

problems or a combination of his right shoulder and other general health problems. At the time claimant left respondent's employment, he was 64 years of age.

Claimant described his general job responsibilities as maintaining respondent's building and equipment in good condition. Specifically, those responsibilities included replacement of electric motors, pumping and cleaning out liquid holding tanks, rebuilding paint guns, welding, cleaning ovens, rebuilding pumps, and ordering supplies.

Another job claimant was required to do was to make lead anodes. This is the job he was performing when he first noticed soreness in his right shoulder. In order to make these lead anodes, claimant was required to pour, from shoulder height, melted lead from a ladle, 16 to 20 inches in length, into a screen mold. The ladle with the hot lead weighed somewhere between 3.5 to 6 pounds. The screen molds were then welded together to make what claimant characterized as lead mats.

Claimant first noticed soreness in his right shoulder after making lead anodes in January 1998. Claimant told his supervisor, Mr. Tommy D. McElhiney, that he had some soreness in his right shoulder after he had completed the process of making the lead anodes. But claimant, at that time, did not attribute the soreness to his work.

Claimant is a retired military person and is entitled to receive medical care through a military medical facility. Because claimant did not relate his shoulder problems to his work activities, he first sought medical treatment on his own at McConnell Air Force Base located in Wichita, Kansas. Claimant's medical treatment records from McConnell's medical center were admitted into the preliminary hearing record.

Claimant was first seen for his right shoulder condition on January 30, 1998, by a military physician at McConnell's medical center. At that time, claimant's diagnosis was adhesive capsulitis of the right shoulder. Claimant was placed in a physical therapy program through March 1998.

Claimant's right shoulder, however, remained symptomatic. Finally, in August 1998, claimant suspected that his right shoulder problem was related to his work activities. At that time, he notified his supervisor, Mr. McElhiney, that he thought his right shoulder problems were related to his work. Mr. McElhiney had claimant report the problem to respondent's workers compensation representative, Ms. Teri Peterson. Ms. Peterson referred claimant for examination and treatment to respondent's physician, Daniel V. Lygrisse, M.D., at the Wichita Clinic.

Dr. Lygrisse saw claimant with right shoulder complaints on August 18, 1998. Claimant advised Dr. Lygrisse he had received previous treatment for his right shoulder pain through McConnell's medical center. After Dr. Lygrisse's examination, he released claimant to light work with restrictions of lifting limited to 25 pounds, no work above shoulder level, and limited use of right arm activities.

Claimant's supervisor, Mr. McElhiney, testified he knew in August 1998 that claimant was having right shoulder problems, particularly when claimant had to make the lead anodes. Mr. McElhiney testified he told claimant, at that time, not to participate in making the lead anodes in the future. But claimant went ahead and again made the lead anodes sometime in either September or October 1998.

This resulted in Mr. McElhiney, on December 2, 1998, to specifically instruct claimant not to participate in making the lead anodes in the future because claimant had indicated that this work activity caused him to have increased shoulder pain. A December 2, 1998, note, signed by Mr. McElhiney, was placed in claimant's personnel file verifying that Mr. McElhiney had instructed claimant not to make the lead anodes in the future.

Although claimant acknowledged he did not again participate in making the lead anodes, he testified his other work activities that required him to use his upper extremities, although considered as light activities, continued to aggravate his right shoulder condition until he left respondent's employment in April 2000. Mr. McElhiney, however, testified that in addition to claimant's right shoulder problem, claimant also had general health problems that contributed to him not being able to continue to perform his required job activities for respondent.

Because claimant's right shoulder remained symptomatic, he was eventually referred for examination and treatment to orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster first saw claimant on August 20, 1998. Claimant gave Dr. Eyster a history of injuring his right shoulder at work in January 1998. Dr. Eyster found claimant's right shoulder range of motion markedly diminished. Claimant was unable to lift his arm over 80 degrees of abduction and 70 degrees of flexion. Claimant's shoulder was injected and anti-inflammatory medication was prescribed. Dr. Eyster's future treatment recommendation was for repeat injections or surgery.

Dr. Eyster saw claimant again on October 2, 1998. Claimant remained symptomatic, and Dr. Eyster decided to proceed with total shoulder reconstruction surgery. But claimant was unwilling to take off work for the length of time required for recuperation from the surgery. Thus, Dr. Eyster again had claimant's shoulder injected.

The last time Dr. Eyster saw claimant was December 9, 1998, with very little improvement. Total shoulder reconstruction surgery was again discussed. But claimant did not want to take off work for the period it would take to recuperate. Dr. Eyster again injected claimant's shoulder. Dr. Eyster then told claimant he would perform an official evaluation concerning claimant's right shoulder condition at claimant's request in the future.

In a letter to claimant's attorney dated April 28, 1999, Dr. Eyster's impression was that claimant's main problem was a significant degenerative process of the right shoulder. But Dr. Eyster went on to indicate:

The only participation that I can figure out of an injury that he had in regards the shoulder is that the onset which would have occurred eventually regardless which may have been brought on a little earlier than it would have otherwise with the injury that occurred at work.

Dr. Eyster's treatment recommendations were surgical fusion or total shoulder reconstruction.

In September 2000, respondent's attorney met with Dr. Eyster. As a result of that meeting, Dr. Eyster wrote a note at the end of a September 27, 2000, letter from respondent's attorney that indicated Dr. Eyster had reviewed a list of claimant's work activities and he did not feel claimant's degenerative right shoulder condition was caused by those work activities.

Respondent argues claimant has failed to prove his right shoulder condition has any relationship to his work activities while he was employed by respondent. Respondent argues that claimant's right shoulder condition is simply a degenerative condition not associated with claimant's work. Additionally, respondent argues claimant did not notify respondent of a work-related injury until August 1998 and if claimant did aggravate his right shoulder condition then he did so in January 1998. The time period between January 1998 and August 1998 is clearly outside the statutory notice requirement of 10 days or 75 days to establish just cause for not providing notice within 10 days of the accident.¹

The Appeals Board, however, finds claimant has proved, through his testimony and the medical records, admitted into the preliminary hearing record, that his degenerative right shoulder condition was aggravated and accelerated by the work activities claimant performed while employed by respondent. Also, the Appeals Board finds claimant's testimony and the testimony of claimant's supervisor, Mr. McElhiney, establish that claimant provided respondent with timely notice in August 1998 of an each and every day series of accidents through claimant's last day worked.

Medical testimony is not essential to the establishment of the existence or nature and extent of claimant's disability.² In addition, in a workers compensation case, when a work-related accident aggravates or accelerates a preexisting condition, the accidental injury is compensable.³

¹ See K.S.A. 44-520.

² See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

³ See *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

The Appeals Board is mindful that Dr. Eyster, after meeting with respondent's attorney, noted that the list of work activities he had reviewed had not caused claimant's degenerative right shoulder condition. But the Appeals Board finds Dr. Eyster's previous opinion contained in an April 28, 1999, letter to claimant's attorney indicating that claimant's work activities at least accelerated claimant's degenerative right shoulder condition is more consistent with claimant's testimony about his job duties and their effect on his shoulder condition. Thus, the Appeals Board finds that Dr. Eyster's original opinion coupled with claimant's testimony of a continuing aggravation, at least at this point in the proceedings, prove that claimant's right shoulder condition is compensable.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' October 2, 2000, preliminary hearing Order should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director