

respondent, Indemnity, Liberty and counsel; (6) unauthorized and future medical are not issues on appeal; and (7) for a date of accident of May 13, 2011, claimant provided timely written claim.

ISSUES

The Award lists as a stipulation that the date of the alleged accident was September 25, 2010, through claimant's last day worked on May 13, 2011. At page 4 of the Award, ALJ Clark found claimant was injured out of and in the course of his employment with respondent each and every working day through his last day of employment, which was May 13, 2011. However, on page 5 of the Award, ALJ Clark indicated claimant's accidental injury occurred on September 25, 2010. The Award also indicates claimant provided timely notice of his work-related injuries to respondent. The ALJ granted claimant an award for a permanent total disability.

Respondent and Indemnity contend claimant did not sustain a compensable injury as he failed to prove an accidental injury arising out of and in the course of his employment and failed to prove he provided timely notice of his alleged accidental injury. If this claim is compensable, respondent and Indemnity assert: (1) claimant is not permanently and totally disabled, (2) claimant is not entitled to work disability benefits, (3) claimant did not sustain any functional impairment and (4) claimant's date of accident is May 13, 2011, claimant's last day of employment and, therefore, Liberty is the liable insurance carrier, as it provided coverage on that date.

Claimant contends he proved he sustained an accidental injury arising out of and in the course of his employment and provided timely notice of his accidental injury. Claimant argues he sustained a functional impairment, is permanently and totally disabled or in the alternative is entitled to work disability benefits and respondent established no evidence of preexisting impairment.

The issues before the Board on this appeal are:

1. Was there a statutory obligation to provide Liberty notice of the regular hearing at least 20 days in advance?
2. Did claimant's personal injury by accident arise out of and in the course of his employment with respondent?
3. Did claimant give timely notice of his accident or in the alternative, did respondent have actual knowledge of claimant's injuries?
4. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant began working for respondent in 1978. For many years, claimant packed bags of cement weighing from 20 to 80 pounds on pallets. He also hammered lids on buckets. He has a history of gout and arthritis.

Claimant sent respondent a demand letter dated August 1, 2011. Claimant filed an Application for Hearing and a corrected Application for Hearing, alleging bilateral upper extremity injuries caused by repetitive use of his right hand and arm and use of heavy tools. Neither claimant's Application for Hearing nor corrected Application for Hearing listed the name of an insurance carrier, despite the fact that the form requires the name of the insurance carrier to be provided. The date of accident was listed as dates prior to September 25, 2010, and all dates thereafter. A Notice of Hearing prepared by the Division dated August 3, 2011, lists Indemnity Insurance Company of North America and Liberty Insurance Corporation as the insurance carriers. Douglas C. Hobbs entered his appearance on behalf of respondent and Indemnity. No attorney entered an appearance for Liberty, nor has Liberty participated in the proceedings. The certificates of service in the notices to take depositions and notices of hearings filed by the parties do not indicate Liberty was ever notified.

At the regular hearing, claimant again asserted the date of accident was "[d]ates leading up to September 25th, 2010 and all dates thereafter."¹ The stipulations listed in claimant's submission letter to the ALJ indicated Indemnity had coverage on all relevant dates leading up to September 25, 2010, and all dates thereafter. Claimant's submission letter argues claimant gave timely notice and timely written claim, but does not specify a date of accident. Nor did claimant specify the date he gave notice to respondent or the date respondent had actual notice of claimant's injuries.

The stipulations listed on page 2 of the Award indicate the date of the alleged accident was September 25, 2010, through claimant's last day of work, which was May 13, 2011.² Claimant, respondent and Indemnity stipulated in their Post-Submission Stipulation that claimant's date of accident was May 13, 2011. However, the Award finds in favor of claimant and against "Respondent, Quikrete Co., Inc., and the Insurance Carrier, Indemnity Insurance Company of North America, and Liberty Insurance Corporation, for an accidental

¹ R.H. Trans at 3.

² May 13, 2011, is also the date claimant's employment with respondent was terminated.

injury sustained on September 25, 2010.”³ The ALJ found claimant gave respondent timely notice.

PRINCIPLES OF LAW AND ANALYSIS

The Board first must determine if it was error to proceed without providing Liberty at least 20 days advance notice of the regular hearing. K.S.A. 44-534(a) states in part, “The administrative law judge shall proceed, upon due and reasonable notice to the parties, which shall not be less than 20 days, to hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.”

Here, claimant notified respondent of the regular hearing more than 20 days in advance. The application for hearing form prescribed by the Director requires the name of the insurance carrier to be listed. However, neither claimant’s Application for Hearing nor corrected Application for Hearing lists the name of an insurance carrier. Neither claimant nor respondent sent Liberty **any** notices to take depositions and hearings. Liberty was unaware of the stipulation that the date of the alleged accident was September 25, 2010, through claimant’s last day worked on May 13, 2011.

In Kansas, employers subject to the Kansas Workers Compensation Act are required to have workers compensation insurance or receive permission from the Director to be self-insured. Most attorneys who represent a respondent are in fact hired by that respondent’s workers compensation carrier. Workers compensation insurance carriers are an integral part of the workers compensation system. The Act makes numerous references to insurance carriers and imposes duties upon them.

Under K.S.A. 44-534(a), an insurance carrier may file an Application for Hearing with the Director:

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker’s right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker’s compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge. The director shall forthwith mail a certified copy of the application to the adverse party. The administrative law judge shall proceed, upon due and reasonable notice to the parties, which shall not be less than 20 days, to

³ ALJ Award at 5.

hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker.

The last sentence of K.S.A. 44-534(a) requires all parties to have at least 20 days notice before the ALJ hears evidence and makes findings. In the present claim, no one provided notice to Liberty of the regular hearing. The Board majority believes that if insurance carriers can apply to the Director for a determination of claimants' benefits, then affected insurance carriers should be notified of hearings. It is not logical that the Kansas Legislature intended K.S.A. 44-534(a) to allow Liberty to apply for a determination of claimant's benefits, but not require Liberty to be notified of hearings.

K.S.A. 2010 Supp. 44-523(a) requires that all parties be given a chance to be heard:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

K.S.A. 2010 Supp. 44-551(i)(1) allows any interested party to appeal final orders, awards, modifications of awards or preliminary awards to the Board. In the past, insurance carriers have been permitted to appeal awards where the issue is date of accident and which insurance carrier had coverage.

Other statutes within the Act impose penalties against insurance carriers. K.S.A. 44-512a allows an ALJ to impose penalties against a respondent or insurance carrier for failure to pay compensation when due and K.S.A. 44-512b allows penalties to be assessed against a respondent or insurance carrier when compensation is not paid prior to award, without just cause.

K.S.A. 44-528(a) allows an insurance carrier to request a review and modification of an award. The fact that the Act allows: (1) penalties to be imposed against insurance carriers, (2) insurance carriers to apply to review and modify an award and (3) insurance carriers to appeal a final order, award or preliminary award to the Board means that insurance carriers are essential parties to workers compensation proceedings. Accordingly, Liberty should have been notified of the regular hearing in this matter. K.S.A. 44-534 allows an insurance carrier to apply to the Director for a determination of benefits or compensation due or claimed to be due a claimant.

The Board majority is cognizant of the cases cited in the dissent. However, in *Lott-Edwards*,⁴ the Kansas Court of Appeals apparently did not consider K.S.A. 44-559 when

⁴ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

making its decision. K.S.A. 44-559 provides that an insurance carrier is a party to all workers compensation proceedings:

Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act as well as by the employer, that the insurer shall be a party to all agreements or proceedings under this act, and his appearance may be entered therein and jurisdiction over his person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer.

Notice of the regular hearing should have been given to Liberty and, therefore, the Board remands this matter with instructions that the matter be reset for regular hearing and Liberty be notified as prescribed by K.S.A. 44-534(a). The Board majority acknowledges that remanding this matter in order to give Liberty the opportunity to present a defense will cause hardship, including additional attorney fees, expenses and delay upon claimant, respondent and Indemnity. In response, the Board majority would note: (1) to affirm the Award would impose an even harsher result upon Liberty, an award of \$125,000 plus claimant's medical expenses, without an opportunity to be heard; and (2) the current situation could have been avoided if claimant, respondent and Indemnity had simply sent notice to Liberty of all depositions and hearings.

CONCLUSION

Under K.S.A. 44-534(a), Liberty was not given due and reasonable notice of the regular hearing, not less than 20 days in advance. Therefore, the Board vacates the Award, remands this matter to ALJ Clark and directs him to insure that Liberty is notified of all future proceedings and is given an opportunity to present evidence and cross-examine witnesses. All other issues are moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board vacates the June 12, 2013, Award entered by ALJ Clark, remands this matter to ALJ Clark and directs him to insure that Liberty is notified of all

⁵ K.S.A. 2012 Supp. 44-555c(k).

future proceedings and is given an opportunity to present evidence and cross-examine witnesses.

IT IS SO ORDERED.

Dated this ____ day of November, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members would reluctantly uphold the judgment against Liberty.

As an initial matter, the dissent would have greatly preferred for Liberty, an insurance carrier, which is a party,⁶ to be entitled to participate meaningfully in workers compensation proceedings. In this case, it would have been ideal if the parties and/or the ALJ ensured Liberty was aware not just that a claim was filed, but that the prehearing settlement conference was set to occur on a date certain and the regular hearing and depositions were going to be held.

The undersigned Board Members would find Liberty was not afforded the due process it was entitled under the law. "The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."⁷ "To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of

⁶ See *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 889 P.2d 1151 (1995).

⁷ *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

the pendency of an action and to afford the parties an opportunity to present any objections.”⁸

Constitutional requirements of due process apply to administrative proceedings.⁹ Parties are entitled to know about a hearing and have the opportunity to be heard.¹⁰ A lack of notice of a hearing is a denial of due process.¹¹ Without question, Liberty was not given notice of the hearings and depositions. Liberty was not afforded due process, regardless as to whether respondent and Indemnity vigorously defended the claim. Liberty and Indemnity’s interests are not one and the same.

All this being said, the Board is duty bound to follow binding precedent.¹² *Lott-Edwards*¹³ and *Kimbrough*¹⁴ indicate it is the employer that is entitled due process and the insurance company has no separate right of due process.

In *Lott-Edwards*,¹⁵ Americold and its workers compensation insurance carriers, National Union Fire Insurance Company of New York (National Union) and Travelers Property Casualty (Travelers), appealed a final award of benefits to Lott-Edwards by the Board. The Board found Travelers responsible for permanent total disability benefits awarded because Lott-Edwards’ date of accident, March 10, 1995, was within Travelers’ period of coverage. The date of accident was based on a legal fiction that it occurred on a single date, even though Lott-Edwards’ repetitive injury occurred over time. Travelers argued its due process rights were violated because its attorney was denied the opportunity to confront witnesses who had testified before Travelers became involved in the case. The Kansas Court of Appeals held:

⁸ *Johnson v. Brooks Plumbing*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

⁹ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 784, 473 P.2d 72 (1970); *Saffer v. Star Construction, Inc.*, No. 1,030,669, 2009 WL 3191382 (Kan. WCAB Sept. 30, 2009); *Eubank v. State of Kansas*, No. 1,042,622, 2009 WL 2480261 (Kan. WCAB July 15, 2009).

¹⁰ See K.S.A. 2010 Supp. 44-523(a); K.S.A. 44-534a; K.A.R. 51-3-5a; *Blackburn v. JAG Construction Company*, No. 1,061,954, 2012 WL 6811300 (Kan. WCAB Dec. 18, 2012); *Saffer*, supra; and *Eubank*, supra.

¹¹ *Crease v. Vezers Precision Industrial Constructors International, Inc.*, No. 1,035,775, 2007 WL 4662039 (Kan. WCAB Dec. 7, 2007).

¹² See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998).

¹³ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 (2000).

¹⁴ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003).

¹⁵ *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

The law does not favor Travelers' argument. It is the employer, Americold, that is entitled to notice and receipt of a written claim, not its insurance company. See K.S.A. 44-520; K.S.A. 44-520a. It is the employer that must be given proper notice and an opportunity to be heard and defend against a claim; the insurance company has no separate right of procedural due process flowing from provisions of the Workers Compensation Act. See *Landes v. Smith*, 189 Kan. 229, 235, 368 P.2d 302 (1962). Throughout this proceeding the interests of Americold have been vigorously defended and there can be no credible claim that the employer's due process rights have been violated. We conclude Travelers' claim is without legal merit.¹⁶

As noted in the above paragraph, *Lott-Edwards* cited *Landes*¹⁷ for the proposition that an insurance carrier has no separate right of procedural due process. In *Landes*, an insurance carrier complained that it was not afforded notice of a hearing. The holding in *Landes* was based on what are now K.S.A. 40-2212 and K.S.A. 44-559. *Landes* noted an insurance company that writes a policy for Kansas coverage is bound by any judgment against its insured employer and "notice to the employer of the hearing is notice to the insurance carrier."¹⁸ K.S.A. 40-2212 states, in part:

Every policy issued by any insurance corporation, association or organization to assure the payment of compensation, under the workmen's compensation act, shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award, or judgment rendered against the insured. . . .

In *Kimbrough*, such claimant's date of accident was determined to be her last day worked. As such, liability befell the insurance carrier on the risk for such date of accident. The Kansas Supreme Court addressed the argument of the employer, the University of Kansas Medical Center:

KUMC further argues that using the last day worked before the hearing could prejudice the employer's insurance carrier if the insurance carrier did not insure the employer when the claimant first made the claim. This argument has no merit. The employer is entitled to notice and receipt of a written claim, not the insurance carrier. K.S.A. 44-520; K.S.A. 44-520a. "[T]he insurance carrier has no

¹⁶ *Id.* at 696-97.

¹⁷ *Landes v. Smith*, 189 Kan. 229, 235-36, 368 P.2d 302 (1962).

¹⁸ *Id.* at 235.

separate right of procedural due process flowing from provisions of the Workers Compensation Act.” *Lott-Edwards*, 27 Kan. App. 2d at 697.¹⁹

Landes, *Lott-Edwards* and *Kimbrough* all seem to say an insurance carrier cannot rightfully assert it was denied due process when the respondent was aware of the claim.²⁰ If jurisdiction over the insured is jurisdiction over the insurer, and the insurance carrier has no separate right to due process under the law, whether Liberty was entitled to separate notice is a moot issue.

The Board majority fails to consider the effect setting aside the Award will have on the parties. Respondent, Indemnity and claimant will incur additional expenses and attorney fees. More importantly, claimant will be delayed in receiving his workers compensation benefits. Holding up claimant’s award to allow for a likely dispute between insurance companies would seem contrary to a long line of precedent:

The Workmen's Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an independent proceeding in which the employee should not be required to participate.²¹

The claimants in this, or any other, workmen's compensation appeal should not be required to stand by while the employer and the insurance carrier settle their personal disputes with respect to such matters.²²

The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. . . . These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between

¹⁹ *Kimrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003).

²⁰ It is possible the holdings of these cases might be different based on strict construction. Neither K.S.A. 40-2212 nor K.S.A. 44-559 state an insurance carrier is not entitled to due process under the law.

²¹ *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 831, 366 P.2d 270 (1961).

²² *Landes v. Smith*, 189 Kan. 229, 236, 368 P.2d 302 (1962).

them, yet their quarrels should not be resolved at the expense of an injured workman.²³

[W]e agree generally with the notion expressed by the ALJ and in the case law that insurance carriers should not litigate disputes about their respective liabilities for the compensation awarded to an injured worker in the compensation proceedings. Instead, these matters should be decided in separate proceedings between the carriers brought for such purposes and outside the Board's jurisdiction.²⁴

Moreover, while Liberty was not alerted as to hearings and depositions during the ongoing litigation, Liberty is not without fault. Liberty was alerted by the claimant and the Division as to the existence of the claim. Liberty was given notice of this claim well in advance of any evidence being taken. A Notice of Hearing dated August 3, 2011, was sent by the Division to Liberty. A Notice of Intent dated August 25, 2011, was sent by claimant via certified mail to Liberty advising that claimant sustained injuries in the course of his employment with respondent and alleging a date of accident of "prior to 9/25/10 and all dates thereafter."²⁵ Despite this information, Liberty simply elected not to participate in the defense of the case. Again, the better practice would have been for the parties and the ALJ to ensure notice of all scheduled hearings and depositions, but Liberty should have participated in this matter from its inception.

In sum, the undersigned Board Members would prefer to remand the matter for Liberty to participate in the case based on lack of due process, but conclude appellate precedent precludes such result.

BOARD MEMBER

BOARD MEMBER

²³ *Kuhn v. Grant County*, 201 Kan. 163, 171-72, 439 P.2d 155 (1968).

²⁴ *Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 174, 239 P.3d 51 (2010).

²⁵ Post-Submission Stipulation, Ex. A.

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Honorable John D. Clark, Administrative Law Judge