

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

DARRELL W. ELAM)	
Claimant)	
)	
VS.)	
)	
OLATHE DODGE)	
Respondent)	Docket No. 1,043,070
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 18, 2009 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh (ALJ).

ISSUES

The ALJ denied claimant's request for benefits for his bilateral knee complaints after concluding claimant failed to provide timely written claim as required by K.S.A. 44-520a.

The claimant has appealed this Order and contends the ALJ erred by failing to consider the entirety of his claim and supporting allegations. Claimant argues that he pled and proved a repetitive injury that commenced on January 15, 2008 and continued each and every day thereafter. Thus, claimant maintains his November 18, 2008 Application for Hearing satisfied the written claim statute and constitutes a timely filing. Thus, the ALJ's Order should be reversed and claimant should be granted medical treatment and payment of his unauthorized medical expenses associated with Dr. Prostic's evaluation.

Respondent argues the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds as follows:

This Board Member finds that the ALJ's Order sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. This member further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the ALJ's findings and conclusions are expressly adopted as if specifically set forth herein.

The only issue in this appeal is whether claimant satisfied the written claim statute. The written claim statute, K.S.A. 44-520a, provides in part:

(a) 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.

It is undisputed that claimant filed his Application for Hearing on November 18, 2008 and that that document is the first document which can be considered a "writing" for purposes of K.S.A. 44-520a. In order to determine if the November 18, 2008 writing is timely, the finder of fact must determine the date of accident, a decision that is not always easy in workers compensation cases.

There is no dispute that claimant suffered an acute injury on January 15, 2008 when his golf cart struck a vehicle in respondent's car lot. Claimant immediately told his employer and although he testified that he had immediate bilateral knee symptoms, he did not ask for, nor did he seek out medical treatment. Claimant also testified about an incident on October 23, 2008 when he stepped off a golf cart and again experienced bilateral knee pain. After this event respondent referred claimant to a physician, Dr. William H. Tiemann, who concluded that claimant's complaints were due to a strain and to ongoing degeneration. Dr. Tiemann also concluded that claimant was suffering from "Syndrome X", a metabolic condition.

If this claim involves solely the January 15, 2008 accident, then the ALJ's Order should be affirmed as it is clear that more than 200 days lapsed between the January 15, 2008 accident and claimant's November 18, 2008 Application for Hearing. Conversely,

if claimant's accident constitutes a repetitive injury, then the ALJ's Order must be reexamined in light of our statute that deals specifically with repetitive injuries.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident in microtrauma cases has been modified and the new date of accident determination is made as follows:

(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.¹ (Emphasis added.)

The ALJ concluded that claimant did not prove it was more likely than not that he sustained a series of repetitive injuries. Instead, he viewed claimant's claim as a single acute injury occurring on January 15, 2008. He offered the following explanation for his Order:

The claimant pled this injury on the application for hearing as having occurred on January 15, 2008 and each and every day worked thereafter, apparently an attempt to claim a repetitive injury. The application for hearing went on to describe only the January 15, 2008 golf cart accident. The record in this case did not support the notion of a repetitive injury. The claimant did not describe a gradual knee problem from no particular event, nor did he describe repetitive job duties with respect to the knees. He testified to two specific injurious events.²

¹ K.S.A. 2005 Supp. 44-508(d).

² ALJ Order (June 18, 2009) at 2.

Claimant alleges the ALJ erred in his analysis and ignored the evidence that supports his claim for a repetitive injury. Claimant characterizes his situation as follows:

There is no evidence that Darrell Elam was not involved in a golf cart incident on or about January 15, 2008 and, further, there is no evidence that suggests he needed medical care at that time. The evidence only reveals that after that date his knees began to cause him more difficulties as he was required to be on his feet walking around several acres of automobiles each day. After doing this for several months and treating himself with over-the-counter medication and ice bags, a minor incident occurred where he walked off the back of a moving golf cart and realized that all events of this nature caused him to have pain for which he should seek medical care.³

In essence, claimant maintains he sustained a series of microtraumas beginning January 15, 2008 and each and every day thereafter, including October 23, 2008. And under the analysis set forth in K.S.A. 44-508, claimant's written claim is, therefore, timely.

This Board Member has considered claimant's arguments along with the evidence contained within the Court's file and concludes the ALJ's Order should be affirmed.

Although claimant attempts to couch this claim as a *series* of injuries, the greater weight of the evidence suggests otherwise. With the aid of his lawyer claimant sought a medical evaluation from Dr. Prostic on December 29, 2008. Dr. Prostic examined claimant and reviewed claimant's previous records, including some of those generated by Dr. Prostic himself in connection with an earlier medical visit. Dr. Prostic's report includes a recitation by claimant of the January 15, 2008 event. There is no mention of the October event stepping off the golf cart. Claimant does, however, relate a worsening with "progressive standing or walking, going up stairs, squatting, or kneeling."⁴ It is unclear if this refers to work activities or elsewhere. Ultimately, Dr. Prostic opines that "[o]n or about January 15, 2008, Darrell W. Elam sustained injury to his knees during the course of his employment at Olathe Dodge."⁵ Dr. Prostic says nothing about the repetitive nature of either claimant's work duties or the injury he now complains of. To the contrary, it appears to be his opinion that claimant's present need for treatment is solely attributable to the January 15, 2008 accident.

Dr. Tiemann's records indicated that claimants' bilateral knee problems are not causally related to his employment. Claimant described both the January and October 2008 events to Dr. Tiemann during his October 27, 2008 visit, but Dr. Tiemann ultimately

³ Claimant's Brief at 5-6 (filed July 17, 2009).

⁴ P.H. Trans., Cl. Ex. 1 at 1 (Dr. Prostic's Dec. 29, 2008 report).

⁵ *Id.*, Cl. Ex. 1 at 2.

concluded that claimant's complaints were attributable to his ongoing metabolic disorder, Syndrome X. He does allow that the "knee complaints may have been temporarily aggravated by his reported twisting of his knees, but his initial and follow up exams were unremarkable."⁶ Thus, Dr. Tiemann is of the opinion that claimant's bilateral knee complaints were not the result of a work-related accident.

It is worth noting that although claimant denies any earlier knee problems, there are medical records that suggest that he had some bilateral knee complaints in 2006 following two motor vehicle accidents, accidents which led to a rather lengthy course of treatment including pain management.

In short, the evidence contained within this record does not support a claim for a repetitive series of injuries. To the contrary. Claimant sustained two separate incidents, one in January and the other in October 2008. His Application for Hearing does not encompass an October 23, 2008 date of accident and therefore no finding can be made with respect to that accident. As for the acute injury on January 13, 2008, this Board Member finds the ALJ's Order should be affirmed. That claim has not been timely filed as required by K.S.A. 44-520a. Moreover, like the ALJ, this Board Member is not persuaded that claimant sustained a series of microtraumas as a result of his work activities since January 13, 2008. Accordingly, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁷ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(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 Kenneth J. Hursh dated June 18, 2009, is affirmed.

⁶ *Id.*, Cl. Ex. 2 at 3 (Dr. Tiemann's May 18, 2009 report).

⁷ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge