



In this Preliminary Hearing Order, Administrative Law Judge Shannon S. Krysl denied claimant's request for temporary total disability benefits and medical treatment on the basis the claimant failed to give timely notice and failed to serve a timely written claim for compensation on the respondent. The claimant requests review of this Preliminary Hearing Order requesting the Appeals Board to address the two foregoing issues.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

The issues raised by the claimant as to whether notice was given or timely written claim was made are issues that are enumerated in K.S.A. 44-534a(a)(2) as jurisdictional and subject to Appeals Board review from a preliminary hearing order.

The claimant, Sandra R. Brown, makes a claim for temporary total disability benefits and medical treatment for an alleged injury to her right wrist, shoulder and neck which occurred while employed by the respondent, Sedgwick County, Kansas. This injury allegedly occurred between January 7, 1991, and June 26, 1993, claimant's last day worked, as a result of performing her everyday work activities. The claimant was employed by the Sedgwick County Evaluation Treatment Center as a psychiatric aide from June 6, 1989, until June 26, 1993, when the facility was closed and she was released from her employment. Her job duties consisted of one-on-one feedback activities with patients, monitoring and keeping patient's charts current and performing miscellaneous janitorial duties.

The claimant testified that on January 7, 1991, while mopping the floor, she bumped her right wrist on a door. She further claims she reported this incident to Sylvia Purves, the night shift nurse who is now deceased. After this incident, claimant received medical treatment for a ganglion cyst from George Lucas, M.D., at the Wichita Clinic. On August 29, 1991, Dr. Lucas excised the ganglion cyst on her right wrist. Claimant returned to regular work in October, 1991. At that time, she did not report the ganglion cyst to be work related and her Blue Cross Blue Shield health insurance paid for this medical treatment. Claimant now claims that her right wrist continued to cause her problems after she returned to work following the removal of the ganglion cyst. However, she contends that she notified the respondent of her continuing right wrist problems approximately one week before her employment was terminated in June of 1993. She further contends she notified her supervisor Kathryn Sanders, Director of Nursing, concerning her right hand and wrist problems and requested at that time medical treatment.

Claimant goes on to testify that after her employment was terminated with Sedgwick County, she was employed by Recovery Services on July 9, 1993, performing work of a psychiatric aide with duties similar to what she performed for Sedgwick County. She testifies that her right wrist and arm problems worsened while she was working for Recovery Services for approximately three months. She is presently being treated for right carpal tunnel syndrome by Miguel Pirela-Cruz, M.D., at the Wichita Clinic. Dr. Pirela-Cruz, has recommended surgery to relieve the claimant from her continuing symptomatology.

The claimant in a workers compensation case has the burden of proof to establish his or her right to an award of compensation and to prove the various conditions on which such right depends. See K.S.A. 44-501(a). In this case, the Administrative Law Judge has

denied the claimant benefits on the basis the claimant has not met her burden of proof in regard to notice and timely written claim. After review of the whole record, the Appeals Board agrees with the Administrative Law Judge's finding that the claimant did not serve on the respondent a timely written claim. However, the Appeals Board disagrees with the Administrative Law Judge's finding that timely notice was not given. The alleged dates of injury in this instant case are January 7, 1991 through June 26, 1993. Accordingly, the notice statute in effect at that time was K.S.A. 1990 Supp. 44-520, required an employee to give the employer notice within ten days after the date of an accident. Claimant claims she notified Kathryn Sanders, Director of Nursing for the respondent, of her continuing right wrist and arm problems approximately one week prior to her termination on June 26, 1993. However, Kathryn Sanders testified that her first notice of claimant's wrist and arm problems was when claimant called her approximately two months before July 12, 1994, the day she testified in this matter. The claimant asked her about certain information that claimant thought was in her personnel file relating to her hand injury.

The notice statute in effect at the time of this accident also provides that notice or any defect therein shall not be a bar to an action for benefits unless the employer proves that he was prejudiced thereby. See K.S.A. 1990 Supp. 44-520. The Administrative Law Judge in finding that the claimant did not give the employer notice of her accidental injury had to find that the claimant's testimony indicating that she told Kathryn Sanders of her wrist and arm problems one week before she left the respondent's employment on June 19, 1993, was not credible. The Appeals Board affirms such finding for preliminary hearing purposes, as the Administrative Law Judge had the opportunity to personally judge the claimant and determine whether her testimony was credible and persuasive. The evidence in this case, however, does establish that the claimant served a written claim on the respondent on March 18, 1994, and such a written claim did give the respondent notice of the claimant's alleged injury. Even though this notice is not within ten days from the date of claimant's alleged injury, respondent failed to prove that it was prejudiced because of this failure and therefore this claim is not barred because of lack of notice. See K.S.A. 1990 Supp. 44-520; Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978).

With respect to the timely written claim issue, the Appeals Board affirms the Administrative Law Judge's finding that a timely written claim for compensation was not served on the respondent by the claimant. The record establishes that claimant did serve a written claim for compensation on the respondent on March 18, 1994. The statute generally requires an employee to serve a written claim on the employer within two hundred (200) days after the accident. See K.S.A. 1990 Supp. 44-520a(a). Claimant testifies that the last day her work activities caused her injury was June 26, 1993, clearly more than two hundred (200) days from date she served written claim on the employer on March 18, 1994. However, K.S.A. 1990 Supp. 44-557, requires the employer to file an accident report within twenty eight (28) days from knowledge of an accident or no limitation of time in the workers compensation act shall run, if the employee has given notice of the accident as required by K.S.A. 44-520. Where an employer has failed to file a report of accident, proceedings are extended to one year from the date of accident. There is no evidence in the record of this case that the respondent filed a report of accident. Therefore, the time period to file the written claim is extended for one year, if the employee has given notice of the accident. Accordingly, since the Appeals Board has found that notice was not given by the claimant to the respondent until March 18, 1994, the two hundred (200) day limitation contained in K.S.A. 1990 Supp. 44-520a, was not tolled and thus, the written claim filed on March 18, 1994, is not timely.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Shannon S. Krysl, dated August 1, 1994, denying claimant temporary total disability benefits and medical treatment is affirmed on the basis that the claimant failed to serve upon employer a timely written claim as provided by K.S.A. 1990 Supp. 44-520a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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