

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

GARY SIEBOLD)	
Claimant)	
VS.)	
)	Docket No. 259,019
CHENEY CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated October 11, 2000. Claimant was awarded temporary total disability compensation at the rate of \$401 per week commencing August 26, 2000. Respondent was ordered to provide medical treatment with William T. Jones, M.D., on claimant's behalf.

ISSUES

- (1) Did claimant suffer accidental injury through a series of injuries arising out of and in the course of his employment with respondent ending August 26, 2000?
- (2) Did the Administrative Law Judge err in ordering temporary total disability compensation at the rate of \$401 per week after the parties agreed to a maximum amount of temporary total disability compensation based upon an injury of March 5, 2000? The maximum rate on March 5, 2000, is \$383 per week.
- (3) Did claimant have just cause for providing notice of accident beyond the ten-day limit set forth in K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds that the Order of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury beginning on approximately March 5, 2000, and continuing through his last day worked before surgery on August 28, 2000. Claimant was a laborer/carpenter for respondent and regularly handled weights in excess of 100 pounds.

Claimant testified that on approximately March 5, 2000, while lifting a 285-pound piece of red iron with another worker, he felt a pop in his right shoulder. Claimant did not have an immediate onset of pain, but did feel a sensation. Claimant continued working for respondent through August 25, 2000. He testified his shoulder gradually became worse with the daily work activities.

Ronald Lang became claimant's supervisor in approximately mid-March 2000. By the time Mr. Lang took over the supervisory duties for respondent, all the red iron work had been completed. Therefore, if claimant did suffer accidental injury while lifting red iron, it would have had to have occurred before the middle of March 2000.

Claimant first approached Mr. Lang in mid to late April 2000, complaining of pain in his right shoulder. He discussed with Mr. Lang the fact that he had injured himself while lifting the red iron in March, but was unclear as to the actual date of accident. He also advised Mr. Lang on two other occasions that his shoulder continued to worsen and that he may need medical treatment.

Claimant also talked to Ron Cheney, the respondent's owner, on approximately April 24, 2000, about his shoulder problems. Claimant was advised to seek medical treatment through his chiropractor, which he did with Dr. Mark Hatesohl. Dr. Hatesohl was unable to improve claimant's condition and referred him to a medical doctor, William T. Jones, M.D. Dr. Jones, an orthopedic surgeon in Manhattan, Kansas, began treating claimant in July 2000. In his July 7, 2000, report, Dr. Jones noted that claimant's shoulder problem "has gotten worse rather than better."

Respondent contends claimant suffered accidental injury on or about March 5, 2000. With his first comment to Mr. Lang not occurring until approximately mid-April, this would raise a question about not only when claimant suffered accidental injury, but also whether he provided timely notice under K.S.A. 44-520. Claimant, however, contends that his accidental injury began in March 2000, but was also a series of accidents, with his condition gradually worsening through his last day worked.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to the benefits requested by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

Claimant's testimony regarding the incident with the red iron is uncontradicted. The fact that the red iron, which was handled by two to three people, weighed nearly 300 pounds is also uncontradicted. The Appeals Board finds the testimony of claimant regarding the lifting of the red iron and the resulting popping sensation in his shoulder to be credible. Therefore, claimant did suffer accidental injury in early March 2000 while working for respondent. Additionally, claimant testified that his shoulder condition continued to worsen, with his pain gradually reaching the point where he left work to undergo surgery for a torn rotator cuff. This evidence is not only uncontradicted; it is supported by the testimony of Mr. Lang, claimant's supervisor, who testified that claimant talked to him on at least three separate occasions about the shoulder problem and the fact that it was continuing to worsen. Additionally, the medical report of Dr. Jones dated July 7, 2000, discusses the fact that claimant's problem "has gotten worse rather than better." The evidence convinces the Appeals Board that claimant suffered not only a traumatic incident in March 2000, but also a series of additional micro-traumas to his right shoulder through his last day at work, August 25, 2000.

When dealing with dates of accident, the Appeals Board has been provided substantial guidance from the Kansas Supreme Court. In Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999), the Kansas Supreme Court decided that, because of the complexities of determining dates of accident in repetitive micro-trauma injuries, the process would be simplified and made more certain if the date from which the compensation flows is the last date that a claimant performed services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position. Here, claimant continued working his regular job for respondent through August 25, 2000, when he left work to undergo surgery. The Appeals Board, therefore, finds the appropriate date of accident for this injury is August 25, 2000.

With a date of accident as above found, this resolves the notice and just cause questions raised by respondent in its appeal. It is uncontradicted that claimant talked to his supervisor, Mr. Lang, on more than one occasion in April 2000. It is also uncontradicted that he talked to the owner, Ron Cheney, on April 24, 2000. Additionally, claimant was provided medical care with both his personal chiropractor and the authorized treating physician, Dr. Jones, beginning as early as July 2000. The medical reports from Dr. Jones verify that claimant discussed a history of work problems and a worsening of his condition due to his work labors. This satisfies the requirement of K.S.A. 44-520 regarding notice. The issue of just cause is rendered moot by this finding.

Finally, the Appeals Board notes that the dispute regarding temporary total disability compensation and the rate at which it should be paid is not normally a jurisdictional issue

from preliminary hearings. See K.S.A. 1999 Supp. 44-534a and K.S.A. 1999 Supp. 44-551. Here, however, respondent contends that the Administrative Law Judge exceeded his jurisdiction by ordering the temporary total disability compensation at a rate which is different than that stipulated to by the parties. If that were true, this could potentially generate an issue under K.S.A. 1999 Supp. 44-551 where the Administrative Law Judge may have exceeded his jurisdiction by arbitrarily rejecting the parties' stipulations. However, a review of the preliminary hearing transcript indicates that the stipulation was that claimant's wage was sufficient for the maximum weekly temporary total disability benefit, with the only issue being did claimant suffer a specific injury in March 2000 or did claimant suffer a series of injuries through August 25, 2000. Therefore, the dispute is one of accidental injury rather than the appropriate temporary total disability rate. A March 5, 2000, date of accident would result in a \$383 per week temporary total disability limit. But, in this instance, the date of accident has been found to be August 2000. Therefore, the temporary total disability rate of \$401 per week is proper.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated October 11, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
James B. Biggs, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director