

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

**SCOTT SWEARENGIN**  
Claimant

VS.

**STONE CONTAINER CORPORATION**  
Respondent  
Self Insured

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Docket No. 199,271

**ORDER**

The Workers Compensation Appeals Board considers the application of claimant for review of an Award entered by Administrative Law Judge Alvin E. Witwer on December 30, 1996.

**APPEARANCES**

Claimant appeared by and through his attorney, William L. Phalen of Pittsburg, Kansas. Respondent, a qualified self insured, appeared by and through its attorney, Timothy G. Lutz of Overland Park, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

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

**ISSUES**

- (1) Whether claimant suffered accidental injury to his left shoulder through a series of injuries ending February 6, 1995.
- (2) Whether claimant's accidental injury arose out of and in the course of his employment with respondent.

- (3) Claimant's entitlement to future medical treatment for the left shoulder.
- (4) The nature and extent of claimant's injury and/or disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

The Administrative Law Judge made findings of fact and conclusions of law in some detail in his Award of December 30, 1996, and it is not necessary to repeat those herein. The findings and conclusions as specifically set forth in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Claimant originally suffered a scheduled injury to his left upper extremity including the wrist and elbow in 1992. An award issued in May 1995 in Docket No. 170,998 granted claimant a 20 percent impairment to the upper extremity on the left side.

Claimant later alleged problems associated with his left shoulder sustained from a series of injuries through February 6, 1995, his last date of employment with respondent.

Claimant was evaluated by three doctors, one of whom, Carl A. Foster, M.D., was a treating physician for claimant. Claimant was also seen by Don B. W. Miskew, M.D., a board-certified orthopedic surgeon appointed to perform an independent medical examination by the Court, and by Edward J. Prostic, M.D., a board-certified orthopedic surgeon hired by claimant's attorney for an evaluation.

The opinions of Dr. Miskew and Dr. Foster are similar in that neither finds claimant suffered any permanent injury to his left shoulder as a result of any accident while employed with respondent. X-rays taken of the shoulder and reviewed by Dr. Miskew were found to be normal with no indication of an abnormal acromion on the left side. Dr. Prostic, on the other hand, found claimant to have suffered a 15 to 20 percent permanent partial impairment of the left shoulder indicating a possible rotator cuff tendinitis on that side. Dr. Prostic recommended an MRI of the shoulder, but this test was never done.

In workers compensation matters it is the claimant's burden to prove his entitlement to benefits by proving the various conditions upon which his right to an award would depend. K.S.A. 44-501 and K.S.A. 44-508(g).

This burden must be carried by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

A preponderance of the medical evidence in this matter convinces the Appeals Board that claimant has failed to prove accidental injury arising out of and in the course of his employment with respondent to his left shoulder. The medical evidence from Dr. Miskew and Dr. Foster fails to support a finding that claimant has any permanency or in fact suffered any new injury to the left shoulder. The medical opinion of Dr. Prostic is based primarily upon claimant’s subjective complaints and is not sufficient to overcome the more credible evidence of the other testifying physicians.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated December 30, 1996, should be, and is hereby, affirmed, and an award of compensation is hereby denied to claimant, Scott Swearingin, and against respondent, Stone Container Corporation, a qualified self-insured, for a permanent partial disability to the left shoulder for the alleged series of injuries through February 6, 1995. Claimant is further denied entitlement to any future medical treatment for the left shoulder.

Fees necessary to defray the expense of the administration of the Workers Compensation Act shall be assessed against the respondent to be paid as follows:

Richard Kupper & Associates	\$356.50
Hostetler & Associates, Inc.	611.00
Metropolitan Court Reporters, Inc.	346.80

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William L. Phalen, Pittsburg, KS
- Timothy G. Lutz, Overland Park, KS
- Alvin E. Witwer, Administrative Law Judge
- Philip S. Harness, Director