

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

PEDRO P. HERRADA)	
Claimant)	
VS.)	
)	Docket No. 1,028,032
UNITED BUILDING CENTERS)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the preliminary hearing Order Denying Medical Treatment of Administrative Law Judge Pamela J. Fuller dated June 20, 2006. Claimant's request for medical treatment was denied.

ISSUES

In claimant's Application For Review, the following issues were raised on appeal:

1. Whether Claimant's current complaints are a natural and probable result of his original injury while working for the Respondent 07-29-04.
2. All other appealable issues.¹

It is obvious from the preliminary hearing transcript that respondent contested claimant's right to medical treatment as it relates to his employment with respondent, as well as whether claimant gave timely notice of an injury to his left shoulder and whether timely written claim was submitted in this matter. However, the Order of the ALJ states, in its entirety, "[c]laimant's request for medical treatment is hereby denied." No additional explanation is contained in the record.

¹ Claimant's Application For Review at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant worked for respondent as a block laborer and a truck driver. On July 29, 2004, while taking a load to KDOT, claimant tripped over some rebar and fell on his knees, injuring his knees, his back and his right shoulder. The injuries were reported to his employer, and medical treatment was provided with Mark S. Williams, D.O., and Michael J. Baughman, M.D., of Sandhill Orthopaedic and Sports Medicine. X-rays of claimant's cervical spine taken on July 29, 2004, were within normal limits. Right shoulder x-rays were basically within normal limits, although one view demonstrated a possible undisplaced fracture of the glenoid. X-rays of claimant's knees and right ankle were normal.

Claimant was provided medication and returned to work with limitations of no kneeling, squatting, crawling or stooping. He was also restricted from lifting over 20 pounds and prohibited from pushing or pulling over 40 pounds. Claimant's history indicated that he had suffered chest pain 3 to 4 years before, at which time he underwent a heart catheterization.

Claimant returned to Dr. Williams on August 9, 2004, at which time he continued with physical therapy for the shoulder and right knee, with his restrictions raised to no lifting over 40 pounds and no pushing or pulling over 60 pounds. The remainder of claimant's restrictions were unchanged.

Claimant was next examined by Dr. Williams on August 23, 2004. At that time, claimant was found to have only minor crepitus in his right shoulder, with full flexion and full range of motion. His right knee remained slightly swollen, as compared to his left knee, but no effusion was palpated. He had no tenderness to palpation. Claimant reported that he was feeling fairly well. He denied any catching, grinding or instability of the shoulder or knee. He was released to full duty with the instruction to return to the doctor if he had any problems. While claimant was being treated by Dr. Williams, he regularly provided the doctor's restriction sheets to respondent.

The next time claimant was examined by Dr. Williams was on December 9, 2004, at which time claimant underwent a DOT physical. At that time, claimant was found to have normal strength and full range of motion in all of his extremities. With the exception of a slight vision problem, claimant's physical was normal, with no complaints. The only cautions from the doctor included that claimant quit smoking and see an optometrist regarding the slight vision limitations.

Claimant last worked for respondent on January 19, 2005. On February 17, 2005, claimant requested a leave of absence, indicating heart trouble as the reason for the

leave request. On March 14, 2005, claimant was terminated from his employment with respondent. At that time, he cashed in his 401(k) fund. Claimant has not worked for anyone since leaving respondent.

Claimant was first examined by Guillermo Garcia, M.D., of the Siena Medical Clinic in Garden City, Kansas, on May 1, 2006. Claimant complained of pain in his shoulders, bilaterally, which he reported to Dr. Garcia was the result of a July 28, 2004 fall at respondent's job. Claimant advised Dr. Garcia that he had been unable to use his upper extremities in a regular fashion since the July 28, 2004 accident.

X-rays of claimant's shoulders were described as normal in the radiology report. However, Dr. Garcia's office note of May 1, 2006, indicated the x-rays showed early degenerative osteoarthritis of the acromioclavicular joint of the right shoulder, and impingement syndrome of both shoulders. Claimant was also complaining of blackouts and indicated he experienced something "almost like a seizure disorder."² Dr Garcia diagnosed a possible rupture of the rotator cuff. Dr. Garcia recommended an MRI.

Claimant was next examined by Dr. Garcia on May 17, 2006. At that time, Dr. Garcia reported the MRI was consistent with a focal tear of the right rotator cuff and a large osteophyte was noted. The left shoulder was indicated as "similar".

A Written Claim For Compensation, form K-WC 15, was submitted to respondent on March 16, 2006.

Respondent raised three defenses to claimant's request for medical treatment. The ALJ's Order denied claimant's request for medical care but failed to specify the reason for that denial. The Board must, therefore, consider each issue raised by respondent in order to determine whether there was justification for that denial.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.³

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.⁴

² P.H. Trans., Cl. Ex. 2 (Dr. Garcia's office note of May 1, 2006).

³ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

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

Respondent argued at the preliminary hearing that claimant failed to provide notice of an injury to his left shoulder. However, respondent agrees that claimant suffered an injury arising out of and in the course of his employment, and that medical treatment was provided to claimant's neck, right shoulder, bilateral knees and right ankle within 24 hours of the injury. K.S.A. 44-520 requires notice of an accident. Claimant provided notice on the date of accident and respondent's agents clearly had knowledge of and provided medical treatment for that accident. Therefore, the requirements of K.S.A. 44-520 have been satisfied.

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. . . .⁵

Claimant argues that written claim in the form of the medical restriction forms from Sandhill Orthopaedic and Sports Medicine were submitted to respondent by claimant on more than one occasion. The law in Kansas is clear in that a written claim need not take any particular form, so long as it is in fact a "claim".⁶ The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.⁷ The same purpose or function has, of course, been ascribed to requirement for notice found in K.S.A. 44-520.⁸ Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*,⁹ the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in

⁵ K.S.A. 44-520a(a).

⁶ *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

⁷ *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

⁸ *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

⁹ *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

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?

Claimant was questioned regarding the restriction forms.

Q. Okay. Dr. Williams gave you some paperwork to take back to your employer; is that correct?

A. Yes.

Q. And did you take that to your employer?

A. Yes.

Q. You remember who you gave that to?

A. To Mr. Stowe.

Q. Did you take that to him as part of your workers' compensation case?

A. Yes.¹⁰

The providing of medical restriction forms from a treating doctor constitutes a claim for workers compensation benefits under certain circumstances, including where they are intended as requests for payment of treatment or for additional treatment, or to request accommodation as a consequence of a work-related injury. Here, the Board finds, by the barest of margins, that claimant submitted timely written claim.

Claimant was released to return to work by the treating physician on August 23, 2004, at which time he was cautioned to return to the doctor if he had any additional problems. Claimant never returned to Dr. Williams for added treatment for his work-related injuries. Additionally, on December 9, 2004, claimant passed a DOT physical, displaying full motion in all of his extremities. There was no indication of any physical problems during that physical examination except for a vision problem and a recommendation by the doctor that claimant quit smoking. The first indication of added problems did not occur until the May 1, 2006 examination with Dr. Garcia.

The Board acknowledges an aggravation is all that is required in order to make an injury compensable.¹¹ However, this record does not support a finding that claimant's condition for which Dr. Garcia is offering treatment is related to his work or his work-related injuries with respondent. The Board finds that claimant has failed to prove that his current

¹⁰ P.H. Trans. at 7 (lines 12-21).

¹¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

need for medical treatment arises out of and in the course of his employment with respondent. The Board, therefore, finds the Order of the ALJ denying claimant medical treatment in this matter should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated June 20, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier