BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALICE STITH	)	
Claimant	)	
	)	
VS.	)	
	)	
TARGET STORES	)	
Respondent	)	Docket No. 1,033,953
	)	
AND	)	
	)	
SEDGWICK CLAIMS MGMT. SERVICES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 2, 2008 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

Following an earlier preliminary hearing, the Administrative Law Judge (ALJ) awarded claimant benefits. Claimant alleged a series of repetitive injuries and testified that her last date of work was April 24, 2006. She went on to work elsewhere and respondent defended the claim by asserting that claimant injured herself while working for her subsequent employers rather than while working for this respondent. At no time was timely notice an issue at that preliminary hearing.

A second preliminary hearing was held at respondent's request. At this hearing respondent contended that claimant failed to file a timely written claim as required by K.S.A. 44-520a(a). That request was denied as the ALJ concluded that "[c]laimant was wholly or partially incapacitated from performing her duties on numerous occasions. Respondent has not filed an accident report. Written claim was timely."[1] It is this Order that is at issue in this appeal.

[1] ALJ Order (Oct. 1, 2008).

Respondent maintains that it was under no duty to file an accident report and claimant's Application for Hearing (E-1) was, therefore, not timely filed. Claimant contends that she did, in fact, miss work periodically due to her bilateral hand complaints and respondent's failure to file an accident report extends the period in which she had to file her claim. Accordingly, claimant argues that the Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds that this matter should be remanded to the ALJ for further findings of fact.

This is the second preliminary hearing that has been held in this claim. In both instances for purposes of the preliminary hearings both claimant and respondent acknowledge that claimant sustained a series of repetitive injuries. They also acknowledge that claimant's last date of work for this respondent was April 24, 2006 and that she filed an Application for Hearing (E-1) with the Division on March 30, 2007, 240 days after claimant's last date of work. Finally, they agree that claimant never provided any earlier written document before March 30, 2007 and at no time did she ask for treatment from this respondent.

At this second preliminary hearing the respondent asserted a statutory defense premised on claimant's alleged failure to file a timely written claim as required by K.S.A. 44-520a(a). K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

The difficulty presented by this factual scenario is that the ALJ failed to make any finding of fact with respect to claimant's date of accident in light of a recent statutory change which dictates how the date of accident is determined in repetitive injury claims.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[2] (Emphasis added.)

Until the date of accident can be determined, it is impossible to determine whether claimant asserted her claim in a timely fashion. It seems from the transcript that the parties *assumed* that claimant's last date of work was the date of accident and that all dates should have been calculated based upon that fact. Yet, there was no stipulation and the ALJ made no such determination.

Under these facts and circumstances, this Board Member finds that the matter should be remanded to the ALJ for further findings of fact concerning the date of accident as well as the ultimate issues originally presented at the second preliminary hearing which was held on October 2, 2008.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[3] Moreover, this review

---

[2] K.S.A. 2005 Supp. 44-508(d).

[3] K.S.A. 44-534a.

on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that this matter is remanded to Administrative Law Judge Brad E. Avery for further proceedings consistent with the findings above.

IT IS SO ORDERED.

Dated this _____ day of December 2008.

_____
JULIE A.N. SAMPLE
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge