

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

SHERRY EMERY)	
Claimant)	
VS.)	
)	Docket No. 267,965
WINDSOR PLACE AT HOME CARE)	
Respondent)	
AND)	
)	
THOMAS MCGEE, L.C.)	
Insurance Carrier)	

ORDER

Claimant appeals Administrative Law Judge Jon L. Frobish's August 16, 2002, preliminary hearing Order.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment for a cervical injury that allegedly arose out of and in the course of claimant's employment as the result of a March 30, 2001, work-related accident.

Claimant appeals and contends she proved she suffered a cervical injury as a result of a fall while working for respondent on March 30, 2001. Claimant requests the Board to reverse the ALJ's preliminary hearing Order and authorize the cervical surgery as recommended by orthopedic surgeon Dr. Don L. Hawkins.

Conversely, respondent requests the Board to affirm the preliminary hearing Order. Respondent argues claimant failed to prove her cervical injury and current need for surgery arose out of and in the course of the March 30, 2001, fall while working for the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board makes the following findings and conclusions:

On March 30, 2001, claimant fell as she was walking down a client's stairs while returning to her car for the groceries she had purchased for the client. On that date, claimant had been employed as a home care provider for respondent since November

2000. Claimant described the fall as slipping on the damp indoor/outdoor carpet covering the stairs causing her legs to come out from under her and hitting her back on the stairs. Claimant also grabbed with her right arm in order to keep herself from falling completely off the stairs which snapped her neck back.

On the date of the accident, she reported the accident to respondent. Respondent first allowed claimant to see her personal physician for examination and treatment recommendations. On April 2, 2001, claimant saw Mr. Barry Phillips, a nurse practitioner, who worked under the direction of Dr. Block. Mr. Phillips' impression was degenerative disc disease of the lumbar spine and contusion of the coccyx and sacrum. Mr. Phillips took claimant off work and saw her again on April 4, 2001, and April 10, 2001.

On April 10, 2001, claimant requested to return to work, although she continued to have intractable pain in the lumbar area and continued neck and right upper extremity pain. Mr. Phillips released claimant to return to work but he also referred claimant for consultation with Dr. Kinyan Kugler, a neurosurgeon, located in Tulsa, Oklahoma.

Dr. Kugler first saw claimant on April 27, 2001, with neck and back pain. He had claimant undergo cervical traction at home. Sometime in the early morning of May 13, 2001, claimant rolled over in her bed and had a sudden onset of pain in her back, right leg, and experienced some numbness and tingling in her right arm.

On May 14, 2001, Dr. Kugler saw claimant at St. Johns Medical Center emergency room and then admitted claimant to the hospital. Claimant underwent an MRI examination of the lumbar and cervical spine. The MRI scan showed minimal degeneration of the C5-6 disc with slight posterior bulging. The MRI scan of the lumbar spine was remarkably normal with questionable lateral protrusion of the L3-4 and L4-5 discs on the right. The anterior portion of the L3 vertebra showed an area suggesting the possible site of a previous fracture, tumor or growth.

Dr. Kugler prescribed cervical and lumbar epidural injections. Sometime in July 2001, Dr. Kugler released claimant and told her she should not work.

At the same time claimant was treating with Dr. Kugler, the respondent referred claimant to Dr. Pandu Chillal, a local physician, who was respondent's company physician. Dr. Pandu Chillal first saw claimant on May 18, 2001. He took claimant off work, prescribed medication and a TENS unit for both claimant's lower back and neck pain.

On July 23, 2001, claimant filed an Application for Preliminary Hearing requesting temporary total disability benefits and medical treatment. On August 16, 2001, respondent took the discovery deposition of claimant. Thereafter, on September 13, 2001, a preliminary hearing Order granted claimant's request for temporary total disability benefits and ordered respondent to provide claimant with the names of three physicians for

claimant to select one as an authorized treating physician. Claimant selected orthopedic surgeon Dr. Don L. Hawkins, located in Tulsa, Oklahoma.

Dr. Hawkins first saw claimant on September 27, 2001. He diagnosed claimant with lumbar radiculitis on the right and cervical radiculitis on the right. Dr. Hawkins ordered claimant to undergo a myelogram of the cervical and lumbar spine as well a CT scan of both of those areas. The cervical myelogram showed a large indentation forming pressure on the C6 nerve group. The lumbar CT scan showed a foraminal herniation in the right neural foramen at L4-L5. Dr. Hawkins opined that the abnormality at L4-5 may be the cause of claimant's radiating pain into the right hip and right leg.

On February 14, 2002, respondent had claimant undergo an independent medical examination by neurosurgeon Dr. Paul S. Stein of Wichita, Kansas. Dr. Stein had for review various medical treatment records concerning claimant both before and after her March 30, 2001, work accident. Based on Dr. Stein's review of claimant's previous medical treatment records, he found that claimant had preexisting complaints of pain in both her low back and in her neck.

In Dr. Stein's report, he referenced the medical note of Dr. Dan Calhoun of Tulsa, Oklahoma dated June 17, 1999, which indicated that claimant had continuing pain in the neck and numbness into the right shoulder and arm. At that time, Dr. Calhoun reviewed a recent MRI scan and concluded that claimant needed neck surgery. The claimant did not elect to go ahead with the surgery.

After Dr. Stein reviewed claimant's medical treatment records and conducted a physical examination of claimant, in regard to claimant's neck condition, he opined, "While I cannot state with certainty that the fall did not exacerbate these symptoms somewhat, the medical records clearly show significant complaints with indications for surgical intervention to be existent prior."¹

On March 11, 2002, claimant underwent a three-level instrumented fusion of the lumbar spine performed by Dr. Hawkins. Upon claimant's recovery from the lumbar spine surgery, Dr. Hawkins also recommended claimant undergo a segmental fixation with an interior plate at C5-6. In a July 25, 2002, letter to claimant's attorney, Dr. Hawkins opined that claimant had to some degree preexisting pathology in the cervical spine necessitating treatment and the possible need for surgery. But those preexisting problems, at least to some degree, appeared to be more dramatic after the March 30, 2001, accident. Thus, Dr. Hawkins concluded, "Aggravation superimposed upon the preexisting problems in my

¹ P.H., Resp. Ex. 1.

opinion has necessitated the need for operative intervention...of the cervical spine at this time which I have recommended."²

Claimant acknowledged that she had preexisting neck and right arm symptoms. She attributed those symptoms to moving some three times in eight months. She also testified that those symptoms did not bother her when she was performing her home care provider job with respondent before the March 30, 2001, accident.

Respondent argues that claimant's current need for cervical surgery is not related to her work-related March 30, 2001, fall. Respondent contends that claimant's cervical condition before the fall was the same as the condition is now. Respondent argues that contention is supported by claimant's previous medical treatment records which indicate that surgery was recommended for her cervical problem in 1999. Moreover, the respondent contends the medical records do not indicate claimant made any neck and right upper extremity complaints until she was seen at the hospital on May 14, 2001, by Dr. Kugler after claimant had suffered increased symptoms rolling over in bed. Respondent also contends that Dr. Stein's independent medical examination report supports the fact that claimant's need for surgical intervention in the cervical spine existed before her March 30, 2001, accident.

But the Board concludes, the greater weight of the evidence and the most persuasive evidence contained in the preliminary hearing record, proves that claimant's current need for cervical surgery is the result of claimant's fall at work on March 30, 2001. The Board finds that conclusion is supported by claimant's testimony and the opinion of claimant's treating physician Dr. Hawkins.

After claimant's March 30, 2001, fall, she testified her most severe and troublesome pain centered in her low back area. As recent as the next day, however, claimant testified she also experienced pain and discomfort in her neck and right arm. Mr. Phillips' April 10, 2001, medical note supports claimant's claim that she suffered an injury to her neck and right upper extremity, during the March 30, 2001, fall, as it indicates that claimant continued to have neck pain and discomfort along with right upper extremity numbness and pain. Dr. Hawkins first saw claimant on September 27, 2001, and on the date of the preliminary hearing July 31, 2002, he remained claimant's treating physician. Based on Dr. Hawkins' experience of treating claimant, he opined that claimant's preexisting cervical condition was aggravated by her fall at work and was the reason he recommended that claimant undergo cervical surgery.³

² Dr. Hawkins' July 25, 2002, letter.

³ See *Demars v. Rickel Manufacturing Corp.*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976) (holding that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease).

The Board, therefore, finds that the ALJ's preliminary hearing Order should be reversed. Dr. Hawkins is authorized to treat claimant's cervical injury, as he deems appropriate, including surgery and any necessary referrals.

WHEREFORE, it is the finding, decision, and order of the Board that Jon L. Frobish's August 16, 2002, preliminary hearing Order is reversed and Dr. Hawkins is authorized to treat claimant's cervical injury, as he deems appropriate, including surgery and any necessary referrals.

IT IS SO ORDERED.

Dated this ____ day of December 2002.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation