

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

<b>RONNIE E. WALKER</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,059,354
	)	
<b>GENERAL MOTORS, LLC</b>	)	
Self-Insured Respondent	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the March 28, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an accidental injury by repetitive trauma that arose out of and in the course of his employment. Further, the ALJ found that claimant's job duties were the prevailing factor in the injury and claimant's need for treatment. However, the ALJ found that claimant failed to provide respondent with timely notice of his repetitive trauma. As such, benefits were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 28, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues the ALJ erred in finding that the date of injury for his repetitive trauma injuries was sometime in September or October 2011. Claimant contends his date of injury was either January 3, 2012, the day he reported his injuries to respondent and had x-rays taken, or on February 14, 2012, the day he was taken off work by his treating physician. Claimant asserts that if his date of injury is found to be either January 3, 2012, or February 14, 2012, he should be found to have timely reported his injury to respondent.

Respondent argues that claimant's date of accident would be in September or October 2011, the date he was made aware that his work was the prevailing factor in causing his condition. Accordingly, respondent asks the Board to affirm the ALJ's Order.

The issues for the Board's review are:

- (1) What is the date of injury of claimant's series of repetitive traumas?
- (2) Did claimant give respondent timely notice of his series of repetitive traumas?

#### FINDINGS OF FACT

Claimant has worked for respondent for 28 years. On or about August 26, 2011, claimant was assigned the job of assembler. His specific job was loading robot cells with car parts. Claimant said his job as an assembler required him to repetitively reach and bend at the waist. He said he bent over 6 times per job, ran 60 jobs per hour, and worked 8 to 9 hours a day. After working as an assembler for about two months, he began to notice a severe sharp, burning pain in his left hip that went down his left calf into his left foot. As claimant continued to work, his symptoms became progressively worse. However, claimant did not report his condition to respondent. Claimant testified that because of a disciplinary issue, he had been told to keep his mouth shut in order to keep his job.

Claimant said when he started having the pain in his hip and leg, he, on his own, went to see Dr. Dean Reeves, a pain management physician, in October 2011. Claimant testified that he told Dr. Reeves that his pain was caused by his excessive bending on the job. Claimant also said that Dr. Reeves told him "excessive bending could absolutely be a major factor" and also "could be a prevailing factor" in causing his symptoms.<sup>1</sup> Dr. Reeves gave him some injections, which temporarily stopped the pain. Claimant said he did not know that his pain was being caused by his back; he thought he was just having problems with his leg.

Claimant's condition continued to worsen and on January 3, 2012, claimant went to see the plant's physician, Dr. Buck, and complained of pain. Claimant believes he told Dr. Buck he had been having problems since October. Dr. Buck sent claimant out for x-rays, after which claimant was put on light duty. Claimant said his foreman was aware he had been placed on light duty. Claimant went back to the plant medical office a second time and saw another physician, at which time he was sent out for an MRI. After the plant medical office received the results of the MRI, claimant was told he had been hurt badly and needed to see a doctor but had to wait for a response as to whether respondent was going to accept the claim under workers compensation. Respondent eventually denied claimant's workers compensation claim.

After claimant's claim was denied by respondent, claimant sought treatment on his own with Dr. Stephen Reintjes. Dr. Reintjes first sent claimant for a myelogram.

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<sup>1</sup> P.H. Trans. at 35.

Immediately after the myelogram, on February 14, 2012, Dr. Reintjes took claimant off work. Dr. Reintjes performed surgery on claimant's back on March 1, 2012. Claimant said he has had no relief from the surgery. In a letter to claimant's attorney dated March 23, 2012, Dr. Reintjes stated, "I think that the work was the prevailing factor in causing his injury, which resulted in these diagnostic tests and his ventral surgery."<sup>2</sup>

Claimant testified that he had surgery on his low back in either 1990 or 1991. He said after his previous surgery, he had no problems with, nor did he have any medical treatment of, his back at all until he began the excessive bending at work.

Claimant was seen by Dr. Edward Prostic on March 13, 2012, at the request of claimant's attorney. In a letter to claimant's attorney dated March 21, 2012, Dr. Prostic opined that claimant's work-related accident at respondent was the prevailing factor in his injury and need for medical treatment.

#### PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) 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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-520 states in part:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

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<sup>2</sup> P.H. Trans., Cl. Ex. 1 at 5.

Notice may be given orally or in writing.

....  
(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

- (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
- (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
- (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

In *Saylor*,<sup>3</sup> the Kansas Court of Appeals held:

When the legislature revises an existing law, the court presumes that the legislature intended to change the law as it existed prior to the amendment. Furthermore, when a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be.

In *Todd*,<sup>4</sup> the Kansas Supreme Court held that “the legislature is presumed to intend that a statute be given a reasonable construction, so as to avoid unreasonable or absurd results.”

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 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.<sup>6</sup>

### ANALYSIS

Before it can be determined if notice was timely for the repetitive trauma injury, the date of injury must first be decided. K.S.A. 2011 Supp. 44-508(e) provides that the date of injury by repetitive trauma is the earliest of four dates. (1) Claimant was taken off work by Dr. Reintjes due to the diagnosed repetitive trauma on February 14, 2012. (2) Claimant was placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma on January 3, 2012. (3) The date claimant was first advised by a physician that his repetitive trauma condition was work-related is not clear. Claimant was advised by Dr.

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<sup>3</sup> *Saylor v. Westar Energy, Inc.*, 41 Kan. App. 2d 1042, Syl. ¶ 5, 207 P.3d 275 (2009), *aff'd* 292 Kan. 610, 256 P.3d 828 (2011).

<sup>4</sup> *Todd v. Kelly*, 251 Kan. 512, 520, 837 P.2d 381 (1992). See also *League of Kansas Municipalities v. Board of Shawnee County Comm'rs*, 24 Kan. App. 2d 294, 298, 944 P.2d 172 (1997).

<sup>5</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>6</sup> K.S.A. 2011 Supp. 44-555c(k).

Reeves in October 2011 that work *could* be the cause of his repetitive trauma condition, but the record does not reflect that Dr. Reeves told claimant that work *was* the cause. The statute mandates that a physician advise the employee that the condition is work related. The next physician claimant saw was Dr. Buck on January 3, 2012. Again, the record is not clear as to whether Dr. Buck advised claimant that his condition was work related. Nevertheless, claimant gave respondent notice on January 3, 2012, and the date of injury is no earlier than January 3, 2012. Finally, the fourth triggering event under K.S.A. 2011 Supp. 44-508(e) is the last day worked. The last day claimant worked for respondent was February 14, 2012. The earliest of these four dates is January 3, 2012. Accordingly, claimant's date of injury is no earlier than January 3, 2012.

Turning now to whether notice was timely given, K.S.A. 2011 Supp. 44-520 provides that notice must be given within 30 days of the repetitive trauma or 20 days from the date the claimant first sought medical treatment, whichever is earliest. Claimant's repetitive traumas began in August or September and continued until he was put on light duty on January 3, 2012, or when he was taken off work on February 14, 2012.<sup>7</sup> He first sought medical treatment in October 2011. Respondent argues that if claimant first sought medical treatment on October 31, 2011, it should have been given notice long before January 3, 2012, the date claimant first gave notice to his employer.

By enacting the 2011 amendments, the Legislature attempted to fine tune the law as to date of accident and date of injury.<sup>8</sup> In construing various sections of the Act, the entire Act must be read together. No one section should be read in isolation from the others. As such, K.S.A. 2011 Supp. 44-520(a)(1)(B) must be read together with K.S.A. 2011 Supp. 44-508(e). If the date of injury is January 3, 2012, then it is unrealistic and illogical to require notice of injury to be given on an earlier date. Moreover, such a result would render meaningless the date of injury provisions in K.S.A. 2011 Supp. 44-508(e). By reading the statutes together, the 20-day notice requirement in K.S.A. 2011 Supp. 44-520 should be read to mean 20 days from the date claimant first sought medical treatment for the repetitive trauma injury after the date the injury becomes a repetitive trauma injury by the definition in K.S.A. 2011 Supp. 44-508(e). Claimant's date of injury by definition is no earlier than January 3, 2012. Claimant gave notice to respondent on January 3, 2012. Therefore, notice was timely given.

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<sup>7</sup> Claimant filed a Form K-WC E-1, Application for Hearing, on January 26, 2012, alleging "[r]epetitive trauma through 1/3/12."

<sup>8</sup> See *Colvin v. Kansas Health Policy Authority*, No. 103,968, unpublished Court of Appeals opinion filed December 30, 2010; *Lietzke v. True-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

CONCLUSION

The date of injury for claimant's series of repetitive traumas is no earlier than January 3, 2012. Claimant gave respondent notice of injury on January 3, 2012. Therefore, notice was timely given.

ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated March 28, 2012, is reversed and this matter is remanded to the ALJ for further orders on claimant's request for preliminary benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2012.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge