BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL D. KOOP Claimant	)	
VS.	)	
KEYS LANDSCAPE INC. Respondent	)	Docket Nos. 1,014,513 & 1,014,514
AND	)	
ALLIED PROPERTY & CASUALTY INS. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 16, 2004 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The claimant filed two claims for work-related injuries allegedly suffered during the course of his employment with respondent. The two claims were consolidated for purposes of preliminary hearing.

It was undisputed claimant suffered a low back injury while lifting at work on April 15, 2003. The claim for compensation for this injury is the subject of Docket No. 1,014,514. The Administrative Law Judge (ALJ) determined claimant had failed to file timely written claim for this injury because the date of accident was April 15, 2003, and written claim was not made until 234 days after the last medical treatment for the injury was provided claimant.

In Docket No. 1,014,513 the claimant alleged a series of repetitive injuries through the last day worked for respondent. The ALJ found the claimant suffered a series of repetitive injuries which arose out of and in the course of employment. The date of

accident was determined to be claimant's last day worked for respondent on December 10, 2003.

In Docket No. 1,014,513, the respondent requests review of whether the claimant's accidental injury arose out of and in the course of employment. The respondent argues that claimant did not sustain a series of injuries through his last day worked on December 10, 2003. Respondent argues that claimant was not credible because of numerous inconsistencies in his testimony. Consequently, the respondent requests the Board to reverse the ALJ's determination that claimant suffered a series of repetitive injuries through his last day worked.

In Docket No. 1,014,514, the respondent argues that for the April 15, 2003 accident the claimant last received medical care on April 23, 2003. Respondent argues that it received written claim for that accident on December 21, 2003, which was 242 days after the last medical treatment. Consequently, respondent requests the Board to affirm the ALJ's determination that timely written claim was not made in Docket No. 1,014,514.

Claimant argues that he suffered a series of work-related injuries when he returned to work after the April 15, 2003 injury. Consequently, the claimant requests the Board to affirm the ALJ's Order For Compensation in Docket No. 1,014,513. In his brief to the Board, the claimant noted that he did not appeal the ALJ's finding in Docket No. 1,014,514, that timely written claim was not made for the April 15, 2003 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant was employed as a landscaper for the respondent when he was injured on April 15, 2003, while removing a tree that had been blown over in a storm. Claimant was lifting a tree stump off a fence when he felt pain in his lower back. He told Mr. Steve Keys, claimant's supervisor, that he had hurt his back. Claimant was taken to Prompt Care for treatment and was treated with medication by Dr. Michael Geist. Dr. Geist took the claimant off work and then finally released the claimant to return to work with restrictions.

Claimant testified that his job duties required him to perform physical activities outside Dr. Geist's restrictions. The claimant's supervisor agreed that claimant's work required him to perform activities outside Dr. Geist's restrictions.

Claimant continued to work with discomfort in his back. It gradually worsened as the claimant continued to work and he continued to notify Mr. Keys about his back. Mr. Keys advised the claimant to deal with it and did not refer the claimant for additional medical treatment. Claimant felt pressured not to request additional medical treatment as his back pain worsened because when he returned to work after the April 15, 2003

accident, his supervisor had chastised him for the lost time and what it had cost respondent. Claimant's supervisor, Steve Keys, agreed that he had told claimant that because of the injury claimant had lost 40 hours of productive work.

However, Mr. Keys further denied claimant had continued to complain of back pain after his return to work following the April 15, 2003 accident. Claimant's co-workers, Lance Rupert and Rebecca Wiley, also testified that claimant never complained about back pain as he continued working after the April 15, 2003 accident. But Milton Groggins, another of claimant's co-workers, testified that claimant made complaints about back pain as he continued working after the April 15, 2003 accident. And Mr. Groggins noted that claimant's supervisor mocked claimant when he complained of back pain.

Claimant's symptoms continued to progress and eventually he sought treatment again with Prompt Care on December 17, 2003. He was experiencing the loss of feeling in the toes of his left foot and sometimes in his lower leg. Dr. Dennis Sale noted that claimant stated that his back continued to hurt as he worked following the April accident but the pain stayed about the same so claimant did not seek further treatment. The doctor ordered an MRI, which revealed disk protrusions at L4-5 and L5-S1.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'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."[2]

An accidental injury is compensable under the Workers Compensation Act where the accident arose out of and in the course of employment. The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[3]

As noted above, there is definitely conflicting testimony in this case. The claimant and respondent's representatives all testified in person before the ALJ. Their testimony is in direct conflict with each other. Thus, credibility is at issue. The ALJ had the opportunity to assess the witnesses' demeanor. In this case, the ALJ did not believe the respondent's witnesses and granted claimant's request for preliminary benefits. Under this circumstance, where conflicting testimony exists, the Board finds some deference should be given to the ALJ's evaluation of the witnesses' credibility.

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[1] K.S.A. 44-501(a) (Furse 2000); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 2003 Supp. 44-508(g).

[3] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

The ALJ made the following findings:

> The claimant is not a particularly good historian. However, Mr. Koop's testimony indicates that claimant's back gradually back [sic] grew worse as the result of his work activities in the late summer and fall of 2003. A witness who testified on behalf of the claimant, Milton Groggins, related two particular incidents when claimant complained about pain in his back while digging a hole for a sprinkler system and digging a rock bed. In addition Mr. Groggins testified that claimant's complaints were ongoing and that he would often complain about his back upon arriving at work.
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> Mr. Koop was discouraged from seeking further medical care by his boss, Mr. Keys, who berated claimant for taking time off of work after his previous injury in April and accused the claimant of being a "wussy" for complaining about his back. Mr. Koop testified that he began to feel a tingling sensation in his back during this period of time. Claimant experienced a spike in his symptoms in December of 2003 while sitting in a chair at home, which compelled him to seek medical attention. While this last incident at home was obviously not work related, the court finds that claimant's back condition gradually grew worse beginning in the fall of 2003 as the result of his work related activities. Claimant suffered personal injury by accident which arose out of and occurred in the course of his employment with the respondent.

The Board agrees and affirms the ALJ's Order For Compensation in all respects.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[4]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated March 16, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2004.

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BOARD MEMBER

c: Dawn C. Counter, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[4] K.S.A. 44-534a(a)(2) (Furse 2000).