

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes that the March 2, 2006, preliminary hearing Order should be reversed.

Respondent employed claimant as a service technician. On October 3, 2005, while working at a shop that had a contract with respondent, claimant felt a pop in his right shoulder as he pulled a jack out from under a truck. Claimant did not feel immediate pain but he felt a tingling sensation down his arm to his fingers. But the next day, claimant's shoulder was painful.

Claimant continued working for respondent until November 10, 2005. Claimant testified at the January 2006 preliminary hearing that his condition worsened while he continued to work for respondent.

Claimant sought medical treatment with his family doctor for his right shoulder on October 13, 2005. According to claimant, he initially reported to the clinic that he had been hurt at work but he told someone at the clinic that he did not want to complete workers compensation paperwork at that time because he was afraid of being fired. Claimant testified he told the clinic he had a go-cart wreck. Indeed, the clinic's October 13, 2005, medical records reference a go-cart wreck. Further, claimant testified he had not actually had such a wreck. Claimant's doctor gave claimant a sling for his right arm. October 13, 2005, x-rays of claimant's right shoulder indicated the shoulder was normal.

Other than seeing his personal doctor on October 13, 2005, claimant has received no treatment for his right upper extremity or right shoulder. According to claimant, his family doctor would not see him again because claimant needed to complete workers compensation paperwork.

Claimant testified that immediately after the October 3, 2005, incident he told Mike Harader, a co-worker at the shop, that his shoulder popped. Claimant also testified that on October 13, 2005, he told Randy Shumway, his supervisor, that he had a lot of shoulder pain. Moreover, claimant acknowledged that November 10, 2005, was the first time he told respondent that he had been hurt at work. According to claimant, he was worried that his job would be in jeopardy if he reported a work-related accident.

Claimant approached Mr. Shumway on November 10, 2005, about filling out a work injury claim. Claimant testified his employment with respondent was then immediately terminated.

The Judge rejected claimant's argument that he sustained a series of traumas to his right upper extremity from October 3, 2005, through November 10, 2005, his last day of work. Instead, the Judge concluded claimant sustained a single accidental injury on

October 3, 2005, when he experienced a pop in his right shoulder while pulling on a jack. The Board agrees with that finding. There is no medical evidence in the record to support claimant's argument of a repetitive trauma injury. Conversely, the evidence establishes that claimant attempted to protect his right upper extremity following the October 3, 2005, incident as he, at least on some occasions, wore a sling as he worked.

The Workers Compensation Act requires a worker to provide an employer notice of an accidental injury within 10 days of its occurrence, unless just cause exists for failing to report the injury within that period.¹ Claimant testified about his fear of reprisal if he reported a work-related accident. Unfortunately, claimant was terminated after speaking with his supervisor about the work injury. In this instance, the Board concludes claimant's fear of reprisal was valid. Accordingly, claimant had just cause for failing to provide notice to respondent within 10 days of the accident. Moreover, claimant's notice to respondent on November 10, 2005, is well within the 75-day period set forth in K.S.A. 44-520. Consequently, the preliminary hearing Order should be reversed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.²

WHEREFORE, the Board reverses the March 2, 2006, preliminary hearing Order entered by Judge Barnes. The Board remands this claim to the Judge for further proceedings consistent with this order. The Board does not retain jurisdiction over this appeal.

IT IS SO ORDERED.

Dated this ____ day of May, 2006.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Matthew R. Bergmann, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹ K.S.A. 44-520.

² K.S.A. 44-534a(a)(2).