

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

KENNY LY)	
Claimant)	
VS.)	
)	Docket Nos. 1,030,212
BROCE MANUFACTURING COMPANY, INC.)	& 1,031,021
Respondent)	
AND)	
)	
ACE PROPERTY & CASUALTY INSURANCE COMPANY and THE HARTFORD INSURANCE GROUP)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier The Hartford Insurance Group (Hartford) appeal the December 2, 2009, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded a 14 percent permanent partial disability to the whole body for injuries suffered on July 6, 2006, and a 10 percent permanent partial functional impairment for the loss of use of the left shoulder from the injuries suffered on September 7, 2006.

Claimant appeared by his attorney, D. Shane Bangerter of Dodge City, Kansas. Respondent and its insurance carrier Ace Property & Casualty Insurance Company appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas. Respondent and its insurance carrier Hartford appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The parties stipulated at oral argument to the Board that the 10 percent upper extremity award at the level of the left shoulder in Docket No. 1,031,021 with an injury date of September 7, 2006, is appropriate and the award should be affirmed. Respondent acknowledged that the issues regarding timely notice and written claim in Docket No. 1,031,021 are no longer in dispute. That portion of that award will, therefore, be affirmed. The parties further agreed that the \$5,000.00 paid to claimant as part of the settlement on July 24, 2009, wherein the liability of Ace

Property & Casualty Insurance Company was resolved, shall be applied to the award in Docket No. 1,031,021 against the 10 percent functional impairment to the left shoulder. The Board heard oral argument on March 3, 2010.

ISSUES

1. Did claimant suffer accidental injury or injuries on and after June 15, 2005, which arose out of and in the course of his employment with respondent? Respondent does not dispute that claimant suffered an injury on June 15, 2005, to his chest which, respondent argues, completely healed. Respondent contends that claimant has failed to prove any additional injury to claimant's right upper extremity and/or paraspinals as the result of any labor-related injury or injuries suffered while working for respondent.
2. If claimant did suffer additional accidental injury or injuries, on what date or dates did the accident or accidents occur? Claimant argues that he suffered the original accident on June 15, 2005, and after returning to work, began experiencing additional symptoms to his upper extremities and paraspinals as the result of the jobs he was performing for respondent. Respondent denies that claimant suffered additional accidents or injuries after the initial accident on June 15, 2005.
3. Did claimant provide timely notice of an accident or a series of accidents through July 14, 2007?
4. Did claimant submit timely written claim for an accident or accidents on June 15, 2005, and/or for a series of accidents through July 14, 2007?
5. If claimant suffered accidental injury or injuries on or after June 15, 2005, what is the nature and extent of those injuries? Claimant argues entitlement to a 19 percent whole body functional impairment. Respondent contends that claimant should be limited to an award to his right upper extremity.

FINDINGS OF FACT

Claimant works as a welder for respondent and has been so employed since February 21, 2000. Claimant worked on the "broom line", an area where welders would assemble street sweeping equipment. On June 15, 2005, while lifting an 80-pound tire, claimant experienced a pop in his chest and immediately felt pain. Claimant reported the injury and was referred to Dr. Snodgrass at the CNS Medical Clinic. Claimant was referred for physical therapy and placed on light duty for a short period of time. Claimant's chest pain was of short duration. Claimant returned to his regular job, but testified that the chest pain returned later. At some point, claimant's chest discomfort was diagnosed as a back

injury. Claimant underwent injections for the back problem and was prescribed additional physical therapy. Claimant continued working his regular job and missed no work. The light duty lasted for approximately one week.

At some point in 2006, claimant began developing right upper extremity pain, with pain extending into claimant's chest area. It should be noted that many date references provided by claimant in this record are vague. Nerve conduction studies indicated ulnar nerve involvement at the right elbow. Claimant underwent a right cubital tunnel release under the care of Dr. Neel on October 20, 2006, and then was referred back to physical therapy. Claimant was recommended for right carpal tunnel syndrome surgery, but this record is unclear as to whether that surgery actually took place. Claimant did undergo surgery to his left shoulder, consisting of manipulation under anesthesia, debridement, bursectomy and subacromial decompression. However, the above stipulations regarding the left shoulder renders further discussion of the left shoulder unnecessary.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on July 24, 2007, and again on December 18, 2007. On July 24, claimant was diagnosed with pain and tightness in the mid back, numbness and tingling in his hands, right elbow pain with swelling, myofascial pain syndrome affecting the right shoulder girdle extending into the thoracic paraspinals and mid back pain and stiffness. Dr. Murati attributed claimant's problems to accidents on June 15, 2005, March 21, 2006, May 11, 2006, and September 7, 2006.

Dr. Murati examined claimant a second time on December 18, 2007. At that time, he diagnosed claimant with right ulnar cubital syndrome, right sternochondritis, right medical epicondylitis, status post manipulation under anesthesia followed by surgery to the left shoulder and myofascial pain syndrome affecting the right shoulder girdle extending into the thoracic paraspinals. Dr. Murati provided no functional impairment rating for claimant.

Claimant was referred by the ALJ to board certified physical medicine and rehabilitation specialist Terrence Pratt, M.D., for an independent medical evaluation on June 24, 2008. Claimant initially reported left shoulder, right elbow and right parascapular complaints along with chest wall complaints. An examination of claimant's chest wall failed to uncover anything. Claimant was diagnosed with a history of chest wall discomfort with resolution, right parascapular syndrome, right cubital tunnel syndrome status post release, right carpal tunnel syndrome and right lateral and medial epicondylitis. A CT scan of claimant's chest was read to display no significant abnormalities. Dr. Pratt noted in his report that claimant did not wish to pursue any active medical treatment at the time of the examination. Therefore, a rating was found to be appropriate.

Dr. Pratt found claimant to have a 2 percent permanent partial impairment of the whole person for the parascapular area. However, Dr. Pratt acknowledged that if he used the DRE under the fourth edition of the *AMA Guides*¹, the rating would be zero because claimant had no rigidity, a requirement for a rating. Dr. Pratt also explained that the parascapular area is actually over the scapula, between the cervical region and the thoracic region. Claimant was given a 20 percent impairment to the right upper extremity for both functional limitations and peripheral nerve entrapment, with this rating being pursuant to the fourth edition of the *AMA Guides*.²

Claimant submitted written claim to respondent on July 28, 2006, for an accident occurring on June 15, 2005, and each day thereafter. It was received on August 2, 2006. This injury involved the chest/back and the upper extremities.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her 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

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

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

⁵ K.S.A. 2006 Supp. 44-501(a).

occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the 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 if it arises out of the nature, conditions, obligations and incidents of the employment."⁶

Claimant worked for respondent for several years performing tasks which required significant lifting and manual labor. He suffered what appears to be several injuries while performing these tasks. These accidents were reported to respondent and medical treatment was provided for a substantial period of time. Respondent argues that claimant suffered a single injury on June 15, 2005, from which claimant fully recovered. However, claimant's testimony that he continued to experience pain and even suffered additional trauma while working is persuasive. Claimant has proven that he suffered a series of accidents while working for respondent which arose out of and in the course of his employment with respondent.

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

"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.

Claimant suffered a specific traumatic injury on June 15, 2005. However, he remained with respondent performing his regular duties, except for a very brief stint on light

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

duty. During this time, claimant continued to suffer additional traumas from the heavy work. Claimant advised his supervisors of ongoing problems from the work and was referred for medical treatment for many months. He even underwent surgery on his right elbow with Dr. Neel on October 20, 2006. However, claimant had submitted written claim to respondent for the chest/back and upper extremity injuries on August 2, 2006. Pursuant to K.S.A. 2006 Supp. 44-508(d), the Board finds that claimant's date of accident for the series of accidents is August 2, 2006.

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. . . .⁷

Claimant's written claim received on August 2, 2006, for an August 2, 2006, date of accident is timely.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

Claimant contends he suffered injury to his right upper extremity, back and chest from the series of accidents beginning on June 15, 2005. However, the medical opinion of Dr. Pratt fails to support claimant's request for an impairment to the whole body. The credible functional opinion limits claimant's functional disability to the right upper extremity, without permanent involvement of the parascapular area. The Board finds that claimant's permanent impairment is limited to the 20 percent permanent partial functional impairment to claimant's right upper extremity pursuant to the opinion of Dr. Pratt.

CONCLUSIONS

Claimant has suffered an accidental injury to his left upper extremity at the level of the shoulder for a 10 percent permanent partial functional disability. Pursuant to the stipulation of the parties, the \$5,000.00 paid to claimant as part of the settlement on

⁷ K.S.A. 44-520a(a).

⁸ K.S.A. 44-510e(a).

July 24, 2009, wherein the liability of Ace Property & Casualty Insurance Company was determined, shall be deducted from the award for the injury to claimant's left shoulder.

Claimant has also suffered a series of accidental injuries which arose out of and in the course of his employment with respondent with an accident date of August 2, 2006, for a 20 percent permanent partial functional disability at the level of the right arm. Both notice and written claim were timely provided.

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified as noted above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 2, 2009, should be, and is hereby, affirmed with regard to the 10 percent permanent partial functional disability to the left upper extremity at the level of the shoulder for the injury occurring on September 7, 2006, but modified to deduct the \$5,000.00 from this award as stipulated above. The Award is further modified to find that claimant has suffered a 20 percent permanent functional disability to the right upper extremity at the level of the right arm for the injuries suffered through August 2, 2006. In all other regards, the award of the Administrative Law Judge is affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kenny Ly, and against the respondent, Broce Manufacturing Company, Inc., and its insurance carrier, The Hartford Insurance Group, for the injury suffered on September 7, 2006, and for an accidental injury which occurred through a series of accidents through August 2, 2006, and based upon an average weekly wage of \$555.96.

Claimant is entitled to 22.5 weeks permanent partial disability at the rate of \$370.66 per week or \$8,339.85 for a 10 percent permanent partial functional disability at the level of the left shoulder for the injury suffered on September 7, 2006. Respondent is given credit for the sum of \$5,000.00 paid from the settlement in this matter with Ace Property & Casualty Insurance Company. The remaining \$3,339.85 is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to 42 weeks permanent partial disability at the rate of \$370.66 per week or \$15,567.72 for a 20 percent functional disability to claimant's right upper extremity at the level of the arm for the series of injuries suffered through August 2,

2006. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge shall be affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: D. Shane Bangerter, Attorney for Claimant
- Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier Hartford Insurance Group
- Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier Ace Property & Casualty Insurance Company
- Pamela J. Fuller, Administrative Law Judge