

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

THOMAS D. ACKERSON)	
Claimant)	
)	
VS.)	
)	
THOMPSON CARTAGE INC.)	
Respondent)	Docket No. 225,518
)	
AND)	
)	
KS. TRUCKERS RISK MGMT GROUP)	
Insurance Carrier)	

ORDER

Respondent appealed Administrative Law Judge Brad E. Avery's Award dated January 19, 2001. Both parties have submitted briefs and the case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Claimant appeared by his attorney, Paul D. Post of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Kevin J. Kruse of Overland Park, Kansas.

RECORD & STIPULATIONS

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

ISSUES

The sole issue raised on review by the respondent is whether the claimant is entitled to temporary total disability compensation for the time period from June 8, 1998, until July 17, 1998, while the claimant was taken off work following surgery to his right elbow.

The respondent notes the claimant had a preexisting bone spur on his right elbow and argues that condition was not aggravated or accelerated by his work-related injury. Accordingly, respondent contends the medical treatment was not causally connected to the work-related injury.

Conversely, the claimant contends the preexisting elbow condition had been asymptomatic for several years until the work-related injury. Thereafter, the condition became symptomatic requiring surgical removal of the bone spur. Claimant concludes the Administrative Law Judge's Award of temporary total disability benefits for the period of time claimant was off work following the surgery to his elbow should be affirmed.

FINDINGS OF FACT

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

The claimant sustained a work-related injury on February 22, 1997. He was employed as a truck driver for the respondent. The accidental injury occurred when the claimant was trying to place a wheel that had come off the trailer onto a tire rack underneath the trailer. While pushing the wheel onto the tire rack the claimant lost his balance, fell over onto the concrete roadway and the wheel fell on his right arm. The claimant noted that he landed on his right wrist and elbow and the tire then fell landing on his right arm.

The claimant sought treatment on February 24, 1997, with his family physician, Dr. Seeman. The doctor's notes indicate the claimant complained of wrist and shoulder pain. An x-ray of the right wrist indicated a possible small chip fracture off the proximal end of the navicular or scaphoid. The doctor placed the claimant in a canvas wrist splint. The claimant again saw Dr. Seeman on March 4, 1997, and his complaints remained unchanged. Dr. Seeman determined that claimant should be referred for an orthopedic consultation.

On March 7, 1997, the claimant was examined by Dr. Smith. The respondent had referred the claimant to Dr. Smith for treatment. The claimant was complaining of right wrist and shoulder pain because of the fall on February 22, 1997. On examination the doctor specifically noted the claimant did not have tenderness over the ulnar collateral ligament nor down along the forearm. The doctor diagnosed a proximal pole scaphoid fracture of the right wrist and placed the claimant in a thumb spica cast. In addition, the doctor felt the claimant might have injured the rotator cuff in his right shoulder.

During the intervening office visits with Dr. Smith in March, April and May, the focus of treatment continued to be the claimant's wrist and shoulder. On June 3, 1997, Dr. Smith

released claimant from treatment and any additional treatment was to be on an as-needed basis.

The claimant returned to see Dr. Smith on June 10, 1997. This is the first office visit that documented complaints of elbow pain. The doctor's office notes on that date indicate claimant complained of pain in the right wrist which he had noticed over the past week while doing quite a bit of painting as well as utilizing his riding lawn mower. The claimant also complained of tenderness over the medial epicondyle of the right elbow. The doctor provided claimant with an elbow brace. The physical therapy records of June 10, 1997, also note that claimant did too much over the weekend and ended up with swelling around the medial epicondyle and olecranon bursa.

On June 20, 1997, the claimant received a cortisone injection in the medial epicondyle. The claimant testified this only provided relief for a couple of days and the pain and tenderness returned.

On August 1, 1997, Dr. Smith referred the claimant to Dr. Wallace for a second opinion. On August 25, 1997, Dr. Wallace examined the claimant and concluded that he had a healed fractured radius but persistent pain in the elbow and shoulder which the doctor concluded was irritated secondary to local trauma. Dr. Wallace recommended surgery to the shoulder as well as surgical excision of the bone spur on the claimant's right elbow.

The claimant then proceeded to preliminary hearing on November 25, 1997, and because there was no specific request made for medical treatment only temporary total disability benefits were ordered. On March 31, 1998, an additional preliminary hearing was held. The claimant was seeking elbow and shoulder surgery which Dr. Smith now recommended. Respondent denied that the elbow surgery was caused by the work-related accident and proffered the medical notes of claimant's personal physician, Dr. Seeman, dated May 2, 1989, which indicated that claimant had complained of intermittent elbow pain for two years. An x-ray taken at that time had revealed olecranon bursitis and a bone spur on the right elbow. The claimant admitted that he had prior problems with his elbow but he testified that it had been asymptomatic since early in the nineties. He further testified that after the accident on February 22, 1997, he could feel the bone spur poking him and he had not previously experienced that sensation.

At the second preliminary hearing, the claimant was questioned about inconsistent answers given at his discovery deposition and the prior preliminary hearing where he had not divulged prior accidents and prior treatment to his elbow and shoulder. At the conclusion of the second preliminary hearing, the Administrative Law Judge denied the requested medical treatment.

Following the denial of medical treatment for his shoulder and elbow, the claimant arranged to proceed with the elbow surgery using his insurance. On June 8, 1998, Dr.

Smith removed the bone spur on claimant's right elbow. Claimant was released to return to work on July 17, 1998.

The Administrative Law Judge referred the claimant to Peter V. Bieri, M.D. for an independent medical examination. The doctor's report, dated November 5, 1999, specifically notes that the doctor and claimant reviewed and confirmed the mechanism of injury and claimant could not specifically relate any instance of trauma to the right elbow. Moreover, the doctor's report notes that although claimant had difficulties with his wrist and shoulder, the right elbow subsequently became more symptomatic in June 1997. Dr. Bieri concluded the claimant had pre-existing bursitis of the right elbow, with no objective findings that this condition was made worse with the work-related injury. Lastly, Dr. Bieri opined the claimant had a 7 percent right upper extremity impairment which included the wrist and shoulder but specifically excluded any rating for the right elbow.

The Administrative Law Judge awarded the temporary total disability benefits for the period of time claimant was off work due to the elbow surgery.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

¹K.S.A. 44-510(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

²K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³*Brobst v. Brighton Place North*, 24 Kan. App.2d 766,771, 955 P.2d 1315 (1997).

⁴*Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

affliction.⁵ The record in this case, however, fails to prove that the work-related accident caused an aggravation or acceleration of claimant's preexisting bone spur on his right elbow.

The record reveals that claimant had a preexisting bone spur on his right elbow. The claimant had received treatment for that condition in the past. Although he claims that the accident on February 22, 1997, made the condition worse, the contemporaneous medical records do not support his contention. The medical notes of claimant's personal physician, Dr. Seeman, do not contain any mention of complaints of elbow pain. Likewise, Dr. Smith's medical notes of claimant's six office visits do not contain any mention of complaints of elbow pain. It was not until after claimant had been released from treatment by Dr. Smith that the first mention of elbow pain is noted in Dr. Smith's records. The office notes indicate the claimant noted the onset of elbow pain after he had been painting and mowing at home.

Moreover, the independent medical examiner, Dr. Bieri, specifically concluded that there were no objective findings that the preexisting elbow condition was made worse with the work-related injury. Dr. Bieri excluded the elbow from claimant's impairment rating.

The claimant has failed to meet his burden of proof that the preexisting bone spur condition on his right elbow was aggravated or accelerated by the work-related injury on February 22, 1997. Accordingly, the Administrative Law Judge's decision awarding claimant temporary total disability benefits for the time period that claimant was off work following the elbow surgery is reversed.

It should be noted that the parties stipulated at regular hearing that 50.71 weeks of temporary total disability compensation had been paid and that the contested additional temporary total disability was for the period from June 8, 1998, to July 17, 1998. Therefore, the Award will be modified to reflect that claimant is entitled to 50.71 weeks of temporary total disability compensation. In addition, it should be noted that the permanent partial disability compensation portion of the Award was calculated based upon 210 weeks for a scheduled loss of the arm rather than 225 weeks for a shoulder. Dr. Bieri's impairment rating specifically included the shoulder. Accordingly, the Award will be calculated based upon the 225 weeks provided by the schedule for injuries to the shoulder level.⁶

⁵*Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App.2d 334, 678 P.2d 178 (1984).

⁶K.S.A. 44-510d(a)(13).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 19, 2001, is modified to reverse the award of temporary total disability benefits from June 8, 1998 through July 17, 1998.

The compensable weeks for a scheduled injury are computed as follows:

The 225 weeks on the schedule minus 50.71 weeks of temporary total equals 174.29 times 7 percent of disability equals the number of compensable weeks. Therefore, the claimant is entitled to 50.71 weeks of temporary total disability at the rate of \$338 per week or \$17,139.98 followed by 12.20 weeks of permanent partial compensation at the rate of \$338 per week in the amount of \$4,123.60 for a 7 percent loss of use of the shoulder making a total award of \$21,263.58.

IT IS SO ORDERED.

Dated this _____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Paul D. Post, Attorney, Topeka, Kansas
- Kevin J. Kruse, Attorney, Overland Park, Kansas
- Brad E. Avery, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director