

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

RICHARD H. FRAZIER)	
Claimant)	
VS.)	
)	Docket No. 199,465
MID-WEST PAINTING, INC.)	
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Claimant requested review by the Appeals Board of the Award entered by Administrative Law Judge Jon L. Frobish on January 31, 1997. The Appeals Board heard oral argument on June 17, 1997.

APPEARANCES

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Steven Marsh of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

Claimant raised the following issue before the Appeals Board:

- (1) Nature and extent of claimant's disability.

The respondent in its brief before the Appeals Board raised the following additional issues:

- (2) Whether claimant's back injury resulted from an accident that arose out of and in the course of his employment with respondent.
- (3) Whether claimant gave respondent timely notice of the back injury.
- (4) Whether claimant served respondent with a timely written claim for benefits as a result of the back injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and arguments of the parties, the Appeals Board finds as follows:

(1), (2)The Administrative Law Judge limited claimant to an award of permanent disability to the right forearm which is a scheduled injury found at K.S.A. 44-510d(a)(12). Claimant was awarded a 12.75 percent loss of use of his right forearm based on J. Mark Melhorn's, M.D., permanent functional impairment rating made in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, (Revised). The Administrative Law Judge found the date of accident of May 2, 1994. Neither of the parties objected to these findings if claimant's permanent partial disability is limited to a scheduled injury instead of a whole body injury.

The claimant, however, contends that he suffered a whole body injury. At the time of the regular hearing, claimant was not employed and, therefore, claimant argues that he is eligible for work disability as defined in K.S.A. 44-510e. Specifically, claimant alleged he aggravated a preexisting low back condition while he was participating in a work-hardening program in June 1994 and suffered a further aggravation while engaging in a functional capacity evaluation on October 19 and 20, 1994. Both of these medical treatment programs were prescribed by claimant's treating physician for his work-related right forearm injury. Accordingly, claimant argues that his low back injury and resultant surgery was a natural and probable consequence of his work-related right forearm injury.

In contrast, respondent argues claimant has failed to prove that his preexisting low back condition was aggravated by either the work-hardening program or the functional capacity evaluation. Respondent further contends that claimant's need for back surgery was entirely related to his preexisting condition. Also, respondent asserts if it is found that separate accidents occurred during these medical treatment programs, then claimant's claim

for compensation benefits is barred because claimant failed to timely notify respondent of the accident and failed to serve respondent with a timely written claim for compensation.

The Appeals Board finds that claimant testified he had a preexisting low back condition but the condition had been asymptomatic for approximately 6 years prior to engaging in the work-hardening program in June 1994. He testified his low back condition became symptomatic after the work-hardening program in June 1994 and was further aggravated when he participated in the functional capacity evaluation on October 19 and 20, 1994. Following the functional capacity evaluation, claimant returned to work for respondent performing a light duty job in November 1994, but voluntarily quit because of increased back and leg pain on December 17, 1994.

Claimant's attorney had claimant examined and evaluated by Ernest R. Schlachter, M.D., on two occasions, April 26, 1995 and January 25, 1996. Dr. Schlachter testified that claimant's preexisting low back condition was permanently aggravated while he was participating in the work-hardening program and also while he was undergoing the functional capacity evaluation. Dr. Schlachter further opined that as a result of this aggravation, Leonard A. Klawns, M.D., a neurosurgeon, performed a laminectomy at L5-S1 on February 16, 1995.

Claimant originally filed an Application for Hearing before the Division of Workers Compensation on March 20, 1995, alleging injuries to his right hand, arm, shoulder and neck. Claimant filed an amended Application for Hearing on May 8, 1995, to include injuries to his low back. The low back injury claim followed Dr. Schlachter's examination that related claimant's low back injury to an aggravation of a preexisting condition while participating in the work-hardening program and the functional capacity evaluation.

The Appeals Board concludes that claimant's testimony coupled with Dr. Schlachter's testimony proves it is more probably true than not that claimant's preexisting back condition was permanently aggravated while he was participating in the June 1994 work-hardening program and the October 19 and 20, 1994, functional capacity evaluation. The Appeals Board, therefore, finds claimant's current low back injury is work-related. Furthermore, the record is clear that two separate accidents occurred while claimant was participating in medical treatment programs prescribed for his work-related right forearm injury. The Appeals Board finds that the case of Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d. 548, 889 P.2d 1151 (1995), is determinative on the question of whether claimant's current low back injury is a natural and probable consequence of the original work-related right forearm injury or is a separate and new work-related injury. The Court of Appeals in Helms reversed an Appeals Board's decision that a back injury sustained by a claimant in an automobile accident while returning from physical therapy treatment for an earlier work-related wrist injury was directly related to the earlier injury. The Court of Appeals found that claimant's back injury received in the automobile accident was a new and wholly unrelated injury. The court utilized the "last injurious exposure" rule in finding claimant's second injury was separate and unrelated to her first work-related injury. 20 Kan. App. 2d., at 558.

(3), (4) At oral argument before the Appeals Board, claimant stipulated that if his alleged back injury was found not to be the natural and probable consequence of his right arm injury, then claimant failed to timely notify respondent of the accident and further failed to serve respondent with a timely written claimant as required by K.S.A. 44-520 and K.S.A. 44-520a. As previously noted, the first notice claimant gave respondent of an accident and the first written claim for compensation that claimant served upon respondent for his low back injury was the amended Application for Hearing filed May 8, 1995, and sent to the respondent by the Division of Workers Compensation on May 9, 1995. The earliest the respondent could have received the amended application would have been May 10, 1995. Therefore, the Appeals Board concludes that since claimant's last injurious exposure date was October 20, 1994, the last day claimant participated in the functional capacity evaluation, then the time interval between October 20, 1994 and May 10, 1995, would exceed the time requirements of both K.S.A. 44-520 and K.S.A. 44-520a.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated January 31, 1997, should be, and is hereby affirmed.

All remaining orders in the Award of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Chris A. Clements, Wichita, KS
- D. Steven Marsh, Wichita, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director