



Claimant contends Judge Foerschler erred and, therefore, the Board should reverse the March 1, 2007, Preliminary Decision. Claimant contends he aggravated his low back on July 13, 2005, when he was selling scrap copper that he and others had picked up at various construction sites. Claimant considered selling the scrap metal as part of his company's business activities. Accordingly, claimant asserts his July 2005 accident arose out of and in the course of employment with respondent.

Conversely, respondent's insurance carrier, Travelers Indemnity Company, contends claimant was on a personal errand at the time of the July 2005 accident. Consequently, Travelers argues claimant's alleged July 2005 accident did not arise out of and in the course of his employment. Travelers requests the Board to affirm the Preliminary Decision.

The only issue on this appeal is whether claimant's alleged July 2005 accident arose out of and in the course of his employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the Preliminary Decision should be reversed.

When claimant testified at the August 2006 preliminary hearing, he was sole owner of AAA Stone. But in 2005, he and his stepson jointly owned the company. Claimant's testimony is uncontradicted that AAA Stone is a Kansas limited liability company. Masonry is the company's primary business activity.

Claimant has a long history of low back problems. In 1996, he underwent low back surgery for a herniated disk. That surgery resolved claimant's symptoms and he returned to work without restrictions.

On August 26, 2003, claimant injured his low back while loading blocks into the back of his truck. Claimant described that accident as follows:

Myself and one of the men at the material yard were loading eight-inch Haydite blocks into the back end of my truck for one of the jobs when the straps gave way and caused the tailgate to drop about six to eight inches, which resulted in a severe jolt.<sup>3</sup>

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<sup>3</sup> P.H. Trans. (Aug. 10, 2006) at 9, 10.

Claimant filed an application for workers compensation benefits against his company for that accident alleging an accident on August 26, 2003, and each day thereafter. That application was assigned Docket No. 1,024,725.

Claimant did not recover to any great extent following the August 2003 incident. Nonetheless, taking pain medications claimant continued to work as a mason while his low back symptoms worsened over the course of the next two years. Indeed, claimant was continuing to take pain medications when he hurt his low back on July 13, 2005. On that date, claimant experienced severe low back pain while unloading copper at a salvage yard when his truck's tailgate straps broke, causing him to fall backward into a dumpster. Following that accident, claimant consulted his family physician, who prescribed Hydrocodone and a morphine patch. Claimant filed an application for workers compensation benefits for the July 13, 2005, incident. That application was assigned Docket No. 1,027,564.

Travelers argues the July 2005 accident did not arise out of and in the course of claimant's employment with AAA Stone because the company's business was masonry rather than selling scrap metal.

Claimant contends that as owner of the company he has the right to define the scope of his employment. The undersigned agrees. As an owner of AAA Stone, claimant could decide what business activities AAA Stone would undertake. And according to claimant, he will consider doing anything, which is consistent with a sign on his truck that says AAA Stone & More. There is no requirement in the Workers Compensation Act that an accident must occur within an employer's primary business activity. Claimant's testimony is uncontradicted that he used the money from selling the scrap metal he and others gathered at their work sites to purchase gas for the company truck and for beer for his company's employees. At this juncture, there is no evidence to contradict claimant's testimony.

The undersigned finds claimant's July 13, 2005, accident arose out of and in the course of employment with AAA Stone. Consequently, the March 1, 2007, Preliminary Decision should be reversed and these claims remanded to the Judge to further address claimant's requests for preliminary hearing benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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

as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member reverses the March 1, 2007, Preliminary Decision and remands these claims to the Judge to further address claimant's requests for benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2007.

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BOARD MEMBER

- c: Mark E. Kolich, Attorney for Claimant  
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier  
Clayton T. Fielder, Attorney for Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge