

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

JOSE JESUS MATA)	
Claimant)	
VS.)	
)	Docket No. 1,004,224
MODERN MAINTENANCE, INC.)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL FIRE INS. CO.)	
Insurance Carrier)	

ORDER

Claimant appeals the July 2, 2002 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was denied benefits after the Administrative Law Judge determined that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent.

ISSUES

- (1) Did claimant suffer accidental injury on the date alleged?
- (2) Did claimant's accidental injury arise out of and in the course of his employment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the order of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury on May 20, 2002, when he allegedly backed into a table at work while bending over and cleaning a floor. Respondent acknowledges claimant suffered some type of incident while working. However, respondent contends that the incident was no more than a continuation of claimant's prior back problems, with no work-related injury involved.

Claimant was found at work on the morning of May 20, 2002, experiencing a great deal of pain in his low back. Claimant's wife is the one who initially found him. She called the lead man, Orlis Alvado, and also the supervisor, Salvador Partida. When Mr. Partida arrived, he was advised by claimant that he was in a great deal of pain in his low back. There was no mention of any contact with the lab table. Claimant was specifically asked by Mr. Partida if he had suffered a work-related accident and, according to Mr. Partida, claimant denied any work-related accident.

Mr. Partida did hear claimant advise his wife that the pain was "harder than the last time." An ambulance was called, and claimant was transferred to the Olathe Medical Center. Claimant was examined on May 20, 2002, with the first attending physician being Stuart Gaynes, M.D. The history provided by claimant to Dr. Gaynes, through a Spanish interpreter identified as John, is that claimant had ongoing symptoms for more than a month, but that this situation was worse than before. There was no indication in that record of any contact with a table or any work-related connection to the injury.

Claimant was examined on May 21, 2002, by emergency room physician David Ramirez, M.D. The history provided to Dr. Ramirez indicated the pain had been present off and on for approximately two months. The medical report when on to state "but it got worse last night, probably after lifting weights a few days ago."

There is again no history of any work-related connection to the injury and no mention of any contact with a table.

Claimant was also examined on May 21, 2002, by Charles Striebinger, M.D. The history provided to Dr. Striebinger was that claimant had experienced problems with his back in the past, but nothing this severe. There is indication that claimant used to work for a cement company and had done a lot of lifting. Again, there is no mention of any contact with a table.

The witnesses for respondent testified consistent with the medical reports. Mr. Partida asked claimant if he had injured himself at work, and claimant denied it on the date of the alleged accident. Michael Zimmerman, the zone manager, was also present that morning and through Mr. Partida's translations was advised that claimant was walking and his back gave out. There is no indication either Mr. Partida or Mr. Zimmerman were advised of a work-related connection to the injury or of any contact with the table. Mr. Zimmerman, who was at the hospital emergency room, did hear the hospital translator discuss the fact that claimant was lifting weights a couple of months prior.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

In order for a claimant to collect workers' compensation benefits, he must suffer accidental injury arising out of and in the course of his employment. K.S.A. 44-501(a).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

As claimant was at work, on the clock, at the time the incident occurred, it cannot be argued that claimant was not in the course of his employment at that time.

However, claimant must also prove that the accident arose "out of" his employment.

The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

In this instance, the evidence is very contradictory regarding how the accident occurred. Claimant testifies to having backed into a table, striking his low back on the corner of the table, and suffering an immediate onset of pain. None of the witnesses at the scene nor any witnesses at the hospital can verify that description of the accident. In fact, respondent's witnesses as well as the medical evidence presented directly contradict claimant's statements. All evidence points to a sudden onset of pain of unknown etiology occurring simply while claimant was walking. Additionally, the medical reports indicated prior problems for from one to two months before the accident.

The Board finds based upon this record that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment.

Claimant's counsel argues in his brief of a growing backlash against Hispanic individuals who have resided in the United States, but have not learned to speak English since their arrival. A review of this record does not support that allegation. The claimant's lack of ability to speak English did not interfere with his ability to obtain a job with this respondent or to obtain raises as indicated by the records at preliminary hearing. Additionally, both this respondent and the hospital provided claimant with interpreters in order to ensure that the information obtained from claimant and the information provided to claimant were understood.

There is no indication in this record that claimant has been punished for his inability to speak English, nor is it at all clear how this suggestion is material to the issues at hand.

It is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. Here, claimant has failed in that burden.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated July 2, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Lynn M. Curtis, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation