

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

GEORGE SULIN)	
Claimant)	
VS.)	
)	Docket No. 264,933
WENDY'S)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent appeals the April 3, 2003 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits after the Administrative Law Judge determined that claimant proved that he suffered accidental injury arising out of and in the course of his employment in a series of accidents through June 29, 2000, that timely notice was provided by claimant to respondent and that claimant was entitled to a 14 percent permanent partial functional impairment to the body as a whole. The Appeals Board (Board) heard oral argument on October 17, 2003.

APPEARANCES

Claimant appeared by his attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary K. Albin of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument, it was stipulated by the parties that the appropriate date of accident to be utilized in this matter is June 23, 2000, as that was claimant's last day at work. While claimant originally pled a June 29, 2000 date of accident, it was noted that after leaving respondent's employment on

June 23, claimant used a week of vacation through June 29, 2000. But the last day of actual work was the stipulated June 23, 2000 date of accident.

Additionally, at oral argument, the parties advised that the issues dealing with whether claimant suffered accidental injury and whether those injuries arose out of and in the course of his employment were no longer before the Board for consideration. Therefore, the Administrative Law Judge's determination that claimant carried his burden on those issues is affirmed by the Board.

ISSUES

- (1) Did claimant provide timely notice of accident?
- (2) What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant began working for respondent in 1983. Over a period of years, he rose to the position of store manager, which position he held for the last 14 years. As manager, he was responsible for a multitude of duties, including running the grill, making fries, counting cash, changing pop bottles, making sandwiches, opening the store in the morning and operating the cash register both at the main counter and at the drive-through. Sometime early in the year 2000, claimant began having problems with his arms and shoulders. He saw his personal physician, Alberto F. Carro, M.D., on April 19, 2000. After being examined by Dr. Carro, claimant returned to respondent and advised his supervisor, Dennis Hoppis (the area manager), that he was having problems with his shoulders and that the problems were being aggravated by his work at the cash register at the drive-through window. He and Mr. Hoppis discussed the fact that the cash register was too high, and Mr. Hoppis instructed claimant to lower the cash register. Mr. Hoppis acknowledged that claimant advised him of the problems with the cash register, but went on to state that he thought claimant's ongoing arm problems were the result of a non-work-related accident suffered to his left arm in the fall of 1999. At that time, claimant suffered an injury to his left biceps, for which he underwent surgery. Claimant did experience tingling into his left arm after that incident.

Claimant was referred to board certified orthopedic surgeon Robert L. Eyster, M.D., on October 27, 2000. Dr. Eyster identified irritation in the shoulder, but determined it was

not due to a rotator cuff tear. He injected claimant's shoulder in the hope of relieving the pain. Claimant also discussed bilateral carpal tunnel problems with Dr. Eyster, but was provided no treatment. Claimant was referred to Lincoln Physical Therapy as part of his ongoing medical treatment. Claimant's return to Dr. Eyster was not the first time he had been treated by Dr. Eyster. When he damaged his left biceps in November of 1999, Dr. Carro referred him to Dr. Eyster for surgery to reattach the left biceps. Claimant was off work for approximately a week at that time and returned to work on a restricted basis for a short period of time.

When claimant went to Dr. Carro in April of 2000, claimant testified that he told Dr. Carro of his shoulder and arm complaints. However, Dr. Carro's reports only indicate a diagnosis of bilateral carpal tunnel syndrome. It was at about that time that claimant talked to Mr. Hoppis, his supervisor, regarding his shoulder pain and the adjustment request with the drive-through window cash register. Mr. Hoppis acknowledged that claimant mentioned the shoulder problems in relation to the level of the cash register.

Claimant acknowledges that he did not file a workers' compensation claim in April or May of 2000, testifying that since he told his supervisor, Mr. Hoppis, he felt that was adequate information to respondent. He testified it was his supervisor's duty to fill out the appropriate workers' compensation forms. Mr. Hoppis testified that claimant never asked him to fill out an accident report, so he did not do so. Claimant did file a workers' compensation claim in August of 2000 after a follow-up visit with Dr. Carro.

At the request of claimant's attorney, claimant was referred to orthopedic surgeon Lee R. Dorey, M.D., for an examination on November 12, 2001. Dr. Dorey diagnosed impingement syndrome bilaterally with the left being worse than the right. He also diagnosed carpal tunnel syndrome on the right and cervical spondylosis. In his November 12, 2001 report to James Cline, claimant's attorney, Dr. Dorey opined that claimant had suffered a 7 percent right upper extremity impairment, which converts to a 4 percent whole person impairment, and a 3 percent impairment to the left upper extremity, which converts to a 2 percent whole body impairment. Combining the impairments, Dr. Dorey concluded claimant had a 6 percent whole person impairment for the injuries suffered with respondent. In the report, Dr. Dorey discusses the fact that he evaluated the MRI study of claimant's right shoulder, but failed to see any disruption of the rotator cuff. He reported that there were subtle changes compatible with tendinitis, which was consistent with the reading of the MRI by Jeffrey A. Hicklin, M.D., the radiologist.

In a letter from Mr. Cline to Dr. Dorey of June 11, 2002, Dr. Dorey was asked to review the report of Lowry Jones, Jr., M.D., from Dr. Jones' June 11, 2001 examination of claimant. Dr. Dorey was asked to provide his opinion regarding Dr. Jones' impairment ratings and his overall evaluation. After reviewing Dr. Jones' report, Dr. Dorey modified his impairment rating to show a 15 percent impairment to the right upper extremity and a 10 percent impairment to the left upper extremity which, when converted to the whole

body and combined, result in a 14 percent whole person impairment. Dr. Jones wrote Shelly Mitchell, the benefits administrator for the workers' compensation carrier, in a letter dated December 12, 2001, wherein he discusses his June 11, 2001 evaluation. In that letter, he records the percentages of impairment assessed to claimant. The only mention in that report of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, is Dr. Jones' comment that he used the combined values chart in order to convert the various impairments to a single 14 percent whole body permanent partial impairment. There is no indication in the report as to what, if any, version of the AMA *Guides* was used to reach the initial percentages of impairment. Likewise, in his deposition, Dr. Dorey mentioned only the conversion charts of the AMA *Guides* utilized to combine the whole body impairments into one 14 percent whole person impairment. There is no indication in the record as to what, if any, version of the AMA *Guides* was utilized to determine the original percentages of impairment.

Claimant was referred by respondent's attorney to Chris D. Fevurly, M.D., board certified in internal and occupational medicine. Dr. Fevurly examined claimant on December 13, 2002. At that time, he diagnosed right side impingement with rotator cuff syndrome, bilateral carpal tunnel syndrome and left-sided rotator cuff syndrome and impingement. In utilizing the AMA *Guides* (4th ed.), Dr. Fevurly opined claimant had a 9 percent whole person impairment. Dr. Fevurly, however, went on to state that in his opinion, certain of claimant's conditions preexisted his accident with respondent. He apportioned one-third of claimant's overall impairment to non-work-related factors, with two-thirds being related to the injury. He, then, assessed claimant a 6 percent whole person impairment for these injuries. However, he did not go through the computations utilizing any version of the AMA *Guides* in order to reach the 6 percent impairment. Moreover, the doctor did not testify that immediately before the work-related injury, claimant had a quantified functional impairment according to the AMA *Guides*. He merely separated the non-work-related and work-related percentages.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.²

¹ K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

² K.S.A. 44-520 (Furse 1993).

Here, it is uncontradicted that claimant discussed his ongoing shoulder problems with his supervisor, Mr. Hoppis. There was also discussion regarding the cause of the problem, pinpointing the cash register at the drive-through window as being a precipitating or aggravating factor. As a result, claimant was instructed to lower the cash register in an accommodation of his job duties. The Board finds that respondent was told of the accident with sufficient particularity to satisfy the requirements of K.S.A. 44-520 (Furse 1993). The Board, therefore, finds claimant did provide timely notice of accident to respondent.

With regard to the nature and extent of injury, the Board finds that the Award of the Administrative Law Judge should be modified to award claimant a 9 percent impairment to the body as a whole based upon the opinion of Dr. Fevurly.

K.S.A. 1999 Supp. 44-510e defines “functional impairment” as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.³

Neither Dr. Jones’ report nor Dr. Dorey clearly displays utilization of the proper version of the *AMA Guides* in reaching the 14 percent whole person impairment. The only mention made by either of them deals with the utilization of the conversion chart of the *AMA Guides* (4th ed.). For the purposes of K.S.A. 1999 Supp. 44-510e, that is not sufficient. Dr. Fevurly did utilize the *AMA Guides* (4th ed.) in reaching the 9 percent whole person impairment. However, in apportioning one-third to the non-work factors and two-thirds to the work injury, Dr. Fevurly also fails to properly utilize the *AMA Guides*. The Board, therefore, finds that the 3 percent attributable to non-work factors by Dr. Fevurly is not supported by the *AMA Guides* and will not be recognized. The Board finds that the 9 percent whole person impairment rendered by Dr. Fevurly is the most credible opinion contained in the record and does satisfy the requirements of K.S.A. 1999 Supp. 44-510e that the rating be pursuant to the Fourth Edition of the *AMA Guides*.

The Board, therefore, modifies the Award of the Administrative Law Judge to award claimant a 9 percent whole person impairment for the injuries suffered through the modified date of accident of June 23, 2000.

³ K.S.A. 1999 Supp. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 3, 2003, should be, and is hereby, modified and claimant is awarded a 9 percent permanent partial disability to the body as a whole on a functional basis for the injuries suffered through June 23, 2000.

Claimant is entitled to 37.35 weeks of permanent partial disability compensation at the rate of \$383 per week totaling \$14,305.05. As of the date of this Award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: R. Todd King, Attorney for Claimant
- Gary K. Albin, Attorney for Respondent
- Nelsonna Potts Barnes, Administrative Law Judge
- Paula S. Greathouse, Director