

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

ANTHONY S. SANCHEZ
Claimant

VS.

GOODYEAR TIRE & RUBBER COMPANY
Self-Insured Respondent

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Docket No. 1,069,162

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 4, 2014, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Bruce A. Brumley of Topeka, Kansas, appeared for claimant. Patrick M. Salsbury of Topeka, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 11, 2014, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ determined claimant's date of injury by repetitive trauma was April 8, 2013, stating:

On April 8, 2013, Claimant discussed with his primary care doctor that he believed his right shoulder condition was work related and discussed Claimant accessing the workers compensation system. Such circumstances constitute Claimant being advised by a physician that his condition is work related. Therefore, Claimant's date of accident is April 8, 2013.¹

The ALJ found claimant did not provide notice of his injury until November 8, 2013. Therefore, under K.S.A. 2012 Supp. 44-520, claimant failed to provide timely notice.

¹ ALJ Order at 3.

Claimant concedes he provided notice of his injury by repetitive trauma to respondent on November 8, 2013. Claimant contends he provided timely notice, as his right shoulder date of injury was March 20, 2014, which he represents is his last day of work. Claimant asserts his date of injury was not April 8, 2013, when he saw his physician, Dr. Raymond Magee, for neck and anxiety issues. Claimant argues Dr. Magee's note from that visit only vaguely mentions shoulder treatment.

Respondent asks that the ALJ's Preliminary Hearing Order be affirmed. Respondent also contends claimant failed to prove he sustained a right shoulder injury by repetitive trauma, as there was no medical evidence in the record setting forth any diagnostic or clinical testing showing an anatomical change in claimant's right shoulder between April 8, 2013, and March 20, 2014, the date Dr. Prostic indicated was the end of claimant's repetitive trauma.

The issues on appeal are:

1. What is claimant's date of injury by repetitive trauma?
2. Did claimant provide timely notice of his injury by repetitive trauma?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's Application for Hearing alleges he sustained repetitive right and left shoulder injuries from March 2013 to November 8, 2013. At the preliminary hearing, claimant requested medical treatment for his right shoulder.

Claimant is a tire builder for respondent. Claimant testified he noticed having slight right shoulder pain a few months before he reported it to respondent, which was on November 8, 2013. When he reported the right shoulder injury, claimant wrote down March 7, 2013, as the date the pain started.

On February 6, 2013, claimant sought medical treatment from Dr. Magee for neck pain. Claimant underwent a physical on March 11, 2013. The notes from the March 11 visit mention claimant was positive for right shoulder and neck pain. Claimant saw Dr. Magee again on April 8, 2013. The doctor's notes from that visit state:

Patient presents today for a follow-up: he was treated for shoulder pain. better with NSAID. work activities make worse. He's thinking that it might be associated with heavy use of upper ext at work. Discussed accessing WC provider.²

With regard to his April 8, 2013, visit with Dr. Magee, claimant testified as follows:

Q. After you started having this pain in March of 2013, you saw Dr. Magee for that, didn't you?

A. I saw Dr. Magee for a neck injury.

Q. Didn't you tell Dr. Magee that you were having problems with your shoulder that you related to work?

A. I thought it was caused from work or -- yeah, I think so.

Q. And you didn't report that to anyone at Goodyear?

A. Uh, no.³

...

Q. And so you knew and you discussed with Dr. Magee that this may be related to your work at Goodyear and thought about getting in contact with the work comp provider, correct?

A. Yes.

Q. And you didn't do that, correct?

A. Yes.

Q. And you never asked for an authorized doctor from Goodyear in March or April or any time up until November 8th, 2013, correct?

A. Correct.⁴

...

Q. . . . Do you know if Dr. Magee ever formally diagnosed whether you were having a repetitive trauma?

² P.H. Trans., Cl. Ex. 5.

³ *Id.* at 15-16.

⁴ *Id.* at 16-17.

A. No, he didn't.⁵

Claimant, on September 9, 2013, saw Dr. Magee for a medical reason unrelated to his right shoulder and the doctor's notes do not mention claimant's right shoulder.

Claimant testified that after reporting his accident, he was provided treatment at respondent's dispensary. Dr. Christopher P. Sheldon performed an MRI of claimant's right shoulder on November 18, 2013. Dr. Sheldon's impressions were: (1) no evidence of a full-thickness rotator cuff or labral tear; (2) an abnormal high signal and thickening within the supraspinatus, infraspinatus and subscapularis tendons compatible with intrasubstance tendinosis; (3) moderate degenerative changes and reactive marrow edema at the acromioclavicular joint; and (4) lateral downsloping of the acromion with narrowing of the subacromial space. The doctor noted findings may result in clinical signs or symptoms of impingement syndrome.⁶

On December 3, 2013, Dr. Magee again saw claimant. The doctor's notes state:

Patient presents today for a new problem: he works as a tire builder and has developed increasing shoulder pain with lifting. He was seen in their WC clinic and initial therapies started and then sent for mri R shoulder. Reviewed report pos joint changes, rotator cuff? He was notified that would not be considered a WC injury and that he should seek medical care thru his personal ins.⁷

Dr. Magee wrote a letter addressed "To whom it may concern" dated December 3, 2013, stating due to right shoulder pain, claimant would not be able to perform full work duties until he was seen by an orthopedic doctor.

Claimant was referred by Dr. Magee to Dr. Michael J. Schmidt, an orthopedic physician. Dr. Schmidt saw claimant on December 11, 2013, and assessed claimant with right shoulder impingement syndrome. Radiographs indicated the right shoulder was normal. The doctor injected claimant's right shoulder. Claimant returned to see Dr. Schmidt on March 28, 2014, and complained of right shoulder pain. The doctor assessed claimant with impingement syndrome of the right shoulder and recommended arthroscopic surgery with decompression and mini-open rotator cuff repair as indicated.

Dr. Prostic evaluated claimant at his attorney's request on May 12, 2014, and took x-rays of claimant's right shoulder. The x-rays revealed a poor border of the lateral clavicle, suggestive of early osteolysis. Dr. Prostic opined claimant, each and every

⁵ *Id.* at 18.

⁶ *Id.*, Cl. Ex. 6.

⁷ *Id.*, Cl. Ex. 5.

workday through March 20, 2014, sustained injury to his right shoulder during the course of his employment. The doctor also opined claimant's repetitious minor trauma each and every workday at respondent was the prevailing factor in claimant's injury, medical condition and need for medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ "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."⁹

K.S.A. 2012 Supp. 44-508(e) states:

"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.

⁸ K.S.A. 2012 Supp. 44-501b(c).

⁹ K.S.A. 2012 Supp. 44-508(h).

Neither party disputes claimant first provided notice of his repetitive right shoulder injury to respondent on November 8, 2013. This Board Member concludes there are three potential dates of injury. The first is April 8, 2013, as contended by respondent and found by the ALJ to be claimant's date of injury. The second is December 3, 2013, when claimant saw Dr. Magee and was given restrictions. Dr. Magee's notes from that visit indicated he was seeing claimant for a "new problem: he works as a tire builder and has developed increasing shoulder pain with lifting."¹⁰ The third is the date of injury alleged by claimant, March 20, 2014, his alleged last day of work.

This is a close case. The issue of timely notice hinges on whether Dr. Magee, on April 8, 2013, advised claimant that his right shoulder condition was work related. Dr. Magee's April 8, 2013, notes do not indicate he specifically told claimant his right shoulder injury was work related. Claimant testified he told the doctor of having right shoulder issues that were work related. Dr. Magee's April 8 notes stated: "Discussed accessing WC provider."¹¹ Claimant and Dr. Magee may have discussed the possibility of claimant contacting respondent's workers compensation insurance carrier or medical provider about his right shoulder injury. Claimant testified he was never diagnosed by Dr. Magee with having repetitive trauma.

In *Smith*,¹² a Board Member stated: "While it may seem appropriate to affix a date of injury by repetitive trauma based on when a claimant is aware that work activities have caused injury, K.S.A. 2012 Supp. 44-508, when read literally, contains no such directive. A claimant's opinion as to cause of injury does not equate with a doctor's diagnosis that a condition is work related." When he saw Dr. Magee on April 8, 2013, claimant may have been aware his work activities caused his right shoulder injury and so informed Dr. Magee. However, Dr. Magee, on April 8, 2013, did not specifically diagnose claimant's right shoulder injury as work related. Had Dr. Magee testified, he may have been able to shed light on whether he advised claimant on April 8, 2013, that his right shoulder injury was work related.

This Board Member finds there is insufficient evidence to establish Dr. Magee advised claimant his right shoulder injury was work related on April 8, 2013. Therefore, pursuant to K.S.A. 2012 Supp. 44-508(e), claimant's date of injury would be December 3, 2013, the date he was given restrictions by Dr. Magee. That, in turn, makes claimant's November 8, 2013, notice to respondent timely.

¹⁰ P.H. Trans., Cl. Ex. 5.

¹¹ *Id.*

¹² *Smith v. Atriums Management Co., Inc.*, No. 1,063,210, 2013 WL 2455717 (Kan. WCAB May 16, 2013).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, the undersigned Board Member reverses the August 4, 2014, Preliminary Hearing Order entered by ALJ Sanders and remands this matter to ALJ Sanders to address the issue of whether claimant sustained an injury by repetitive trauma arising out of and in the course of his employment with respondent and claimant's request for medical treatment.

IT IS SO ORDERED.

Dated this ____ day of October, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge

¹³ K.S.A. 2013 Supp. 44-534a.

¹⁴ K.S.A. 2013 Supp. 44-555c(j).