

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

RAY M. PAYNE)	
Claimant)	
VS.)	
)	Docket No. 268,622
COPP TRANSPORTATION)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF THE WEST GROUP, COMMERCE & INDUSTRY INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY and TIG INSURANCE COMPANY)	
Insurance Carriers)	

ORDER

Respondent and two of its insurance carriers, TIG Insurance Company (TIG) and Insurance Company of the West Group (West Group), appeal the December 16, 2004 Preliminary Decision of Administrative Law Judge Robert H. Foerschler.

ISSUES

1. Did the Administrative Law Judge (ALJ) err in including TIG Insurance Company (TIG) as a responsible carrier for additional medical care?
2. Did claimant suffer accidental injury from June 29, 1998 forward¹ arising out of and in the course of his employment during West Group's insurance coverage between May 23, 2000, and May 23, 2002? More particularly, did claimant's injury to his shoulders result from his employment with respondent or as a result of a degenerative arthritic condition? Additionally, is the problem with claimant's kidneys

¹ K-WC Amended E-1 Application for Hearing, filed March 5, 2003.

the result of his work-related injury or the result of a non-work-related, inappropriate use of pain medication, specifically ibuprofen?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Preliminary Decision of the ALJ should be affirmed.

Claimant, a truck driver, had worked for respondent since 1992. His last work with respondent was in February of 2004, although an exact date is not contained in this record. Claimant developed upper extremity problems in both shoulders and was diagnosed with degenerative arthritis in his shoulders as early as March of 1999. He underwent conservative treatment, including injections, under the hand of Mark J. Maguire, M.D. During this time, claimant continued his regular duties as a truck driver for respondent.

For a period of what appears to be several years, claimant was not provided pain medication for his ongoing shoulder problems. He was forced to self-medicate, using over-the-counter medications, including ibuprofen, which he took at a substantially higher dosage than was recommended.

Claimant's history is significant in that, when claimant first began treating with Preston Forester, M.D., on June 29, 1998, he provided a history of painful right shoulder, following a traumatic injury in 1990. However, the treatment received by claimant between 1990 and 1998 is not contained in this record.

Claimant's testimony is that his shoulder condition continued to worsen as he continued driving a truck through February 2004. Respondent and its insurance carrier, Continental, argued at the preliminary hearing of December 9, 2004, that claimant had not proven accidental injury arising out of and in the course of his employment. However, the only medical evidence on the issue of causation in the record is that from Edward J. Prostic, M.D., a board certified orthopedic surgeon, who examined claimant on October 23, 2001, and again on March 4, 2003. Dr. Prostic opined that claimant's repetitious trauma to his shoulders during the course of his employment aggravated the osteoarthritis in both of his shoulders. Respondent provides no contradictory medical opinion.

The Board finds the allegation that claimant did not suffer accidental injury arising out of and in the course of his employment to his bilateral shoulders resulting from his employment to be unsupported by this record.

Claimant developed a significant deterioration in his kidneys resulting from claimant's over-medication with ibuprofen. By the time he was examined by Dennis C.

Dobyan, M.D., F.A.C.P., a specialist in kidney diseases and dialysis, at St. Joseph Nephrology Associates, Inc., in St. Joseph, Missouri, claimant's kidneys had failed to the point where he was required to undergo dialysis treatments on a regular basis and was being considered for a kidney transplant. Dr. Dobyan, in his September 22, 2004 report, stated that the cause of claimant's kidney failure was due to the long-term use of nonsteroidal anti-inflammatory drugs resulting in analgesic nephropathy.

In essence, claimant's bilateral shoulder problems, which resulted from his many years of driving a truck, led to the over-the-counter use of ibuprofen, which led to the failure of his kidneys. Therefore, the Board finds that not only are claimant's shoulder difficulties directly related to his work-related injuries, but also the resulting kidney difficulties which he developed from the overuse of the medication. While it is unfortunate that claimant overused the ibuprofen medication, it is even more unfortunate that claimant was not provided appropriate pain medication from the various insurance carriers. This matter has been in dispute for several years, with the treatment which would have been appropriate to claimant having been denied during this litigation.

In reviewing the briefs, the Board has determined that it is not necessarily the issue of causation which has the insurance companies upset, but more the decision by the ALJ, in his December 16, 2004 Preliminary Decision, that claimant's current medical treatment for his needs be continued by the employer "and the involved carriers." This matter has been before the Board on one prior occasion upon respondent's appeal from the June 9, 2003 Preliminary Decision also entered by Judge Foerschler. In that decision, the Board ruled that the dispute by the insurance carriers regarding which insurance carrier was liable for treatment was not a jurisdictional issue which the Board would determine on an appeal from a preliminary hearing. At that time, the insurance carriers attempted to raise the causation issue to the Board without having raised it originally to the ALJ. As noted above, even though the insurance carriers and respondent timely raised the causation issues in this matter, the medical evidence supports claimant's contention with regard to how his shoulder problems developed, how they led to his kidney problems and how the entire medical scenario is related to his work as a truck driver for respondent. Once we get beyond the causation issues, the Board is faced with insurance disputes which do not qualify as issues over which the Board takes jurisdiction on appeal from preliminary hearings.² In this instance, the ALJ did not exceed his jurisdiction in ordering the cost of claimant's ongoing treatment to be shared among the various insurance carriers until the time of final award.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a

² K.S.A. 44-534a and K.S.A. 2003 Supp. 44-551.

decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

The Board is unaware of any provisions in the Workers Compensation Act that give the Board jurisdiction to review a preliminary hearing order for the purpose of determining liability among multiple insurance carriers. The Board has been presented with similar issues in the past where the Board has held that it was without jurisdiction to consider issues of which insurance carrier should pay for preliminary benefits. In *Ireland*,⁴ the Board stated:

Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established. Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968); Hobelman v. Krebs Construction Co., 188 Kan. 825, 366 P.2d 270 (1961).⁵

The Board, therefore, determines that the Preliminary Decision of ALJ Robert H. Foerschler dated December 16, 2004, should be affirmed in all respects.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated December 16, 2004, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁴ *Ireland v. Ireland Court Reporting*, Nos. 176,441 & 234,974, 2002 WL 123220 (Kan. WCAB Feb. 22, 1999).

⁵ *Id.* at 3.

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