

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

<b>RICHARD LEROY HAUSERMAN</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,033,148
	)	
<b>WESTAR ENERGY, INC.</b>	)	
Self-Insured Respondent	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the July 23, 2008, Award entered by Special Administrative Law Judge John Nodgaard. The Board heard oral argument on October 17, 2008. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas, appeared for the self-insured respondent.

The Special Administrative Law Judge (SALJ) concluded that claimant failed to prove that his work activities aggravated and accelerated his arthritis beyond what would have been caused by the natural aging process and normal daily activities and failed to timely file an Application for Hearing within three years from the accident of February 2, 2002, or two years from the date of the last payment of compensation. The SALJ further concluded that claimant suffered a subsequent intervening injury to his shoulder and that no written claim was filed for that injury. Accordingly, the SALJ denied claimant's request for workers compensation benefits.

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

**ISSUES**

Claimant contends the evidence showed that his job activities at respondent aggravated his preexisting right shoulder arthritic condition. Claimant also requests the Board find that he suffered three separate injuries: a slip and fall on February 2, 2002, after which he was treated and released without restrictions; an incident wherein claimant was injured throwing wire into a dumpster, that claimant described as an insignificant injury for which he neither reported to respondent nor sought medical treatment; and a third injury, which consisted of a series of accidents from sometime in October 2005 through his

last day worked before his shoulder replacement surgery of November 21, 2006.<sup>1</sup> Claimant argues that if the Board agrees he suffered a series of accidents through his last day worked before November 21, 2006, he has clearly met the requirements of K.S.A. 44-534(b) requiring him to file an application for hearing within three years of the date of accident or within two years of the date of the last payment of compensation, whichever is later. In the event the Board finds that claimant suffered a single, traumatic injury on February 2, 2002, he requests the Board find he has still met the requirements of K.S.A. 44-534(b) because the bill of Dr. Harry Morris was paid in October 2006. Claimant next asserts that Dr. C. Reiff Brown, who rated his permanent partial impairment as 36 percent to his right upper extremity at the level of the shoulder, was the only physician to testify concerning his impairment and that the rating by Dr. Brown should be adopted as the nature and extent of claimant's disability. Finally, claimant requests the Board award future medical benefits.

Respondent stipulates that claimant suffered injury by accident on February 2, 2004. However, respondent argues that claimant failed to sustain his burden of proving that his current condition arose out of and in the course of his employment with respondent, failed to establish that his work duties caused an increase in his disability, failed to file a timely application for hearing, and failed to sustain his burden of establishing the amount of permanent impairment of function which relates to the February 2002 injury. The ALJ found that claimant suffered an intervening accident for which no notice or written claim was provided, and respondent contends that claimant did not raise this issue in his application for review or brief to the Board and has, therefore, waived his right to appeal this finding.

The issues for the Board's review are:

- (1) Did claimant sustain injury by accident or accidents that arose out of and in the course of his employment with respondent? If so,
- (2) What was claimant's date of accident or accidents?
- (3) Did claimant make a timely application for hearing?
- (4) What is the nature and extent of claimant's injury?
- (5) Is claimant entitled to future medical benefits?
- (6) Did claimant waive his right to appeal the ALJ's finding that he suffered an intervening accident?

---

<sup>1</sup> Claimant's Brief at 3 (filed Aug. 22, 2008).

FINDINGS OF FACT

Claimant retired on July 1, 2007, after having worked for respondent for 37 1/2 years. Beginning in 1991, claimant was a troubleshooter in the service department. Before that, he was a lineman. His job involved getting in and out of a truck, pushing and pulling heavy wire, a lot of digging, lifting and climbing. Towards the end of his career, claimant had a helper who did the climbing. Nevertheless, the job required him to use his hands, arms, and shoulders in a repetitive fashion.

Claimant and respondent have stipulated that claimant met with personal injury by accident on February 2, 2002. On that date, claimant slipped and fell on ice, injuring his right shoulder. Claimant was seen by Dr. Ron Davis on March 14, 2002, and was placed on light duty. Claimant asked to be referred to Dr. Harry Morris, a board certified orthopedic surgeon, and Dr. Morris saw claimant on April 8, 2002.

Claimant gave Dr. Morris a history of an injury in February 2002 when he slipped on ice and his arm went out in an abducted position going out to the side. He had complaints of pain in his right shoulder. X-rays were taken, and claimant was sent for an MRI scan. His radiographic tests revealed that he had osteoarthritis of the right shoulder, and Dr. Morris opined:

I think most of his symptoms really are coming from his degenerative osteoarthritis across the shoulder. He does certainly have what appears to be under the skin evidence for a small rotator cuff tear, but I do not think that [it's] his main contributing factor in regard to pain at this point. I discussed with him that his shoulder is aggravation from his work but he certainly has an annoying condition of arthritis as well. . . . I would not proceed at this point with a rotator cuff repair because I just do not think it is going to relieve any of his symptoms as I think they are all from the bone-on-bone contact. We did discuss anti-inflammatory use. He thinks things are tolerable at this point so he is going to live with things.<sup>2</sup>

Dr. Morris released claimant from treatment after his one office visit in April 2002. He did not give claimant any work restrictions, and claimant returned to his regular job.

In a letter to claimant dated December 19, 2002, respondent asked him to submit any outstanding bills from the February 1, 2002, accident within 10 days. The letter went on to state: "Otherwise, unless I receive further bills or requests for treatment, I will consider this file to be closed."<sup>3</sup> Claimant admits receiving a letter but said he had numerous injuries and joint replacements and could not specifically say whether the letter he remembered receiving was in reference to his shoulder injury.

---

<sup>2</sup> Stipulation filed May 14, 2008, at 13.

<sup>3</sup> R.H. Trans., Resp. Ex. 2.

Claimant testified that his shoulder continued to worsen to the point where by 2005 he was having trouble sleeping at night due to the pain. Finally, in October 2006, "it got pretty bad"<sup>4</sup> and he went to his supervisor and told her he needed to get his shoulder fixed. Together they contacted Sherri Marcus, respondent's occupational health nurse. Ms. Marcus told claimant's supervisor that the file had been closed. Claimant's supervisor told her that claimant most likely had not agreed to close that claim. Claimant states that he told Ms. Marcus that he could lie and say that he had just torn his rotator and his shoulder was hurting and then have respondent fix the shoulder.

Ms. Marcus testified she conferred with her superior at respondent and then met with claimant. Ms. Marcus stated that during this meeting, she was led to believe that claimant's problems stemmed back to the February 2002 injury, and she explained to him that the file had been closed. She also explained the time frame of two years since he was last paid compensation. She told claimant that even though respondent had no responsibility for any further care under that claim, she had been authorized to offer him a single visit to Dr. Morris for the purpose of evaluating whether his current complaints were related to the rotator cuff tear or had to do with his arthritis. She told him that if it was Dr. Morris' opinion that his pain was being caused by the rotator cuff tear, respondent would authorize treatment for that even though it was not required to do so because the file was closed. Claimant agreed to that plan. If claimant had indicated at that time that he was planning to file a claim regardless of what Dr. Morris said, she would not have authorized Dr. Morris to evaluate him. Claimant admits that Ms. Marcus told him that respondent would fix his torn rotator cuff but that he would have to take care of his shoulder himself because it was arthritis.

Dr. Morris saw claimant on October 4, 2006, after having been authorized by respondent for a single appointment and any necessary tests to obtain his opinion as to the status of the work-related rotator cuff tear. Claimant complained of increasing pain in his right shoulder. Dr. Morris found that his range of motion had decreased since 2002. Claimant's rotator cuff was strong. Radiographic testing showed claimant had a progression of his osteoarthritis in the glenohumeral joint, the ball and socket joint. Dr. Morris believed that claimant's symptoms were caused by his arthritis. He recommended shoulder replacement surgery. Claimant decided to have surgery to fix his shoulder. He did not turn the bills into workers compensation but, instead, turned them into his personal health insurance, since he had been told by Ms. Marcus that respondent would not be responsible for treatment of his shoulder.

Dr. Morris performed right shoulder replacement surgery on November 21, 2006. Dr. Morris stated that there was no reason to do a rotator cuff repair, and claimant's surgery was performed because of his existing arthritis. Dr. Morris said that claimant progressed well after surgery. On January 8, 2007, Dr. Morris told him to take it a bit easier on his shoulder because claimant had reported he had been hauling wood with a

---

<sup>4</sup> R.H. Trans. at 15.

wheelbarrow. The last time Dr. Morris saw claimant concerning his right shoulder was on October 1, 2007, at which time claimant was close to being at maximum medical improvement (MMI) because he was almost one year past surgery. Dr. Morris opined that claimant would have some impairment of function associated with his preexisting osteoarthritis, but he did not give claimant a disability rating.

In February 2007, claimant decided to submit his right shoulder surgery to workers compensation. His Application for Hearing was filed on February 14, 2007, three months after his surgery, and gave a date of injury of "February 02, 2002 and each and every working day thereafter through present."<sup>5</sup> Claimant believes that his job activities caused wear and tear on his shoulder and aggravated it to the point where he could no longer take the pain. He said he injured his shoulder in 2002, it had not been fixed, it hurt a little for three years and then started to hurt badly, after which he requested treatment in 2006.

On July 9, 2007, claimant, at the request of his attorney, was seen by Dr. C. Reiff Brown, a retired orthopedic surgeon who performs independent medical examinations. At that time, claimant described an accident wherein he was "throwing some scrap wire into a tall trash dumpster—felt a pain in my right shoulder."<sup>6</sup> Claimant testified that he could not remember when he hurt his right shoulder throwing trash into a dumpster but thought it was a couple of years after his slip and fall on the ice. He never filed a written claim or made any type of workers compensation claim for injury after the dumpster incident because his shoulder had been hurting anyway and he was only worried that he had damaged it further. He does not think he saw a doctor after the dumpster incident. He blamed his confusion on the passage of time.

Dr. Brown's recitation of claimant's medical history also included the statement that after Dr. Morris released claimant in 2002, he "continued to be highly symptomatic and on November 21, 2006 a total shoulder arthroplasty was done by Dr. Morris."<sup>7</sup> Dr. Brown admitted that in his report he was blaming the February 2, 2002, injury for the symptoms claimant experienced before his 2006 surgery. He testified that since claimant, in fact, worked without difficulty for approximately three years after being seen by Dr. Morris in 2002, he believed that claimant had an additional injury to his shoulder after Dr. Morris' initial release to return to work. Dr. Brown concluded that claimant's injury of February 2002 resulted in a torn rotator cuff as well as aggravated preexisting degenerative arthritic changes in the right shoulder and AC joint but that claimant's subsequent work activity aggravated the osteoarthritis in his shoulders. He opined that claimant was at MMI as of the date of his examination of claimant and rated him as having a 9 percent right upper extremity impairment for loss of range of motion and an additional 30 percent impairment

---

<sup>5</sup> Form K-WC E-1, Application for Hearing, filed February 14, 2007.

<sup>6</sup> Brown Depo., Ex. 3.

<sup>7</sup> Brown Depo., Ex. 2 at 1.

for total joint arthroplasty of the right shoulder based on the *AMA Guides*.<sup>8</sup> Those values combined for a total 36 percent permanent partial impairment of function of the right upper extremity.

Dr. Brown recommended that claimant permanently avoid frequent use of his right hand above shoulder level and frequent reach with the right hand away from the body more than 18 inches. No lifting should be done above chest level, and lifting from waist to chest level with the right upper extremity should be limited to 20 pounds occasionally and 10 pounds frequently.

Dr. Brown believed that claimant's work was aggravating his osteoarthritis, and the work claimant was performing would have continued to aggravate that condition each and every day he worked until he sought medical treatment.

Dr. Brown admitted that if the dumpster incident occurred after claimant had been released by Dr. Morris in April 2002 but before he returned to Dr. Morris in 2006, it could be an explanation for his increase in problems. Dr. Brown agreed that the cause of claimant's increased shoulder discomfort was unclear.

Q. [by respondent's attorney] Can you state within a reasonable degree of medical probability what specific incident or event resulted in the impairment of function that you've provided in your report in light of the conflicting histories?

A. [by Dr. Brown] Well, when I wrote the report, I was of the opinion that the February 2, '02 accident had caused it. But I think that there is enough evidence that's been presented to me today that I can say that that didn't contribute all, something else added contribution to his pathology.

Q. And that something else might have been this incident when he was throwing wire into a dumpster, is that right?

A. It might have been.

Q. And it also might have been what else?

A. It might have just been contribution by the work activity that he did after Dr. Morris returned him to his usual work activity and the time when his symptoms became so severe that he had to return to Dr. Morris and ask for help.

Q. But, again, it's really hard to say which one of those various things was the culprit, if you will, without more information; would you agree with that, Doctor?

---

<sup>8</sup> American 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.

A. Well, it would be speculative possibly, yes, I would like more information before I select one of those two methods.<sup>9</sup>

### PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

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.<sup>10</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>11</sup>

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 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.<sup>12</sup>

K.S.A. 2007 Supp. 44-508(e) states:

---

<sup>9</sup> Brown Depo. at 18-19.

<sup>10</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>11</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

<sup>12</sup> *Id.* at 278.

"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 accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>13</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>14</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>15</sup> Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.<sup>16</sup>

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.

The Supreme Court has stated that the purpose of written claim is to enable the employer to know about the injury in time to investigate it.<sup>17</sup> The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.<sup>18</sup> Written claim

---

<sup>13</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>14</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>15</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

<sup>16</sup> *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), cf. *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

<sup>17</sup> *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

<sup>18</sup> *Pike v. Gas Service Co.*, 223 Kan. 408, 409, 573 P.2d 1055 (1978).

is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required.

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

K.S.A. 2001 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.<sup>19</sup> K.S.A. 2007 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 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.

---

<sup>19</sup> L. 2005, Ch. 55, sec. 1.

Before the amendment to K.S.A. 44-508(d), our appellate courts repeatedly proclaimed a preference for setting the accident date as late as possible in cases involving repetitive traumas and a series of accidents. In *Treaster*,<sup>20</sup> the court reaffirmed the last day worked rule first announced in *Berry*<sup>21</sup> but added that if the job changes to an accommodated job that ends the offending activity, then the date of accident is the last date claimant performed the offending activity, *i.e.*, the last day he performed his regular, unaccommodated job duties.

In *Fletcher*,<sup>22</sup> the Court of Appeals stated: "The bright-line last-day-worked rule is not limited to situations in which the claimant can no longer continue employment because of a medical condition."

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.<sup>23</sup>

In *Kimbrough*<sup>24</sup>, our Supreme Court reiterated that an injured worker should not be penalized for attempting to work through pain. In that case, the date of accident for a worker who continued to work in the same position even after the initial injury was the last day worked before the workers compensation hearing.

### ANALYSIS

Claimant's date of accident is critical to determining the compensability of this claim. Claimant's Application for Hearing alleged a date of accident of "February 02, 2002 and each and every working day thereafter through present."<sup>25</sup> After working for respondent for more than 37 years, claimant retired on July 1, 2007. At the February 7, 2008, regular hearing, claimant alleged "that he met with personal injury by accident in Sedgwick County, Kansas on February 2, 2002 and October, 2006 through November 20, 2006, and every

---

<sup>20</sup> *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 623-24, 987 P.2d 325 (1999).

<sup>21</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

<sup>22</sup> *Fletcher v. U.S.D. No. 229*, 38 Kan. App. 2d 388, Syl. ¶ 2, 165 P.3d 1071, *rev. denied* 285 Kan. \_ (2007).

<sup>23</sup> *Treaster*, 267 Kan. 611, Syl. ¶ 3.

<sup>24</sup> *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

<sup>25</sup> Form K-WC E-1 (filed Feb. 14, 2007).

working day thereafter."<sup>26</sup> Respondent admitted that claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent on February 2, 2002, and that claimant gave timely notice of that accident and timely written claim but denied the other accident dates. Respondent denied the compensability of the February 2, 2002, accident because claimant failed to file a timely application for hearing. K.S.A. 44-534(b) requires that an application for hearing be filed with the Division within three years of the date of accident or within two years of the last payment of compensation, whichever is later.

Claimant had the shoulder replacement surgery because of degenerative arthritis, not because of the rotator cuff tear that occurred on February 2, 2002. The arthritic condition in claimant's shoulder was aggravated by his work activities each and every working day through November 20, 2006, when he took off work to have surgery. The need for shoulder joint replacement surgery was accelerated by his work.

In 2002, Dr. Morris recommended only conservative treatment for claimant's shoulder because at that time the pain was not intolerable.

Q. [by respondent's attorney] And when you say the symptoms were not intolerable at that point in time, does that play a role in what treatment you would offer?

A. [by Dr. Morris] Well, the treatment for arthritis of the shoulder at some point in time if symptoms are severe enough is to replace the shoulder. You make that decision—I tell patients when they put up the white flag and say, uncle, it hurts too much, time to replace the shoulder then. He had not reached that point.

....

Q. If I'm hearing you correctly, what you are saying is that because he had this osteoarthritis he was going to have that shoulder replaced eventually regardless of what he did. Is that true?

A. Yes, the pain eventually gets severe enough that the majority of people say replace the shoulder.

Q. It is just a matter of sooner rather than later if he engages in activities.

A. Yes, think of the joint as two surfaces that initially are perfectly matched to each other. With arthritis they are no longer perfectly matched. So as you move your arm around, whether you move it around loading something or you move it around to eat, these two surfaces now are not congruent, they are not smooth. They are rubbing on each other. So just with motion he's eventually going to wear

---

<sup>26</sup> R. H. Trans. at 4.

that joint out. And daily living causes motion. As I said, you can sit in a chair and not move it forever and then it might not do it. But we're not going to live that way.<sup>27</sup>

Q. [by claimant's attorney] And you mentioned in your direct testimony that, look, had this guy just sat in a chair and done nothing for the next five years he still would have had to have this shoulder replaced. If you increase the physical activity of the shoulder does that aggravate or accelerate that condition?

A. [by Dr. Morris] Yes.

Q. And if you continue to aggravate that, does that require the surgery to be done at a time sooner than if you just were less active?

A. I would probably say that's a reasonable assumption.<sup>28</sup>

Even though any activity would aggravate and accelerate the arthritis, the more activity claimant engaged in, the more aggravation he would experience. Clearly, claimant engaged in more shoulder activity at his job than he did away from work.

Q. [by claimant's attorney] And, Doctor, given the history that [claimant] testified to, that he was released in '02 without restriction, that he was able to perform his job without difficulty for approximately three years, but that approximately one year before October of '06 he began having increasing symptoms, such to the point he sought medical treatment, do you have an opinion within a reasonable degree of medical certainty whether the work being performed by Mr. Hauserman was aggravating that osteoarthritis which was the cause of his problem?

A. [by Dr. Brown] Yes.

Q. And what is that opinion?

A. I believe it was aggravating it.

Q. Would the work he was performing continue to aggravate that condition each and every day that he worked up until the point in time he sought medical treatment?

[Respondent's attorney]: Object, lack of foundation, calls for speculation. You can answer.

A. I believe it could.

---

<sup>27</sup> Morris. Depo. at 5-7.

<sup>28</sup> *Id.* at 19.

Q. [by claimant's attorney] Okay. Do you believe it happened in this particular case?

[Respondent's attorney] Same objection.

A. Yes, I believe it apparently did.<sup>29</sup>

Dr. Brown also agreed that the incident when claimant threw the wire into the dumpster could have caused an increase in symptoms. This was yet another instance of claimant's work activities causing him injuries by a series of accidents each and every working day.

### CONCLUSION

Claimant sustained personal injury to his right shoulder by a series of accidents that arose out of and occurred in the course of his employment with respondent each and every working day through November 20, 2006, his last day worked before his joint replacement surgery. There is no evidence that work caused further injury to claimant's right shoulder after that date. Claimant probably gave timely oral notice to respondent that his work was aggravating and accelerating his shoulder condition in October 2006 during claimant's conversations with Helen Wimsatt, Sherri Marcus, Patrick Bush, and Larry Strotkamp. Even though claimant was unaware that the gradual worsening of his condition constituted a series of accidents under the Workers Compensation Act, the purpose of the notice statute was satisfied. Regardless, notice was timely given on February 14, 2007, because none of the triggering events for determining a date of accident for a series under K.S.A. 2007 Supp. 44-508(d) occurred until February 14, 2007, when claimant gave written notice to the employer of the injury. Therefore, claimant's date of accident for his series of accidents is February 14, 2007. Claimant likewise made timely written claim for compensation and timely application for hearing on February 14, 2007, when he served his Form E-1 on respondent and filed same with the Division of Workers Compensation.

Claimant is entitled to permanent partial disability compensation for a 36 percent scheduled injury to the shoulder at the 225 week level, payment of his past medical expenses, and future medical upon application. Finally, claimant did not waive his right to appeal the SALJ's finding of an intervening accident. The SALJ denied compensation. This appeal involved the compensability of the claim and as such necessarily involved that finding by the SALJ. Furthermore, the Board has always held that an appeal from an award gives rise to all issues that were raised to and determined by the ALJ.<sup>30</sup>

---

<sup>29</sup> Brown Depo. at 10. Respondent's objections are overruled.

<sup>30</sup> See, e.g., *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John Nodgaard dated July 23, 2008, is reversed and an award is entered in the amount of 36 percent permanent partial disability to the right upper extremity; all reasonable and related medical ordered paid, and future medical upon application.

Claimant is awarded 36 percent permanent partial disability to the right upper extremity at the level of 225 weeks. No temporary total disability was paid. Claimant is, therefore, entitled to 81 weeks of permanent partial disability compensation at the rate of \$483 per week in the amount of \$39,123, for a 36 percent loss of use of the shoulder, making a total award of \$39,123.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2008.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

- c: Chris A. Clements, Attorney for Claimant
- Terry J. Torline, Attorney for Self-Insured Respondent
- John Nodgaard, Special Administrative Law Judge
- Nelsonna Potts Barnes, Administrative Law Judge