

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

RANDY RAY CAMPBELL)	
Claimant)	
VS.)	
)	Docket No. 1,002,994
JOE'S BODY SHOP)	
Respondent)	
AND)	
)	
NORTHWESTERN NATIONAL INSURANCE CO.)	
UNION INSURANCE COMPANY)	
Insurance Carriers)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and Union Insurance Company requests review of the August 11, 2004 Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Appeals Board (Board) heard oral argument on January 11, 2005.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and Northwestern National Insurance Company. James E. Biggs of Topeka, Kansas, appeared for respondent and Union Insurance Company. Andrew E. Busch of Wichita, Kansas, appeared for Kansas Workers' Compensation Fund.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award except that during oral argument to the Board counsel for Union Insurance Company clarified that its coverage commenced February 1, 2002, not January 31, 2002.¹ Also, during oral argument to the Board, the parties agreed that the Award contained two additional typographical errors. The date claimant saw Dr. Gluck was February 6, 2002, not 2004.² The date Joe Wendell spoke with claimant was January 31, 2002, not 2003.³

ISSUES

Claimant was granted 37.43 weeks of temporary total disability compensation followed by a period of permanent partial disability compensation based on the 12.4 percent functional impairment followed by a 76.15 percent work disability for a total award of \$100,000.

The nature and extent of disability is an issue, including whether all of the medical conditions which prevent claimant from working are due to the alleged work injuries. Also, because of a change in workers' compensation insurance coverage, there is a dispute between the insurance carriers concerning date of accident and which carrier should pay the benefits.

Claimant alleged personal injury by accident by a series beginning January 1, 1998 through February 7, 2002. Northwestern National Insurance Company (Northwestern) provided respondent's insurance coverage for the period of May 23, 1999 through May 23, 2001. Union Insurance Company (Union) provided coverage beginning February 1, 2002 and thereafter. Accordingly, there was a period from May 24, 2001 through January 31, 2002 when claimant was not insured. For this reason, the Kansas Workers' Compensation Fund (Fund) is a party to this claim.

Claimant's last day of work was February 6, 2002. The ALJ determined claimant's date of accident to be February 6, 2002, which was when Union was on the risk. Union argues that claimant's condition did not worsen during the period that it provided coverage and that the claimant's date of accident should be before February 1, 2002. Finally, if the claimant's date of accident is found to be before claimant's last day worked, then respondent and Northwestern would also raise issue concerning the timeliness of claimant's notice and written claim.

¹ Award at 2 and 3 Stipulations for Union Insurance paragraph No. 6 (Aug. 11, 2004).

² Award at 5 (Aug. 11, 2004).

³ *Id.* at 12. (Claimant also spoke to his supervisor, Mr. Wendell, about his symptoms on Feb. 6, 2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed. The ALJ, in the Award, sets forth findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. In short, claimant suffered work-related injuries to his bilateral upper extremities, including cubital tunnel and carpal tunnel syndromes and ulnar nerve entrapment neuropathy by a series of accidents. As noted, claimant alleged a series of accidents and repetitive trauma injuries beginning January 1, 1998 through February 7, 2002.⁴ However, in order to determine which insurance carrier is liable, a single accident date must be determined.

Following the creation of the bright line rule in the 1994 *Berry*⁵ decision, Kansas appellate courts have consistently grappled with determining the date of accident for repetitive use injuries. In *Treaster*⁶ which is one of the most recent decisions on point, the Kansas Supreme Court held the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. Accordingly, *Treaster* focuses upon the offending work activity.

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.⁷

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.⁸

⁴ K-WC E-1 (filed April 5, 2002).

⁵ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁶ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

⁷ *Id.* at Syl. ¶ 3.

⁸ *Id.* at Syl. ¶ 4.

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held the appropriate date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

The *Lott-Edwards*⁹ decision is also relevant. In *Lott-Edwards*, the Kansas Court of Appeals held the last-day worked rule is applicable if the work performed in an accommodated position continues to aggravate a repetitive use injury. One of the insurance carriers in that proceeding argued the appropriate date of accident should have been in 1994, when the worker left work for carpal tunnel release surgeries, as the employee allegedly returned to work after those surgeries in an accommodated position. The Kansas Court of Appeals disagreed, however, stating the worker had returned to work performing work duties that were substantially similar to those she performed before surgery. The Court explained the worker's injuries were relentless and continuing with no attenuating event, despite the accommodated work. Consequently, the Court reasoned the appropriate date of accident was the worker's last day of working for the employer.

Claimant was never placed in an accommodated job by respondent. Accordingly, there was no triggering event as described in *Treaster*. In the absence of returning to accommodated work, there is no basis for establishing a date of accident before claimant's last day of work for respondent. The Board finds that the ALJ's determination that claimant suffered personal injury by a series of accidents that arose out of and in the course of his employment each and every working day through February 6, 2002, should be affirmed.

The Board also finds that the ALJ's determination of the nature and extent of claimant's disability should be affirmed. Claimant was not diagnosed with Parkinson's disease until over a year after he left employment with respondent. Dr. Mills said the Parkinson's disease did not contribute to claimant's bilateral upper extremity problems. And, Dr. Mills restrictions are only for claimant's work-related injuries. Only Dr. Delgado attributed his restrictions to the condition he suspected was Parkinson's disease. Dr. Delgado acknowledged he was not qualified to make that diagnosis.

Claimant was ultimately referred to a neurologist, Dr. Andrew Massey. He first examined claimant in January 2004. Dr. Massey diagnosed mild Parkinson's disease, but found no significant functional limitations relating to that condition. He imposed no restrictions, but noted claimant may have difficulty doing fine motor skills. Furthermore, he did not consider there to be a need for any treatment for the Parkinson's disease at this time because it was not having any significant effect on claimant's ability to function. As Dr. Massey was the last expert medical witness to examine claimant and the last witness to testify, none of the other physicians had the benefit of his testing and opinions when they testified. Nevertheless, the Board does not find Dr. Massey's testimony to be such

⁹ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

that it would render the prior opinions to be not credible or untrustworthy. The Board agrees with the analysis of the evidence and law as set forth in the Award and adopts the ALJ's findings, conclusions and orders as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 11, 2004 Award entered by Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2005

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: James S. Oswalt, Attorney for Claimant
- James B. Biggs, Attorney for Respondent and Union Insurance Company
- Ronald J. Laskowski, Northwestern National Insurance Company
- Andrew E. Busch, Attorney for Kansas Workers Compensation Fund
- Bruce E. Moore, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director