

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

<b>DANIEL E. HAYS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,465
<b>SUMMIT MASONRY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY REGIONAL AGENCY MARKETS</b>	)	
<b>UNITED SECURITY INSURANCE COMPANY</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and its insurance carrier, Liberty Regional Agency Markets, appeal the April 1, 2002, preliminary hearing Order of Administrative Law Judge Steven J. Howard. Claimant was awarded benefits in the form of medical compensation and temporary total disability compensation.

**ISSUES**

- (1) Did claimant suffer accidental injury while employed with respondent during the date or dates alleged?
- (2) Did claimant's accidental injury arise out of and in the course of his employment?
- (3) Did claimant provide timely notice of the accidental injury?
- (4) Did claimant provide timely written claim?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant alleged accidental injury on or about March 21, 2001, when moving planks to build a scaffold. Claimant, a hod carrier for a masonry company, carried heavy items on a regular basis. Claimant testified after feeling a pop in his right shoulder, the shoulder began to hurt and the pain gradually increased. Claimant advised his superintendent, Dave McDonald, of feeling the pop in his shoulder and that he was in pain.

Claimant was referred to Cedric B. Fortune, M.D., on March 26, 2001, but advised Dr. Fortune of no specific injury. Claimant continued working his regular duties with respondent and was referred in July to Prem Parmar, M.D. Dr. Parmar returned claimant to light-duty work for a period of time. On August 16, 2001, claimant received a cortisone shot, which provided little or no benefit. Claimant returned to his regular activities, although with the assistance of respondent, he did attempt to protect his shoulder from the heavier work. However, his shoulder continued to get worse through his last day worked, October 12, 2001.

On January 4, 2002, claimant underwent surgery on his right shoulder to repair a partial rotator cuff tear, underwent a debridement of a torn labrum and underwent a subacromial decompression.

Claimant continued in rehabilitation at the time of the preliminary hearing.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). In this instance, the Board finds that claimant, who was the only person to testify in this matter, did suffer accidental injury arising out of and in the course of his employment with his injury date being October 12, 2001, the last day he worked before surgery.

K.S.A. 44-520 mandates that a claimant provide notice to respondent of the accident within ten days of the date of the accident, stating the time, place and particulars thereof. Claimant's testimony that he told Mr. McDonald, the superintendent, of the accident shortly after the accident occurred, and continued informing him of his ongoing pain complaints for a period of several months, is uncontroverted. The Board finds that timely notice was provided to respondent of claimant's ongoing injuries pursuant to K.S.A. 44-520.

Finally, the Board finds that claimant's first E-1 (Application for Hearing), which was filed January 14, 2002, was within 200 days of his last day worked, that being October 12, 2001. Therefore, claimant has satisfied the requirements of K.S.A. 44-520a in that he submitted timely written claim within 200 days of the injury.

The Board, therefore, finds that the Order by the Administrative Law Judge granting claimant benefits for the injury to his right shoulder should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated April 1, 2002, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2002.

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BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant  
Gary R. Terrill, Attorney for Respondent (Liberty)  
J. Scott Gordon, Attorney for Respondent (United)  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director