

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

| | | |
|--|---|--------------------|
| RAMZI ATIE |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 228,769 |
| GREEN WAYS, INC. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| HARTFORD ACCIDENT & INDEMNITY |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals from a preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated February 26, 1998, wherein the Administrative Law Judge ordered respondent to provide ongoing medical treatment through Dr. Sergio Delgado, and to pay a past medical bill with Dr. Delgado in the amount of \$635.

ISSUES

- (1) Whether claimant met with accidental injury arising out of and in the course of his employment.
- (2) Whether claimant provided notice to the respondent in a timely fashion.

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:

Claimant is the owner and 53 percent stockholder of respondent, Green Ways, Inc. Claimant alleges accidental injury on May 7, 1997, when, while carrying a generator, he slipped, and injured his knee and back. Claimant did not seek medical treatment until November 24, 1997, slightly over six months after the date of accident. Claimant alleges

he did not seek medical treatment because he felt his condition would get better and because he did not want to drive up his workers compensation insurance rates.

It was noted that claimant's workers compensation insurance coverage with Hartford was cancelled in July 1997 for failure to pay the premiums.

Claimant's partner, Mary Bowden, went into business with claimant on April 3, 1997. However this relationship soured very quickly and claimant and Ms. Bowden were involved in legal disputes regarding the assets of the company in less than one month. At no time did claimant advise Ms. Bowden that he had suffered an injury or was in need of medical care. Claimant also failed to file an accident report with the State of Kansas and provided no notice to his insurance company of the accident until November 1997.

Claimant's employee, Mr. W. A. Potter, was present on the date of accident and witnessed claimant lying on the ground next to the generator. He assisted claimant at that time and advised him to sit and rest. He acknowledged claimant appeared to be in pain. Mr. Potter worked for respondent until approximately the first of July, 1997, at which time the job concluded and his employment relationship with respondent ceased.

Claimant continued performing his job duties although he substantially reduced his physical labor and began doing paper work and telephone work instead. Claimant sought medical treatment in November 1997. He was concerned because his condition had only partially improved and he feared that something serious was wrong. Claimant acknowledged his condition did not worsen during the period May through November 1997.

With regard to whether claimant suffered accidental injury arising out of and in the course of his employment on May 7, 1997, the Appeals Board finds claimant's testimony and that of Mr. W. A. Potter, uncontradicted. Claimant apparently slipped while carrying a generator, suffering injury to his knee and his back. While respondent contends claimant did not suffer accidental injury, citing his failure to advise his partner or any other person of the injury, the testimony of claimant and Mr. Potter convinces the Appeals Board that claimant did suffer accidental injury arising out of and in the course of his employment. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

K.S.A. 44-520 requires notice of an accident be provided to the respondent within 10 days of the date of accident. This notice is to state the time and place and particulars of the accident and indicate the name and address of the person injured. The 10-day notice shall not bar recovery if the claimant shows that failure to provide notice within this 10 days was due to just cause. Just cause will allow the notice to respondent to extend to 75 days from the date of accident unless actual knowledge of the accident by the employer or the employer's duly authorized agent renders giving notice unnecessary.

Notice is intended to afford an employer an opportunity to investigate an accident and to furnish prompt medical treatment. Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978).

In this instance the Administrative Law Judge found that claimant, as the owner of the company, provided notice to himself of the accident. While it is acknowledged claimant told no other member of the company, filed no accident report, and provided no information to the respondent's insurance carrier, the Administrative Law Judge found that claimant's own personal knowledge was sufficient to satisfy K.S.A. 44-520.

The Kansas Court of Appeals was asked to consider this issue in Wietharn v. Safeway Stores, Inc., 16 Kan. App. 2d 188, 820 P.2d 719, *rev. denied* 250 Kan. 808 (1991). In Wietharn, the claimant was the manager of a Safeway store and was the duly authorized agent to receive notice of accidents. Claimant suffered an initial injury on December 31, 1983, which was not contested by respondent. Claimant then alleged a second injury on June 20, 1984, but failed to file an accident report until October 1985. Claimant obtained medical treatment on June 29, 1984, but failed to mention any work-related connection to the June 20, 1984, injury. The Kansas Court of Appeals found that claimant's personal knowledge of his own injury, even as respondent's authorized agent, did not constitute notice of the accident to respondent. In considering the facts in Wietharn, the Appeals Board finds this circumstance to be substantially different. In Wietharn, the claimant was the manager of a Safeway Store and a duly authorized agent to receive notice. He was, however, not the ultimate authority in respondent's organization. There were people in a supervisory position to whom the claimant could report and provide notice of his accident. Claimant elected to provide no notice to any of his supervisors regarding the accident.

In this instance, the claimant is the owner of the company. There is no higher authority within the organization to whom claimant could report this accident.

A review of Kansas case law fails to uncover a case on point with this situation. Cases similar to this factual situation have, however, been found in other jurisdictions. In Moreno v. Las Cruces Glass & Mirror Co., 818 P.2d 1217 (N.M. App. 1991), claimant, the president, chief executive officer and sole stockholder of the employer corporation, was found to have provided notice to the corporation of his work-related injury based upon his own personal knowledge. The Court in Moreno held that the corporation/employer was deemed to have actual knowledge of the work-related injury sustained by claimant based upon his own actual knowledge.

In Dick's Delicatessen v. W.C.A.B., 475 A.2d 1345 (Pa.Cmwlth. 1984), the claimant who was the chairman of the board, president and 60 percent stockholder of a family-owned deli, suffered a heart attack. The Court in Dick's Delicatessen found that claimant was not required to give notice to the insurance carrier within 21 days after the accident as mandated by statute. While the Dick's Delicatessen Court acknowledged that

a claimant who stands in the shoes of both employee and employer could cause abuse of the Workers Compensation Act in these circumstances, the Dick's Delicatessen Court went on to find that the insurance carrier could guard against such abuses by close corporations and sole proprietorships by "conditioning coverage on compliance with mandatory prompt notification provisions written into the insurance contract."

In this instance, claimant was the majority stockholder and president of respondent corporation. As such he was the ultimate authority to whom any notice would be presented regarding a work-related accident. The Appeals Board finds that claimant's actual knowledge of the work-related injury constituted knowledge of the corporation and therefore notice under K.S.A. 44-520. The Appeals Board therefore finds the Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated February 26, 1998, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. In citing Wietharn v. Safeway Stores, *supra* the majority misconstrued the findings of the Court of Appeals. In Wietharn, the Court of Appeals cited Renco, Inc. v. Nunn, 474 P.2d 936 (Okl.1970), as support for its decision to deny that claimant had provided appropriate notice. In Renco, the claimant, president and manager of the corporation, was injured at work, selected his own doctor, and sought medical treatment. The claimant in Renco failed to provide notice to the workers compensation insurance carrier of the accident. The

Oklahoma Court found that this would not operate to toll the one-year statute of limitations applicable in Oklahoma. Based upon Wietharn and the Kansas Court of Appeals' reliance upon Renco, this Appeals Board member would reverse the Administrative Law Judge and find that notice by president and CEO of a corporation to himself of a work-related accident does not count as notice to respondent in these circumstances.

BOARD MEMBER

DISSENT

The majority concedes that the Court of Appeals addressed the same legal issue in Wietharn. That decision, however, is distinguished on its facts. I consider the Wietharn decision to be close enough factually to this case that its holding must be followed. Accordingly, I would hold that claimant's knowledge of his accidental injury does not constitute notice to or actual knowledge by the respondent corporation. The claim is time-barred and benefits must be denied.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Ronald J. Laskowski, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director