

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

**ANDREW R. SUMAHIT** )  
Claimant )  
VS. )  
**WALTERS-MORGAN CONSTRUCTION** )  
Respondent )  
AND )  
**CINCINNATI CASUALTY COMPANY** )  
Insurance Carrier )

Docket No. 1,011,437

**ORDER**

Claimant requests review of the September 8, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

**ISSUES**

The ALJ found the claimant had failed to meet his evidentiary burden on the issue of temporary total disability benefits and medical treatment.

The claimant requests review of this determination. Claimant alleges the ALJ's findings are "contrary to the facts presented", "contrary to the evidence presented" and that in denying claimant's request, the ALJ exceeded his jurisdiction.<sup>1</sup> Claimant maintains the evidence, taken as a whole, supports his contention that he was injured while working for respondent.

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<sup>1</sup> Appeal of Preliminary Hearing Order at 1-2 (filed Sept. 11, 2003).

Respondent argues the ALJ's findings are sufficiently supported by the evidence contained within the record and should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant began working for respondent as a laborer/lead man on May 5, 2003. His job duties included building and setting forms for concrete and he was assigned to work on a project at the Hutchinson Water Sewage Treatment Plant. According to claimant, he was required to shovel gravel eight hours per day for the entire first week of his employment. He also testified that his low back began to hurt after a few hours on the first day of work and that he advised Tom Hager, the job superintendent, of his problem. When asked how specific he was in advising Mr. Hager of his low back problem, claimant testified he told Tom that the shoveling was the cause of his pain.

Claimant continued to work for respondent. The project progressed and claimant and the rest of the crew were building forms and pouring concrete. The second week of work there was sporadic shoveling but claimant testified his back was constantly sore. Claimant also says his arms began to go numb and he had some tingling in his hands along with severe headaches.

These physical complaints continued into the 3rd and 4th week. Claimant says he continually complained to Tom of his back problems and that he was not the only employee to suffer such complaints. In fact, according to claimant, he wore a back brace for the last few weeks on the job. On Thursday, June 12, 2003, claimant was seen at work wearing some sort of black belt around his waist. This was the only time that anyone ever admits to seeing claimant wearing such a brace. The same individual who observed claimant in the back brace also testified that on that same date, claimant acknowledged hurting his back while moving furniture the weekend before.

On Friday, June 13, 2003, none of the employees worked as there was a supervisor's meeting. Over that weekend, Tom Hager concluded he needed to terminate claimant's employment as claimant was not as productive as Mr. Hager needed him to be to complete the project.

On Monday, June 16, 2003, claimant did not appear at work. At 9-9:30 a.m., he called in and spoke to Tom Hager and advised he would not be coming in due to a back injury. At this point, Mr. Hager said he had already decided he was going to fire claimant but he wanted to make certain claimant had not sustained a work-related injury. Mr. Hager questioned claimant about the nature of his injury as well as the cause. According to Mr.

Hager, claimant told him he hurt his back moving furniture, not while working for respondent. Accordingly, Mr. Hager terminated claimant's employment.

Claimant then sought treatment that same day from a chiropractor. The medical records indicate claimant reportedly hurt his back a few days before. Although the chiropractor continued to treat claimant for a period of time he was not taken off work until June 23, 2003.

Following the preliminary hearing and the post-hearing submission of two depositions, the ALJ made the following findings:

Claimant's preliminary hearing requests are denied. Claimant has failed to establish that he is in need of additional treatment and is temporarily totally disabled by reason of his shoveling activities in the early days of his employment, as opposed to his intervening moving furniture.

Claimant's credibility has been seriously undermined by his exaggeration as to the number of days he shoveled gravel, the length of the footings he was required to dig and the number of days he wore a back brace. The brace was not worn at work, and Claimant exhibited no limitation in his ability to function, until after he had moved a dresser at home, the activity to which Claimant initially attributed his back discomfort.<sup>2</sup>

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.<sup>3</sup> "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."<sup>4</sup>

In this instance, there is apparently no dispute that the Board has the jurisdiction to review this matter. However, it is worth noting that claimant bases his appeal, in part, upon the contention that the ALJ's findings are "contrary to the facts presented."<sup>5</sup> This is not a proper basis for jurisdiction under the Kansas Workers Compensation Act. An ALJ has jurisdiction to determine the factual and legal issues at a preliminary hearing and only

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<sup>2</sup> Order (Sept. 8, 2003).

<sup>3</sup> K.S.A. 44-551(b)(2)(A).

<sup>4</sup> K.S.A. 44-534a(a)(2).

<sup>5</sup> Appeal of Preliminary Hearing Order (filed Sept. 11, 2003).

those issues delineated in the statute are entitled to Board review. Merely alleging the ALJ was wrong is an insufficient basis for appeal.

The claimant bears the burden of proof to establish his right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>7</sup>

Judge Moore had the opportunity to observe the claimant at the preliminary hearing and balance his testimony and demeanor against the testimony of Tom Hager and Jeff Bolden, the job superintendents who testified on respondent's behalf. The ALJ found that claimant's credibility was sufficiently compromised and as a result, he failed to meet his evidentiary burdens to establish his claim. In this instance, the Board defers to the Judge's assessment of credibility and, likewise, finds that claimant has failed, based upon the record as it is presently developed, to establish that he is in need of additional treatment and is temporarily and totally disabled by reason of his shoveling activities in the early days of his employment, as opposed to his intervening accident while moving furniture.

As provided by the Workers Compensation act, preliminary hearing findings are not final as they may be modified in a subsequent preliminary hearing or upon a full hearing of the claim.<sup>8</sup>

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated September 8, 2003, is affirmed.

**IT IS SO ORDERED.**

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<sup>6</sup> K.S.A. 44-501(a); *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993).

<sup>7</sup> K.S.A. 44-508(g); see also *In Re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>8</sup> K.S.A. 44-534a(a).

Dated this \_\_\_\_\_ day of November, 2003.

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BOARD MEMBER

- c: David M. Bryan, Attorney for Claimant  
D. Steven Marsh, Attorney for Respondent and Cincinnati Casualty Co.  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director