

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

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|--------------------------------------|---|------------------------------|
| MARY JANE RANDEL |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 241,262 & 241,263 |
| HUTCHINSON PUBLISHING COMPANY |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| CINCINNATI INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Pamela J. Fuller's preliminary hearing Order entered on September 1, 1999.

ISSUES

This is a claim for alleged work-related injuries to claimant's left knee and bilateral upper extremities. Claimant alleged she suffered an injury to her left knee when she fell delivering papers for the respondent in Garden City, Kansas, on September 22, 1998. This claim was assigned Docket No. 241,262.

Claimant alleged she suffered injuries to her bilateral upper extremities caused by overuse while performing her regular work activities for the respondent each and every day through her last day worked. This claim was assigned Docket No. 241,263.

The Administrative Law Judge ordered respondent to provide medical treatment for claimant's work-related injuries and to pay claimant temporary total disability benefits from November 10, 1998, through November 24, 1998.

On appeal, respondent contends claimant failed to prove that either alleged accident arose out of and in the course of her employment with the respondent. Additionally, respondent argues that claimant failed to prove she provided respondent with timely notice of accident for either of the injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board makes the following findings and conclusions:

Claimant first sought medical treatment for her work-related injuries on October 28, 1998. Claimant went on her own to orthopedic surgeon, Guillermo E. Garcia, M.D., located in Dodge City, Kansas. Dr. Garcia's medical treatment records were admitted into evidence at the preliminary hearing and showed that claimant had seen Dr. Garcia in the past for various injuries dating back to July 10, 1989.

During the October 28, 1998, visit, claimant's principle complaints were related to her right upper extremity and her left knee. Dr. Garcia's diagnosis in relation to claimant's right upper extremity was trigger finger and carpal tunnel syndrome. The left knee diagnosis was a tear in the medial meniscus. The doctor had claimant undergo an EMG and nerve conduction studies, plus an MRI examination. The EMG and nerve conduction studies showed bilateral carpal tunnel syndrome, worse on the right than left, and asymptomatic ulnar cubital tunnel syndrome. The MRI examination of claimant's left knee showed early degenerative changes and, what appeared to be, a horizontal tear of medial meniscus.

The doctor proposed claimant proceed with a right carpal tunnel and trigger finger release surgery. After that surgical procedure, Dr. Garcia proposed claimant undergo arthroscopic surgery to repair the left horizontal medial meniscus tear.

On November 10, 1998, Dr. Garcia performed the right carpal tunnel and trigger finger release. The next day, November 11, 1998, respondent terminated claimant for reasons not related to her injuries.

The Appeals Board concludes that claimant established through her testimony that her work activities while employed by the respondent, though only occasionally repetitive, were hand intensive in that claimant was required to use her hands to drive, communicate by telephone, type, and perform heavy lifting activities.

At claimant attorney's request, claimant was examined and evaluated by Philip R. Mills, M.D., on May 24, 1999. Dr. Mills had the benefit of claimant's medical treatment records and the results of diagnostic testing performed concerning claimant's bilateral upper extremities and her left knee. Claimant gave Dr. Mills a description of her work activities while employed by respondent. Following his physical examination of claimant, the doctor opined, within a reasonable degree of medical probability, there was a causal relationship between claimant's bilateral carpal tunnel syndrome and her work activities. He went on to find that claimant's left knee injury was causally related to her fall at work on September 22, 1998.

The Appeals Board concludes claimant has proven it is more probably true than not that her work activities while employed by the respondent caused her bilateral carpal tunnel syndrome condition and the fall at work on September 22, 1998, resulted in her left knee injury.

K.S.A. 44-520 requires claimant to give the respondent notice of a work-related accident within ten days thereof. The time for giving notice can be extended up to 75 days for "just cause".

In regard to claimant's September 22, 1998, left knee injury, claimant testified she telephoned her supervisor, Jason Kluesner, on September 24, 1998, and "I may have mentioned to him that I skinned my knee, that I fell". Claimant also testified that she notified Sally Johnson, a clerk, and Betty McGervan, respondent's customer service manager, that she fell at work on September 22, 1998. But respondent's circulation manager, Jay Gillispie, testified that neither Sally Johnson nor Betty McGervan had any supervisory responsibility over claimant and neither one had any workers compensation reporting responsibility for respondent.

The Appeals Board, therefore, finds the first notice claimant provided respondent concerning her September 22, 1998, fall and resulting injury was on November 11, 1998, after respondent terminated claimant. Rex Christner, respondent's business manager, who is responsible for filing employee's workers compensation claims, testified claimant notified him on November 11, 1998, that she was making a workers compensation claim for both a left knee and bilateral carpal tunnel syndrome injuries.

The Appeals Board concludes that claimant has failed to establish that she gave respondent notice of the September 22, 1998, fall and resulting left knee injury until November 11, 1998, clearly, outside the required ten-day time limit. The Appeals Board acknowledges that claimant also argues, if the Appeals Board does not find claimant gave notice to respondent of the accident within ten days, there was just cause for not giving such notice. But the Appeals Board finds it is inconsistent to argue that notice was given within ten days of the accident, on the one hand, and then, on the other hand, to argue that there was just cause not to give notice within ten days. Therefore, the Appeals Board concludes claimant's claim for preliminary hearing benefits for her left knee injury should be denied for failure to give timely notice of accident.

As found above, claimant's regular work activities caused her bilateral upper extremity injuries. The preliminary hearing record established claimant worked at her regular job duties until Dr. Garcia performed the right carpal tunnel release on November 10, 1998. Claimant was then terminated by the respondent on November 11, 1998. Following the termination and on that date, claimant gave respondent notice of her work-related bilateral upper extremity injuries. The Appeals Board concludes claimant's appropriate date of accident for her bilateral upper extremity injuries is November 9, 1998,

her last day worked.¹ Thus, the Appeals Board finds the notice claimant gave respondent on November 11, 1998, was timely notice of accident in regard to the bilateral upper extremity injuries.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's September 1, 1999, preliminary hearing Order as it relates to Docket No. 241,262, the left knee injury, is reversed and as it relates to Docket No. 241,263, the bilateral upper extremity injuries, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

c: Henry A. Goertz, Dodge City, KS
Christopher J. McCurdy, Wichita, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director

¹See Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).