

(1) Claimant alleges a series of accidents from December 1993 through March 5, 1994. At no time during this period did the claimant report his problems to respondent because his condition had not yet been diagnosed; although, claimant was experiencing symptoms.

On March 7, 1994, claimant was involved in a nonwork-related accident which rendered him unable to work from March 7, 1994 through August 29, 1994. On April 26, 1994, while being treated by Dr. Welch in Topeka for the injuries suffered from the car accident, claimant was informed by Dr. Welch that he had carpal tunnel syndrome caused by his repetitive work. After the carpal tunnel syndrome was diagnosed and the claimant was told that it was work related, he reported it to Payless on April 29, 1994.

Claimant suffered accidental injury for the period December 1993 through March 5, 1994. The Kansas Court of Appeals in Berry v. Boeing Military Airplanes, No. 71,007, found, when dealing with carpal tunnel syndrome, the pertinent date of injury to be the last day worked. Thus, claimant suffered accidental injury in a series of accidents up to March 5, 1994. As claimant advised respondent of the alleged injury on April 29, 1994, this would be beyond the ten (10) days set forth in K.S.A. 44-520, but would be within seventy-five (75) days.

Claimant, while aware that he was experiencing problems, was unaware of the diagnosis until April 26, 1994, when he was advised by Dr. Welch that he had repetitive injuries that were work related. The Appeals Board feels that knowledge of symptoms do not constitute knowledge of an injury in all instances and finds this confusion on the claimant's part to constitute just cause for claimant's having failed to advise respondent of his condition within ten (10) days of March 5, 1994. As such, the Appeals Board finds that while claimant failed to provide notice to the respondent within ten (10) days of the injury, claimant did have just cause for having failed to provide same to the respondent and the provisions of K.S.A. 44-520 are satisfied. Whether just cause exists depends upon all the facts and circumstances and is to be determined on a case-by-case basis.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge Floyd V. Palmer dated October 27, 1994, shall be, and is, reversed and remanded for further findings consistent with this decision.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I must respectfully dissent from the opinion of the majority in this matter. I agree the Court of Appeals in Berry v. Boeing Military Airplanes, *supra*, found the last date worked to be the appropriate date of injury in a carpal tunnel situation. This would establish March 5, 1994, as the last injury date suffered by claimant. This would require claimant, by March 15, 1994, to advise respondent of his condition or provide just cause for his failure to notify respondent of same under K.S.A. 44-520. Claimant admitted that his hand and wrist problems began in December 1993 and further testified that the operating of his fork lift caused him problems. His symptoms, including tingling in his hands, waxed and waned with the level of activity at work.

The majority of the Appeals Board, in finding that claimant did not have knowledge of an accident until the condition was diagnosed, violates the language of K.S.A. 44-520. K.S.A. 44-520 requires notice be provided to the employer of the accident, stating the time and place and particulars thereof, ". . . within 10 days after the date of the accident"

K.S.A. 44-520 says nothing about the claimant's knowledge of medical conditions nor about a diagnosis of the condition. Claimant was aware that he was having symptoms and problems through his last day at work. Claimant's delay until a specific title could be attached to his symptoms does not constitute just cause for failing to advise the employer that he was suffering these symptoms. To so define just cause will allow any claimant the right to delay up to seventy-five (75) days from the date of accident until a specific medical term is attached to his or her injuries or symptoms. This was not the intent of the Legislature when the statute was written.

The Court of Appeals in Berry, *supra*, declined to use the date of diagnosis in deciding date of injury. The date of diagnosis as stated by the Court of Appeals would set a potential trap for individuals, who despite pain and discomfort, continue to work after their carpal tunnel is "diagnosed" or has "manifested itself." The Court elected to avoid this uncertain date due to its prejudice to the claimant. The Appeals Board has elected to adopt this date of uncertainty even though it causes significant prejudice to respondents and allows claimants to avoid notifying the respondent of their conditions until after having gone to a doctor and been labeled with a specific medical condition.

It is this Board Member's opinion that claimant failed to provide notice to respondent within ten (10) days of his accidental injury of March 5, 1994 as is required by K.S.A. 44-520. Further, no just cause existed to fail to notify respondent of claimant's injury. Claimant was aware of his problem and yet elected to withhold this information from the respondent. This Board Member would move to affirm the Administrative Law Judge's Order denying compensation, although on slightly different grounds from that of the Administrative Law Judge, and feels claimant did not have just cause for failing to notify respondent of his condition, as is required by K.S.A. 44-520.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS

FRANK AUSTIN, SR.

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Patrick M. Salsbury, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director