

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

<b>WILLIE O'NEAL</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>KSQ, INC.</b>	)	
Respondent	)	Docket No. <b>267,032</b>
	)	
AND	)	
	)	
<b>ZURICH AMERICAN INS. CO.</b>	)	
<b>FIREMAN'S FUND INS. CO.</b>	)	
<b>TRANSPORTATION INS. CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Respondent and its insurance carrier, Transportation Insurance Co. (CNA) requests review of a preliminary Order entered by Administrative Law Judge John D. Clark on August 28, 2001.

**ISSUES**

The Administrative Law Judge determined claimant sustained a series of repetitive mini-traumas while working for respondent through June 14, 2001. Respondent and its insurance carrier, Transportation Insurance Co. (CNA), requested review of the findings that claimant had sustained accidental injury arising out of and in the course of employment and the determination of the date of accident. Respondent and its insurance carriers, Zurich Insurance Co. and Fireman's Fund Insurance Co., contend the Board does not have jurisdiction, on an appeal from a preliminary order, to address the issue of the date of accident. Conversely, the claimant contends the Administrative Law Judge's decision should be affirmed.

**FINDINGS OF FACT**

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

The claimant filed an Application for Hearing on May 31, 2001, alleging a specific date of accident on or about February 11, 1997, followed by repetitive injuries each and every day worked thereafter. During the course of time encompassed by the alleged series of accidents the respondent had workers compensation insurance coverage provided by three different insurance carriers. Zurich provided coverage until June 1, 1998. Fireman's Fund provided coverage from June 1, 1998, through June 1, 1999. Transportation Insurance Co. (CNA) provided coverage from June 1, 1999, through the present.

The claimant, a six-year employee of the respondent, sustained injury at work on February 18, 1997,<sup>1</sup> when he slipped on some products left on the floor. Claimant notified his supervisor and was referred for medical treatment. Claimant saw Dr. Wells on one occasion and was diagnosed with a groin pull.

The claimant testified the groin injury improved but he gradually developed pain in his left hip. The claimant advised his supervisor that heavy lifting was causing him problems and claimant was transferred to a different job. Claimant estimated this change in job duties occurred two or three months after the slip and fall incident at work.

Although the new job was easier the claimant's hip pain continued to worsen. Nonetheless, the claimant did not seek treatment for his hip. On February 11, 1999, claimant returned to Dr. Wells and advised the doctor he thought he had a hernia and noted he had the same complaints of groin pain that he had after his slip and fall two years earlier. Ultimately, claimant was diagnosed with bilateral inguinal hernias which were surgically repaired on February 28, 2000.

Claimant testified the lifting and turning at work caused his hip problems which on occasion would hurt so much that he would call in to report he could not work. Claimant testified he first missed work because of hip pain sometime during the year 2000. The claimant worked at the easier job for about a year and a half, however, he was then returned to his original job. Claimant testified his left leg and hip significantly worsened when he returned to the original job.

The claimant had told Ben Campbell, respondent's safety director, that his hip pain was worsening. Finally in April 2001, the claimant advised Mr. Campbell that his left leg and hip was getting worse and he was starting to have pain in his right hip. Mr. Campbell referred claimant to Dr. Faimon, the company physician.

Dr. Faimon's history taken from claimant noted an injury to the left hip at work in 1997. Claimant described intermittent pain since that incident which had become much worse over the last few months. It was noted the pain was worse at the end of the work

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<sup>1</sup>At preliminary hearing claimant noted the incident occurred on February 18, 1997, rather than the February 11, 1997, date alleged on the E-1 Application for Hearing.

day. Dr. Faimon diagnosed left hip pain and osteoarthritis of the left hip. Dr. Faimon referred the claimant to Dr. Siwek.

The parties submitted a significant amount of medical evidence at the preliminary hearing. The majority of the proffered exhibits referred to the hernia treatment and surgery. Unfortunately, just a few pages of notes from Drs. Faimon and Siwek, the doctors who treated claimant for his left hip problems, were proffered. Dr. Siwek's notes simply contain a diagnosis of post traumatic osteoarthritis of the left hip. When Dr. Siwek recommended surgery, the respondent advised claimant the surgery would not be covered because respondent did not consider claimant's hip problems to be work-related. The claimant elected to proceed with the recommended surgery and on June 5, 2001, Dr. Siwek performed left hip replacement surgery.

Following the preliminary hearing on August 28, 2001, the Administrative Law Judge specifically determined claimant sustained accidental injury arising out of and in the course of his employment with respondent each and every working day through June 14, 2001, when claimant was taken off work for his left hip replacement surgery. All the ordered benefits were assessed against Transportation Insurance Co. (CNA), the insurance carrier which had workers compensation insurance coverage for the respondent on the last date worked before surgery.

#### CONCLUSIONS OF LAW

Respondent and its insurance carrier, Transportation Insurance Co. (CNA), initially contend claimant failed to sustain his burden of proof that he sustained any hip injuries at work. It is argued that claimant never sought medical treatment for his hip after the slip and fall incident in 1997 until April 2001. This argument is premised on a single date of injury of February 18, 1997, and claimant's testimony that he was unaware of any particular injury that caused his left hip to hurt except when he slipped and fell and later became aware of left hip pain a few months after that incident.

If claimant had just alleged the slip and fall as the cause of his left hip problem, then such an argument might have some merit. However, this argument is not persuasive because it ignores claimant's further testimony which described a gradual onset and worsening of his hip condition. Claimant's testimony reflects that although he is not particularly sophisticated he is clearly forthright when he noted he could not identify a particular injury to his left hip and referred to the slip and fall simply because the pain started a few months thereafter.

Because the left hip problem was the result of a series of mini-traumas, the fact claimant did not seek treatment until 2001 is not significant. Again, respondent's argument focuses on the time span between the slip and fall in 1997 and treatment for the left hip in 2001 while ignoring the claimant's uncontradicted testimony that he had a gradual onset and worsening of pain in his left hip. The failure to mention hip problems during the

intervening treatment for a hernia condition is likewise insignificant when viewed from the perspective of a series of accidents rather than one specific date of accident in 1997.

Respondent and its insurance carrier, Transportation Insurance Co. (CNA), further argue there is no medical evidence that claimant's hip condition was caused by his fall at work on February 18, 1997. As previously discussed, claimant only noted the slip and fall because the onset of his left hip pain began a few months after that incident. The claimant described the cause of his left hip problems as lifting and twisting at work. The claimant further described the gradual onset and worsening of his left hip which finally resulted in his request for treatment when his condition significantly worsened after he was returned to his original job. The claimant's testimony alone is sufficient evidence of the claimant's physical condition. *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P. 3d 1184, *rev. denied* \_\_\_ Kan. \_\_\_ (2001). Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability. *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976). Moreover, the admittedly cryptic medical note from Dr. Siwek indicates a diagnosis of post traumatic osteoarthritis of the left hip.

Although the claimant alleged a specific injury date, he further alleged a series of repetitive mini-traumas each and every day worked thereafter. The claimant's uncontradicted testimony was he began to experience a gradual onset and worsening of left hip pain. Claimant's further uncontradicted testimony was respondent knew about his hip pain and placed him on a job which did not require lifting heavy parts. Uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy. *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976). The Board concludes the claimant has met his burden of proof that he sustained a work-related series of repetitive traumas to his left hip and accordingly affirms the Administrative Law Judge's finding.

Respondent and its insurance carrier, Transportation Insurance Co. (CNA), next argue the Administrative Law Judge erred in determining the date of accident. Respondent and its insurance carriers, Zurich and Fireman's Fund, contend the Board does not have jurisdiction to address this issue on appeal from a preliminary order. The Board agrees.

The Board has held in the past and continues to hold that date of accident and disputes between insurance carriers concerning which of them is to pay the cost of ordered preliminary hearing benefits are not jurisdictional issues. The determination of whether claimant's date of accident is found to be on or after February 18, 1997, does not alter the fact that the injury is the result of claimant's employment with respondent. The Administrative Law Judge's finding that claimant has a compensable injury as a result of his work for respondent over a period of time is not really the issue. It is clear from the briefs that the real issue regarding the date of accident is which insurance carrier should pay. The Administrative Law Judge's determination of that issue for purposes of preliminary hearing is not jurisdictional.

The parties may preserve the date of accident issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part: "Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts."

K.S.A. 44-534a, as amended, and K.S.A. 44-551(b), as amended, do not grant the Board jurisdiction at this juncture of the proceeding to review and reweigh the evidence concerning the award of preliminary benefits as to which insurance carrier should be liable for payment of same.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated August 28, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2001.

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BOARD MEMBER

- c: Joe Seiwert, Attorney for Claimant
- Matthew J. Thiesing, Attorney for Respondent and its Insurance Carrier, Zurich Insurance Co.
- Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier, Fireman's Fund Insurance Co.
- D. Steven Marsh, Attorney for Respondent and its Insurance Carrier, Transportation Insurance Co.
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director