

the Administrative Law Judge. Those issues are date of accident, average weekly wage, nature and extent of disability, and whether claimant was disabled for a period of at least one week from earning full wages.

FINDINGS OF FACT

(1) Claimant started working for respondent in January 1985. Approximately 90 percent of his job was spent in front of a computer terminal doing programming and working at the keyboard.

(2) In June or July 1990, claimant started developing problems with his hands and wrists. These problems worsened and in August 1990, he contacted his family doctor, Dr. Grindel. An EMG study was performed which disclosed that claimant had bilateral carpal tunnel syndrome.

(3) On January 11, 1991, claimant advised his supervisor, Ty Starksman, of his condition. The supervisor recommended claimant report to medical or human resources to fill out the necessary paperwork, which claimant did. Thereafter, respondent's workers compensation insurance carrier (Aetna) contacted claimant and sent him to Dr. Clark, a hand specialist in Wichita, Kansas.

(4) On January 15, 1991, claimant voluntarily terminated his employment with respondent and soon thereafter moved to Florida. Before claimant left for Florida, he was also seen by respondent's own doctors at Boeing Central Medical on January 18, 1991. He was instructed to wear splints, which he did on and off for about a year.

(5) In December 1991, claimant contacted Aetna to request that medical treatment be provided in Florida. Aetna authorized claimant to find a doctor in Florida, which claimant did at Matthews Orthopedic Clinic in March 1992. This treatment was authorized and paid for by Aetna. In May 1992, claimant was instructed to use wrist splints as a part of his ongoing conservative treatment by the doctors at Matthews Orthopedic Clinic.

(6) In response to a request by Aetna, claimant wrote Aetna a letter on April 10, 1992, explaining his current job activities. According to claimant, his work for Cadre Technologies after leaving Boeing involved very little keyboarding. His base wage with Cadre Technologies was \$858.44 per week with an additional \$197.20 per week in fringe benefits.

(7) On October 6, 1994, claimant underwent carpal tunnel release surgery. Dr. Jeffrey A. Deren with the Matthews Orthopedic Clinic testified that claimant would have been taken off work in excess of one week following that surgery.

CONCLUSIONS OF LAW

Date of Injury

The Administrative Law Judge, citing Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), concluded that claimant's date of injury was November 30, 1990. This conclusion was based on the fact that claimant sought chiropractic treatment for his carpal tunnel syndrome condition during September through November 1990. Claimant contends that the Administrative Law Judge misapplied the law as set forth in Condon, and that the rule of law announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), should control the issue as to when the date of injury should be.

Respondent contends that the Administrative Law Judge's finding should be affirmed. According to respondent, the "last day of work" rule announced in Berry does not apply because claimant left work with respondent for reasons unrelated to his injury.

In Berry, the Court of Appeals attempted to resolve the problem that arises in cases involving injuries due to repetitive traumas. A bright line rule was established for these cases whereby the date of accident would be the last day worked by the claimant. Problems with this "last day of work" rule soon became apparent. In Condon, the Court of Appeals acknowledged that there would be exceptions to the bright line rule announced in Berry.

When a worker suffering from work injuries diagnosed as caused by micro-traumas is laid off from work in a general layoff and not because of a medical condition, the date of injury is not always the last day the worker worked. Condon at Syl. ¶ 2.

In Alberty v. Excel Corporation, 24 Kan. App.2d 678, 851P.2d 967, *rev. denied* 264 Kan. __ (1998), the Court of Appeals adopted the rule that where the claimant leaves work for reasons unrelated to the injury, the date of accident in a repetitive trauma case is the last day of work before work restrictions are implemented.

The theory connecting these decisions is that as long as a claimant continues to work at the same job that caused the injuries, the claimant is continuing to experience mini-traumas and thus further injury. Consistent with the "last injurious exposure" rule previously followed in occupational disease cases, the date claimant ceases to experience these mini-traumas is generally the date claimant stops work or changes job duties. Hence, the date medical restrictions are implemented resulting in accommodations being made to claimant's job duties is the equivalent to quitting work because the claimant will no longer be exposed to the traumas which caused the injuries. Therefore, when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure and hence, the date of accident, is when the claimant's restrictions are implemented and/or the job changes or job accommodations are otherwise made by the employer to prevent further injury.

In the case at bar, claimant did not leave his work with respondent because of his injury. But claimant continued working for respondent at the same job without restrictions and without accommodations until he voluntarily quit on January 15, 1991. Accordingly, claimant's last injurious exposure was January 15, 1991. The Appeals Board finds January 15, 1991, to be the date of accident.

Notice

The Administrative Law Judge applied the incorrect version of K.S.A. 44-520 in determining that claimant failed to give notice of injury within 10 days and that even though claimant did give respondent notice within 75 days, claimant failed to establish just cause for his failure to give notice within 10 days. As noted above, the Administrative Law Judge found November 30, 1990, to be claimant's date of accident. This was the date the Administrative Law Judge utilized to determine whether claimant gave respondent notice of injury within 10 days of the accident date. The Appeals Board finds that January 15, 1991, should be used for the date of accident. Therefore, the notice given to the respondent on January 11, 1991, was given within 10 days of claimant's accident.

Using an accident date of January 15, 1991, respondent argues that the notice given on January 11, 1991, cannot be proper notice because the statute requires that notice be given after the accident, not before. It hardly needs to be noted that the single date of accident in repetitive trauma cases is a legal fiction utilized to establish such things as a date from which to commence permanent disability benefits, determine an average wage, and determine what law to apply. The fact remains that repetitive trauma injuries are, by definition, a series of accidents that occur after a period of time. It is not necessary for a claimant to give notice each and every day during that series. Furthermore, in this case the applicable version of the notice statute is K.S.A. 44-520 (Ensley) which provided that the failure to give notice will not bar the claim unless the employer proves prejudice as a result of lack of notice. Wietharn v. Safeway Stores, Inc., 16 Kan. App. 2d 188, Syl. ¶ 2, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991). Respondent has failed to show how it was prejudiced by receiving notice four days early.

Written Claim

K.S.A. 44-520a provides in part that written claim for compensation must be served upon the employer within 200 days from the date compensation was last paid. Aetna paid compensation in the form of medical bills that claimant incurred for authorized medical treatment in January 1991 and in March and May of 1992. Claimant wrote a letter to Aetna dated April 10, 1992, which claimant contends satisfies the requirement for written claim. Although respondent does not concede that letter constitutes a claim for compensation, the Administrative Law Judge found the letter represented a written claim. But because the April 10, 1992, letter was not delivered within 200 days of November 30, 1990, the Administrative Law Judge found claimant's written claim was not timely. This analysis would produce the same result utilizing an accident date of January 15, 1991, were it not for the ongoing compensation in the form of medical treatment furnished by respondent and

Aetna. See Sparks v. Wichita White Truck Trailer Center, Inc., 7 Kan. App.2d 383, 642 P.2d 574 (1982).

A claim for compensation need not take any particular form as long as it is, in fact, a claim. In determining whether written claim was served, the trier of facts should examine the various writings and all surrounding facts and circumstances and, after considering all of these, place a reasonable interpretation upon them to determine what the parties had in mind. See Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973); Lawrence v. Cobler, 22 Kan. App.2d 291, 915 P.2d 157 (1996). Claimant testified that the paperwork he completed at Boeing was for the purpose of making a claim for workers compensation benefits.

Q. How did you go about reporting this to your employer?

A. Well, I know that at least on January 11th of 1991, that I am positive, that I filled out some paperwork at that time at Boeing with respect to this injury because I knew at that time that I would be leaving Boeing, my position at Boeing. So knowing that it was a pre-existing condition and moving to a new job I wanted to have continued medical and I went ahead and filled out the necessary paperwork so that I could continue to get this looked after and paid for.

The fact that claimant filled out this "paperwork" is uncontroverted. Although the actual paperwork is not part of the record, the Appeals Board finds that claimant clearly had making a claim for workers compensation benefits in mind when he completed the paperwork. That writing, therefore, satisfies the written claim requirement of K.S.A. 44-520a.

Average Weekly Wage

Claimant asserts his average weekly wage was \$1,055.64, which consisted of \$858.44 in wages and an additional \$197.20 per week in fringe benefits. Respondent does not dispute the \$858.44 in weekly wages but did not agree to the figure for additional compensation. The fringe benefit statement was prepared by respondent. As there is no evidence to the contrary, the average weekly wage is found to be \$1,055.64.

Disabled For One Week

Claimant requests an award for permanent partial disability compensation. K.S.A. 1990 Supp. 44-501(c) provided:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the

employee for a period of at least one week from earning full wages at the work at which the employee is employed.

Respondent contends claimant is not entitled to permanent partial disability compensation because he missed no work from his job at Boeing. The statute does not, however, require that the employee miss work from the employer in whose employ claimant was injured. Instead, the requirement is that claimant be disabled "from earning full wages at the work at which the employee is employed." The evidence is that the claimant was employed by Cadre Technologies in Florida and that he ultimately underwent surgery for his work-related condition. The physician testified that claimant would have been disabled for more than a week from the surgery. At page 15 of the Deposition of Jeffrey A. Deren, M.D., there appears the following:

- Q. About how much time would Mr. Remmel have missed from work from this procedure?
- A. What type of work did he do?
- Q. At the present time when you saw him he was a computer salesman with some demonstration involved.
- A. Probably three to four weeks. And, again, my standard protocol for this is I have them out of work completely for the first week.

The Appeals Board finds that claimant was disabled from earning full wages at the work he was doing and, therefore, he is not limited to only medical compensation by K.S.A. 1990 Supp. 44-501(c).

Nature and Extent of Disability

Respondent did not argue the issue of nature and extent of disability at oral argument, or in its brief to the Appeals Board, or in its submission letter to the Administrative Law Judge. Claimant requests an award of permanent partial disability compensation based upon the 12 percent whole person impairment rating given by James F. Holleman, Jr., D.O., rather than the 2 percent rating given by Dr. Deren because the 12 percent rating was based upon the AMA Guides to the Evaluation of Permanent Impairment whereas the 2 percent rating was not. Although the Workers Compensation Act did not require impairment ratings to be based upon the AMA Guides at the time of the accidental injury, in this case the Appeals Board agrees that the 12 percent impairment rating is the more credible evidence. Therefore, an award for a 12 percent permanent partial disability is appropriate.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated December 9, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas D. Remmel, Jr., and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury which occurred January 15, 1991, and based upon an average weekly wage of \$1,055.64 for 415 weeks of permanent partial general disability compensation at the rate of \$84.46 per week or \$35,050.90, for a 12% permanent partial general disability, making a total award of \$35,050.90.

As of July 15, 1998, there is due and owing claimant 391.14 weeks of permanent partial general disability compensation at the rate of \$84.46 per week, in the sum of \$33,035.68 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,015.22 is to be paid for 23.86 weeks at the rate of \$84.46 per week, until fully paid or further order of the Director.

Respondent and its insurance carrier are ordered to pay all reasonable and related medical expenses.

An unauthorized medical allowance of up to \$350 is awarded upon presentation to respondent of an itemized statement verifying same.

Future medical will be awarded upon proper application to and approval by the Director.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 1990 Supp. 44-536.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of Regular hearing	\$320.55
Total	\$320.55
Metropolitan Court Reporters, Inc.	
Deposition of James F. Holleman, Jr.	\$ Unknown

Total	\$ Unknown
Central Florida Reporters, Inc. Deposition of Jeffrey A. Deren	\$ Unknown
Total	\$ Unknown

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy J. Pringle, Topeka, KS
Frederick L. Haag, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director