

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

PAUL T. DHAENENS)	
Claimant)	
VS.)	
)	Docket No. 1,000,370
SEDGWICK COUNTY)	
Respondent,)	
Self-Insured)	

ORDER

Claimant appealed the March 20, 2002 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleges he injured his back at work on either September 25 or 26, 2001, while participating in restraint exercises. After conducting a preliminary hearing, Judge Barnes denied claimant's request for benefits, finding claimant had failed to provide respondent with timely notice of the accidental injury.

Claimant contends Judge Barnes erred. Claimant argues he notified respondent of the accidental injury on either October 1 or 2, 2001, and, therefore, respondent had notice within 10 days of the accident, as required by statute. Accordingly, claimant requests the Board to reverse the Judge's finding of lack of timely notice.

Conversely, respondent requests the Board to affirm the preliminary hearing Order. In addition to challenging claimant's contentions that he provided timely notice, respondent also argues that claimant failed to prove that he injured his back at work.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. If so, did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and after considering the parties' arguments, the Board finds and concludes that the preliminary hearing Order should be affirmed. The Board concludes that claimant has failed to prove that it is more probably true than not that claimant injured his back at work.

Claimant allegedly injured his back on either September 25 or 26, 2001, when he was participating in restraint training exercises with coworkers. But when he first sought medical treatment on September 28, 2001, claimant provided a history to the doctor that he injured his back leaning down to pick up something. The medical notes from that office visit read, in part:

This is a 28 y/o cauc male who presents to the clinic c/o low back injury. He states that on 9/26/01 he was training for his National Guard hike, which is in 1 month, and had his ruck sack [sic] on. He went for his walk and came back and leaned down to pick something up. The pt states he is having a difficult time walking and hard time getting in and out of cars. He states that the pain is worsening and going into his right leg all the way down to his heel w/numbness, tingling and some pain. He maintains good strength and ability to control all his bodily functions. . . .

Claimant testified that he experienced back pain during the September 25 or 26, 2001 restraint training exercises and that he was in obvious pain. But when claimant spoke to his immediate supervisor, Nadia Betancourt, on October 1 or 2, 2001, he reported that he "sort of" injured his back in the restraint exercises. Furthermore, when claimant completed an incident report on October 10, 2001, he noted that his back pain did not commence until the morning after the restraint training and that he did not know how the injury occurred.

Claimant also testified that he had told a coworker, Shawn Dowd, about injuring his back during training. But Mr. Dowd testified at the preliminary hearing that he could not recall claimant complaining of back pain immediately following the restraint exercises. Moreover, Mr. Dowd testified that within several days following the restraint training exercises claimant complained of back symptoms but Mr. Dowd did not know the source of claimant's back injury. Mr. Dowd testified, in part:

Q. (Mr. McClellan) Do you remember a conversation shortly after September 25th, a matter of days after that, that you and he had when you two were out running errands regarding his back? Let me refresh your recollection. During one of the days that you and Paul participated in the defensive driver training, do you recall the two of you going to Warehouse Records?

A. (Mr. Dowd) Yes, I remember that.

Q. And then you also went to Old Chicago, correct?

A. Yes.

Q. And do you remember during that time frame that Paul continually complained about his back hurting?

A. Yes, I remember that, but I don't know what the injury stemmed from.

Q. And he also told you during that time frame that he was on pain killers because of his back injury, right?

A. Yes, he did.¹

Furthermore, Mr. Dowd also testified that if claimant had informed him of a work-related injury, Mr. Dowd would have advised claimant to report the injury and have it checked out.

When considering the inconsistencies in the evidence compiled to date, the Board is not persuaded that claimant injured his back at work.

Although the notice issue is rendered moot by the above conclusion, the Board finds and concludes that claimant did provide timely notice to respondent of a work-related injury on either October 1 or 2, 2001, when he spoke with his immediate supervisor and stated that he "sort of" injured his back in the restraint training exercises. As that notice was within 10 days of the alleged accident, the notice was timely.²

WHEREFORE, the Board affirms the March 20, 2002 preliminary hearing Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

c: Roger E. McClellan, Attorney for Claimant
E. L. Lee Kinch, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

¹ January 17, 2002 preliminary hearing at pages 105 and 106.

² See K.S.A. 44-520.