

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

|   |   |                      |
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| <b>TERESA A. ELSTEN</b>                 | ) |                      |
| Claimant                                | ) |                      |
| VS.                                     | ) |                      |
|   | ) |                      |
| <b>WEAVER MANUFACTURING, INC.</b>       | ) | Docket No. 1,062,125 |
| Respondent                              | ) |                      |
| AND                                     | ) |                      |
|   | ) |                      |
| <b>SENTINEL INSURANCE COMPANY, LTD.</b> | ) |                      |
| Insurance Carrier                       | ) |                      |

**ORDER**

Respondent requests review of the November 20, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark. R. Todd King of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Claimant's application for hearing alleges injury to her bilateral upper extremities from working with hand and power tools with an injury by repetitive trauma occurring on August 17, 2012. Judge Clark ruled: (1) claimant's injury arose out of and in the course of her employment; (2) claimant provided notice on August 16, 2012; (3) respondent was to provide claimant with a list of two physicians from which she could select authorized medical treatment; and (4) respondent was to pay claimant temporary total disability benefits from August 17, 2012 forward. No date of injury by repetitive trauma was listed in Judge Clark's order.

The record on appeal is the same as that considered by Judge Clark and consists of the transcript of the November 20, 2012 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

**ISSUES**

Respondent asserts Judge Clark erred in finding claimant's injury, current complaints and symptoms arose out of and in the course of her employment and that claimant provided timely notice for her alleged work related injury. Claimant argues Judge Clark's decision should be affirmed. The issues raised on review are:

1. Did Judge Clark err in finding claimant's claimed injury by repetitive trauma arose out of and in the course of her employment with respondent?
2. Did Judge Clark err in finding that claimant provided timely notice?
3. Did Judge Clark err in ordering respondent to provide medical treatment and temporary total disability benefits?

#### FINDINGS OF FACT

Claimant worked for seven years as a deburr operator, using power and hand tools to smooth out aluminum aircraft parts. In April or May, 2012, claimant began experiencing upper extremity symptoms. In May 2012, claimant told her supervisor, Matt Siggert, that her hands were hurting. Claimant did not recall whether she told Mr. Siggert that her problems were work related. Mr. Siggert suggested she see her family physician.

On May 4, 2012, claimant went to the office of her primary care physician, Dr. Mary Kay Mroz, M.D., with complaints of right hand pain. While Dr. Mroz was listed as the "provider," the corresponding report does not show that she signed the report.<sup>1</sup> Claimant testified she actually saw a physician assistant, Charles Fletcher.<sup>2</sup> The corresponding report noted claimant's symptoms started one month earlier. Mr. Fletcher diagnosed claimant with carpal tunnel syndrome that occurred with her use of hand tools at work. Claimant was prescribed Mobic and a wrist splint. Mr. Fletcher recommended claimant rest the right hand and wrist for at least two weeks, avoid activities that worsen her symptoms, immobilize her wrist in a splint, and apply ice or a cold compress to the affected area.

Claimant returned to Mr. Fletcher on May 18, 2012. The May 18, 2012 report states claimant was first observed for carpal tunnel syndrome by Dr. Mroz on May 4, 2012. Claimant failed to pick up the wrist splint, but indicated her pain was better with the Mobic. Mr. Fletcher noted claimant was looking for a different job where she would not use air tools. Mr. Fletcher again recommended claimant avoid activities that worsen her symptoms, immobilize her wrist in a splint, and apply ice or a cold compress.

Claimant was seen by Mr. Fletcher on June 15, 2012. He indicated claimant's hand seemed better and noted "NKI" or "no known injury." Mr. Fletcher further noted claimant was not using her brace all the time and continued to use an air drill at work, but was trying to get a quality control job. Mr. Fletcher recommended claimant rest her right hand and wrist for at least two weeks, avoid activities that worsen her symptoms and apply ice or a cold compress to the affected area.

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<sup>1</sup> P.H. Trans., Resp. Ex. 3 at 1.

<sup>2</sup> P.H. Trans. at 14, 33.

Claimant returned to Mr. Fletcher on July 20, 2012, complaining of increased pain. Mr. Fletcher noted claimant wore her wrist brace while working and at home. Mr. Fletcher again indicated claimant's carpal tunnel syndrome occurred with work. Mr. Fletcher discontinued the Mobic and prescribed Naproxen. Claimant was referred to Dr. John Babb, an orthopedic surgeon. Mr. Fletcher provided the same recommendations, but added that claimant should immobilize her wrist in a splint.

The May 18, June 15 and July 20, 2012 reports from Dr. Mroz's office were all electronically signed by Mr. Fletcher. There is no evidence that Dr. Mroz signed off on or adopted restrictions, job modifications or recommendations of Mr. Fletcher. Despite Mr. Fletcher's recommendations, claimant did not alter how she performed her repetitive work.

On August 16, 2012, claimant advised respondent's human resources manager, Kathy Jackman, that she had been hurt at work. Ms. Jackman prepared an accident report indicating claimant was injured over the last couple months and coinciding with a July 20, 2012 doctor's visit.

On August 23, 2012, Mr. Fletcher provided the following report regarding claimant's upper extremity complaints:

Teresa has been our patient since May of 2009, she recently has seen me in the office for Carpal tunnel syndrome. She has been wearing a Wrist brace and taking anti [sic] inflammatory [sic] medication. She was also advised to stop activities that make her condition worse, in her case using the pneumatic drill at work. She was also referred [sic] to an orthopaedic surgeon for surgical consultation.<sup>3</sup>

Claimant was seen by Dr. Babb on September 7, 2012. Claimant testified Dr. Babb gave her injections. Dr. Babb's office's work restriction report noted claimant was diagnosed with bilateral carpal tunnel syndrome. Dr. Babb allowed claimant to frequently use repetitive vibratory tools, including air tools. Claimant was to use a wrist splint.

At claimant's attorney's request, claimant was evaluated by George Fluter, M.D., on October 23, 2012. Claimant reported pain affecting the right hand, wrist, forearm and elbow, and numbness in both hands. Dr. Fluter diagnosed claimant with various upper extremity injuries. Dr. Fluter provided the following causation opinion:

The prevailing factor for the condition and the need for medical evaluation/treatment, is the repetitive work-related activities involving the upper extremities. These activities are over and above those associated with routine activities of daily living.<sup>4</sup>

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<sup>3</sup> *Id.*, Resp. Ex. 3 at 6.

<sup>4</sup> *Id.*, Cl. Ex. 2 at 4.

Dr. Fluter advised claimant to restrict lifting, carrying, pushing, pulling up to 10 pounds occasionally, and negligible weight frequently (sedentary level of physical demand); restrict repetitive flexion, extension, pronation, and supination of each elbow to an occasional basis; restrict repetitive flexion, extension, radial deviation and ulnar deviation of each hand to an occasional basis; restrict repetitive grasp using each hand to an occasional basis; restrict use of power/vibratory tools with each hand to an occasional basis; provide appropriate thermal protection for the hands when working in cold environments; and avoid activities resulting in direct pressure over each elbow. Dr. Fluter recommended medications, use of splints, bilateral upper EMGs, a course of therapy, and depending upon results, an orthopedic reevaluation for surgical treatment.

#### PRINCIPLES OF LAW

“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.”<sup>5</sup>

An employer is liable to pay compensation where the employee incurs personal injury by repetitive trauma arising out of and in the course of employment.<sup>6</sup> The phrases arising “out of” and “in the course of” employment have separate meanings; each condition must exist before compensation is allowable. “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. “Out of” the employment points to the cause of the accident and requires a causal connection between the injury and the employment. An injury arises “out of” employment when if it arises out of the nature, conditions, obligations and incidents of the employment.<sup>7</sup>

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

(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.

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<sup>5</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>6</sup> K.S.A. 2011 Supp. 44-501b(b).

<sup>7</sup> See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P. 2d 837 (1984).

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.

. . . .

(h) "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 unless a higher burden of proof is specifically required by this act.

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.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(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.

...

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

“When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.”<sup>8</sup>

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<sup>8</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009).

The Kansas Workers Compensation Act does not define “physician” or “physician assistant.” However, K.S.A. 2011 Supp. 65-6112(y) defines a “physician” as a “person licensed by the state board of healing arts to practice medicine and surgery.” K.S.A. 2011 Supp. 65-6112(z) defines a “physician assistant” as a “person who is licensed under the physician assistant licensure act and who is acting under the direction of a responsible physician.” A physician assistant may perform acts constituting the practice of medicine, but only under the direction and supervision of a physician and as consistent with rules and regulations adopted by the Kansas State Board of Healing Arts.<sup>9</sup>

### ANALYSIS

This Board Member agrees with Judge Clark’s ruling that claimant provided notice for injury by repetitive trauma on August 16, 2011. However, Judge Clark did not find a date of injury by repetitive trauma. Whether notice was timely depends on the date of injury by repetitive trauma, which is a legal fiction.<sup>10</sup> Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma<sup>11</sup> or 30 days from the date of injury by repetitive trauma, whichever came first.

Claimant knew her work activities were causing her symptoms in April, 2012. She sought medical treatment through Dr. Mroz’s office for a condition she knew to be work related. Claimant did not alert respondent about her ongoing work-related condition while she was receiving treatment from Mr. Fletcher, Dr. Mroz’s physician assistant. Unfortunately, claimant’s failure to alert respondent to her ongoing and work-related symptoms could very well have caused her physical condition to deteriorate. Had claimant reported having work-related symptoms earlier, instead of vaguely telling her supervisor that she felt hand pain, respondent might have had the opportunity to direct her to appropriate medical treatment to potentially circumvent any worsening.

However, the new law does not affix a date of injury by repetitive trauma when claimant knows her injury is due to work activities or when claimant told Mr. Fletcher that she used an air drill and was looking for a different job. Rather, the date of injury by repetitive trauma is based on the earliest of several triggering events listed in K.S.A. 2011 Supp. 44-508(e).

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<sup>9</sup> K.S.A. 65-28a08(b); see also K.A.R. 100-28a.

<sup>10</sup> *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

<sup>11</sup> The Appeals Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2011 Supp. 44-508(e). See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

The first two considerations for an injury date are based on when a claimant is taken off work or provided modified or restricted duties by a physician due to diagnosed repetitive trauma. Mr. Fletcher advised claimant to avoid activities that worsened her symptoms, to rest and use a splint. The date of injury by repetitive trauma is not based on a physician assistant's recommendations, at least if the law is literally applied. The restrictions must come from a physician. Reading language into the Kansas Workers Compensation Act that a physician assistant's restrictions are on par with restrictions from a physician would be impermissible judicial blacksmithing.<sup>12</sup>

There is no reliable evidence that Dr. Mroz provided claimant restrictions or if Dr. Mroz ever evaluated claimant. Claimant's uncontradicted testimony was that she only was seen by Mr. Fletcher.<sup>13</sup> There is no showing Dr. Mroz signed, endorsed or otherwise "rubber-stamped" Mr. Fletcher's restrictions.

Dr. Babb, or someone in his office, provided restrictions on September 7, 2012. While such work restrictions could be viewed as showing a connection between work activities and claimant's carpal tunnel syndrome, Dr. Babb's work restriction report states claimant's condition was not related to work, so it is difficult to conclude Dr. Babb's restrictions are due to any specifically diagnosed repetitive trauma.

Dr. Fluter provided restrictions for a work-related condition on October 23, 2012. A date of repetitive injury based on a physician imposing restrictions for diagnosed repetitive trauma would be October 23, 2012, but this would be after claimant's last day worked.

Another possible injury date is when a physician first told claimant her condition was work-related. Mr. Fletcher is not a physician. There is no reliable evidence that Dr. Mroz told claimant her condition was work related or if Dr. Mroz evaluated claimant. Dr. Babb never indicated claimant's injury was work related. Dr. Fluter's October 23, 2012 report notes claimant's condition was work related. Dr. Fluter appears to be the first physician to advise claimant her condition was work related, but he would have done so only after claimant's last day worked.

Analyzing K.S.A. 2011 Supp. 44-508(e), the earliest date of injury by repetitive trauma was claimant's last day worked, August 16, 2012. The evidence establishes that claimant's bilateral upper extremity injuries arose out of and in the course of her employment. Her work was the prevailing factor in causing such injuries. Claimant's date of injury by repetitive trauma was August 16, 2012. Notice provided that day was timely.

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<sup>12</sup> See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197, 1201 (2010).

<sup>13</sup> "Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive." *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146, syl. ¶ 2 (1976).

Had Dr. Mroz taken claimant off work or provided modified or restricted duty, or advised claimant her condition was related to work, when claimant presented to Dr. Mroz's office in May, June and/or July, this Board Member would likely find an earlier date of injury by repetitive trauma and conclude notice on August 16, 2012, was untimely.

The Appeals Board currently does not have jurisdiction over Judge Clark's order that respondent provide a list of two physicians from which claimant could select medical treatment or over his ruling that respondent must pay temporary total disability benefits.

### **CONCLUSIONS**

Claimant's bilateral upper extremity injuries arose out of and in the course of her employment. Her date of injury by repetitive trauma occurred on August 16, 2012. Notice was provided that very day.

The above preliminary hearing findings and conclusions are neither final nor binding and may be modified upon a full hearing.<sup>14</sup> 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), unlike appeals of final orders, which are considered by the entire Board.

### **DECISION**

**WHEREFORE**, the undersigned Board Member affirms Administrative Law Judge John D. Clark's Order dated November 20, 2012.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2013.

\_\_\_\_\_  
HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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Honorable John D. Clark

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<sup>14</sup> K.S.A. 44-534a.