

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

CHRISTOPHER J. HUBBARD)

Claimant)

VS.)

MARION COUNTY IMPLEMENT)

Respondent)

AND)

JOHN DEERE INSURANCE COMPANY)

Insurance Carrier)

Docket No. 230,423

ORDER

Respondent appeals from the October 29, 1999, Award of Administrative Law Judge Bryce D. Benedict. The Administrative Law Judge awarded claimant a stipulated 5 percent whole body functional impairment after finding that claimant proved that he suffered accidental injury arising out of and in the course of his employment and provided timely notice of accident. Oral argument before the Board was held on March 10, 2000.

APPEARANCES

Claimant appeared by his attorney, David G. Shriver of McPherson, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary A. Winfrey of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

- (1) Did claimant meet with personal injury by accident arising out of and in the course of his employment on the date alleged?
- (2) Did claimant give timely notice of that alleged accident?

- (3) Is claimant entitled to temporary total disability compensation for the period March 20, 1998, to August 10, 1998?
- (4) Is respondent entitled to reimbursement from the Kansas Workers Compensation Fund for medical expenses paid pursuant to a preliminary hearing order?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleged accidental injury on October 24, 1997, when he was handling 33-gallon and 55-gallon barrels of oil. The barrels had to be manhandled onto pallets and then moved by forklift. Claimant worked for approximately 10 minutes without assistance and then was joined by another worker. Claimant and the coworker then handled the barrels together.

Claimant suffered no physical symptoms while moving the barrels. Claimant acknowledged completing the rest of his work on that day with no injury noted. Claimant continued working for several days and did not begin to experience any symptoms in his low back for a week to 10 days after moving the barrels. On November 11, 1997, claimant reported to respondent's representative, Terri Bina, that he had a terrible pain in his back, he could not move and could hardly walk. Claimant was referred to the company doctor, but elected to go to his personal doctor, Dr. James R. Larzalere. Dr. Larzalere restrained claimant from working, referred him to physical therapy and ultimately returned claimant to work with a 25-pound lifting restriction.

Respondent offered claimant accommodated work within his restrictions, but claimant elected to leave respondent's employment. At the time of regular hearing, he was working for his grandfather on Hubbard Farms, earning a comparable wage. The parties have stipulated claimant has a 5 percent whole person functional disability, and work disability is not at issue.

Claimant ultimately came under the treatment of orthopedic surgeon Milo G. Sloo, III, M.D. Dr. Sloo first saw claimant on June 15, 1998, as a referral by claimant's attorney. Dr. Sloo diagnosed lumbosacral sprain syndrome, preexisting spondylolysis at L5-S1 and preexisting degenerative disc disease at L4-5 and L5-S1, with mild bulging central discs at both levels.

Dr. Sloo's history indicated that claimant was lifting wheel barrels, rather than oil barrels, but Dr. Sloo indicated that may have been a typographical error or a misunderstanding on his part.

Dr. Sloo had the opportunity to review the medical reports of Dr. Larzalere. These medical reports indicated claimant advised Dr. Larzalere that he had been in pain since October 23, 1997, the date of the barrel incident. This medical history contradicts the testimony provided by claimant at both the preliminary and regular hearings.

At the preliminary hearing, respondent's representative, Terri Bina, testified. Ms. Bina is the service clerk for respondent and had been there for approximately three years. She has known claimant since he became employed with respondent in October 1996. Ms. Bina testified that, on the morning of November 3, 1997, she was talking to claimant and slapped him on the back in the area of his shoulder. Claimant drew back and, when she asked what was wrong, he indicated he had hurt his back riding his motorcycle. Claimant denied suffering any injury while riding a motorcycle and testified that, around the date of the alleged injury, his motorcycle was not working.

Claimant did contact Ms. Bina on November 11, 1997, regarding his back pain. He advised her on that date that he thought it was probably the unloading of the barrels on October 24, 1997, that caused him injury. November 11, 1997, was the first time claimant mentioned to Ms. Bina that he suffered any type of work-related accident. When Ms. Bina tried to refer claimant to the Marion Family Clinic, claimant elected instead to go to his own doctor, which Ms. Bina did not prevent.

Respondent contends claimant has failed to prove that he suffered accidental injury on October 24, 1997. Claimant does discuss a worsening of his symptoms over time, but has neither alleged nor requested an amendment to his alleged accidental injury date of October 24, 1997. The Administrative Law Judge found claimant's date of accident to be November 11, 1997. However, claimant did not testify regarding what, if any, specific activities caused his condition to worsen. In addition, no doctor testified regarding whether claimant's activities as a service technician for respondent aggravated or worsened his condition. Dr. Sloo testified that the heavy lifting claimant was doing while moving the barrels could cause low back pain. However, the history given to both Dr. Larzalere and Dr. Sloo indicated that claimant began experiencing back pain on October 23, 1997, when he moved the barrels.

Claimant deposed claimant's sister, Jennifer Hubbard, and claimant's father, Ron Hubbard. The testimony of Jennifer Hubbard is consistent with claimant's in that she stated claimant did not begin complaining of any back pain until early November 1997. While claimant discussed the barrel moving incident with Ms. Hubbard, he did not associate any discomfort or pain with moving of the barrels. Claimant's father, Ron Hubbard, on the other hand, testified that claimant advised him shortly after the

October 24, 1997, barrel moving incident that he was having back pain and he related that pain to the unloading of the barrels.

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his or her entitlement to the benefits requested by a preponderance of the credible evidence. K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

Claimant testimony does not support a finding that he suffered accidental injury arising out of and in the course of his employment on October 24, 1997, while moving the barrels. Claimant suffered no symptoms at that time and was symptom-free for a week to a week and a half afterwards. Claimant does discuss a worsening of his conditions in November, but does not relate those symptoms to any particular activity either at work or away from work. In addition, the medical history provided by claimant to his treating doctors contradicts claimant's testimony about when the symptoms originated. Dr. Larzalere's records indicate claimant suffered pain immediately after October 24, 1997. Dr. Sloo's medical report of June 15, 1998, discusses claimant unloading the "wheel barrels," followed by a sudden onset of low back pain. This low back pain then persisted to the time of Dr. Sloo's examination. The testimony provided by claimant and his sister is also contradicted by the testimony provided by claimant's father regarding the onset of claimant's pain.

It is claimant's burden to prove that which he contends to be true. Here, the record regarding claimant's alleged injury and symptoms is contradictory. It is impossible to identify from this record exactly when claimant's symptoms began or what activities caused claimant to become symptomatic. The Appeals Board, therefore, finds claimant has failed to prove accidental injury arising out of and in the course of his employment on the dates alleged. The Award of the Administrative Law Judge is reversed.

This finding renders moot Issue No. 2, dealing with whether claimant gave notice of accidental injury, and Issue No. 3, regarding claimant's entitlement to temporary total disability compensation.

Respondent contends that it is entitled to reimbursement from the Kansas Workers Compensation Fund for medical expenses provided to claimant pursuant to the preliminary hearing Order of June 4, 1998. This reimbursement request is based upon K.S.A. 1997 Supp. 44-556(d)(1). A review of that statute indicates that it is the responsibility of the Director of Workers Compensation to determine what, if any, compensation paid by the employer or insurance company shall be reimbursed from the Fund. The Appeals Board will, therefore, dismiss respondent's Issue No. 4, as it has no jurisdiction to decide that issue. Respondent is free to seek reimbursement under K.S.A. 1997 Supp. 44-556 from the Director of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 29, 1999, should be, and is hereby, reversed, and an award in favor of claimant, Christopher J. Hubbard, and against the respondent, Marion County Implement, and its insurance carrier, John Deere Insurance Company, for an injury on October 24, 1997, should be, and is hereby, denied.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Nora Lyon & Associates	\$611.80
Deposition Services	\$356.00
Patty L. Morton, C.S.R.	\$250.00
Owens, Brake, Cowan & Associates	\$164.79

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: David G. Shriver, McPherson, KS
- Gary A. Winfrey, Wichita, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director