. Murati's deposition was not taken. However, the existence of Dr. Murati's report did result in the Administrative Law Judge referring claimant to Dr. Mills for an independent medical examination. The conflict between Robert L. Eyster, M.D., and Dr. Murati created the justification for the independent medical examination under K.S.A. 1999 Supp. 44-510(c). However, K.S.A. 1999 Supp. 44-510(c)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

It is acknowledged that Dr. Murati's report contained a functional impairment rating. The Kansas Court of Appeals has recently addressed K.S.A. 1999 Supp. 44-510(c) in Castro v. IBP, Inc., ___ Kan. App. 2d ___, 30 P.3d 1033 (2001). In Castro, claimant was examined by Dr. Edward Prostic, an orthopedic surgeon in Overland Park, Kansas, who is well-known to workers' compensation practitioners. Dr. Prostic examined Ms. Castro and issued a report of his findings. The purpose of the meeting with Castro was for "examination and evaluation and recommendations for treatment." Dr. Prostic was later contacted by the claimant's attorney and asked to issue a separate report regarding what, if any, functional impairment the claimant may have suffered. The cost of the second report was paid for by the claimant's attorney and did not come out of the $500 statutory medical allowance for unauthorized medical under K.S.A. 1999 Supp. 44-510(c). Furthermore, in Castro, when Dr. Prostic testified, he did not express his opinion on the functional impairment rating. Instead, evidence of functional impairment was provided by Dr. Harris, who also examined claimant during an independent medical examination ordered by the administrative law judge.

The Court of Appeals, in Castro, found the bifurcated billing system utilized by the claimant's attorney to be appropriate in that instance as Dr. Prostic did not testify as to the functional impairment. The Court of Appeals, in citing the Board's opinion from Castro, concluded:

> Claimant, if he or she so desires, may obtain a functional impairment rating from an examining physician and pay for such a rating separately. The

> claimant can then choose whether or not to enter the functional impairment rating into the record and this would not violate the provisions of K.S.A. 44-510(c)(2).

In this instance, Dr. Murati did not testify and his opinions were not admitted into evidence. However, the same rationale can be applied. If the parties had elected to use Dr. Murati's opinion with regard to the examination, diagnoses and treatment recommendations, then respondent would pay for that portion of the examination. However, the portion of the examination utilized to create the rating would be in violation of K.S.A. 1999 Supp. 44-510(c)(2) and would not be the responsibility of respondent. The Board, therefore, finds respondent would be responsible for the portion of Dr. Murati's examination which resulted in the diagnoses and treatment recommendations, but not for the portion resulting in the impairment rating.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated November 21, 2001, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority with regard to the unauthorized medical provisions of K.S.A. 1999 Supp. 44-510(c)(2). In this instance, unlike the situation in Castro, Dr. Murati did an examination and evaluation of claimant,

reaching his recommendations for treatment, and provided a functional impairment rating in the same report. In Castro, the initial examination was purely for the purposes of examination, diagnoses and treatment recommendations. The request for a functional impairment came at a separate time, was contained in a separate report and was paid for separately by the claimant's attorney. Claimant's actions, in this instance, are in direct violation of the provisions of K.S.A. 1999 Supp. 44-510(c)(2), and the prohibitions contained in that statute should preclude the use of the report as it contains a functional impairment opinion in violation of the statute. Also, the statute prohibits the use of the unauthorized medical allowance to obtain a functional impairment rating. This Board member would, therefore, deny claimant's request for the use of the unauthorized medical provisions of K.S.A. 1999 Supp. 44-510(c)(2).

BOARD MEMBER

DISSENT

I believe the Board has erred by failing to award claimant the cost of Dr. Murati's medical evaluation under the unauthorized medical allowance. I believe the language of K.S.A. 1999 Supp. 44-510(c)(2) is clear and unambiguous. The statute provides that a functional impairment opinion is not admissible if it is obtained with the $500 available for unauthorized medical benefits. Contrary to the majority's interpretation, the statute does not require apportioning a doctor's services between those related to an "examination, diagnosis or treatment" from those services related to assessing a worker's functional impairment.

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
James M. McVay, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation