

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

DONALD E. KIEHL)	
Claimant)	
VS.)	
)	Docket No. 217,855
ALLIED GROUP INSURANCE)	
Respondent)	
AND)	
)	
CIGNA PROPERTY & CASUALTY INSURANCE)	
Insurance Carrier)	

ORDER

The employer and its insurance carrier appeal from an Award entered by Administrative Law Judge Bryce D. Benedict on July 9, 1999. The Appeals Board heard oral argument January 5, 2000.

APPEARANCES

Paul D. Post of Topeka, Kansas, appeared on behalf of claimant. Gary R. Terrill of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This claim involves three alleged injuries. First, claimant alleges he injured both his left shoulder and left knee in a fall at work on August 24, 1994. Next, claimant alleges he aggravated the shoulder and knee injuries as a result of repetitive work duties he performed through October 2, 1996. Finally, claimant alleges he aggravated the shoulder injury in a series of injuries through October 11, 1996, by using crutches after surgery on his knee.

In this appeal, respondent raises separate issues for each alleged date of accident:

- I. Accident of August 24, 1994
 - A. Did claimant make a timely written claim as required by K.S.A. 44-520a?

- II. Accident by series from work through October 2, 1996
 - A. Has claimant proven accidental injury arising out of and in the course of employment?
 - B. Did claimant give timely notice as required by K.S.A. 44-520?
 - C. Did claimant make a timely written claim as required by K.S.A. 44-520a?
 - D. Did claimant make a timely application for hearing as required by K.S.A. 44-534(b)?

- III. Accident by series for use of crutches through October 11, 1996
 - A. Did claimant prove accidental injury arising out of and in the course of employment?
 - B. Did claimant give timely notice as required by K.S.A. 44-520?

Claimant's testimony about the initial accident of August 24, 1994, is uncontradicted. Claimant injured his knee and shoulder, claimant gave timely notice, and respondent authorized medical treatment. The issues on appeal for all three alleged dates of accident turn on whether the authorization for medical treatment following the August 24, 1994 injury extended the time for written claim, whether claimant has proven that he permanently aggravated the shoulder and knee injuries through the alleged series of accidents and, if so, when he first gave notice of the alleged series of accidents.

Claimant's brief identifies as additional issues the amount of the average weekly wage, nature and extent of disability, unauthorized medical, and future medical.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be affirmed.

Findings of Fact

1. Claimant worked for respondent, an insurance carrier, as a senior physical damage appraiser. On August 24, 1994, while inspecting damage to a car, claimant tripped on some weeds and fell. He broke his fall with his left hand on the side of the car but fell to the ground. The accident resulted in injury to his left shoulder and his left knee.

2. Respondent authorized claimant to choose a physician and claimant went to Dr. David E. Thurston. Dr. Thurston had done arthroscopic surgery on claimant's knee in 1987. After the accident at issue here, claimant saw Dr. Thurston once, September 13, 1994, and then did not return for approximately two years. Dr. Thurston's record of that one visit in 1994 shows that he saw claimant regarding his left knee and left shoulder.

As to the left knee, Dr. Thurston diagnosed degenerative changes to the knee with a new strain. Dr. Thurston stated he did not think claimant needed to do anything "right now" but offered anti-inflammatories that claimant declined.

As to the left shoulder, Dr. Thurston noted arthritis and possibly an old rotator cuff injury. Dr. Thurston considered it doubtful that claimant's injury could be repaired but offered to refer claimant to one of his partners. Dr. Thurston also offered steroid injections. Claimant declined because of his experience with previous injection to his other shoulder. The record also contains the following statement indicating further treatment may be required:

Right now, I think he simply wishes to wait and see how he does, but if he calls back, I would be happy to refer him further for arthroscopic evaluation and whether or not debridement could be done or whether he could have a rotator cuff injury that would be amenable to any kind of surgical repair.

3. Claimant continued to have difficulties with both the knee and shoulder but chose to take pain medication and did not ask for additional treatment until September 1996. The ongoing shoulder problems included loss of range of motion, loss of strength, and pain. In September, claimant decided it was time to deal with the knee problem and contacted first Ms. Gretchen Cowling, a personnel assistant for respondent. Claimant advised Ms. Cowling that Dr. Thurston had recommended knee surgery. Ms. Cowling in turn contacted respondent's insurance carrier in the person of Lisa Wagner. The insurance carrier authorized the surgery and Dr. Thurston performed surgery on claimant's left knee on October 2, 1996. Respondent paid for the surgery and paid temporary total disability benefits for a period after the surgery.

4. Following the surgery to his knee, claimant used crutches. While using the crutches, claimant experienced increased symptoms in his left shoulder.

5. On October 11, 1996, during a follow-up visit after the left knee surgery, claimant mentioned shoulder problems to Dr. Thurston and Dr. Thurston referred claimant to Dr. Craig L. Vosburgh for evaluation of the shoulder. Dr. Thurston's notes mention the original 1994 injury but do not mention aggravation of the shoulder from work or use of the crutches.

6. Claimant first saw Dr. Vosburgh October 17, 1996. Dr. Vosburgh's records reflect claimant had injured his left shoulder in 1972. An arthrogram in December 1972 revealed

fibrous changes but no evidence of rotator cuff tear. Dr. Vosburgh's notes from a visit on November 13, 1996, indicate claimant thought use of the crutches exacerbated the symptoms in his shoulder.

7. Dr. Vosburgh diagnosed, and ultimately performed surgery for, a torn rotator cuff in claimant's left shoulder. Dr. Vosburgh concluded, based on Dr. Thurston's records, that claimant likely had a torn rotator cuff in 1994 when Dr. Thurston saw claimant. Dr. Vosburgh testified that use of the crutches could exacerbate symptoms from a torn rotator cuff but he did not believe use of the crutches would cause a tear to become bigger. He thought a high acceleration-type injury would be necessary to cause a dramatic worsening in the rotator cuff.

Claimant developed a staph infection from the first shoulder surgery and has had to undergo several shoulder surgeries to address resulting problems.

8. Dr. Vosburgh rated claimant's shoulder impairment as 50 percent of the left upper extremity and converted this to 30 percent of the whole person.

9. Dr. Sergio Delgado examined claimant September 2, 1998. He testified the use of crutches could cause an extension of a tear in the rotator cuff and could cause increase in the symptoms. In fact, he considered any activity, following an initial tear, to be source of additional tear or erosion of the bone.

10. Dr. Delgado rated the shoulder impairment as 45 percent of the shoulder or 27 percent of the whole person. He found a 25 percent impairment of the left lower extremity which he converted to 10 percent of the whole person. Dr. Delgado combined the impairment rating for a 34 percent impairment of the whole person.

11. Claimant first made written claim October 28, 1996. The written claim states the accident occurred August 24, 1994.

12. Claimant receives social security retirement benefits of \$308.39 per week.

Conclusions of Law

1. The Board finds claimant did make a timely written claim for the accident of August 24, 1994. K.S.A. 44-520a requires that written claim be made within 200 days from the date of accident or the last payment of compensation, whichever is later. Payment of medical expenses is payment of compensation and once an insurance carrier has authorized a treating physician, it owes a duty to notify the employee of its discontinuance of medical services. If the insurance carrier does not give such notice, the time for filing written claim may be extended. *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973). The Board does not construe the *Blake* decision to extend the time indefinitely in all cases. The *Blake* decision, itself, limited the holding by stating the

extension of time limits would apply “at least where the respondents are on notice that the workman is seeking additional treatment on the assumption that he is still covered” In this case, the authorized physician proposed specific future treatment that included the possibility of surgery. Claimant initially chose not to have the additional treatment, hoping to avoid it if possible. Nothing in the conduct of the employer or its insurance carrier alerted claimant that the treatment would not be available to him if needed. Under these circumstances, the Board finds the time limits were extended, the same as when medical treatment is provided, until respondent notified claimant that treatment for the shoulder would be denied. Claimant made written claim within 200 days from that date.

2. The Board finds claimant has not proven permanent aggravation of the shoulder or knee injuries by work through October 2, 1996.

3. The Board also finds claimant has not proven permanent aggravation of the shoulder injury by use of the crutches through October 11, 1996. The Board finds claimant did experience increase in the shoulder symptoms while using crutches but even the opinion from Dr. Delgado is only an opinion that the use of crutches could cause additional tear. The Board concludes claimant has not met his burden.

4. Since the time limit was extended, notice, written claim, and application for hearing were all timely for both the injury to the shoulder and the knee.

5. Respondent is entitled to an offset for the amount of the social security benefit but the workers compensation benefits are not to be less than the functional impairment. K.S.A. 44-501(h). In this case, claimant is, for that reason, entitled to benefits based on the functional impairment only.

6. The Board agrees with and affirms the finding that claimant’s functional impairment for both injuries is 34 percent of the body. This is based on the rating of Dr. Delgado. On appeal, claimant asks for a work disability but for reasons given above, the Board limits the award to the functional impairment. Respondent disputes compensability, based on various time limits, but not the finding of 34 percent whole body impairment.

7. The Board finds, as did the ALJ, that claimant’s average weekly wage was high enough to pay the maximum weekly benefit. Mr. Monty D. Longacre’s report reflects a base wage of \$873 and the parties agreed the wage would warrant the maximum.

8. Claimant is entitled to future medical treatment for both the knee and the shoulder on application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on July 9, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Paul D. Post, Topeka, KS
- Gary R. Terrill, Overland Park, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director