

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

CYNTHIA P. KELLEY)	
Claimant)	
VS.)	
)	
BIG M RESTAURANT)	
Respondent)	Docket No. 1,008,310
)	
AND)	
)	
NATIONWIDE MUTUAL INSURANCE CO.)	
C/O BERKLEY RISK ADMINISTRATORS)	
Insurance Carrier)	

ORDER

Claimant appealed the March 13, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

Judge Moore denied benefits finding claimant failed to prove she suffered personal injury by accident arising out of and in the course of her employment with respondent and also failed to prove that she gave timely notice of accident. Claimant disputes those findings and contends that her testimony is uncontradicted and, therefore, the ALJ's Order should be reversed. Conversely, respondent argues that claimant's testimony is self-contradictory and is further contradicted, in significant parts, by the testimony of Mr. Glenn C. Saunders, one of the co-owners of the restaurant.

Accordingly, the issues for the Appeals Board (Board) review are:

1. Whether claimant met with personal injury by accident on the date alleged.

2. Whether claimant's alleged accidental injury arose out of and in the course of her employment with respondent.
3. Whether claimant gave timely notice of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the record compiled to date, the Board finds that the preliminary hearing Order should be reversed.

1. Claimant began working as a waitress at the Big M Truck Stop and Restaurant on August 23, 2002. She worked from 10:00 at night until 6:00 in the morning. At approximately 11:00 p.m. on Monday, September 16, 2002, claimant was lifting a mop bucket filled with water to clean up a spill on the floor when she felt a pop in her left shoulder. Claimant continued working and completed her shift. Claimant told a co-worker about her injury, another waitress named Doreen, but did not report her injury to a supervisor during that shift.

2. After getting off work the following morning, claimant went to the emergency room at the Hutchinson Hospital. The hospital records show that claimant arrived at approximately 8:29 a.m. on September 17, 2002. She reported weakness, pain and numbness in her left arm which began at work approximately 11:00 the night before.¹ There is no description of a specific accident. But on September 19, 2000, claimant returned to the emergency room with pain in her left shoulder, neck and upper back. And the records for that date contain a history of being injured at work when she "picked up [a] mop bucket."²

3. Claimant was not scheduled to work again until 10:00 p.m. on September 19, 2002. When she arrived at work on that date she told her supervisor, Karen Saunders, that she was not feeling well and that she had injured herself on the job. Claimant was told to go home. However, while waiting for a ride home, claimant was playing some video games when she began to feel numb all over and fell down. There was apparently some confusion about whether claimant was making a claim for injury from this fall, but claimant clarified at the preliminary hearing that the accident was on September 16 lifting a mop bucket.

4. The next day, September 20, 2002, claimant took a document to work that she had been given at the hospital. The document was to be filled out for workers compensation insurance purposes. Claimant intended to deliver the document to Karen

¹ P.H. Trans., Ex. 1.

² P.H. Trans., Ex. 1.

Saunders, but because Karen was busy, claimant gave the document to a co-worker named Jenny to give to Karen Saunders. Claimant spoke with Karen Saunders the next day, September 21, 2002, about the accident. They did not discuss the workers compensation document from the hospital at that time. At the preliminary hearing Mr. Saunders acknowledged that his wife Karen Saunders received the document from another employee. It was introduced as an exhibit at the preliminary hearing by respondent. That document indicated that claimant had reported to the hospital that she suffered an on the job injury to her “shoulder/back area occurring on 9/19/20 [sic].”³

5. Karen Saunders did not testify at the preliminary hearing, nor did the co-workers identified only as Doreen and Jenny. Glenn Saunders, husband of Karen Saunders and a co-owner of the restaurant, was the only witness to testify at the preliminary hearing other than claimant. Mr. Saunders described the respondent’s policy of immediately reporting accidents to the employee’s supervisor. He also testified that mopping is done at the end of a shift. Therefore, claimant would not have been mopping at 11:00 p.m. Furthermore, the mop bucket has wheels and is filled at a floor sink. Therefore, according to Mr. Saunders, claimant would never need to lift the mop bucket.

Respondent argues that claimant’s credibility is at issue because claimant was aware that she was being terminated before the alleged accident occurred on September 16, 2002. Furthermore, the hospital document and claimant’s Application for Hearing alleged an accident date of September 19, 2002. And it was not until the preliminary hearing that claimant changed her alleged date of accident to September 16, 2002. In addition, claimant is right-handed and acknowledged that she generally does everything with her right hand due to that fact that she was born without any thumb on her left hand. Accordingly, it is unreasonable to accept that claimant would attempt to lift a heavy mop bucket full of water with her left hand. Finally, Mr. Saunders said he interviewed claimant’s co-workers and did not find anyone who knew anything about the alleged accident.

Claimant’s description of how she injured her left shoulder is uncontradicted. “Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.”⁴ Claimant’s description of her accident is not improbable or unreasonable. Although there is some evidence suggesting claimant’s description of the accident may be untrustworthy, the Board does not find it improbable or unreasonable, nor so untrustworthy as to be disregarded. Accordingly, in the absence of testimony from Karen Saunders or claimant’s co-workers directly contradicting claimant, the Board accepts claimant’s testimony as conclusive. The Board finds claimant has proven she suffered injury by accident arising out of and in the course of her employment with respondent on September 16, 2002, and

³ P.H. Trans., Ex. C and D.

⁴ *Anderson v. Kinsley Sand & Gravel Inc.*, 221 Kan. 191 Syl. ¶ 2, 558 P. 2d 146 (1976).

that she gave notice of her accident to her supervisor, Karen Saunders, within ten days thereof.

WHEREFORE, the Board reverses the March 13, 2003, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore and remands this claim to the Administrative Law Judge for further orders and/or proceedings consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director