

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

BRAD BARTHOLOMEW)	
Claimant)	
)	
VS.)	
)	
PROFESSIONAL VIDEO SUPPLY)	
Respondent)	Docket No. 1,015,131
)	
AND)	
)	
ZURICH US)	
Insurance Carrier)	

ORDER

Claimant requests review of the November 8, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

After a preliminary hearing the ALJ concluded that claimant was not entitled to temporary total compensation or medical treatment because the medical records did not, in his view, support claimant's contention of ongoing cervical complaints throughout the course of his treatment.

The claimant disagrees with the ALJ, and contends that the ALJ erred by denying his request for additional medical treatment with Dr. Nicolas U. Ahn for the cervical complaints claimant contends arose out of and in the course of his compensable injury that occurred on August 28, 2001. Claimant maintains "ALJ Howard exceeded his jurisdiction in preliminarily finding that these cervical complaints did not arise out of and in the course of employee's employment".¹

Respondent argues that the Board does not have jurisdiction to review the ALJ's Order. Respondent contends the ALJ has the exclusive authority to decide whether to

¹ Claimant's Brief at 2 (filed on Dec. 13, 2004).

award or deny the requested medical treatment or monetary benefits at a preliminary hearing pursuant to K.S.A. 44-534a(a)(2). Alternatively, respondent contends that the ALJ was correct in denying the claimant's request because there was a complete lack of evidence within the submitted medical records to show that the claimant made any specific complaints of neck pain from the date of the accident August 28, 2001, until over two years later on October 3, 2003. Thus, Respondent argues the claimant's appeal should either be dismissed or the ALJ's Order affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

On August 28, 2001, claimant was driving back from Branson, Missouri, on Highway 13 and pulled up to an intersection where two other cars were stopped. He states he had the right of way and proceeded to pull out, and as he did the driver of one of the other cars pulled out as well and hit claimant's car. There is no dispute about the compensability of this accident. Respondent concedes claimant's accident arose out of and in the course of his employment. Rather, it is the causal connection of claimant's present complaints of neck pain and the need for treatment that is disputed.

Claimant contends he injured his low back, neck and his right knee in the accident. Claimant received medical treatment for his injuries including a series of epidural shots in the spine and three months of physical therapy. Claimant states that he mentioned his neck pain constantly to his medical care providers yet there is no mention of it in his medical records until over 2 years after the accident.

Claimant's saw his personal physician Dr. Kevin F. Ring on September 6, 2001, for a case of contact dermatitis stemming from his exposure to poison ivy when he walked out of the ravine from the accident. There was no mention of neck pain in the doctor's notation. Claimant saw Dr. Ring again on December 14, 2001, complaining of trouble sleeping and back pain, although there was, again, no mention of a neck injury. At the preliminary hearing claimant testified that the source of his sleep disturbance was his neck pain.² In addition, claimant asserts that the reason there was no mention of neck pain in Dr. Ring's records is because his "entire body was radiating with pain from top to bottom. I had eight disks that were destroyed."³ Dr. Ring attributed claimant's complaints of pain to the accident and gave claimant pain medication. He indicated that if the pain continued he would consider sending claimant to physical therapy.⁴

² P.H. Trans. at 10.

³ *Id.* at 10.

⁴ *Id.*, Resp. Ex B at 31.

In April of 2002, claimant saw Dr. Miskew regarding his right knee complaints. He did not mention his neck pain to this doctor. Claimant also saw Dr. Daniel M. Merck on April 14, 2002, at the Headache and Pain Center. These records reflect claimant complaining only of pain in the low back. In July of 2002, claimant saw Dr. Steven L. Hendler and was sent to physical therapy at HealthSouth. Again there was no mention of any neck complaints in his records, claimant contends that he went to HealthSouth to receive therapy for his neck.⁵ While there are routine references to claimant's full range of motion to the neck within the physical therapy records, the balance of the information contained within those records reflects evaluation, care and treatment to the low back, not the neck.

In October 2003 claimant saw Dr. Ring again and complained of neck pain. This is the first express reference of claimant's neck pain in any of the doctors' records. Claimant explained that the doctors knew he had pain in his shoulders, neck and back, but had no idea his disks were destroyed.⁶

Claimant then saw Dr. Ahn in January 2004 for neck pain. On February 27, 2004, claimant had surgery on his low back. Thereafter, on July 21, 2004, Dr. Ahn performed surgery on claimant's neck. Claimant states the Dr. Ahn would like to continue treating him or refer him to someone for pain management. Claimant states that he did not wait for his surgery to be authorized by the Court because he was in such severe pain that his business was suffering and he needed to do something right away. Claimant was asked what attempts were made to get authorization for this surgery and he stated that he "went through Dr. Ahn and it came to making a decision which is first, my neck, or my back first."⁷ Moreover, claimant contends that he always knew his neck pain was related to his back injury, but that Zurich Insurance refused to allow him the proper treatment. Claimant testified that he did not try to go to court to get authorization for surgery on his neck, because he was "tired of messing with Zurich Insurance, I had to get fixed. I had 18 employees who would be unemployed soon."⁸

The Legislature has empowered the Board under K.S.A. 44-534a to review preliminary findings pertaining to the following issues: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain

⁵ *Id.* at 12.

⁶ *Id.* at 14.

⁷ *Id.* at 14.

⁸ *Id.* at 17.

defenses apply. There is additional authority to review those preliminary decisions when it is alleged the ALJ exceeded his or her jurisdiction.⁹

The Board finds the ALJ's preliminary hearing conclusion to deny claimant medical treatment and temporary total disability benefits implicitly includes a finding that claimant's present need for medical treatment *to his neck* did not arise out of and in the course of his employment, specifically the August 8, 2001 accident. Thus, the Board has jurisdiction to consider this matter under K.S.A. 44-534a.¹⁰

After considering the parties' briefs as well as the preliminary hearing testimony and exhibits offered at the hearing, the Board finds the ALJ's preliminary hearing Order should be affirmed. The ALJ concluded claimant's present complaints of neck pain were not causally related to the August 8, 2001 accident. The Board believes the ALJ's conclusion to be well supported by the record and finds no reason to disturb his Order.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.¹¹

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated November 8, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁹ K.S.A. 44-551(b)(2)(A).

¹⁰ See e.g. *Tinoco v. J.C. Penney Company, Inc.*, No. 228, 844, 1998 WL 599425 (Kan. WCAB Aug. 12, 1998); and *Wilson v. Braum Inc.*, Nos. 222,345 & 222,514, 1997 WL 556178 (Kan. WCAB Aug. 17, 1997).

¹¹ K.S.A. 44-534a(a)(2).