

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

<b>J. JODY GAMBREL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 233,773
<b>DISABILITY SUPPORTS OF THE GREAT PLAINS</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the preliminary hearing Order of Administrative Law Judge Bruce E. Moore dated October 5, 1998.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date or dates alleged?
- (2) Did claimant provide timely notice of accidental injury to respondent as required by K.S.A. 44-520?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, the Appeals Board finds, for preliminary hearing purposes, as follows:

Claimant alleges accidental injury through a series of accidents beginning February 1, 1998, and continuing through claimant's last day of work on March 31, 1998, while working as a CNA for respondent. Claimant was denied benefits by the Administrative Law Judge who found claimant failed to prove accidental injury arising out of and in the course of his employment, and further failed to prove timely notice as required by statute.

Claimant had a long history of ongoing back problems, and underwent back surgeries in both 1985 and 1986 while living in Florida. Claimant suffered additional

aggravations and injuries in 1994 and 1996 while working in Kansas. Claimant's back condition progressively worsened over the years, with the injury being confined to his back in 1984 and 1985. By 1996, claimant's condition had spread into his hips. By the time claimant began experiencing the symptoms in 1998, the symptoms were spreading into the hips and down into the legs, with the pain being more severe and sharper than he had ever experienced in the past.

The Administrative Law Judge denied claimant benefits, finding that claimant's history of injury as presented to Dr. C. Reiff Brown, the independent medical examination doctor, substantially differed from claimant's sworn testimony at preliminary hearing. When claimant testified at preliminary hearing, he described a gradual increase in symptoms over a period of approximately two months, with no specific incident being the culminating trauma. The respondent argued at that time that claimant's condition was no more than a natural consequence of the original problems suffered by claimant during the preceding 14 years. However, when claimant provided a history of trauma to Dr. Brown, he described a specific incident on February 1, 1998, when he was lifting a patient and noticed an increase in discomfort in his back with radiculopathy into his legs. He went on to describe a worsening of this condition as he continued working for respondent. The specific trauma history provided by claimant appeared to change between the time of the preliminary hearing testimony on August 6, 1998, and the time of his examination with Dr. Brown on September 23, 1998.

The Administrative Law Judge apparently felt that the history provided by claimant at preliminary hearing was enough different from the history provided to Dr. Brown as to cast doubt upon claimant's credibility. The Appeals Board has, upon many occasions in the past, given deference to the administrative law judge's conclusions when the administrative law judge has the opportunity to assess the credibility of witnesses, and in particular that of the claimant. In this instance, whether claimant suffered accidental injury hinges to a substantial degree upon claimant's own testimony and description of the incidents which caused him physical problems. The Appeals Board finds that the Administrative Law Judge's finding that claimant failed to prove accidental injury arising out of and in the course of his employment should be affirmed in this instance, as claimant did provide conflicting histories at the preliminary hearing and from that given during the examination with Dr. Brown.

In addition, claimant acknowledges he failed to advise respondent of any work-related injury while in respondent's employ. He advised respondent of his ongoing back problems, and respondent was fully aware of claimant's injury history. Claimant at no time advised respondent while working there that his ongoing problems were in some way related to his work with respondent. The first time claimant advised respondent that he was alleging a work-related accident or aggravation was approximately one week prior to his conference with his attorney, Mr. Shriver, who immediately sent a letter to respondent which was dated April 24, 1998. This would indicate claimant's contact with respondent and the notice to respondent was sometime around April 17, 1998.

K.S.A. 44-520 obligates a claimant to provide notice of accident to respondent, stating the time, place, and the particulars thereof, within ten days of the accident. In this instance, claimant acknowledges that, while he advised respondent of ongoing complaints, he failed to advise respondent of any work-related connection to these complaints until well beyond the ten-day limitation set forth in K.S.A. 44-520. This would be true regardless of whether a single date of accident of February 1, 1998, was accepted, or a series of traumas through claimant's last day worked on March 31, 1998.

Claimant also argues that, under K.S.A. 44-520, the time limit for providing notice should be extended as he had just cause for failing to notify respondent of this accident. Under K.S.A. 44-520, failure to provide notice may be justified if just cause is shown for claimant's failure to notify respondent as required. However, in this instance, claimant acknowledges the symptoms worsened at work while lifting patients. He even provided a history to Dr. Brown of a specific sudden onset on February 1, 1998, while lifting a patient. In addition, claimant's condition worsened to the point where he sought medical treatment on February 6, 1998, with Dr. Billings. However, Dr. Billings' records indicate no history of an injury while lifting any patient. Dr. Billings' February 6, 1998, report indicates claimant suffered from an upper respiratory infection, and states that he had been doing a lot of coughing, which may have contributed to claimant's back problems.

The Appeals Board finds that claimant did not have just cause for failing to advise respondent of his increasing symptoms, which claimant attributed to lifting patients at work. The Appeals Board, therefore, finds that claimant has failed to prove not only that he provided timely notice to respondent, but also that there was just cause for his failure to so notify respondent of the accident.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the October 5, 1998, Order of Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1998.

---

BOARD MEMBER

c: David G. Shriver, McPherson, KS  
William L. Townsley, III, Wichita, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director