

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

<b>PAULA L. ROSS</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,018,610
	)	
<b>GENERAL MOTORS CORPORATION</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requested review of the August 31, 2005 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on January 4, 2006.

**APPEARANCES**

Phillip R. Carson, of Kansas City, Kansas, appeared for the claimant. Peter J. Chung, of Kansas City, Missouri, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ awarded claimant a 27 percent permanent partial whole body impairment based upon the testimony of Dr. Edward J. Prostic, the only physician to offer an opinion as to claimant's permanent impairment associated with her work-related injuries.<sup>1</sup> The ALJ declined to decrease this 27 percent for an alleged pre-existing impairment based on K.S.A. 44-501(c) explaining that there was insufficient evidence on that issue.<sup>2</sup> Simply put, the ALJ concluded that the claimant had sustained a series of repetitive injuries to her upper extremities and her neck, while in respondent's employ, all culminating in an accident on her last date of work, March 21, 2005.

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<sup>1</sup> ALJ Award (Aug. 31, 2005) at 4.

<sup>2</sup> *Id.*

The respondent requests review of the ALJ's Award alleging several errors, each of which, in some way, relate to claimant's appropriate date of accident. Unfortunately, these allegations of error were not supported by an initial brief. Rather, after claimant filed her brief on October 25, 2005, incorporating an earlier submittal letter brief to the ALJ, respondent filed a "Reply Brief" on November 15, 2005. Upon receipt of this filing, claimant filed a Motion to Strike, asserting that respondent's brief was neither timely nor appropriate as a reply under K.A.R. 51-18-4(a)(3).

The Board has considered claimant's motion and finds that it must be sustained. Respondent's brief was filed after the expiration of 10 business days, contrary to K.A.R. 51-18-4(a)(3). Moreover, because claimant's brief to the Board did not raise any new issues, under K.A.R. 51-18-4(a)(3), a reply brief was not warranted. Thus, the Board will sustain claimant's objection and will not consider the arguments asserted within that so-called reply brief and will, instead, rely on respondent's oral arguments.

Respondent orally argues the 27 percent whole body impairment awarded by the ALJ was excessive and should be limited to 20 percent to the right upper extremity for claimant's carpal tunnel complaints and 10 percent to the right shoulder for rotator cuff symptoms. According to respondent, the balance of claimant's complaints (and her resulting permanent impairment) are, by virtue of K.S.A. 44-520a, 44-534(b), and the statutory notice requirement contained within K.S.A. 44-520, or an earlier workers compensation settlement, barred.

Claimant argues the ALJ's Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the claimant's brief and the parties' oral arguments, the Board makes the following findings of fact and conclusions of law:

For the last 14 years claimant has been employed by respondent as an assembly line worker. She has suffered a series of injuries some of which were acute in nature and some which came about over time. Based upon the evidence contained within the file, it appears that she suffered an injury on July 25, 1996 to various parts of her body, including her left shoulder, in an accident involving a fork lift. That injury was the subject of an earlier workers compensation claim and involved treatment with Dr. Gregory Barnhill. That claim was ultimately settled on April 1, 1999, and according to the settlement documents, claimant was assigned a 6 percent permanent whole body impairment. Although claimant had some left shoulder complaints at the time of that settlement, as evidenced by the claimant's own testimony at that proceeding, the settlement documents do not indicate the settlement included any permanency for claimant's left shoulder.

Claimant returned to work and in August 1999 experienced some problems with her neck from work duties that required her to pull glass up out of a door panel. Claimant reported these complaints to respondent and she was referred to Dr. Barnhill or one of his associates for treatment. According to claimant, she continued to see Dr. Barnhill off and on for neck and left shoulder complaints which she attributed to her work activities. In June 2000, surgery was recommended, but she elected to treat her complaints more conservatively with injections.

Claimant continued working and would report to plant medical at various times complaining of left upper extremity and neck pain. Then, on January 15, 2004, she notified respondent of an additional injury to her right elbow and neck which she sustained while pulling quarter glass panels into the rear door assembly. Respondent referred claimant to Dr. Donald Knepper for treatment and was referred to Dr. Richard Korentager for an EMG on her right elbow, which confirmed carpal tunnel on the right. Surgery was done on claimant's right wrist. Claimant returned to work, at first on light duty, then back to her normal work activities.

Throughout her work history, from 1999 and on up to the date of her regular hearing, claimant testified that she continued to aggravate her upper extremity and neck conditions. As her complaints increased, she would inform her supervisor and report to plant medical. She would also report her complaints to the physician who was treating her at the time.

The only physician who testified in this case was Dr. Edward J. Prostic, who examined claimant on December 21, 2004, at the request of her attorney. He diagnosed claimant as having -

. . . sustained repeated minor trauma. She has aggravated degenerative disc disease in her neck. She has developed rotator cuff tendinitis at each shoulder. She has had inadequate relief from carpal tunnel release of the right wrist. Her continuing radicular symptoms [in] the right arm are caused by a combination of thoracic outlet syndrome and residuals of carpal tunnel syndrome. She has significant weakness of grip on that side that is also contributed to by medial epicondylitis.<sup>3</sup>

He assigned the following permanent partial impairment: "5 percent of the body as a whole for the cervical spine, 10 percent of the right upper extremity and 15 percent of the left upper extremity for rotator cuff disease, and 20 percent of the right upper extremity for residuals of carpal tunnel syndrome complicated by medial epicondylitis and thoracic outlet syndrome. Combined impairment is 27 percent of the body as a whole on a functional basis."<sup>4</sup> Dr. Prostic testified that claimant's symptoms were due to her work on the

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<sup>3</sup> Prostic Depo., Ex. 1 at 4.

<sup>4</sup> *Id.*

assembly line and that she repetitively injured herself while in respondent's employ. He further testified that he was not aware of any prior impairment rating.

Based upon statements at the oral argument, it is respondent's contention that it only owes compensation for the right upper extremity impairments and conditions which it believes developed as recently as 2004 and which are reflected in claimant's E-1 filing. As for claimant's 5 percent neck impairment, that condition, in respondent's view, stems from an injury that occurred in 1999 and was not mentioned in the E-1. And based upon the applicable statutes of limitation, K.S.A. 44-520 and K.S.A. 44-534(b) claimant's claim for the neck impairment is barred. Similarly, respondent argued that claimant's left shoulder impairment was the focus of her earlier workers compensation claim and as a result, she cannot assert that injury again in this claim.

Respondent's arguments are rejected. Claimant pled a series of repetitive injuries in her E-1 to her upper extremities commencing August 13, 2004 and continuing each day thereafter. Then, at the regular hearing she moved to amend her claim to bring it current, up to the last date she worked for respondent, which was March 21, 2005. Based upon claimant's testimony and the medical evidence submitted on her behalf, it was claimant's very clear intention to establish a repetitive injury claim based upon her daily work activities up to March 21, 2005. Although respondent objected to this amendment and continued to maintain the staleness of claimant's claim, the ALJ nonetheless granted her request and the Board agrees with that decision.

In order to determine whether claimant's claim is timely, the appropriate date of accident must be determined as all of the relevant time periods begin on the date of an employee's accident. Following creation of the bright line rule in the 1994 *Berry*<sup>5</sup> decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,<sup>6</sup> which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use 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. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury should be the last date that the worker performed those work duties.

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

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

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

performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.<sup>7</sup>

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

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as “neither fish nor fowl.”) A claimant’s last injurious exposure to repetitive or cumulative trauma is when he or she leaves work.

In this instance, claimant testified that she suffered additional aggravations to her upper extremities and her neck commencing August 13, 2004 and up to the last date she worked. Dr. Prostic’s testimony confirms this assertion. Dr. Prostic testified her work duties continued to exacerbate her ongoing conditions. In fact, there is no evidence to contradict this fact. Claimant’s job duties never significantly changed during this period of time. Based upon *Berry*, the Board concludes that claimant suffered additional aggravation to her neck and upper extremities each time she returned to the same job she had performed before her various treatments and surgeries. Because claimant continued to aggravate her condition, the last day worked rule is applicable. The ALJ’s conclusion that claimant’s date of accident was March 21, 2005 is affirmed.

It follows then that respondent’s argument that the claimant’s neck and left shoulder claims are barred either because of a lack of notice or failure to timely file an Application for Hearing cannot prevail. Respondent obviously had notice of claimant’s neck and left shoulder complaints not only during the course of her visits at the plant medical facility (before the accident is deemed to have occurred), but at the Regular Hearing on March 22, 2005 (the day after her accident is deemed to have occurred). Likewise, the E-1 was amended to include her neck complaints on the same day of the Regular Hearing. In both instances, the neck and shoulder claims are timely. Accordingly, the ALJ’s implicit conclusion that claimant’s claim was timely, both in terms of notice and written claim, is affirmed.

Respondent’s final argument related to the nature and extent of claimant’s permanent impairment must fail as well. For whatever reason, the only evidence contained within the file bearing on the issue of permanent impairment comes from Dr. Prostic, who opined claimant sustained a 27 percent impairment, all as a result of her repetitive work

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<sup>7</sup> *Id.* at Syl. ¶ 3.

injuries in her job as an assembly worker. There was no evidence to suggest any of this permanency might have pre-dated August 13, 2004, the commencement date of the claimant's series of injuries. Absent any other evidence, the Board must affirm the 27 percent whole body functional impairment.

Moreover, although there is a rating contained within the file suggesting an earlier functional impairment assessment dating back to 1997 following the fork lift accident, the ALJ concluded there was an insufficiency of evidence to determine pre-existing impairment. The Board agrees with this finding. There is simply a lack of factual basis upon which the Board can conclude that claimant's left shoulder was involved in the earlier accident and what portion of the 6 percent impairment assigned in 1997 was attributable to her left shoulder. Accordingly, the ALJ's refusal to find a pre-existing impairment is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 31, 2005, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Phillip R. Carson, Attorney for Claimant
- Peter J. Chung, Attorney for Self-Insured Respondent
- Robert H. Foerschler, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director