

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

NANCY LAWRENCE
Claimant

VS.

WALTER COBLER, CPA, CHARTERED
Respondent

AND

TRINITY UNIVERSAL INSURANCE COMPANY
Insurance Carrier

AND/OR

KANSAS WORKERS COMPENSATION FUND

DOCKET NO. 155,752

ORDER

The application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated August 10, 1994, came on for oral argument in Topeka, Kansas.

APPEARANCES

The claimant appeared by and through her attorney, Paul D. Post, of Topeka, Kansas. The respondent and insurance carrier appeared by and through their attorney, Matthew S. Crowley, of Topeka, Kansas. The Workers Compensation Fund appeared by and through its counsel, Jeff Cooper, of Topeka, Kansas. There were no other appearances.

RECORD

The record as set forth in the Award of the Special Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent on January 10, 1990.
- (2) Whether claimant gave timely notice of the accident and if not whether respondent was prejudiced by said lack of notice.
- (3) Whether claimant served timely written claim.
- (4) The amount of temporary total disability compensation and medical expense payment to which claimant is entitled.
- (5) The nature and extent of claimant's disability.
- (6) Whether the Kansas Workers Compensation Fund should bear a portion of the liability for the claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant has failed in her burden of proof in showing she filed a timely written claim pursuant to K.S.A. 44-520a, K.S.A. 44-557(c) and K.S.A. 44-510(b).

K.S.A. 44-520a states in part:

"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; . . ."

K.S.A. 44-557(c) states in part:

"No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced before the director within one (1) year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A 44-520a and amendments thereto."

K.S.A. 1989 Supp. 44-510(b) states in part:

"If the employer has knowledge of the injury and refuses or neglects to reasonably provide the benefits required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director".

Claimant, an account clerk for respondent, alleges that she suffered a low back injury on January 9, 1990 when she bent over and pulled a large file box from under a work station. Because of continuing pain, claimant requested and apparently was granted the remainder of that day off work. She took Tylenol and rested, returning to work the next day. Claimant states that she reported her injury to Linda Hauschild, office manager, or Tony Cook, a co-worker, on January 11, 1990, and asked permission to go to her doctor. Claimant was given the time off and saw her personal physician, Dr. William R. Lentz, on January 12, 1990.

Dr. Lentz had treated claimant for years for various conditions and ailments, including hypertension, obesity, depression, and injuries from a 1979 vehicular collision. Dr. Lentz diagnosed a low back strain of the muscles in the L5-S1 area. On January 13, 1990 claimant went to St. Francis Hospital complaining of low back pain. The admitting form indicates that she hurt her back moving boxes at work, but "did not want work comp". She next saw Dr. Lentz on January 16, 1990, at which time x-rays were taken demonstrating no abnormality. The chart indicates that the doctor prescribed medications and bed rest. Claimant continued to work for respondent through the remainder of the tax season, last working for respondent on April 19, 1990. Claimant did not return to Dr. Lentz for treatment of her low back condition until July 16, 1990. She apparently saw no other doctor for this condition during that period.

Claimant acknowledges that she did not request that her employer provide her medical treatment for her low back injury. In fact, she does not recall even telling her employer's representatives what doctor she was seeing in January 1990. In early March 1990 claimant gave Linda Hauschild notice that she would be quitting after the tax season. Claimant felt like she would be more able to rest her back and, also, claimant could better operate her ceramics business out of her home. Claimant testified that a few days after she gave notice of her intention to terminate her employment, Linda Hauschild came to claimant and asked her if she wanted to file a workers compensation claim. Claimant states that she did not want to pursue a workers compensation claim because it would not look good on her employment record. No accident report was filed by respondent, and Ms. Hauschild denies that claimant ever gave her notice of any accident or injury.

Claimant next saw Dr. Lentz on July 16, 1990, and began a course of treatment for her low back and related problems that continued through March 1991. Treatment included hospitalization, exercise and therapy, traction, medication and steroid injections. CT scans of the lumbar spine August 6, 1990 and March 6, 1991 showed no significant disc abnormality. There was no significant change when the CT scans were compared. Dr. Lentz opined that the claimant's obesity was an aggravating factor to the muscular strain he diagnosed, and further emphasized that he never found any spinal structural damage.

The medical expenses associated with claimant's treatment by and through Dr. Lentz prior to June 1991 were all submitted to claimant's group carrier, Blue Cross. There is no indication that any medical expense, prior to June 1991, was ever submitted to the respondent.

On August 25, 1990 claimant signed a credit disability claim form for Globe Insurance. That form was then sent to respondent, apparently by the claimant. Claimant nowhere in her testimony explained what she intended by that disability claim form, and the claim form on its face fails to indicate that claimant was claiming workers compensation benefits for her January 1990 alleged injury.

In October 1990 claimant applied for Social Security which was refused May 4, 1991. Claimant then applied for workers compensation by written claim prepared by her attorney, signed May 29, 1991, and received by the respondent on or about June 4, 1991. The Form E-1 was filed with the office of the Director June 3, 1991, almost seventeen months after the alleged accident. In June 1991 claimant was employed at Presbyterian Manor as a payroll clerk, but left that job in August, 1991 due, not to her back problems, but because of memory loss. On September 4, 1991 claimant reapplied for Social Security and was granted disability benefits in April 1992.

Claimant argued that since respondent failed to provide medical treatment pursuant to K.S.A. 1989 Supp. 44-510(b) her treatment with Dr. Lentz should be deemed authorized, thus tolling the statute. Since the E-1 was filed within 200 days of the last treatment by Dr. Lentz in March 1991, the claim would be timely filed. The Appeals Board disagrees.

The Supreme Court has held that an employee's procurement of his or her own medical treatment is not the equivalent of compensation payments and the statute of limitations for purpose of written claim will not be tolled. Solorio v. Wilson & Co., 161 Kan. 518, 169 P.2d 822 (1946). The Court therein stated:

"We now have to decide for the first time the question whether the procurement of outside medical attention by an employee without authorization of his employer, either express or implied, has the same force and effect as medical attention voluntarily furnished. . . .

"It is one thing to hold medical services furnished are compensation, but quite another to determine that outside services of that character when procured by the employee are tantamount thereto. Judicial construction permits the first conclusion for the simple reason that any recognition of liability on the part of the employer by the furnishing of medical attention is a part of the compensation to which the employee is entitled to receive from such employer under the act, and therefore tolls the statute, but precludes the second for the equally sound reason that there is nothing in its terms, either express or necessarily implied, which permits a construction that the procurement of outside medical treatment by the employee is payment of compensation by the employer." Solorio, supra, p. 523.

Even assuming that claimant properly reported her accidental injury and the respondent failed to timely file an accident report, claimant, at most, had one year from the date of her accident or the last date compensation was provided by the respondent in which to file her claim. The Globe credit disability insurance claim form, although signed

within that period, patently fails to meet the requirements of K.S.A. 1989 Supp. 44-520a. Claimant served written claim upon respondent on June 4, 1991 when the E-1 was received. It is well beyond one year from January 9, 1990 to June 4, 1991. The Appeals Board finds that claimant has failed to prove timely written claim was served upon the respondent pursuant to K.S.A. 44-520a and K.S.A. 44-557(c).

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated August 10, 1994, is reversed and that an award of compensation in favor of the claimant, Nancy Lawrence, and against respondent Walter Cobler, CPA, Chartered and its insurance carrier, Trinity Universal Insurance Company, is denied due to claimant's failure to file written claim in a timely fashion pursuant to K.S.A. 44-520a and K.S.A. 44-557(c).

The Appeals Board further finds that the additional issues raised in this matter are rendered moot as a result of the above decision.

Fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are assessed against the respondent and its insurance carrier as delineated in the August 10, 1994 Award of Special Administrative Law Judge William F. Morrissey.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

- cc: Paul D. Post, Topeka, Kansas
- Matthew S. Crowley, Topeka, Kansas
- Jeffrey K. Cooper, Topeka, Kansas
- William F. Morrissey, Special Administrative Law Judge
- George Gomez, Director