

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

<b>RONALD L. KEATHLEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>BROWN &amp; BROWN, INC.</b>	)	
Respondent	)	Docket No. 1,030,660
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the November 8, 2006 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

The Administrative Law Judge (ALJ) denied the claimant's request for compensation as he found that the claimant failed to sustain his burden of proving that notice of his accident was within 10 days and failed to establish "just cause" for enlargement of the notice period to 75 days.<sup>1</sup>

The claimant requests review of this decision and alleges the ALJ erred in concluding he failed to establish "just cause" as that term is used in K.S.A. 44-520. Claimant maintains that he gave notice on the 13<sup>th</sup> day after the accident and that such notice was "reasonable".<sup>2</sup> And that he not only wanted to preserve the safety bonus for himself and his co-workers, but that he thought his pain would subside over time, thereby avoiding the need to file a claim. Thus, "since the notice was just a few days tardy, the

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<sup>1</sup> ALJ Order (Nov. 8, 2006).

<sup>2</sup> Claimant's Brief at 1 (filed Nov. 27, 2006).

Board should require a lesser 'just cause' showing to justify [an] extension of time than in a situation where it has taken a claimant 75 days to convey notice."<sup>3</sup>

Respondent argues that the ALJ's preliminary hearing Order should be affirmed as claimant failed to establish "just cause" for giving notice beyond the statutorily prescribed 10 day period.

The only issue before the Board in this appeal is whether claimant established "just cause" for the delay in reporting his alleged accident as claimant concedes he did not provide notice within the 10 day period set forth in the statute.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The ALJ adequately and succinctly set forth the pertinent facts relative to this appeal and this Board Member adopts those as her own.

K.S.A. 44-520 provides:

**Notice of injury.** 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.

This statute provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to "just cause".

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<sup>3</sup> *Id.*

In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually;
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job;
- (3) The nature and history of claimant's symptoms; and
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

Here, the claimant alleges his accident occurred not in a single, acute event but over a period of a few days. While it was not a single sudden injury, he is apparently able to identify where he was injured (Stanton County, Kansas), what he was doing when he was injured (running heavy equipment up and down out of a ditch) and when it occurred (over a 5-6 day period, ending August 8, 2006). He would notice the pain as he got out of his seat at the end of the day. So the connection between his low back pain and his work duties was clear and relatively quick to manifest itself. And while claimant had an earlier upper back problem that necessitated surgery to his spine, nowhere in the record does it suggest that he believed these low back pains were related to that earlier injury and subsequent treatment. Moreover, claimant knew he was required to report such injuries. Put simply, claimant had a low back injury as a result of a series of days work and he knew it but failed to tell his employer even during subsequent phone conversations within the initial 10 day period.

Before a determination can be made on the timeliness of claimant's notice, it must first be determined what claimant's date of accident is for purposes of this claim. This is an alleged repetitive trauma injury. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.<sup>4</sup>

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

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<sup>4</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

(d) "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.

In this case, claimant was neither taken off work, nor restricted from performing the work which caused his condition by an authorized physician. He went to the emergency room on August 18, 2006, but there is no indication in the records that his condition is diagnosed as work-related. A second emergency room visit to a Salina hospital indicates his low back complaints are "possibly" due to work, "jounding [sic] around".<sup>5</sup> This record is undated but according to claimant, he went to this facility on August 21, 2006. On or about August 23, 2006 claimant had an MRI and thereafter, on August 25<sup>th</sup> claimant spoke to Ken Michael, his supervisor. Claimant testified that he told Mr. Michael the following:

I told him that I was hurt, that I had tried to let it ride and I thought maybe it would go away. I was willing to just, you know, eat the first couple bills, see if I got feeling better, and – but it wasn't going – you know, it wasn't going away and I had to tell him, you know.<sup>6</sup>

Respondent denied the compensability of claimant's claim based upon this conversation, asserting that claimant failed to notify respondent of his claim within 10 days. As a result, claimant obtained counsel and, on August 29, 2006, an Application for Hearing was filed by claimant's counsel. The Division's file also indicates that claimant's counsel provided respondent with a Form 15, Written Claim for Compensation on that same date.

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<sup>5</sup> P.H. Trans., Resp. Exhibit A.

<sup>6</sup> Claimant Depo. at 29.

Based upon the new version of the statute, this member finds that August 29, 2006 is claimant's date of accident, at least for purposes of providing timely notice. Even though claimant knew he injured his back in the days leading up to August 8, 2006, and even after that date, as he sought out treatment, the statute's language makes no mention of the date of accident being tied to a claimant's realization as to the cause of his problems. To the contrary, the language of the statute makes it clear under these facts that claimant's accident is not deemed to have occurred until written notice was given to respondent. And that date was August 29, 2006. There is no evidence to suggest that any of the physicians who saw claimant diagnosed him with a work-related injury. One record indicates the injury was "possibly" caused by work activities, but there is no indication when or if that fact was communicated to claimant in writing.

Admittedly, the date of accident occurring on August 29, 2006, 3 weeks after claimant last worked for respondent is logically problematic. But the Legislature has determined that last date worked was no longer acceptable and one could argue that the legal fiction created by the new version of the statute is just as problematic as the "last date of exposure" dictated by *Treaster* and its progeny.

This analysis is all the more difficult as the parties did not address this change in the law. It could well be that there are additional documents or facts that would alter this analysis. Nevertheless, given the facts contained within the record as is presently developed, claimant provided timely notice as his accident date is deemed to have occurred on August 29, 2006, the same date his attorney mailed written notice of his claim to respondent. For this reason, the ALJ's preliminary hearing finding that claimant failed to give timely notice is reversed.

The ALJ did not comment on the balance of the disputed jurisdictional issue, that being whether claimant sustained an accidental injury arising out of and in the course of claimant's employment. Accordingly, this member of the Board will remand this matter back to the ALJ for consideration of that issue.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 8, 2006, is reversed and remanded to the ALJ for further proceedings consistent with the findings set forth herein.

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<sup>7</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2007.

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BOARD MEMBER

c: Scott M. Price, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge