BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT GEORGE FULLERTON	)	
Claimant	)	
VS.	)	
WAL-MART STORES, INC.	)	
SAM'S CLUB	)	
Respondents	)	Docket Nos.1,003,405
AND	)	1,011,809
	)	1,017,441
AMERICAN HOME ASSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondents and their insurance carrier appealed the August 4, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

APPEARANCES

R. Todd King of Wichita, Kansas appeared for claimant. Jon E. Newman of Wichita, Kansas, appeared for respondents and their insurance carrier.

ISSUES

The ALJ found that respondent Wal-Mart had notice of claimant's January 27, 2002 injury and ordered an independent medical examination by Philip R. Mills, M.D., "for treatment recommendations or a rating and restrictions"[1] in all three docketed claims.

In Docket No. 1,003,405, respondent Wal-Mart denies claimant provided timely notice of his January 27, 2002 accident. In addition, respondents contends that claimant's current symptoms and need for treatment, if any, are not related to his accident at work.

In Docket No. 1, 011,809, respondent Wal-Mart denies that claimant suffered personal injury by accident arising out of and in the course of his employment on February

[1] Order (Aug. 4, 2004).

19, 2003. In addition, respondents contends that claimant's symptoms and need for treatment, if any, are not causally related to the alleged work-related accident.

In Docket No. 1,017,441, respondent Sam's Club likewise denies claimant suffered personal injury by accident arising out of and in the course of his employment and denies that claimant's current symptoms and need for treatment, if any, are causally related to his alleged work-related accident in this docketed claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before reaching the merits of respondents' appeal, the Board must first determine what is included in the record. Two discovery depositions were taken of claimant by respondent, the first on July 19, 2002, and the second on August 25, 2003. A preliminary hearing was held before Judge Clark on July 27, 2004.

Counsel for respondents sought to introduce the transcripts of the two depositions at the preliminary hearing. Counsel for claimant objected "until I've had an opportunity to review those."[2] Judge Clark instructed claimant's counsel to "review them quick and then we'll take that matter up - - let's go ahead and leave them with me, and then you decide whether or not you want to have a formal objection after you go through them."[3] Thereafter, the record is silent as to the question of the admissibility of the discovery depositions. The original transcripts are contained within the original administrative file but there is no indication in Judge Clark's Order as to whether he considered those transcripts. Nevertheless, claimant's objection was only "until I've had an opportunity to review those" and the record reflects that he was given that opportunity. Furthermore, claimant's counsel was instructed to "decide whether or not you want to have a formal objection after you go through them."[4] Thereafter, no formal objection was made on the record. Therefore, the Board finds that the two discovery deposition transcripts were admitted and are part of the record along with the transcript of the July 27, 2004 preliminary hearing and the documents contained in the administrative file, including the July 22, 2004 report by Diana Crook, M.D.

In respondents' brief to the Board an issue is raised by respondents in all three docketed claims as to whether claimant's "symptoms at the time of hearing and need for treatment, if any, [were] causally related to his alleged work accident in this claim."[5] However, at the preliminary hearing Judge Clark asked "[d]oes respondent admit or deny

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[2] P.H. Trans. at 7.

[3] *Id.* at 8.

[4] *Id.*

[5] Appeals Board Brief of Respondent and Insurance Carrier at 2 and 3 (filed Sept. 23, 2004).

that the problems the gentleman is having today are work-related?"[6] Counsel for respondent answered, "[y]es, Your Honor, we do."[7] Obviously, the response did not answer the ALJ's question. But there was no followup question. Based on this record it would be speculation to say what each party understood the ground rules of the hearing were. If claimant's counsel understood this to have been a stipulation to admit that claimant's present symptoms were attributable to one or more of his work-related injuries, then that would obviously impact what evidence claimant would present or not present. In addition, review by the Board is limited to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."[8] In this case it is difficult to tell what questions of law and fact were raised before the ALJ.

Furthermore, the ALJ's Order does not award preliminary hearing benefits (temporary total disability compensation or medical treatment). Rather, it orders an independent medical examination (IME). As such it is an interlocutory order, not an award of compensation. The Order states that the IME is "for treatment recommendations or a rating and restrictions."[9] It is not clear how the IME would assist the ALJ in determining any of the causation issues raised by respondents on appeal. This is a further indication that the ALJ understood respondents to have stipulated "that the problems [claimant] is having today are work-related."

In any event, this appeal is premature. Should preliminary benefits be awarded at some future date, the ALJ is requested to specify which accident the need for those benefits is attributable to and under which docketed claim they are being awarded.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal by respondents and their insurance carrier of the August 4, 2004, Order, should be and is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of February 2005.

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BOARD MEMBER

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[6] P.H. Trans. at 5.

[7] *Id.*

[8] K.S.A. 44-555c(a).

[9] Order (Aug. 4, 2004).

c: R. Todd King, Attorney for Claimant
Jon E. Newman, Attorney for Respondents and American Home Assurance Co.
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director