

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

<b>KRISTINA SABER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,699
<b>W. H. BRAUM, INC.</b>	)	
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appeals Administrative Law Judge Nelsonna Potts Barnes' March 13, 2002, preliminary hearing Order.

**ISSUES**

This is a claim for bilateral upper extremity injuries occurring as a result of a series of accidents from December 2000 through January 11, 2002, claimant's last day worked. The Administrative Law Judge (ALJ) found claimant proved she suffered work-related bilateral upper extremity injuries while employed by the respondent and granted claimant's request for medical treatment.

Respondent appeals and contends that claimant's bilateral upper extremity injuries and need for medical treatment are not related to her employment with respondent. But instead, respondent argues claimant's injuries are the result of work activities she performed while employed at the same time at Wal-Mart and the work activities she presently continues performing while employed at Wal-Mart. Respondent requests the Appeals Board (Board) to reverse the ALJ's preliminary hearing Order and deny claimant's request for medical treatment.

Conversely, claimant contends she proved her bilateral upper extremity injuries were the result of her work activities while employed by the respondent and are not related to her work activities at Wal-Mart. Accordingly, claimant requests the Board to affirm the preliminary hearing Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the arguments contained in the respondent's brief, the Board makes the following findings and conclusions:

Claimant started working part-time for respondent on November 13, 2000. At the same time, claimant was also employed full-time for Wal-Mart. Claimant had worked for Wal-Mart since April 29, 1998. Claimant started having pain and discomfort in her hands while washing windows and tables for respondent. After claimant complained of hand discomfort to her store manager, Robert Layman, he took claimant off the job duty of washing windows.

Because her store manager required a note from a physician restricting her from washing windows, claimant went on her own to the Hunter Health Clinic. Claimant was seen at the Hunter Health Clinic on April 26, 2001, by nurse practitioner Christa Hamann. Claimant gave Ms. Hamann a history of washing windows and glass causing her hands and wrists to hurt. She told Ms. Hamann her supervisor had then removed her from that job duty and after she stopped cleaning windows and glass her wrists and hands improved. Clinically Ms. Hamann found claimant with a positive Phalen's test, numbness in her right index finger and pain in her right wrist. Her assessment was mild right carpal tunnel syndrome. Ms. Hamann prescribed Advil and recommended claimant wear a wrist splint, as needed. In an April 26, 2001, prescription note, Ms. Hamann stated: "Kristina has mild carpal tunnel syndrome in her ® hand and wrist. She should avoid using her ® hand for repetitive tasks at work."

Claimant's hands improved after she was taken off the window and glass cleaning duties. But a new store manager, Gregg Harris, took over managing the store on or about January 1, 2002. At that time, claimant's job duties were changed to include cooking breakfast. Cooking breakfast required claimant to perform repetitive hand duties such as stirring food, cleaning tables, chopping and cutting meat. As a result of those repetitive hand duties, claimant's hand and wrist symptoms worsened. Claimant testified she performed those repetitive cooking duties for a two week period before she was terminated by the respondent on January 11, 2002.

Claimant was terminated because she purchased a soft drink and rang the purchase up herself on the cash register, instead of having another employee ring the purchase up as required by company policy. Claimant, however, testified that the former store manager previously allowed her to ring the purchase herself, but Mr. Harris, the new store manager, found that violated company policy.

Mr. Harris, the new store manager, also testified at the preliminary hearing. He testified that claimant worked the first week of January as a package person taking care of the grocery side of the store. Her job duties were to stock groceries, run the cash register, clean tables and clean floors. The only job duty he was aware that claimant was to avoid performing was washing windows. Mr. Harris testified claimant only cooked breakfast for the last couple days before she was terminated and then only for a few hours per day. The remaining hours she would run the cash register on the grocery side. Claimant did complain to Mr. Harris that her hands were hurting, but the reason they were

hurting was because of irritation from the gloves she was required to wear while working and not her physical job duties.

Claimant worked at Wal-Mart in the lawn and garden department. Her job duties were light and consisted of straightening merchandise on the shelves, watering flowers, answering the telephone and running the scanner cash register. Claimant testified her Wal-Mart job duties had not caused her any problem with her hands.

After her termination, claimant returned to Hunter Health Clinic on January 23, 2002, with complaints of pain and discomfort in both her right and left wrists and hands. She was again examined by Ms. Hamman and her impression was carpal tunnel syndrome on the right along with left wrist pain. Claimant was restricted to avoid typing, stirring, and scrubbing with the right hand.

At respondent's request, claimant was examined and evaluated by J. Mark Melhorn, M.D. on February 22, 2002. At that time, claimant complained of pain and discomfort in both her right and left hands and wrists. She provided Dr. Melhorn with a history of the onset of symptoms while performing her work activities for respondent and the worsening of those symptoms through her last day worked for respondent. Dr. Melhorn's diagnosis was neuropraxia (temporary nerve dysfunction) and possible carpal tunnel syndrome based on her subjective complaints. He recommended a nerve conduction test, continued claimant in her regular work at Wal-Mart, discontinued the wearing of the splint, continued claimant on home exercises and advised claimant to use heat therapy in the morning and cold therapy in the afternoon. If authorized, he scheduled claimant to return in one or two weeks.

In response to a letter from respondent's attorney, Dr. Melhorn, in a letter dated March 6, 2002, stated he had included in claimant's chart the information respondent's attorney had provided him on the perceived inaccuracies in the history claimant had provided Dr. Melhorn. Presumably based on those perceived inaccuracies, Dr. Melhorn went on to opine that claimant's current Wal-Mart work activities had contributed to her current symptoms. Furthermore, the doctor opined that it was possible that she developed symptoms on the right as of April 26, 2001, when working for both respondent and Wal-Mart. But further evaluation and possible apportionment opinion would be possible only after a nerve conduction test.

Respondent argues that the description of the job duties claimant performed and the duration she performed those duties while employed by the respondent were more accurately described by respondent's store manager, Gregg Harris, than the description given by claimant. Based on Mr. Harris' job duty description and Dr. Melhorn's medical opinion, respondent argues claimant's current symptoms and need for medical treatment are related to her work at Wal-Mart and are not related to her work she performed while working for respondent. Moreover, because claimant did not make a claim for workers

compensation until after her termination, the respondent also argues that the claim was only made against respondent in retaliation for the termination.

There is conflicting testimony in this case between respondent's store manager and claimant in regard to the description of job duties and the duration that those job duties were performed. Where there is such conflicting testimony, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's store manager testify before her. In granting claimant's request for medical treatment for her bilateral upper extremity injuries, the ALJ apparently believed claimant's testimony over the testimony of the store manager. Additionally, the Board finds Dr. Melhorn's medical opinions as set forth in the March 6, 2002, letter to respondent's attorney on the causation question are somewhat suspect because Dr. Melhorn's opinions were based on respondent's attorney's personal perceived inaccuracies in the history claimant provided Dr. Melhorn. Moreover, the Board also does not interpret Dr. Melhorn's March 6, 2002, letter as a definitive causation opinion that claimant's current symptoms and need for medical treatment are the result of her work activities at Wal-Mart instead of her work activities while employed by respondent.

The Board finds that some deference should be given to the ALJ's findings and conclusions because she is able to judge the witnesses' credibility by personally observing them testify. Therefore, giving some deference to the ALJ, the Board concludes, for preliminary hearing purposes, the claimant's bilateral upper extremities injuries arose out of and in the course of her employment with respondent.

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' March 13, 2002, preliminary hearing Order should be, and is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2002.

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BOARD MEMBER

c: John F. Carpinelli, Attorney for Claimant  
Joseph Seiwert, Attorney for Respondent  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director