

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

WALTER STIMAX)	
Claimant)	
VS.)	
)	Docket No. 265,773
L.E. BARNES CIRCUS, INC.)	
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the November 16, 2001 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This is a claim for a March 15, 2001 accident while claimant was working for a circus in the State of Florida.

This is the second appeal of a preliminary hearing Order in this claim. The issue decided in the first appeal was whether claimant's contract of employment with respondent was made in the State of Kansas. In its Order dated November 15, 2001, the Board determined that it was and, accordingly, the Kansas Division of Workers Compensation had jurisdiction over this claim.

In its November 15, 2001 Order, the Board remanded this claim to Judge Frobish to address the remaining preliminary hearing issues. The next day, November 16, 2001, the Judge entered an Order denying claimant's request for benefits. The Judge found claimant failed to prove that he provided respondent with proper notice of the alleged accident and, likewise, failed to prove that his brain hemorrhage was caused by the accident. The Order read, in part:

The Court finds that the Claimant has failed to sustain his burden of proof that he provided proper notice as to an accidental injury on March 19 [sic], 2001, while in the employee [sic] of the Respondent. The Court further finds the Claimant has failed to sustain his burden of proof that his AV fistula

is related to an accidental injury on March 19 [sic], 2001. Additionally, the Court finds there was no evidence presented as to any injury sustained on March 19 [sic], 2001, to the Claimant's back and upper and lower extremities. Therefore, the Claimant's request for benefits under the Kansas Workers Compensation Act are [sic] denied.

Claimant contends Judge Frobish erred and filed this appeal. In claimant's application requesting Board review, the following issues are listed for review: "(a) whether claimant suffered an injury arising out of and in the course of his employment; (b) whether timely notice was given; (c) the extent of claimant's injuries; (d) whether claimant is entitled to temporary total disability and medical benefits."

The August 2, 2001 letter respondent and its insurance carrier sent to the Judge indicates there were additional preliminary hearing issues for the Judge to consider besides those listed by claimant in the application for review, namely whether claimant was working for respondent as an employee or an independent contractor and whether claimant's accident was compensable under the Workers Compensation Act as claimant had allegedly failed to prove that his cerebral vascular injury was caused by unusual exertion. In their August 2001 letter, respondent and its insurance carrier also disputed that claimant's hip condition was compensable under the Act as claimant had allegedly waited for several months following the March 2001 fall to seek medical treatment for his hip.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent when he allegedly fell from a ladder on March 15, 2001, while raising the sides of a circus tent? If so, did that fall either cause, aggravate, intensify, accelerate, or contribute to the brain hemorrhage that was later discovered on March 19, 2001, or did the fall injure claimant's hip?
2. Did claimant provide respondent with timely notice of the March 15, 2001 accident?
3. At the time of the accident, was claimant working for respondent as an employee or as an independent contractor?

FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. Claimant is a professional circus clown and entertainer who lives in Arkansas City, Kansas. Claimant saw an article in a trade publication about a new circus that was being formed and sometime before October 4, 2000, contacted Mr. John Frazier, the person who was forming the circus, and offered to work as a clown for \$1,000 per week.

2. Approximately two weeks after their initial telephone conversation, Mr. Frazier telephoned claimant and asked if claimant would work as a clown for \$500 per week and also manage a side show for a commission. The \$500 per week also compensated claimant's wife for any work that she performed. After some discussion, claimant accepted the offer.

3. Mr. Frazier sent claimant a letter dated October 4, 2000, to confirm the terms of their agreement. After making notes on the letter to reflect their oral agreement, claimant and his wife signed and returned the letter to Mr. Frazier. Claimant's wife noted on the letter that they would be independent contractors, there would be no withholding for taxes, and they would be paid \$500 per week regardless of the number of days per week that they worked or had performances. Claimant's wife wrote the notes on the letter as claimant neither reads nor writes.

4. In early March 2001, claimant and his wife joined the circus in Florida. As a professional clown and entertainer, claimant designed his own acts and costumes. Claimant also performed a magic show in the side show tent and selected and paid his assistant. Claimant did not have the authority to hire or fire other employees working under him in the side show tent as that authority rested in Mr. Frazier, the circus' general manager.

5. On March 15, 2001, while the circus was in Kissimmee, Florida, claimant fell from a ladder while raising the walls of the side show tent during a sudden storm. As he fell, claimant struck his head on a pipe.

6. Claimant's memory of the accident and subsequent events is somewhat clouded. He does not recall whether he was knocked unconscious and his memory is vague concerning his activities for several days after the fall. But at the preliminary hearing, the Judge admitted affidavits from both James B. Hand and Ed Kuneman, which shed additional light on the accident.

Immediately after claimant's fall, Mr. Hand found claimant unconscious, lying on the ground under a tent pole. When claimant awoke, he was groggy and dazed. According to Mr. Hand, he and claimant immediately reported the accident to the office manager, Gary Gray, as Mr. Frazier was away.

On the other hand, Mr. Kuneman was not present on the date of accident. But Mr. Kuneman, who was an old friend, saw and spoke with claimant on both March 17 and March 18, 2001, and described how claimant complained of a headache and acted differently. Mr. Kuneman's July 11, 2001 affidavit reads, in part:

During our conversations, Walt [claimant] complained about having a prolonged headache, and showed me a bruised area on his left hip. He said he got the bruise when he was trying to tie up a sidewall on the tent during a storm, and the wind knocked the pole ladder down.

...

Walt acted differently during these days (March 17 and 18) than he ever had before. It is hard to describe, but he looked and acted lost, stopping to think about everything he did. He seemed to talk slowly and wasn't his usual, joking self. He said he felt poorly and complained about headaches. He almost acted dazed. He obviously did not feel well.

7. At approximately 2 a.m. on March 19, 2001, claimant awoke with a severe headache. An ambulance took claimant to a Naples, Florida, hospital where he underwent surgery for a brain hemorrhage.

8. At this stage of the claim, there is limited evidence whether claimant's brain hemorrhage was either caused or aggravated by the March 2001 accident. According to the various medical records and reports introduced into the record, claimant had a preexisting arteriovenous fistula that hemorrhaged. In a medical note dictated on March 19, 2001, Dr. Ronald E. Howard wrote:

The patient [claimant] apparently does not have a history of hypertension and has not been hypertensive during his hospital course, arguing against hypertensive hemorrhage. Location though is good for hypertensive hemorrhage. There does not appear to be much of a cortical involvement. I do not think that this is traumatic given that there is no cerebral contusion, subarachnoid blood, etc on his CT scan, although he did have something of a headache after his fall when he injured his left hip. It is possible that he has an underlying aneurysm which ruptured due to elevated blood pressure secondary to his pain. It is also possible that he has an underlying tumor, AVM or other lesion which could have bled. . . .

Claimant introduced the July 11, 2001 letter from Dr. Jerry Old, who took over claimant's treatment when he was transferred from Florida to Kansas. Based on the information that claimant was not functioning very well after the fall, the doctor opined that it was likely the fall would have aggravated or accelerated the bleeding. Dr. Old wrote, in part:

During his multiple surgeries, Mr. Stimax was found to have an AV fistula that ruptured and was bleeding. It is my understand [sic] that following the fall, the patient did not function very well for the next several days, which would indicate that the AV fistula had been disturbed by the fall. The fistula is an abnormality that would have been present for quite some time, however, I think it is medically likely that consequences of the fall would have aggravated or accelerated the bleeding.

Although it's impossible to tell for sure the cause and affect relationship, I think there is a good degree of medical probability that the fall would have

exacerbated a pre-existing arteriovenous fistula, and contributed to the cerebral bleed.

On the other hand, respondent and its insurance carrier hired Dr. Steven L. Hendler of Shawnee Mission, Kansas, to review claimant's medical records and provide an opinion of the cause of claimant's brain hemorrhage. According to Dr. Hendler, the fall and hemorrhage are unrelated and separate events. In a July 12, 2001 letter to respondent and its insurance carrier's attorney, the doctor wrote, in part:

I am asked specifically to comment on the relatedness of Mr. Stimax's intracerebral hemorrhage to the reported work injury of 3/26/01 [sic]. In my opinion, based on the records reviewed, the intracerebral hemorrhage is unrelated to the fall. There was a well identified congenital abnormality, a common sequella of which is to cause hemorrhage. There was no history of hypertension and there are no findings to support an elevation in blood pressure following the fall. As such, the fall and the intraparenchymal hemorrhage are separate events.

CONCLUSIONS OF LAW

1. For the reasons explained below, the November 16, 2001 preliminary hearing Order should be reversed as claimant is entitled to receive workers compensation benefits for his brain hemorrhage and hip injury.
2. At this stage of the claim, the Board finds that on March 15, 2001, claimant sustained personal injury by accident arising out of and in the course of employment with respondent. Considering the fact that claimant was bothered by prolonged headaches and acted in an odd manner following the March 15, 2001 fall, the Board is persuaded by Dr. Old's opinion that the fall aggravated the fistula on claimant's brain. Conversely, the record does not indicate that Dr. Hendler was aware of the problems that claimant experienced between the March 15, 2001 fall and when he was taken to the hospital in the early morning hours of March 19, 2001. The Board also finds that the greater weight of the evidence establishes that the fall injured claimant's hip.
3. The Board also concludes that claimant gave timely notice of the March 15, 2001 accident as he and Mr. Hand immediately notified the office manager of the accident. That evidence is persuasive and uncontested.

The Board notes that respondent and its insurance carrier attempted to introduce additional evidence by attaching it to their August 2, 2001 letter to the Judge. But those documents are not part of the evidentiary record as they were neither offered at preliminary hearing nor placed into the record by the parties' agreement. Consequently, those documents should not be considered. Likewise, the documents attached to claimant's brief to the Board are not part of the evidentiary record for purposes of this appeal.

4. Under these unusual circumstances, the Board concludes that claimant was working for respondent as an employee at the time of the accident. Claimant performed two types of services for respondent. First, claimant was employed as a professional performer. But separate and apart from those services, claimant managed the side show tent and was under respondent's direct control. The parties recognized the difference in those services as claimant was paid a set amount to clown and paid a commission to manage the side show tent.

As a clown, claimant devised his act and costumes, subject to very little control from respondent. But as the side show manager, respondent controlled where the tent would be set, respondent hired and paid the performers who worked in the tent, respondent owned the side show tent and controlled the signs and banners that were placed on it, and respondent controlled the times that the side show was open and the price of the tickets. In short, respondent owned the side show and controlled its operations.

Under these unique facts, the Board concludes that a principal/independent contractor relationship existed between claimant and respondent regarding claimant's professional services as an entertainer. But an employer/employee relationship existed between claimant and respondent regarding managing the side show tent.

5. Because claimant's March 15, 2001 accident occurred while claimant was performing the duties of the side show manager, claimant was an employee at the time of the accident and, therefore, entitled to workers compensation benefits for the brain hemorrhage that he developed and his hip injury. Any contrary findings or contrary conclusions contained in the November 16, 2001 Order are reversed.

WHEREFORE, the Board reverses the November 16, 2001 preliminary hearing Order and remands this claim to the Judge to award claimant the appropriate medical and temporary total disability benefits for both the brain hemorrhage and hip injury, and any other injuries sustained by claimant in the March 15, 2001 accident.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

c: Orvel Mason, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director