

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

MARGARET A. GODDARD)	
Claimant)	
VS.)	
)	Docket No. 223,167
SOUTH HAVEN GUEST HOME)	
Respondent)	
AND)	
)	
COMMERCIAL UNION INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals from the December 18, 1997, Order and December 19, 1997, Order Nunc Pro Tunc of Administrative Law Judge John D. Clark wherein the Administrative Law Judge authorized Dr. J. Mark Melhorn to perform surgery and assessed benefits against the Fund.

ISSUES

- (1) Whether the Administrative Law Judge erred in finding the Workers Compensation Fund liable for benefits related to claimant's carpal tunnel syndrome.
- (2) Whether claimant submitted timely written claim pursuant to K.S.A. 44-520a.

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:

(1) Claimant suffered accidental injury on February 16, 1996, suffering damage to her right shoulder. At that time, respondent South Haven Guest Home was uninsured for workers compensation purposes and the Fund has acknowledged liability for that injury.

(2) On July 18, 1996, respondent contracted through Commercial Union Insurance Company for workers compensation insurance. This contract lasted through December 10, 1996. Evidence regarding respondent's insurance status after December 10, 1996, is not in the record.

(3) Claimant was off work for a brief period of time after the February 16, 1996, injury. After returning to work, claimant began experiencing symptoms in her right upper extremity, specifically the right hand and wrist. The symptoms began in approximately March 1996 and have gradually worsened since that time. When claimant first returned to work, she was placed on light duty for approximately one month. After a month, claimant was returned to her regular occupation and has remained so employed ever since.

(4) Claimant was treated by several doctors for the carpal tunnel syndrome and was ultimately recommended for surgery. This surgery was scheduled in October 1997 with Dr. J. Mark Melhorn, an orthopedic surgeon. However, the insurance company refused to pay for the surgical treatment and the parties proceeded to preliminary hearing.

(5) The issues presented to the Appeals Board, including the potential liability of the Fund and whether timely written claim was submitted, hinge upon which date of accident is appropriate in this case. The parties argue several alternate dates. The Fund argues that the date of accident should be July 23, 1996, when claimant's hand pain increased to the point she was forced to seek medical treatment from Dr. James E. Marvel. The Fund argues that the principles of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) and Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) do not apply here as claimant has not experienced a "last day of work" and continues to work for respondent in her regular job.

(6) Respondent and its insurance carrier Commercial Union Insurance Company argue that the Order of the Administrative Law Judge is unclear regarding the specific date of accident. In requiring the Fund to be liable for the medical treatment, the Administrative Law Judge could be finding that claimant's ongoing upper extremity problems are all related to the February 16, 1996, accident. This finding was contradicted by claimant's testimony at the preliminary hearing when she stated that her carpal tunnel problems did not begin until some time in March 1996 after she returned to work.

(7) Respondent further argues both Berry and Condon should be considered and in addition cite Alberty v. Excel Corp., (No. 77,948, Decided January 9, 1998) wherein the Court of Appeals again addressed the issue dealing with the determination of the appropriate date of accident. However, the Appeals Board notes that a petition for review in Alberty was granted February 9, 1998, and thus far, no decision has been rendered by the Supreme Court. Therefore, citing Alberty at this time is inappropriate.

(8) In determining date of accident in this instance, it is the testimony of the claimant which is most convincing. Claimant acknowledged a specific injury to her right shoulder on February 16, 1996, after which time she was off duty for a period of time and then returned to work for a short period at light duty. When she began working her regular job, the symptoms in her right hand and wrist worsened. When asked if her condition continued to worsen up until the time Dr. Melhorn recommended surgery in October 1997, claimant answered "Yes."

(9) The Board acknowledges that claimant has not reached the last day worked as is the bright line rule in Berry supra. However, the logic of Condon applies in this instance where a claimant suffers ongoing and continuous aggravation of a microtrauma injury and is then recommended to undergo surgery. This would indicate that claimant's date of accident extended at least through October 1997 when Dr. Melhorn recommended the surgical release.

(10) It was noted that claimant filed an E-1 on May 23, 1997, which listed a specific date of accident of February 16, 1996, through August 1996 only. However, the Appeals Board notes a second E-1 was filed by claimant and claimant's attorney on June 24, 1997, alleging a date of accident of February 16, 1996, and each and every day thereafter. The Appeals Board finds that the claimant has appropriately notified all parties of her allegations with regard to the amended dates of accident claimed.

(11) The Appeals Board finds that the appropriate date of accident in this instance would be October 1997 when claimant was recommended for surgery with Dr. Melhorn. Claimant filed an E-1 with the Director of Workers Compensation on both May 23 and June 24, 1997, and the parties acknowledge that written claim was submitted May 1, 1997. Therefore, the Appeals Board finds that written claim was timely submitted pursuant to the requirements of K.S.A. 44-520a.

(12) An additional problem arises in that there is no evidence in the record regarding what if any insurance company represents respondent for an accident date of October 1997. There is also no evidence in the record regarding whether respondent is financially able to pay for the workers compensation liability which may arise from this surgery and any temporary total disability compensation to which claimant may be entitled. Having found an accident date of October 1997, the Appeals Board further finds that should respondent be financially able to pay for the temporary total disability compensation and medical treatment ordered then it will be respondent's obligation to do so. Should it

be found, however, that respondent is financially incapable of paying for the benefits provided, then the liability would fall on the Fund pursuant to K.S.A. 44-532a. In addition, the Fund shall have a cause of action against the respondent for the recovery of any amounts paid by the Fund pursuant to this order. K.S.A. 44-532a(b).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark and Order Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish, should be, and is hereby, modified and the claimant is granted medical treatment up to and including surgery with Dr. J. Mark Melhorn. With regard to whether the benefits are to be assessed against the Kansas Workers Compensation Fund, this matter is remanded to the Administrative Law Judge for a hearing regarding what if any workers compensation insurance was available to respondent in October 1997, and if no such insurance exists whether respondent is financially capable of providing the benefits ordered. The Appeals Board does not retain jurisdiction over this matter.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Kendall R. Cunningham, Wichita, KS
Christopher J. McCurdy, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director