

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

**ORVILLE E. ANDERSON**  
Claimant

VS.

**LEARJET AIRCRAFT CORPORATION**  
Respondent

AND

**SELF INSURED**  
Insurance Carrier



Docket No. 190,739

**ORDER**

**ON** the 27th day of October, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge Shannon S. Krysl, dated September 1, 1994, came on for oral argument.

**APPEARANCES**

The claimant appeared by and through his attorney, Dale V. Slape of Wichita, Kansas. The respondent, a qualified self insured, appeared by and through its attorney, Edward Heath, Jr. of Wichita, Kansas. There were no other appearances.

**RECORD**

The record in this case consists of the documents of record on file with the Division of Workers Compensation, including the transcript of the Preliminary Hearing held before Administrative Law Judge Shannon S. Krysl on August 25, 1994, and the exhibits attached thereto.

**ISSUES**

- (1) Did claimant provide notice of an accident arising out of and in the course of his employment to the respondent as is required by K.S.A. 44-520?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

Claimant has failed to prove by a preponderance of the credible evidence that notice was provided to the respondent of an accident arising out of and in the course of his

employment for the period January 1994 through February 2, 1994, within ten (10) days or within seventy-five (75) days as is required by statute.

Claimant had worked for the respondent for many years and had suffered foot problems for many years. In 1974, claimant was forced to walk five (5) miles in a snowstorm, causing immediate and severe foot pain. In 1986, claimant was diagnosed as having Morton's neuroma and surgery was suggested by Dr. Artz. In 1994, Dr. Toohey also diagnosed Morton's neuroma and likewise suggested surgery. The claimant had delayed undergoing surgery for his feet as he had earlier been informed by Dr. Toohey that claimant's foot problems might be associated with a pre-existing back problem suffered by claimant. When back surgery did not resolve the problem, claimant underwent the foot surgery as was earlier recommended. Claimant terminated his employment with respondent on February 2, 1994.

On May 5, 1994, claimant was referred to Dr. Philip Mills for an independent medical examination in relation to his back. Dr. Mills, in assessing the back, also opined that claimant's foot problems were work-related, stemming from the constant activities of claimant walking on hard surfaces in the respondent's plant. Shortly thereafter, claimant provided notice and written claim to the respondent alleging bilateral foot problems arising out of and in the course of his employment through February 2, 1994, his date of termination.

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

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The time limit between February 2, 1994, when claimant terminated his employment, and May 5, 1994, when he attended the independent medical examination with Dr. Mills, exceeds the seventy-five (75) day statutory limit set in K.S.A. 44-520. Thus, the claimant must either show that the respondent had actual notice of the accident, the employer was unavailable to receive such notice, or the employee was physically unable to give such notice. There is no evidence in the file to indicate the employer had actual knowledge of any accident to claimant's feet related to claimant's employment. The employer, Learjet Aircraft Corporation, was, and continues to be, in existence and was available to receive notice to any of its authorized agents had claimant offered said notice. There was also no evidence presented to show claimant physically unable to give such notice. The Appeals Board thus finds that claimant has failed to prove by a preponderance of the credible evidence that notice of an injury from January 1994 through February 2, 1994, to claimant's feet and legs, was provided to the respondent as is required by K.S.A. 44-520.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl, dated September 1, 1994, remains in full force and effect.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the findings and conclusions of the majority. The Legislature has mandated the Workers Compensation Act to be liberally construed to bring parties within its provision. See K.S.A. 44-501(g). The Workers Compensation Act, from a historical perspective, gave injured workers the right to pursue benefits under a statutory scheme in exchange for their relinquishing the common law right to sue the employer for damages in tort. The majority decision effectively eliminates the rights of all injured workers to obtain benefits under the Act when they lack knowledge they have been injured at work, a not-so-uncommon fact when the injury results from repetitive mini-trauma or overuse. In the instant case, the claimant did not learn that his symptoms were related to work activities until more than seventy-five (75) days from his last day of work. We do not have any appellate court decisions interpreting K.S.A. 44-520, as amended by 1993 Legislature. Because the ten (10) day period to report accidents is so limited, it should not commence until the injured worker has knowledge of injury and its potential relationship to work activities. To fail to do otherwise, in my opinion, violates constitutional principles.

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BOARD MEMBER

- c: Dale V. Slape, Wichita, KS
- Edward Heath, Jr., Wichita, KS
- Shannon S. Krysl, Administrative Law Judge
- George Gomez, Director