

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

VERNON C. CLUCK)
Claimant)
)
VS.)
)
ATCHISON CASTING CORPORATION)
Respondent)
Self Insured)

Docket No. **265,534**

ORDER

Claimant requests review of a preliminary Order entered by Administrative Law Judge Bryce D. Benedict on July 12, 2001.

ISSUES

The Administrative Law Judge determined claimant had failed to give timely notice of any accident and the employer had no actual notice. The Administrative Law Judge also determined claimant had not made timely written claim. The Administrative Law Judge further noted that it appeared claimant sustained a hearing loss because of his employment but the loss was not compensable because of claimant's willful failure to use hearing protection furnished by the employer.

The administrative file contains a letter from claimant's counsel seeking clarification whether the Administrative Law Judge's Order denied compensability for the hearing loss for any reason other than the failure to use hearing protection. The Administrative Law Judge responded indicating benefits for the hearing loss were denied for failure to use hearing protection and the injury was otherwise compensable. The Administrative Law Judge concluded such determination was erroneous but because it was a substantive error it was not amenable to correction by a nunc pro tunc as requested by claimant.

The claimant appealed raising all issues found adverse to claimant. However, the sole issue briefed by claimant on appeal to the Board is whether the hearing loss claim was properly denied because of claimant's alleged willful failure to use hearing protection.

The respondent did not file a brief with the Board.

FINDINGS OF FACT

Having reviewed the complete evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It should be noted that at preliminary hearing the claimant stated he was seeking temporary total disability compensation and medical treatment for his back, carpal tunnel syndrome, his shoulders and neck. During the preliminary hearing the Administrative Law Judge inquired why claimant was testifying about his hearing aids and was advised claimant was also seeking payment of a \$220 repair bill for his hearing aids as well as a \$3,400 bill for the purchase of new hearing aids. The respondent noted those issues were related to claimant's other pending workers compensation claim and confirmed it was denying notice of any alleged increase in hearing loss.

The claimant is a 55-year-old man who began employment with respondent in 1964 and worked his way into a supervisory position. The claimant accepted a buy out offer and retired with full benefits in May 2000.

Over the course of time the claimant had noticed he was experiencing increased difficulty hearing and in 1995 he filed a workers compensation claim for hearing loss which is still pending.¹ The claimant was provided hearing aids.

The claimant testified that everyone knew he had hearing problems. The claimant had attempted to have his hearing aids cleaned and fixed but those repairs were not successful so he had later purchased new hearing aids. The following colloquy occurred regarding the hearing aids:

Q. So about 1995 you made a work comp claim for hearing loss?

A. Yes.

Q. And at that point, you got hearing aids?

A. Yes.

Q. And ultimately Rockwell--not Rockwell, but Atchison Casting did pay for those?

A. As far as I know. I never did see a bill.

Q. Did they tell you that they paid for them?

¹Docket No. 204,983.

A. The day of my retirement, I told them in the office I would not sign the paper cause that was solved and they told me, the safety man said them hearing aids is paid for and taken care of.²

On cross-examination the claimant further described the meeting regarding his hearing aids.

Q. All right. Now, when you took this early retirement program and at your retirement party, as I understand it, you were concerned about your hearing aids, correct?

A. Yes.

Q. And these were the aids that you already had and you were concerned that you were going to get that straight before you retired. Is that correct?

A. Yes.

Q. And as I understand your testimony, you had to have an assurance that those aids had been paid for before you left the building.

A. True. I wanted them paid for.³

CONCLUSIONS OF LAW

The Application for Hearing filed on this claim alleged hearing loss each and every day through claimant's last day of employment on May 26, 2000. At preliminary hearing the respondent denied timely notice. The Administrative Law Judge's Order specifically determined claimant failed to give timely notice of any accident and that the employer had no actual notice.

The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.⁴ And that burden is to persuade the trier of facts by

²Preliminary Hearing Transcript, July 11, 2001; pp.15-16.

³Preliminary Hearing Transcript, July 11, 2001; pp. 67-68.

⁴K.S.A. 44-501(a).

a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.⁵

The Workers Compensation Act requires a worker to provide the employer timely notice of a work-related accident or injury. The Act reads:

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. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.⁶

The claimant alleged a series of accidents, including hearing loss, that continued each and every working day. Claimant testified that everyone knew he had hearing problems. The issue of payment for the hearing aids he had been provided was discussed before he signed his retirement forms.

The difficulty with claimant's position is that while everyone may have been aware of his hearing problems, claimant never gave notice alleging increased hearing problems or a need for additional medical treatment. The claimant had been provided hearing aids after filing a workers compensation claim in 1995 alleging work-related hearing loss. The conversations with respondent at the time of his retirement related to payment for the hearing aids that had been provided pursuant to the previous claim as well as a request for replacement of those hearing aids. Such conversations cannot be construed to provide notice of a new accident or an alleged worsening of claimant's hearing loss.

⁵K.S.A. 44-508(g).

⁶ K.S.A. 44-520.

The claimant has failed to meet his burden of proof to establish that he made timely notice of his claimed additional hearing loss. The Administrative Law Judge's finding that claimant failed to give timely notice of any accident is affirmed.

The Board's determination that claimant failed to give timely notice renders moot the remaining issue raised by claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated July 12, 2001, finding claimant failed to provide timely notice is affirmed.

IT IS SO ORDERED.

Dated this 31st day of October 2001.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John B. Rathmel, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Workers Compensation Director