

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

DONALD HACKNEY)
 Claimant)
)
VS.)
)
R.S. ANDREWS ENTERPRISES OF)
KANSAS)
 Respondent)
)
AND)
)
ZURICH AMERICAN INSURANCE CO.;)
CONTINENTAL CASUALTY INS. CO.;)
CONTINENTAL WESTERN INS. CO.; and)
NATIONWIDE MUTUAL INSURANCE CO.)
 Insurance Carriers)

Docket No. 1,031,297

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, Nationwide Mutual Insurance Co., (Nationwide) requested review of the February 8, 2007, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Timothy E. Power, of Overland Park, Kansas, appears for claimant. Bret C. Owen, of Topeka, Kansas, appears for respondent and its insurance carrier, Nationwide. Nathan D. Burghart, of Lawrence, Kansas, appears for respondent and its insurance carrier, Continental Western Insurance Company (Continental Western). Brian G. Boos, of Kansas City, Missouri, appears for respondent and its insurance carrier, Zurich American Insurance Company (Zurich). James R. Hess, of Overland Park, Kansas, appears for respondent and its insurance carrier, Continental Casualty Insurance Company (Continental Casualty).

The record is the same as that considered by the ALJ and consists of the transcript of the February 8, 2007, Preliminary Hearing, claimant's Exhibits 1 through 3, and respondent's Exhibit A, together with the pleadings contained in the administrative file.

The Administrative Law Judge (ALJ) determined that claimant's date of accident was October 9, 2006, and directed respondent/Nationwide to provide medical care, including surgery, with either Dr. Mark Bernhardt or Dr. John Ciccarelli. The ALJ's Order does not contain any analysis, nor does Judge Howard indicate how he decided October 9, 2006, is the date of accident. The ALJ made no other findings of fact or conclusions of law in the ALJ's Order except for a recitation of the dates of coverage for the four insurance carriers for respondent that were represented by counsel and were present at the hearing. The ALJ did not make a finding that notice of accident and written claim were timely, but this can be inferred from the ALJ's order that workers compensation benefits be provided to claimant by respondent and Nationwide.

By statute, preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board, as it is when the appeal is from a final order.²

ISSUES

Respondent/Nationwide argues that claimant's need for surgery is a direct and natural result of his July 23, 2002, accident. Respondent/Nationwide also contends that timely written claim was not made for the 2002 accident, and claimant is, therefore, not entitled to workers compensation benefits.

Respondent/Continental Western agrees with respondent/Nationwide's argument that claimant's present condition, including his need for surgery, is a direct and natural consequence of his 2002 injury. However, in the event the Board agrees with the ALJ that claimant suffered a compensable series of accidents, respondent/Continental Western asserts that the ALJ properly determined the date of injury to be October 9, 2006, making respondent/Nationwide solely responsible for all benefits to which claimant would be entitled.

Respondent/Zurich requests that the Board affirm the preliminary hearing Order of the ALJ. Respondent/Zurich argues that claimant's current condition resulted from a series of events within the meaning of K.S.A. 44-508(d), and since claimant was not taken off work or restricted between July 23, 2002, and the date he made claim for compensation, the date of accident is the date he gave written notice to the employer of his injury.

Respondent/Continental Casualty did not file a brief in this appeal.

¹ K.S.A. 44-534a.

² K.S.A. 2006 Supp. 44-555c(k).

Claimant argues that his low back condition got progressively worse over time due to a series of micro-traumas as a result of his employment with respondent. Claimant contends he was asymptomatic after his July 2002 accident but was symptomatic due to his repetitive work activities from approximately late 2004 forward. Accordingly, claimant requests that the Board affirm the ALJ's preliminary hearing Order.

The issues for review are:

1. Did claimant suffer a single accident or a series?
2. What is the claimant's date of accident?
3. Did claimant give timely notice of his accident?
4. Did claimant make a timely written claim for compensation?

FINDINGS OF FACT

Claimant claims he suffered a series of repetitive traumas, with an "[i]nitial injury on July 23, 2002, and each and every day worked thereafter."³ At the preliminary hearing, claimant's attorney stated that claimant is "claiming a series of cumulative traumas from July 23rd, 2002, forward, to cover all applicable time periods. . . . The date [of accident] would be October 9th, 2006, based on [K.S.A. 2006 Supp. 44-508(d)] because that's the day the written notice was given."⁴ During the period of time claimant is claiming injuries, respondent had insurance coverage with at least four insurance carriers:

Zurich had coverage from March 1, 2002, to June 30, 2003.⁵
Continental Casualty had coverage from June 30, 2003, to March 15, 2004.
Continental Western had coverage from March 16, 2004, to March 15, 2006.
Nationwide had coverage from March 15, 2006, to March 15, 2007.

Claimant began working for respondent as a plumber in 2000. As part of his job, he was required to lift objects weighing up to 250 to 300 pounds. He also was required to work in awkward positions, including twisting, bending, and stooping. While working for claimant on July 23, 2002, claimant fell through a ceiling, striking a corner of a desk and ending up on the concrete floor. He was taken by ambulance to the emergency room.

³ Form K-WC E-1 Application for Hearing filed October 9, 2006.

⁴ P.H. Trans. (Feb. 8, 2007) at 7.

⁵ At the Preliminary Hearing, counsel for respondent and Zurich announced that Zurich's coverage was from March 1, 2002, to June 30, 2003. However, the Division's records reflect that the insurance carrier for the period of March 2, 2003, to June 29, 2003, is unknown.

The emergency room records note:

He complains of severe pain in his lower back. He denies any bowel or bladder incontinence but did have weakness and numbness feelings as if his legs were dead initially after he landed. He states he could move them, everything was working but it did feel dead and numb. . . .

. . . . We did obtain LS spine which was interpreted by radiology as well as myself as showing no acute abnormalities. . . . I went ahead and did a CT scan of the LS spine as well which showed basically spondylolisthesis of L4-L5 and L5-S1, a little bit of significant spinal narrowing but no acute abnormalities.⁶

Claimant was discharged the same day with a diagnosis of left shoulder contusion, musculoskeletal strain and contusion, and abrasions. By the time he was released, the numbness, tingling and pain in his legs had gone away. The records indicate claimant was to do no heavy lifting for 48 hours, but he did not remember being told that and, in fact, returned to work the next day doing the same duties as before his fall. He was told that if he had any further problems to see his personal physician. He was not given any permanent work restrictions following the July 23, 2002, accident.

In October 2002, claimant became self-employed. He started his own business in an effort to make more money. His company installed and repaired water softeners. His condition was not worsened by his work at his business because it was lighter duty than the work at respondent. Claimant remained self-employed until June 2004. During that period of time, claimant did not sustain any injuries to his back or legs. In June 2004, claimant returned to work for respondent, again in the capacity of a plumber.

Claimant had left calf pain from June 2004 that progressed into his leg and hip and into the back. On June 27, 2005, claimant saw a physician's assistant in the office of his personal physician, Dr. Darren Davis. Those records indicate that claimant

complains of left posterior calf pain that has been present for the last year. The patient states that the pain seems to be worse after he gets home from work. The patient states he will sit down in his chair and notice the pain and [it] will be intense throughout the rest of the evening. The patient states even though this has been present over the past year it has been extremely painful over the past month. . . . Patient denies any numbness, tingling, decrease strength, or sensation.⁷

Claimant thought the leg pain was related to his diabetes. He returned to Dr. Davis' office on January 16, 2006, at which time he complained of

⁶ *Supra* at note 4, Cl. Ex. 1, sec. 1 at 2-3.

⁷ *Id.*, Cl. Ex. 1, sec. 2 at 1.

left posterior calf pain that has been present for the past several months. Patient states when it initially started it was intermittent. He would notice the pain later in the day. He would sit down in the evening and put heat on his leg and the pain would resolve. Patient states the pain has increased to where he is noticing it throughout the day. He is having a hard time getting comfortable at night when he rests. Heat and anti-inflammatories helped initially. The patient questions [sic] it is possibly worse with activity. The patient states his job does require him to be active throughout the day. The patient denies any swelling. He denies any numbness or tingling or decreased strength or sensation.⁸

X-rays taken January 16, 2006, showed mild anterolisthesis of L4 on L5. Alignment was normal, and no fracture was seen. Mild degenerative changes were seen, but no identified acute abnormality was noted. An MRI performed on February 24, 2006, showed “[d]egenerative disk and facet joint disease at multiple levels, with spinal canal narrowing from L3-4 through L5-S1, greatest at L4-5. No prominent focal disk herniations are seen.”⁹

On April 7, 2006, claimant was seen by Dr. Brian Balanoff. Dr. Balanoff’s report notes:

He has had approximately six months of cramping, aching back pain, most of his problem being pain from his left hip to his calf, kind of an achy, crampy sensation. No sharp burning sensation. No tingling or numbness. No muscle weakness is noted. His pain is described as about a 7 out of 10 made worse with walking or standing or lifting any weight, although he does do quite a considerable amount of lifting as he is a plumber and has to lift water heaters. The pain stops if he is either sitting or lying down without weight bearing.

IMPRESSON: Lumbar back pain with radiculopathy.¹⁰

Claimant then received a series of three epidural steroid injections. These injections provided him only temporary relief.

Dr. Davis referred claimant to Dr. O’Boynick, and claimant saw Dr. O’Boynick on July 26, 2006. Claimant described a pain that begins in the left buttock and extends down the left posterior thigh into the calf. He has the same pain but of lesser severity on the right. Claimant testified that after Dr. O’Boynick reviewed the x-ray films taken on July 23, 2002, he told him that he had fractured his spine. Dr. O’Boynick told him that the type of work he was doing was damaging his back. This was the first time claimant realized that his problems were work related. Dr. O’Boynick recommended a CT scan and a myelogram

⁸ *Id.*, Cl. Ex. 1, sec. 2 at 4.

⁹ *Id.*, Cl. Ex. 1, sec. 2 at 9.

¹⁰ *Id.*, Cl. Ex. 1, sec. 3 at 1.

of claimant's lumbar spine. After reviewing the results of those tests, Dr. O'Boynick stated that claimant had stenosis at L4, 5, which he opined was the cause of claimant's pain. Dr. O'Boynick recommended a decompressive laminectomy.

Claimant saw Dr. James Stuckmeyer at the request of his attorney on December 16, 2006. Claimant complained of significant low back pain with numbness and tingling into both lower extremities. He had cramping in both calves and in the buttock and posterior thigh region, greater on the left than the right. Claimant told Dr. Stuckmeyer that he had a traumatic accident in July 2002 but that the symptoms resolved and he continued to work full time with no restrictions. But as a result of the repetitive nature of his occupation in late 2004 and early 2005, he developed increasing symptoms of back pain and leg pain.

Dr. Stuckmeyer agreed with Dr. O'Boynick that claimant would benefit from a decompressive laminectomy at L3-4 and L4-5. Dr. Stuckmeyer believed that the occupational duties required by claimant throughout his six years of employment aggravated and accelerated the development of his spinal stenosis.

Dr. Ciccarelli saw claimant for an independent medical examination requested by respondent/Nationwide on January 11, 2007. His report indicates that claimant fell on July 23, 2002, resulting in severe back pain and numbness and tingling down both legs.

He was released from the ER and then went back to work although he was in significant pain and discomfort. His pain has essentially never resolved although he has continued to work since that time out of fear of losing his job. His pain continues to be chronic back pain which again has been persistent since his fall. . . . This has slowly been progressive over the duration of his employment over the past 4 years; however, it all began following his fall.¹¹

Dr. Ciccarelli's diagnosis of claimant was L4-L5 and L5-S1 spondylolisthesis with associated stenosis resulting in low back pain and bilateral radiculopathy. He believed that claimant's spondylolisthesis and stenosis preexisted his fall, but the fall resulted in symptomatic aggravation of the preexisting spondylolisthesis, resulting in the need for his current treatment, including a lumbar decompression and fusion.

Claimant was seen by Dr. Vito Carabetta on January 24, 2007, at the request of respondent/Nationwide. Claimant presented with complaints of low back pain and left sciatica. On the left, claimant described burning pain to the left of midline. This continues throughout the left lower extremity as more of a cramping sensation, along with tingling and numbness. Dr. Carabetta diagnosed claimant with lumbar spinal stenosis and recommended a decompressive laminectomy. Dr. Carabetta opined that "it appears quite clear that the instigating factor that ultimately set everything in motion for required surgical

¹¹ *Id.*, Cl. Ex. 1, sec. 7 at 2.

intervention was indeed [claimant's] original work-related injury of July 23, 2002. His need for subsequent treatment, and effectively surgical intervention, is the direct and natural result of the July 23, 2002 injury."¹²

After claimant saw Dr. O'Boynick in July 2006, he informed Chuck Sauro, manager of the plumbing department at respondent, that he had seen a neurosurgeon and had been informed that he had fractured his spine in the fall of 2002, and that the lifting and work he had been doing since that date had continually made it worse. Claimant made a written claim on October 9, 2006. All of the medical treatment claimant had received up to this point had been paid for by his personal health insurance carrier.

Claimant is still working for respondent doing the same job he was doing before, which includes lifting full water heaters out of basements. He has not been taken off work and has not been given any restrictions by any of the doctors he has seen. He has a burning sensation at the base of his tail bone and constant pain through the calf of the left leg. Occasionally his right leg will also hurt.

PRINCIPLES OF LAW

An injured worker must give notice of accident to his employer. This notice is generally required to be given within ten days of the date of accident. The time for giving notice, however, may be extended to 75 days for just cause.

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.

¹² *Id.*, Cl. Ex. 1, sec. 8 at 4.

Generally, written claim for compensation must be served upon the employer within 200 days of the date of accident. K.S.A. 44-520a(a) states:

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; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 2002 Supp. 44-508(d) describes an accident as

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 2005, the Legislature amended K.S.A. 44-508(d), adding language setting out the criteria for determining the date of accident in cases involving repetitive use injuries.¹³ K.S.A. 2006 Supp. 44-508(d) reads:

"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

¹³ L. 2005, Ch. 55, sec. 1.

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.

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. In *Jackson*¹⁴, the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of 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.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*¹⁵, the court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.¹⁶

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*¹⁷, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

¹⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹⁵ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

¹⁶ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

¹⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*¹⁸, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”¹⁹

In *Logsdon*²⁰, the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

ANALYSIS

The testimony of claimant and the contemporaneous medical records of the treating physicians are the most credible evidence concerning claimant’s symptoms and complaints. These support the conclusion that claimant’s symptoms subsided after his fall on July 23, 2002. Thereafter, claimant suffered new aggravations of his preexisting back condition and a new series of accidents performing his regular job duties with respondent.

There is no evidence of a diagnosis that claimant’s condition was work-related having been communicated in writing to claimant before October 9, 2006. Claimant gave written notice to respondent and made written claim for compensation on October 9, 2006, by filing his Form E-1 Application for Hearing with the Division and serving a copy of same on his employer.

CONCLUSION

1. Claimant suffered a series of accidents.
2. Claimant’s date of accident is October 9, 2006, the date he gave written notice of his work-related series of accidents to his employer, the respondent herein.

¹⁸ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

¹⁹ *Id.* at 728.

²⁰ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

3. Based upon an accident date of October 9, 2006, claimant gave timely notice of his accident.

4. Based upon an accident date of October 9, 2006, claimant made a timely written claim for compensation.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated February 8, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2007.

BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant
Bret C. Owen, Attorney for Respondent and its Insurance Carrier Nationwide Mutual Ins. Co.
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier Continental Western Insurance Co.
Brian G. Boos, Attorney for Respondent and its Insurance Carrier Zurich American Insurance Co.
James R. Hess, Attorney for Respondent and its Insurance Carrier Continental Casualty Insurance Co.
Steven J. Howard, Administrative Law Judge