BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WALTER DAVID CAMP	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,001,697
BOURBON COUNTY	)	& 1,044,337
Respondent	)	
AND	)	
	)	
KANSAS WORKERS RISK COOP FOR COUNTIES	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 25, 2010, Award and Review & Modification Award (Award) of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was granted a modification of the award in Docket No. 1,001,697 for an 88.5 percent general disability, but limited to payments from April 18, 2008 (claimant's last day worked with respondent) to December 4, 2008. The ALJ determined that as K.S.A. 44-510e limited claimant to an award for 415 weeks of compensation from the date of the accident, claimant's entitlement to an award ended on the December 4, 2008, date. Claimant was denied an award in Docket No. 1,044,337, after the ALJ determined that claimant had failed to prove that he suffered additional injuries as a series through his last day worked with respondent. The ALJ went on to determine that, even if claimant had proven the series of accidents, claimant did not provide timely notice of the accident nor timely written claim to respondent under K.S.A. 44-520 and K.S.A. 44-520a, respectively.

Claimant appeared by his attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The parties stipulated at oral argument to the Board that the benefit levels utilized by the ALJ in the Award were inappropriate. The stipulated average weekly wage of $362.42 would result in a weekly compensation rate of $241.63. The average weekly wage of $488.94, which included the fringe benefits (effective April 19, 2008), would result in a weekly compensation rate of $325.98. The calculation of this

award will reflect these stipulated weekly compensation rates. Respondent also acknowledged that the issues dealing with notice and written claim in Docket No. 1,001,697 are no longer disputed in this matter. Finally, the parties stipulated that claimant had a 13 percent whole person disability from the original settlement in this matter, to be followed by a permanent partial whole person (work) disability of 88.5 percent. The Board heard oral argument on June 23, 2010.

ISSUES

Docket No. 1,001,697

1. What is the appropriate date of accident in this matter? Claimant argues that he suffered a series of accidents from December 11, 2000, through February 27, 2003. Respondent contends claimant suffered only a single traumatic incident on December 11, 2000. The ALJ found a single date of accident on December 11, 2000.

2. What is the effective date of claimant's disability? Respondent contends that K.S.A. 44-510e(a)(3) limits claimant's entitlement to benefits to 415 weeks from the date of the injury. As such, the 415-week time period would be a statute of limitations. Claimant contends that the 415-week limit is not continuous, but, instead, allows 415 weeks of total compensation regardless of when those weeks are actually paid. Respondent originally contested the nature and extent of claimant's disability in this matter. However, the 13 percent whole body impairment determined appropriate at the time of the settlement hearing in this matter on February 27, 2003, remains and is uncontested. Additionally, the parties agreed at oral argument to the Board that claimant has suffered an 88.5 percent work disability under K.S.A. 44-510e. The only issues are when the work disability payments will begin, how long the payments should last and against which docket number the work disability should be applied.

ISSUES

Docket No. 1,044,337

1. Did claimant suffer an accidental injury or injuries which arose out of and in the course of his employment with respondent? Claimant alleges that he suffered additional trauma beginning February 28, 2003, and continuing every day through his last day with respondent on April 18, 2008. The ALJ determined that claimant had failed to prove that he suffered a work-related repetitive injury through his last day with respondent in Docket No. 1,044,337. Respondent argues that the denial of benefits by the ALJ should be affirmed.

2. Did claimant provide timely notice of his alleged accidents to respondent? Claimant testified that he discussed his ongoing physical problems with respondent's supervisors on a regular basis. Additionally, claimant provided respondent a doctor's note dated April 1, 2008, from Douglas C. Burton, M.D., which changed claimant's work restrictions. Between the ongoing verbal complaints by claimant and the new restrictions from the authorized treating physician, claimant contends that notice of the new series of injuries was provided. Respondent contends the note from the doctor was nothing more than added restrictions for the same injuries suffered by claimant in the first claim in Docket No. 1,001,697. The complaints were for symptoms which were the same as in the original claim as well.

3. Did claimant provide timely written claim of the second series of accidents? Claimant alleges the note from the doctor constitutes written claim as it requests that respondent accept additional medical restrictions which are to be applied to claimant's job. Respondent argues the medical restrictions are nothing more than added restrictions for the original series of injuries settled in Docket No. 1,001,697.

FINDINGS OF FACT

Claimant was lifting a truck tire on December 11, 2000, when he felt a pop in his back. Claimant notified his supervisor and was sent to the doctor. Claimant ultimately came under the care of orthopedic surgeon William Lonnie Dillon, M.D. Conservative care did not improve claimant's condition, and he later underwent a discectomy and foraminotomy at L5-S1, performed by Dr. Dillon. Claimant ultimately returned to work, with specific restrictions being assessed by Dr. Dillon on December 10, 2002. Claimant was limited to no lifting, pulling or pushing over 20 pounds with no repetitive bending or stooping. Claimant was assessed a 10 percent whole person impairment by Dr. Dillon.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation on January 17, 2003. Dr. Prostic's history indicated an accident on December 11, 2001 [*sic*], but otherwise mirrored the history of injury including the surgery discussed above. The only restrictions were that claimant be cautious with lifting, twisting, pushing, pulling and the use of vibratory equipment. He did note the restrictions provided by Dr. Dillon and voiced no objection. Dr. Prostic assessed claimant a 16 percent whole person functional impairment for the lifting injury to claimant's low back.

Claimant and respondent entered into a settlement by way of a running award in a settlement hearing on February 27, 2003. The settlement was for a 13 percent whole person functional impairment, representing a compromise between the ratings of Dr. Dillon and Dr. Prostic. Claimant's entitlement to future medical treatment and the right to review and modify the award remained open. The Joint Award Agreement attached to the transcript of settlement lists the date of accident as December 11, 2000, and every working

date to present. However, during the hearing, it was stated that claimant suffered a traumatic injury on December 11, 2000, with no series of additional injuries being discussed. Claimant continued working for respondent at his regular job both before and after the settlement hearing. Claimant testified that the restrictions placed on him were not honored by respondent.

Claimant's job duties with respondent continued after the settlement hearing and involved driving a dump truck over uneven county roads, and included some shoveling, climbing and bending. In an ordinary day, claimant would drive for about 7 hours. He also did minor repair work on the truck, including oil changes and grease jobs.

Claimant continued on pain medications but the medications became less and less effective. He was referred to board certified orthopedic surgeon Douglas Charles Burton, M.D., on July 27, 2004. Claimant initially presented with low back pain from the 2001 accident. Dr. Burton next examined claimant on November 1, 2005, for an exacerbation of the low back pain. Claimant had bent over to lift a can of diesel fuel and felt a pop in his back, initiating severe low back pain. Dr. Burton was unable to find any obvious neurological findings pointing to any kind of nerve pinch or disk herniation. No physical injury was identified. Claimant was returned to work with the restrictions of no lifting over 20 pounds and no bending or stooping.

Claimant was next examined by Dr. Burton on April 1, 2008. Claimant presented with the same type of complaints, indicating a flare-up of his low back pain. At that time, claimant discussed the problems being created by driving the dump truck over rough roads. Dr. Burton added a restriction against driving the dump truck on the uneven surfaces. The remaining restrictions were no lifting over 20 pounds and no bending or climbing, although Dr. Burton did indicate no stooping would be recommended as well. When respondent was presented with the new restrictions against driving, claimant was told that they had nothing for him. Later that night, claimant was called and told to report to the county dump in the morning, which claimant did. Claimant was then assigned the task of picking up trash on hills and while walking on uneven surfaces.

Claimant's last day worked was April 18, 2008. He then received workers compensation benefits for a period of time. His employment with respondent was terminated on August 13, 2008. Claimant testified that his back condition continued to worsen through his last day worked.

Claimant was again referred by his attorney to Dr. Prostic on September 21, 2009. Claimant was diagnosed with disc space narrowing at L5-S1. Claimant suffered new symptoms of bilateral S1 radiculopathy. Added restrictions were recommended including no frequent bending or twisting at the waist, forceful pushing or pulling, use of vibrating equipment or working in a captive position. Claimant was assessed an additional 5 to 10 percent permanent partial impairment to the whole body "from his status

of January 17, 2003."[1] During his deposition, Dr. Prostic clarified his opinion, stating that claimant had suffered repetitive injuries at work from January 2003 through April 18, 2008, claimant's last day at work. The added injuries resulted in the additional impairment.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,001,697

Claimant initially suffered an accidental injury on December 11, 2000, while moving a truck tire. Claimant alleges that his condition worsened through the date of the settlement hearing on February 27, 2003. However, claimant did not testify to a gradual worsening of the back condition. Instead, he testified that he suffered the traumatic injury and was almost immediately sent to the doctor for treatment. This ultimately led to surgery on his back and culminated in the settlement of the claim with the running award discussed above. While the Joint Award Agreement attached to the settlement transcript lists a date of accident "on or about 12/11/00 and every working date to present", the discussion during the settlement hearing only notes the trauma on December 11, 2000. The ALJ determined that claimant had suffered a specific trauma on December 11, 2000, and the Board agrees. The 13 percent whole person functional impairment from the settlement has long since been paid. The stipulation by the parties of an 88.5 percent work disability would be effective on April 19, 2008, the day after claimant's last day of work for respondent.

> In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.[2]

Claimant argues that the 415-week statutory limit is not a statute of limitations, but, instead, guarantees claimant 415 weeks of benefits regardless of when those benefits are paid. Respondent argues that the Court of Appeals, in *Ponder-Coppage*[3], establishes that the 415-week limit runs from the date of accident and is a statute of limitations. The Board finds that the 415-week limit under K.S.A. 44-510e(a)(3) runs from the date of accident. Claimant's entitlement to an award will be limited accordingly.

The ALJ in the Award determined that 415 weeks from the December 11, 2000, date of accident fell on December 4, 2008. The Board calculates the last day of this 415-week period as being on November 24, 2008. The period from April 19, 2008, through November 24, 2008, comprises a total of 31.43 weeks. The Award of the ALJ will be

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[1] See Dr. Prostic's September 21, 2009, report.

[2] K.S.A. 44-510e(a)(3).

[3] *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

modified to award claimant 31.43 weeks of benefits at the stipulated weekly compensation rate of $325.98, totaling $10,245.55.

PRINCIPLES OF LAW AND ANALYSIS

Docket No. 1,044,337

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify

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[4] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2007 Supp. 44-501(a).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

a preexisting condition, the aggravation becomes compensable as a work-related accident.[8]

Claimant suffered a specific traumatic injury on December 11, 2000, which led to surgery on his back. Claimant was then returned to work with specific restrictions which were not honored by respondent. Claimant continued to suffer added injuries to his low back from the point of the settlement hearing on February 27, 2003, through his last day with respondent on April 18, 2008. During the regular hearing, claimant testified to specific incidents where, while lifting, he suffered added pain in his back. Additionally, claimant was regularly lifting, shoveling, climbing and bending while working. These activities were in addition to the several hours per day that claimant drove his truck over rough roads. When claimant told Dr. Burton of the pain from the driving activities, the doctor added the "no driving" restriction to claimant's preexisting restrictions. While Dr. Burton could find no obvious neurological findings indicating a pinched nerve or massive disk herniation, he could tell that the work and driving were causing claimant increased pain.

Claimant returned to Dr. Prostic for an examination on September 21, 2009. Dr. Prostic opined that claimant had sustained additional injury to his low back from the work at respondent's establishment, between January 2003 and April 18, 2008. He determined that claimant had an additional 5 to 10 percent permanent partial impairment to the whole body, pursuant to the fourth edition of the AMA *Guides,*[9] as the result of these additional repetitious traumas. He restricted claimant from frequent bending or twisting at the waist, and claimant was to avoid forceful pushing or pulling, the use of vibratory equipment and working in captive positions. Dr. Prostic's 77 percent task loss compiled from Jerry Hardin's task list is the only task loss opinion in this record.

The ALJ determined that claimant had failed to prove that he suffered additional injuries in Docket No. 1,044,337. The Board disagrees. Claimant was returned to work at physical labor, with specific restrictions which respondent elected to ignore. The tasks claimant was required to perform worsened his condition resulting in an additional 5 to 10 percent whole person impairment. The Board finds that claimant suffered additional injuries from a series of traumas from February 28, 2003, through claimant's last day with respondent on April 18, 2008. Based on the opinion of Dr. Prostic, claimant has suffered an additional 7.5 percent permanent partial disability to the whole body on a functional basis. Additionally, claimant has suffered an 88.5 percent work disability beginning April 19, 2008. However, as claimant has already been awarded the 88.5 percent work disability in Docket No. 1,001,697, respondent would be entitled to a credit under K.S.A. 44-510a for the overlapping weeks of benefits. The K.S.A. 44-510a credit would be based on a contribution of 100 percent from the prior disability.

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[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[10]

In order to determine whether timely notice has been provided, a determination must first be made as to the proper date of accident. In this instance, claimant was provided restrictions above those originally ordered by the treating physician when Dr. Burton limited claimant's driving over rough roads. This satisfies the criteria set forth in K.S.A. 44 -508(d). This new restriction on April 1, 2008, establishes the date of accident for this new series of traumas.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[11]

Claimant testified that he discussed his ongoing problems, including the worsening of his pain, with his supervisors on a regular basis. That testimony is uncontradicted in this record.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[12]

Additionally, claimant continued to receive medical treatment with Dr. Burton, who was a referral from Dr. Dillon, the authorized treating physician. Claimant was referred for physical therapy, underwent injections in his spine and was prescribed pain medication. Claimant was examined by Dr. Burton on April 1, 2008, and given the added restriction against driving over rough roads. Respondent argues that this new restriction would not constitute notice of a new accident or series of accidents. This might be true had claimant

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[10] K.S.A. 2007 Supp. 44-508(d).

[11] K.S.A. 44-520.

[12] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

not discussed his ongoing problems and worsening condition with respondent and been receiving additional medical treatment with the authorized treating physician. But, with the multiple contacts and ongoing need for treatment and added restrictions, the Board finds that notice was timely for an accident ending on April 1, 2008.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[13]

Claimant contends that the medical report from Dr. Burton constitutes written claim for the purpose of the Kansas Workers Compensation Act. Respondent objects, contending that the medical report is just that, a medical report. However, a written claim need not take any particular form, so long as it is in fact a claim.[14] The court must look at the intention of the parties to determine what was in their minds in preparing and receiving the document. "The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?"[15] Here, claimant presented the added restrictions from Dr. Burton on April 1, 2008, with the intention that respondent honor the new restriction. Instead, claimant was removed from his normal job due to respondent being unable to meet the driving restriction. The Board finds that claimant intended to request added accommodation from respondent when the medical report from Dr. Burton was provided on April 1, 2008. Therefore, the requirements of K.S.A. 44-520a were satisfied and written claim was timely provided.

K.S.A. 44-510a(a) states:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if

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[13] K.S.A. 44-520a(a).

[14] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

[15] *Id., citing Richardson v. National Refining Co.*, 136 Kan. 724, 18 P.2d 131 (1933).

> compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

Claimant suffered two injuries to his low back while working for respondent for which he is entitled to compensation under the Workers Compensation Act. When, as here, a second injury and resulting disability are contributed to by a prior injury and disability, respondents are eligible for a credit, depending on the amount of contribution the first disability contributes to the overall disability in the second injury. Here, the functional disability found to be 7.5 percent from the second series of accidents is above and beyond the original 13 percent whole body disability awarded in the original settlement. There is no contribution from the first functional impairment to the second. Thus, no credit will be awarded.

However, the parties stipulated to an 88.5 percent whole person permanent disability in this matter with a dispute as to whether the disability stems from the first accident or the second series of accidents, or both. The Board finds that the first disability has contributed to the second and a credit is in order. The percentage of contribution for the overlapping weeks is at the 100 percent level. However, the functional impairment of 7.5 percent comprises a total of 28.45 weeks. The remaining disability in Docket No. 1,001,697, after the application of the 415-week statutory limit, only leaves 31.43 weeks of compensation. The original permanent partial general disability in Docket No. 1,001,697 begins after claimant's last day worked on April 18, 2008. The functional impairment in Docket No. 1,044,337 begins April 2, 2008, the day after the date of accident, and continues through October 16, 2008. Respondent's entitlement to a credit for the overlapping weeks of permanent partial general disability runs from October 17, through November 24, 2008, a period of 5.57 weeks. The Award will be adjusted accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified in Docket No. 1,001,697 to award claimant 31.43 weeks of permanent partial disability at the rate of $325.98, totaling $10,245,55, but affirmed in all other respects.

The Board further finds that the award of the ALJ in Docket No. 1,044,337 should be reversed with regard to whether claimant suffered accidental injuries arising out of and

in the course of his employment with respondent through a series of traumas ending on April 1, 2008, the proper date of accident in this matter. Claimant has provided timely notice of accident and timely written claim in this matter. Claimant is entitled to an additional whole person functional impairment of 7.5 percent, followed by a permanent partial general disability of 88.5 percent, with respondent entitled to a 100 percent credit under K.S.A. 44-510a against the award of permanent partial general disability in Docket No. 1,001,697.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award and Review & Modification Award of Administrative Law Judge Kenneth J. Hursh dated February 25, 2010, should be, and is hereby, modified in Docket No. 1,001,697 to award claimant 31.43 weeks of permanent partial disability at the rate of $325.98, totaling $10,245,55, but affirmed in all other respects.

The Board further finds that the award of the ALJ in Docket No. 1,044,337 should be reversed with regard to whether claimant suffered accidental injuries arising out of and in the course of his employment with respondent through a series of traumas ending on April 1, 2008, the proper date of accident in this matter. Claimant has provided timely notice of accident and timely written claim in this matter. Claimant is entitled to an additional whole person functional impairment of 7.5 percent, followed by a permanent partial general disability of 88.5 percent, with respondent entitled to a 100 percent credit for the overlapping weeks of permanent partial general disability, under K.S.A. 44-510a, against the award in Docket No. 1,001,697.

Docket No. 1,001,697

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Walter David Camp, and against the respondent, Bourbon County, and its insurance carrier, Kansas Workers Risk Coop For Counties, for an accidental injury which occurred December 11, 2000, and based upon an average weekly wage of $362.42 through April 18, 2008, and as of April 19, 2008, an average weekly wage of $488.94.

Claimant is entitled to 50.66 weeks of temporary total disability compensation at the rate of $241.63 per week totaling $12,240.98, followed by 49.31 weeks of permanent partial disability compensation at the rate of $241.63 per week totaling $11,914.78 for a 13 percent permanent partial disability, followed by 31.43 weeks of permanent partial disability compensation for the period from April 19, 2008, through November 24, 2008, at the rate of $325.98 per week totaling $10,245.55 for a 88.5 percent work disability, making

a total award of $34,401.31. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

Docket No. 1,044,337

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Walter David Camp, and against the respondent, Bourbon County, and its insurance carrier, Kansas Workers Risk Coop For Counties, for an accidental injury which occurred April 1, 2008, and based upon an average weekly wage of $362.42 through April 18, 2008, and as of April 19, 2008, an average weekly wage of $488.94.

Claimant is entitled to 2.43 weeks of permanent partial disability compensation at the rate of $241.63 per week totaling $587.16 for a 7.5 percent permanent partial disability, on a functional basis, followed by permanent partial disability compensation beginning April 19, 2008, at the rate of $325.98 per week for an 88.5 percent work disability, making a total award of $100,000.00. However, respondent is entitled to a 100 percent credit for the permanent partial disability compensation paid claimant in Docket No. 1,001,697, for the overlapping weeks from October 17, 2008, to November 24, 2008, a period of 5.57 weeks, paid at the rate of $325.08 per week, totaling $1,810.70. After November 24, 2008, and thereafter until the award is paid, claimant is entitled to $325.98 per week. This reduces the total award to $98,189.30.

As of July 15, 2010, there would be due and owing to claimant 2.43 weeks of permanent partial disability compensation at the rate of $241.63 per week in the sum of $587.16, plus 85.43 weeks of permanent partial disability compensation at the rate of $325.98 per week in the sum of $27,848.47, for a total due and owing of $28,435.63, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $69,753.67 shall be paid at the rate of $325.98 per week until fully paid or until further order from the Director.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.[16]

IT IS SO ORDERED.

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[16] K.S.A. 44-536(b).

Dated this ____ day of July, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the opinion of the Majority in Docket No. 1,044,337 in that we believe claimant did not prove that he suffered a new series of accidents and failed to provide timely notice of the new series of accidents allegedly suffered while working for respondent. K.S.A. 44-520 requires that notice of the accident be given within 10 days of that accident and that notice must state the "time and place and particulars thereof, ..." Here, claimant suffered an original back injury with ongoing problems. He complained to his supervisors of ongoing problems but not of a specific series of accidents or of a worsening of his problems. Under most circumstances, notice of ongoing complaints is not notice of a new series of accidents.

Likewise, when claimant provided the medical report from Dr. Burton, he was merely advising of those same continued complaints, not of a new accident or series of accidents. K.S.A. 44-520 is specific as to what is necessary for notice of an accident to be accomplished. Claimant providing mere generalities regarding ongoing complaints that have been in existence for years is not sufficient.

The Kansas Supreme Court, in the recent case of *Bergstrom*[17], determined that a statute which is plain and unambiguous must be given its express effect as set out by the language of the statute. The notice statute sets standards regarding what is acceptable for proper notice. Claimant has not satisfied those standards. Claimant's complaints were not specific as to time, place and particulars of the alleged new series of accidents.

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[17] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

They were merely ongoing complaints which echoed the complaints claimant's supervisors had been hearing since December 2000.

The ALJ, after having the opportunity to observe this claimant in live testimony, determined that, had claimant experienced some new and distinct injury, claimant would have alleged it at the time of the accident or series of accidents, instead of several months later, as was the case here. This claimant has failed to prove that he suffered a new accident or series of accidents while working for respondent. The only specific accident described by claimant occurred in 2005 when he picked up a can of diesel fuel. Yet, claimant failed to advise respondent of that incident. Additionally, Dr. Burton failed to identify any physical injury from that incident. Claimant was released to return to work with no restrictions beyond those already in place.

In this instance, respondent was provided with a series of complaints from 2000 forward, with nothing specific regarding an alleged series of accidents. Claimant chose not to file the new claim for 10 months after his departure from respondent's employment. The ongoing series of complaints to his supervisors constituted just that, complaints of a situation of long standing. This does not satisfy the requirements of K.S.A. 44-520. Claimant failed to prove that he suffered a new series of accidents and further failed to satisfy the requirements of the notice statute, K.S.A. 44-520.

Claimant's request for benefits in Docket No. 1,044,337 should be denied. The Award of the ALJ denying claimant any additional award should be affirmed.

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BOARD MEMBER

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BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge