

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

HARRY WOOD)	
Claimant)	
)	
VS.)	
)	
RVB TRUCKING, INC.)	
Respondent)	Docket No. 1,027,404
)	
AND)	
)	
COMMERCE & INDUSTRY INS. CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 24, 2007, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 6, 2007. Orvel B. Mason, of Arkansas City, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment with respondent in a series of accidental injuries beginning on October 25, 2005, and culminating on November 4, 2005. The ALJ also found that claimant reported his accident to his boss, Dennis Ringwald, within 10 days of the ending date of the series of accidents, November 4, 2005. As November 4, 2005, was found to be the date of accident, the notice of accident to respondent was timely.¹ After reviewing the medical evidence, the ALJ found that claimant is entitled to temporary total disability benefits from November 4, 2005, continuing to July 17, 2006, at the rate of \$359.12 per week. The ALJ also found that claimant is entitled to an award based on a 17 percent permanent partial impairment of function to the body as a whole.

¹ Excluding intervening weekends and holidays, as required, the notice respondent admittedly received on November 7, 2005, would likewise have been timely for an October 25, 2005, date of accident.

The ALJ ordered the payment of all of claimant's medical expenses incurred as a result of his work injury, and awarded future medical expenses upon proper application.

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

ISSUES

Respondent argues that claimant did not meet his burden of proving that he suffered personal injury by a series of accidents arising out of and in the course of his employment from October 25, 2005, through November 4, 2005, and that claimant did not give respondent timely notice of his alleged injury. Respondent contends that if claimant was injured at work, it occurred on October 25, 2005. In its brief, respondent argued that temporary total disability benefits are inappropriate in this claim because claimant was paid wages by respondent in the amount of \$400 per week for the period of January 2006 through June 30, 2006, and that respondent is entitled to a credit under K.S.A. 44-510f(b) for unearned wages paid by respondent to claimant during this time period. But during oral argument to the Board, respondent withdrew these issues and argued claimant was not temporarily and totally disabled for all of the weeks for which temporary total disability compensation was being claimed. Respondent also contends that claimant is not entitled to reimbursement for hospital and/or medical expenses because he did not prove a compensable injury. Respondent notes that claimant's medical treatment with Dr. Christopher Siwek and South Central Kansas Medical Center was paid for by Medicare and Blue Cross/Blue Shield (BCBS). Last, respondent asserts that if this claim is compensable, claimant's permanent disability is limited to a 10 percent functional impairment of the left shoulder.

Claimant argues that he proved he suffered a series of accidental injuries through his last day worked. He further claims he provided the appropriate notice of accident to respondent or, in the alternative, that he had "just cause" for any delay. Claimant also asserts he has proven a compensable claim for injuries to his left shoulder, cervical spine, and left elbow. Accordingly, claimant requests the Board affirm the ALJ's Award.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by a series of accidents on October 25, 2005, through November 4, 2005, that arose out of and in the course of his employment with respondent?

(2) Did claimant provide appropriate notice of accident to respondent within 10 days? If not, did claimant have just cause for not providing such notice?

(3) Is claimant is entitled to temporary total disability benefits? If so, for what period?

- (4) Is respondent obligated to pay claimant's medical expenses as authorized medical?
- (5) What is the nature and extent of claimant's disability?
- (6) Is claimant entitled to future medical benefits?

FINDINGS OF FACT

At the time of the alleged series of accident, claimant was a 65-year-old over-the-road truck driver who had worked for respondent since April 22, 2002. He primarily hauls cement, fly ash, and corn.

On October 25, 2005, claimant was unloading a truck load of fly ash. After he had completed the unloading, the 20-foot long, 4-inch diameter hose was still full of fly ash. In order to get the fly ash out of the hose, he had to pick up the hose manually and walk the hose upwards to drain the fly ash out of the hose. This required lifting 50-60 pounds at a time. He lifted the hose to about shoulder level and was pushing the hose into a tube. He developed a sharp left shoulder pain that lasted for only a couple minutes. He did not think much more of it, thinking he might have some arthritis in his joints, and continued to work his regular job. However, he started having problems when he would lie on his left side when sleeping in his truck. He also started having pain when he would open or pull on the truck door. On November 4, 2007, he went to see his family physician, Dr. Aaron Watters. Dr. Watters took some x-rays and told claimant that he had injured his shoulder. Dr. Watters scheduled claimant for an MRI and told claimant not to use his arm.

Claimant admits he did not call his employer before November 4, 2005. He thinks he called Mr. Ringwald, his boss, on Friday, November 4, but he may have waited and talked to him the next Monday morning, November 7. When claimant talked to Mr. Ringwald, he told him he was going to have an MRI. He told Mr. Ringwald that he had hurt his shoulder but could not remember whether he said he had hurt it at work. The MRI was run the next Friday, November 11, and showed that he had a torn rotator cuff. Claimant then called Mr. Ringwald to let him know he would be off work indefinitely. At that time he did tell Mr. Ringwald that he had hurt his shoulder at work.

After seeing the results of the MRI, Dr. Watters referred claimant to Dr. Christopher Siwek, an orthopedic surgeon. Dr. Siwek performed surgery on claimant's shoulder on December 16, 2005. By the time claimant had the surgery on his shoulder, the pain had started moving up his neck and down his left arm.

Dennis Ringwald is the president and sole stockholder of respondent. Mr. Ringwald remembered that claimant called him and said he had hurt his shoulder. The first time claimant called, he did not think anything was said about how the shoulder had been injured. He did not make any note of the conversation. On November 7, 2005, claimant

called back and told him he was going to have further medical attention, and at that time claimant told him he had hurt his shoulder on the job. Claimant drove to Mr. Ringwald's office on November 19, 2005, and together they filled out the paperwork needed to inform the insurance carrier of the claim.

Claimant was off work from November 4, 2005, until July 18, 2006, when he was released from treatment by Dr. Siwek. He did not receive temporary total disability checks during that time. From January 2006 through June 30, 2006, he received a check in the amount of \$400 each week from respondent. The checks indicated they were for "driver's expenses."² Respondent's workers compensation insurance carrier denied the claim. Therefore, neither temporary total disability nor claimant's medical treatment were paid for by respondent's workers' compensation insurance carrier, but, instead, his medical expenses were paid for by Medicare and BCBS.

On July 18, 2006, claimant returned to work at respondent doing the same job he did before his injury. He currently is having pain in his shoulder, especially in wet weather, pain in his neck, and tingling in his fingers.

Dr. Aaron Watters is a family practice physician and is claimant's family doctor. He saw claimant on November 4, 2005, at which time claimant was complaining of left shoulder pain. Dr. Watters' note of November 4, 2005, indicates that claimant told him he injured his shoulder at home. Dr. Watters testified he did not specifically recall claimant saying he hurt his shoulder at home, but claimant said that the shoulder bothered him at home and he was having trouble sleeping at night. Dr. Watters said that claimant is stoic, and Dr. Watters did not press him on where or how he hurt the shoulder.

Dr. Watters saw claimant again on November 15, 2005, after receiving the results of the MRI. The MRI showed that claimant had a complete tear of the supraspinatus tendon, with tears to the superior and anterior labrum and a longitudinal tear of the bicipital tendon. Dr. Watters recommended that claimant see an orthopedic surgeon and referred him to Dr. Siwek.

Dr. Watters next saw claimant on December 12, 2005. At that time claimant told him that he was having trouble with the insurance carrier. Together Dr. Watters and claimant went through his history. Claimant told him that he initially reported that he had hurt his shoulder at work, and Dr. Watters amended the chart by dictating a new note setting out claimant's history of the injury. That was the first time Dr. Watters had gotten a full history of how the injury occurred. At the time of claimant's initial visit, Dr. Watters did not make notes as he talked to patients but would dictate the notes for the charts later. Dr. Watters said the dictation setting out that claimant was injured at home was a mistake. Dr. Watters thinks claimant told him he injured his shoulder maneuvering a truck door. He

² R.H. Trans. (Apr. 10, 2007) at 32.

does not recall claimant mentioning rubber hosing but remembered claimant saying that grabbing the truck doors made it worse.

Dr. Christopher Siwek, an orthopedic surgeon, first saw claimant on November 22, 2005, for a left shoulder injury. Claimant had an MRI which revealed an impingement syndrome and a torn rotator cuff. Dr. Siwek diagnosed claimant with an impingement syndrome of the left shoulder and torn rotator cuff. After visiting with claimant, it was decided to proceed with surgery. On December 12, 2005, Dr. Siwek was notified by the workers compensation insurance carrier that the claim had been denied. Dr. Siwek performed surgery, a subacromial decompression and repair of the rotator cuff, on claimant's left shoulder on December 16, 2005. In the pre-surgical history and physical, claimant complained of a severe pain in his shoulder with weak, limited motion. He made no complaints involving his cervical spine and had normal range of motion of his neck.

Dr. Siwek last saw claimant on October 10, 2006. At that time claimant had gone back to work full time. He denied any pain but had occasional crepitation. Dr. Siwek did not find any evidence of muscle atrophy. He took range of motion measurements, which revealed that claimant was near normal. His strength was good. Claimant had initial restrictions of lifting limited to 20 pounds to shoulder level and avoid lifting over 15 pounds above the shoulder level for three months. After that, Dr. Siwek gave him no other limitations because his work requirements were not such that he needed to have specific limitations. Dr. Siwek has no opinion on whether claimant's problems in his cervical area or arm are related to the injury he sustained at work.

Dr. C. Reiff Brown, a retired board certified orthopedic surgeon, evaluated claimant on November 3, 2006, at the request of claimant's attorney. He took a history from claimant setting out the facts of the October 25, 2005, accident and his medical treatment. He performed a physical examination of claimant which showed he had no atrophy about the neck, shoulder or shoulder girdle. There was tenderness in the left cervical paraspinal from occiput to upper trapezius. Tenderness was severe in the upper trapezius. Tenderness was noted over the front of the shoulder. Range of motion of the left shoulder was slightly limited in flexion and extension. Mild crepitus was noted on active range of motion of the glenohumeral joint. Range of motion of the cervical spine was decreased with pulling discomfort in the cervical paraspinals on the left at end range. No crepitus was palpated. There was tenderness over the ulnar nerve and elbow on the left arm, and the Tinel sign was positive. Medial and lateral epicondylar signs were negative. Examination of the left wrist and hand revealed normal Tinel, Phalen and Finkelstein tests. There was no atrophy about the thenar, hypothenar or intrinsic musculature. There was a decrease of sensory perception in the small and ring fingers of the left hand extending into the ulnar aspect of the distal forearm. Claimant had mild grip strength weakness.

An MRI taken November 11, 2005, showed claimant had a full thickness rotator cuff tear on the left. There was degenerative joint disease in the acromioclavicular joint. An MRI performed on June 5, 2006, revealed degenerative disc disease present at the lower

four cervical segments. Foraminal stenosis was noted at C5-C6 on the foramina and contact with the dural sack was noted. There was some osteophyte formation noted at C6-7 involving the right foramina to a lesser degree. There was no herniation and no evidence of specific nerve root impingement.

Dr. Brown opined that claimant suffered a rotator cuff tear and impingement syndrome involving his left shoulder, as well as aggravation of preexisting degenerative disc disease in the cervical area. Claimant also has an ulnar cubital syndrome on the left. Dr. Brown believed those diagnoses and claimant's ongoing symptoms are the result of the October 25, 2005, injury.

Dr. Brown was not surprised that claimant did not complain about an ulnar nerve problem or numbness and tingling in his fingers for several months after the accident because it was a progressive thing and may not have reached a point of being symptomatic for several months. He admits claimant had no medical treatment for his left elbow, and he is not recommending surgery or any treatment for claimant's left elbow.

Dr. Brown said that the symptoms claimant describes in his neck are typical of a symptomatic degenerative problem involving the disks and facet joints of the cervical spine. Claimant had no history of having neck trouble before the injury, but since the injury he has a severe neck problem. Dr. Brown said that it is common for people with rotator cuff injuries and acromial impingement to have neck pain. He believes that claimant had a neck injury and after the shoulder got better, he had enough pain in his neck to get serious about treatment. Degenerative disc disease would make the neck more subject to an injury. Dr. Brown reviewed the MRI of claimant's cervical spine and agreed there was no evidence of herniation, but there was extensive degeneration. There was no evidence of cervical radiculopathy. Claimant had no medical treatment, injections or surgery on his cervical spine.

Using the *AMA Guides*,³ Dr. Brown rated claimant as having a 5 percent impairment of the left upper extremity on the basis of loss of range of motion of the shoulder, an additional 6 percent impairment of the left upper extremity on the basis of crepitus on active movement of the shoulder joint, and an additional 10 percent impairment of the left upper extremity on the basis of his ulnar cubital syndrome. Dr. Brown also rated claimant as having a 5 percent whole body impairment based on DRE Cervicothoracic Category II for an aggravation of preexisting degenerative disc disease. The ratings converted and combined for a 17 percent permanent partial impairment to the body as a whole.

Dr. Chris Fevurly, who is board certified in internal medicine and occupational medicine and who is a board certified independent medical examiner, saw claimant on

³American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

February 16, 2007, at the request of respondent. He reviewed claimant's past medical records and took a history from claimant concerning the facts of the accident.

Claimant complained that he was having an aching in the left shoulder that occurs at the extreme ranges of forward flexion or abduction, or extreme ranges of internal rotation or by leaning on the left elbow. The pain in his left shoulder is aggravated by any type of forceful activity and he has no lift strength. Claimant has pain into the left neck on occasion and there is occasional numbness in the ulnar nerve distribution of the left hand. He had no complaints relative to his right arm.

Upon examination, Dr. Fevurly stated that claimant had excellent range of motion in the cervical spine with near full rotation, extension, flexion and lateral motion. There was mild tenderness over the left neck paraspinal area and negative Spurling's test. Claimant had mild to moderate tenderness over the shoulder girdle musculature with no visible or palpable spasm. Claimant's current range of motion in his shoulders is symmetric. He found mild crepitation in both claimant's right and left shoulders. There was no obvious weakness on rotator cuff strength testing. Claimant has weakness in the left shoulder as compared to the right. There was no instability to inferior stress or anterior drawer sign. Motor strength testing in the upper extremities showed no deficits. Claimant had full range of motion in the shoulders, elbows, wrist and hands; there was no visible atrophy in the ulnar nerve innervated musculature of the hand intrinsics. Provocative testing for ulnar nerve symptoms was negative bilaterally. Tinel's testing was negative bilaterally. He had good range of motion of the lumbar spine. There was mild-to-moderate tenderness to percussion over the lumbar spine.

Dr. Fevurly diagnosed claimant with left shoulder rotator cuff tear. He opined that claimant likely had preexisting degenerative thinning and changes in the rotator cuff that was aggravated by the work activity in October 2005, leading to the diagnosis of left shoulder rotator cuff tear. He found claimant had degenerative disc disease at C5-6 and C6-7 but found no evidence of cervical spine injury resulting from his work events. Dr. Fevurly suspects claimant's cervical spine changes are preexisting and degenerative in nature and occurred over time. Claimant had an abnormal left upper extremity EMG with findings consistent with ulnar neuropathy, but Dr. Fevurly opined that this condition was not work related. Claimant had a history of low back pain with radiculopathy and a history of numbness in the thumb and index fingers that were not related to claimant's injury of October 25, 2005.

Based on the *AMA Guides*, Dr. Fevurly rated claimant as having a 10 percent left upper extremity impairment as a residual of the left shoulder rotator cuff repair. He found no evidence of a cervical spine injury from his work or evidence that claimant's left ulnar nerve entrapment condition was caused by a work event. Dr. Fevurly recommended that claimant limit his lifting to chest level to 30 pounds on an occasional basis, overhead lifting limited to 15 pounds on an occasional basis. He should avoid prolonged or repetitive forceful overhead activity with the left arm.

Alice Erickson is the business services team leader at South Central Kansas Regional Medical Center. She has access to the billing provided to claimant for services on November 11, 2005, December 16, 2005, and from December 19, 2005, through March 1, 2006. She identified an itemized statement of all the services provided to claimant on each of the aforementioned dates. They are the bills from Dr. Siwek. The billing for November 11, 2005, was for an MRI of the left shoulder. There was also billing for physical therapy from December 19, 2005, through March 1, 2006. Payments on those accounts were made by BCBS and Medicare, and the present balance on the accounts is 0. The total charges for all the services provided to claimant from November 11, 2005, through March 1, 2006 was \$15,635.62. None of the charges were ever submitted to the workers compensation insurance carrier for payment.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" 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 when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the

⁴ K.S.A. 2006 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.⁶

“An accidental injury is compensable even where the accident only serves to aggravate a pre-existing condition.”⁷

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act.⁸ In *Nance*,⁹ the Kansas Supreme Court stated:

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2006 Supp. 44-508(d) states:

⁶ *Id.* at 278.

⁷ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁹ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. 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.

K.S.A. 44-510h(b) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

ANALYSIS AND CONCLUSION

The ALJ's Award contains findings of fact and conclusions of law that are accurate and supported by the record. The Board agrees with and adopts the findings and conclusions of the ALJ. In short, the Board finds:

(1) Claimant suffered personal injuries to his elbow, shoulder and neck by a series of accidents that occurred each and every working day from October 25, 2005, through November 4, 2005. Those accidental injuries arose out of and in the course of his employment with respondent.

(2) Claimant gave timely notice of accident on November 7, 2005, to his supervisor, Dennis Ringwald.

(3) Claimant is entitled to 36.43 weeks of temporary total disability compensation for the period of November 5, 2005, through July 17, 2006.

(4) Respondent is to pay all reasonable and related medical expenses incurred by claimant subject to the Kansas Medical Fee Schedule.

(5) Claimant is entitled to an award of permanent partial disability compensation based upon the 17 percent permanent impairment of function rating opinion given by Dr. C. Reiff Brown.

(6) Claimant is entitled to future medical compensation upon application to and approved by the Director of the Division of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 24, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel B. Mason, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge