

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

MARSHA L. KELLEY)	
Claimant)	
VS.)	
)	Docket No. 233,493
KINEDYNE CORPORATION)	
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE COMPANY and)	
FREMONT COMPENSATION INS. GROUP)	
Insurance Carrier)	

ORDER

Respondent and one of its insurance carriers, American Home Assurance Company, appeal from the November 1, 1999 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on April 5, 2000.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for the claimant. John B. Rathmel of Overland Park, Kansas, appeared for the respondent and American Home Assurance Company (hereinafter American). Donald J. Fritschie of Overland Park, Kansas, appeared for the respondent and Fremont Compensation Insurance Group (hereinafter Fremont).

RECORD AND STIPULATIONS

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

ISSUES

This claim involves bilateral upper extremity injuries due to a series of repetitive traumas. The compensability of this claim is not in dispute. Whether claimant suffered one series of accidents or two and consequently the date or dates of accident is the primary issue. This is essentially a dispute between the insurance carriers for respondent. The Administrative Law Judge granted claimant a permanent partial disability award based upon a finding that claimant sustained a single series of accidents and one accidental

injury under Depew v. NCR Eng'g & Mfg., 263 Kan. 15, 947 P.2d 1 (1997). Citing Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999), the ALJ placed the date of accident as June 10, 1997, the date so-called "permanent" restrictions were imposed, because this was when claimant presumably last performed her old job duties. Respondent and American appeal those findings. The specific issues raised by American in its application for review are:

- "1. Whether ALJ Avery erred in failing to find Claimant suffered a distinct compensable injury resulting from work-related activity subsequent to her release from medical treatment in January 1998;
- "2. The determination of the date, or dates, of accident;
- "3. The determination of Claimant's average weekly wage;
- "4. The determination of whether Claimant is entitled to future medical benefits;
- "5. The determination of whether Claimant is entitled to an unauthorized medical benefit;
- "6. The determination of the nature and extent of Claimant's permanent partial impairment, if any."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds that the ALJ's Award should be modified to find an accident date of August 17, 1999, but should otherwise be affirmed.

FINDINGS OF FACT

1. Claimant first sought medical treatment for her upper extremity symptoms on April 18, 1996 with Dr. Michael Geist. At that time she had complaints of bilateral elbow pain that sometimes went up into her neck and upper back.
2. On July 24, 1997, she underwent surgery consisting of a left cubital tunnel release and a left lateral epicondylectomy by Dr. John B. Moore, IV. Claimant was released to return to work on July 29, 1997 for one-handed duty and full duty September 1, 1997. This was followed by light duty restrictions and restrictions for one-handed duty again being imposed by Dr. Moore. He eventually released claimant to full duty with no restrictions on June 26, 1998. Thereafter, claimant continued to aggravate and reinjure her bilateral

upper extremities working on the same or similar machines to those she had worked on prior to her surgery.

3. In March 1998 Dr. Moore determined that claimant only had permanent impairment in her left upper extremity, but in July 1998 he referred claimant to a physical medicine physician, Dr. Vito J. Carabetta, for treatment of her right myofascial shoulder pain and right lateral epicondylitis. In August 1998 Dr. Moore instructed claimant to begin using a splint on her right arm. He last saw claimant on August 18, 1998.

4. Dr. Robert W. Warner began treating claimant's bilateral upper extremities and neck in September 1998. In his September 22, 1998 report, Dr. Warner recommended restrictions against repetitive bending movement of either arm and to avoid lifting more than 20 pounds.

DIAGNOSIS

1. Chronic left cubital tunnel syndrome complicated by post surgical infection and flexion contracture.
2. Chronic left lateral epicondylitis.
3. Chronic right lateral epicondylitis.

RESTRICTIONS

Due to the previously discussed diagnosis the patient should be restricted in the following manner:

1. The patient should avoid any repetitive bending motions of either elbow.
2. The patient should avoid any heavy lifting over twenty pounds involving either elbow.

It should be noted that since the time of the surgery the patient has been moved to a lighter duty type of job description however the patient continues to have residual symptoms in both elbows. I feel that over a period of time this will tend to aggravate her current condition, which will leave her unable to perform these job duties.

On July 14, 1999, he rated claimant's impairment as 30 percent to the left upper extremity and 10 percent to the right which gives a 23 percent to the body as a whole based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Claimant was released on a p.r.n. basis by Dr. Warner on July 28, 1999.

5. Dr. Lanny Harris performed a court-ordered independent medical evaluation of claimant on May 21, 1999. In his June 11, 1999 report, he opined as follows:

The initial impression was that of bilateral tendonitis at the lateral epicondylar structures of the elbow, with a flexion contracture of the left elbow. There

was satisfactory resolution of the ulnar nerve symptoms on the left, but the patient had persistent symptoms. . . .

Using the AMA guides to the evaluation of permanent partial impairment fourth edition as a guide, it was calculated that Ms. Kelley had residual and permanent partial impairment of the right upper extremity of 15%, and a residual permanent partial impairment of the left upper extremity of 26%. A combined permanent partial impairment body as a whole equaled 21%.

In my opinion, she has lost considerable ability to do her full job activity, but continues to do it on a more limited basis, in that she is doing lighter materials, and probably slower than she once was. An exact percentage of functional impairment as related to the job, is impossible for me to come up with. It would be my recommendation though that she consider doing some other activity that is not as stressful to her upper extremities, simply because if she does, she will probably incur increasing physical impairment, and additional physical problems.

6. Claimant continues to work for respondent doing work similar to what she has always done, although she is no longer required to do the government job that caused the onset of her symptoms. Claimant testified that her arms and shoulders have hurt essentially all the time since April 1996. Although the pain she experienced in 1996 and 1997 was worse on the left, claimant described bilateral symptoms from the beginning and the pain in both upper extremities has continued to worsen since then, even after she was moved from the heavier government job.

CONCLUSIONS OF LAW

The Appeals Board finds claimant has sustained one series of accidental injuries that arose out of and in the course of her employment with respondent. A problem arises, however, when attempting to affix a date to this series of accidents. The Court of Appeals attempted to establish a bright line rule whereby in repetitive trauma cases the date of accident would be the last day worked by the claimant.¹ Problems with the "last day of work" rule soon became apparent. For example, not every injured worker has to leave work because of his/her injuries. The Court of Appeals addressed the date of accident problem again in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995). There claimant left work for reasons unrelated to her injury. Instead of applying the last day worked rule, the Court in Condon found claimant's date of accident to have been earlier than the last day worked. Condon has been treated as standing for a "date of restrictions" rule, but the Court did not actually adopt as the date of accident the date when the claimant was given work restrictions. The claimant in Condon developed new symptoms in a

¹ Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

different part of her body after she was given restrictions and after she had been transferred to a different job position. Those new symptoms were later determined to be indicative of a new or additional injury that also became a part of her workers compensation claim. No new restrictions were imposed, however, before the date the Court adopted as the date of accident. Thus, the Condon case actually stands more for a “date of onset of symptoms” or a “date of seeking medical treatment” rule than it does for a “date of restrictions” rule.² Either way, in Treaster the Supreme Court stated that “Condon should be limited to its facts and not used to erode Berry’s authority”.³

The Court strictly adopted a date of restrictions rule for determining the date of injury in Alberty v. Excel Corporation, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. ___ (1998). An interesting twist in Alberty was that the Court rejected the Board’s analysis that because claimant’s condition continued to worsen after her restrictions were imposed and while she was working in her first accommodated position, the date of accident should be the last day claimant worked in that position before being reassigned to another accommodated position which did not worsen her condition. The Court found that date of accident to be inconsistent with Condon and adopted the rule that the date of accident in a repetitive trauma case is “the last day of work before work restrictions were implemented.”⁴ In Condon, however, there was expert medical opinion testimony that the work the claimant performed after a certain date did not worsen the claimant’s condition. Unlike Condon, that was not what the evidence established in Alberty. To the contrary, in Alberty, the claimant’s condition continued to worsen in the first accommodated job. Nevertheless, the date restrictions were first imposed was determined to be the date of accident and the rule to be followed in cases where the claimant does not leave work due to the injury, regardless of whether the claimant’s condition worsens and the restrictions are later deemed to be inappropriate. “The confusion began [sic] by Condon is amplified

² See also Durham v. Cessna Aircraft Company, 24 Kan. App.2d 334, 945 P.2d 8 (1997), where the Court of Appeals utilized the last day claimant worked prior to undergoing surgery as the date of accident. The Court described its holding as following the last day worked rule from Berry. But this would also be consistent with a date of restrictions rule because, following his recovery, claimant returned to work for the respondent at an accommodated position that was intended to prevent claimant from sustaining further injuries. The Supreme Court in Treaster approved of the Durham decision as following Berry.

³ Treaster at 620.

⁴ Actually, in Alberty, although the treating physician gave the claimant work restrictions on the date selected by the Court as the date of accident, those restrictions were not “implemented” at work because, for some time thereafter, claimant continued to grip and pull meat. Also, because claimant’s condition continued to worsen and she developed new symptoms in her shoulder after March 31, 1992, the physician later gave claimant additional restrictions regarding the use of her right arm. Thus, the date of accident found by the Appeals Board in Alberty was “the date restrictions were implemented.” The Court of Appeals just disagreed with the Board’s finding of fact as to which restrictions to use and when they were implemented.

by Alberty."⁵ "To the extent we have stated herein, the logic and results of Condon and Alberty are disapproved."⁶

This aspect of the Treaster decision aside, there still appears to be a connecting thread between the decisions beginning with Berry that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in Berry when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

"Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks."⁷

In the case at bar, claimant was given various temporary and permanent restrictions and her job duties were modified somewhat to accommodate those restrictions. Claimant nevertheless continued to be symptomatic and, in fact, continued to worsen. Since her surgery in July 1997, claimant has performed a job that may have been within her restrictions but her symptoms have continued to worsen and she has suffered additional permanent injury. Claimant has continued working for respondent in a substantially similar job. Claimant testified at the regular hearing that she was doing basically the same job as before but with smaller parts. Under Treaster, if claimant has an injury, the date of accident will be either the date claimant leaves work due to her injury or when new or additional restrictions are imposed by a physician and implemented by respondent by making further job accommodations. Under the facts presented, that date has yet to occur. Claimant was continuing to do the same or similar work on the same type of machines that she did before her surgery and she continued to aggravate her condition "each and every working day" through to the date of the regular hearing and, presumably, beyond. Therefore, setting an accident date is a problem. Nevertheless, claimant has decided not

⁵ Treaster at 622.

⁶ Treaster at 624.

⁷ Treaster, Syl. ¶ 4.

to wait upon the occurrence of some legal fiction to establish a date of accident in order to obtain an award of permanent disability benefits.

The Appeals Board finds the rationale of Depew, Berry and Treaster require a finding that claimant suffered one accident and one injury and that benefits should be awarded under a single accident date which, in this case, is the date of regular hearing. This is the date claimant alleged she was at maximum medical improvement. Respondent did not object and the ALJ allowed the trial of the case to proceed.

It must be remembered that the bright line rule first announced in Berry is intended to establish a single date of accident for the purpose of computing the award. This does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time. The fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act.

Liability for medical and temporary total disability compensation benefits are the responsibility of the insurance carrier on the risk when the medical expense or temporary disability occurred. Liability for permanent partial disability compensation and future medical shall be the responsibility of the insurance carrier for respondent on the risk on the date of accident, August 17, 1999.

The Board is mindful that this finding results in liability being assessed against an insurance carrier that did not participate in these proceedings, but this result is not unprecedented. Furthermore, it is respondent's obligation to notify its appropriate insurance carrier or carriers of the claim.⁸

American points out that the \$9.00 hourly rate on the wage statement conflicts with claimant's testimony that she thinks she was earning about \$8.35 per hour when she left work for the surgery on her left arm. American objects to using this wage to determine claimant's average weekly wage because it does not conform to the date of accident.

K.A.R. 51-3-8 provides, in pertinent part:

The parties **shall** be prepared at the first hearing to agree on the claimant's average weekly wage . . .

QUESTIONS TO BOTH PARTIES

⁸ See, Landes v. Smith, 189 Kan. 229, 368 P.2d 302 (1962); Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995). See also, Johnson v. J & J Maintenance, WCAB Docket No. 234,975 (Jan. 1999).

10. What was the average weekly wage?

(c) The respondent **shall** be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage.

(e) Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance. (Emphasis added.)

The wage statement was introduced into evidence by stipulation as Claimant's Exhibit 1 to the Regular Hearing. No other wage statements were offered or introduced. The Board agrees with and affirms the ALJ's decision to use the \$9.00 per hour figure in the wage statement provided by respondent as the best evidence of claimant's average weekly wage.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery on November 1, 1999, should be, and is hereby, modified to find an accident date of August 17, 1999, but is otherwise affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Marsha L. Kelley, and against the respondent, Kinedyne Corporation, and its insurance carriers for an accidental injury which occurred August 17, 1999, and based upon an average weekly wage of \$360.00 for 12.86 weeks of temporary total disability compensation at the rate of \$240.01 per week or \$3,086.53, followed by 87.15 weeks at the rate of \$240.01 per week or \$20,916.87, for a 21% permanent partial disability, making a total award of \$24,003.40.

As of April 28, 2000, there is due and owing claimant 12.86 weeks of temporary total disability compensation at the rate of \$240.01 per week or \$3,086.53, followed by 36.43 weeks of permanent partial compensation at the rate of \$240.01 per week in the sum of \$8,743.56 for a total of \$11,830.09, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,173.31 is to be paid for 50.72 weeks at the rate of \$240.01 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority determining the respective liability of the insurance carriers. The Award should be entered jointly and severally against both carriers.

The Kansas Supreme Court has long held that, unless specifically provided, the Division of Workers Compensation does not have the authority or jurisdiction to determine the respective liability of two or more insurance carriers.⁹ In Hobelman, the Kansas Supreme Court said:

The Workmen’s Compensation Act has as its primary purpose an expeditious award of compensation in favor of an injured employee against all persons who may be liable therefor. The Act does not contemplate that such proceedings should be hampered or delayed by the adjudication of collateral issues relating to degrees of liability of the parties made responsible by the Act for the payment of compensation. Questions of contractual obligations or even equitable considerations may well be involved between the responsible parties which are of no concern to the injured employee. If such questions are involved, they should be resolved by a court in an independent proceeding in which the employee should not be required to participate.¹⁰

⁹ Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961).

¹⁰ Hobelman, p. 831.

That rule was repeated 29 years later by the Court of Appeals in American States¹¹ in which the Court stated:

. . . Unless specifically allowed by statute, insurance companies may not litigate in the workers compensation division their respective liability for an award if the employee's interests are not at issue.¹²

When a worker's physical condition or disability results from the combined effects of multiple injuries, the Award should be entered jointly and severally against the contesting insurance carriers.¹³ In Kuhn, the Supreme Court held:

. . . Under the existing circumstances, the claimant's physical condition having been found to be the result of both accidents, it is our opinion that the trial court should have held both carriers, Reliance and Farmers, jointly and severally liable, leaving the two contesting insurance companies to litigate their grievances against each other in an independent action.

This conclusion accords with the rationale underlying prior decisions of this court. It also serves a primary purpose of the Workmen's Compensation Act, *i.e.*, the compensation of workers injured in industrial accidents with as little delay as possible and without having to wait for the disposition of collateral issues in which they have no interest.¹⁴

In deciding that the two insurance carriers should litigate apportionment issues in a separate proceeding in district court, the Kansas Supreme Court quoted a California decision for the following:

. . . In permanent disability cases, the proper procedure is to hold the carriers jointly and severally liable to the employee, leaving the carriers to debate the apportionment issue in a separate proceeding. 'The **successive carriers** or employers should properly have the burden of adjusting the share that each should bear and that should be done by them in an independent proceeding between themselves. They are in a better position

¹¹ American States Ins. Co. v. Hanover Ins. Co., 14 Kan. App. 2d 492, 794 P.2d 662 (1990).

¹² American States, p. 498.

¹³ Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968).

¹⁴ Kuhn, pp. 170 and 171.

to produce evidence on the subject and establish the proper apportionment.’
...¹⁵ (Emphasis added.)

Claimant has sustained a repetitive use or repetitive trauma injury that is ongoing in nature. From Depew,¹⁶ we know that repetitive use injuries may encompass both upper extremities and be considered as only one accident despite the fact that the symptoms in each extremity manifest themselves at different times. Like Depew, it is reasonable to conclude that claimant sustained simultaneous injury to both upper extremities. Therefore, American Home Assurance Company may have some liability for the right upper extremity injury although the injury probably worsened after its coverage ceased.

Further, it is reasonable to conclude that the repetitive trauma sustained during the earlier stages of the injury when American Home Assurance Company was on the risk will contribute to claimant’s ultimate injury and disability. Therefore, similar to Kuhn, claimant’s disability is from the combined effects of multiple injuries involving multiple insurance carriers. Therefore, as directed by Kuhn, the Appeals Board should not attempt to apportion liability between the insurance carriers. Instead, the Appeals Board should enter its Award jointly and severally against both carriers.

BOARD MEMBER

c: Chris Miller, Lawrence, KS
John B. Rathmel, Overland Park, KS
Donald J. Fritschie, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director

¹⁵ Kuhn, p. 171.

¹⁶ Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).