

of proof by a preponderance of the evidence that she suffered an injury on August 16, 2005, and that she is in need of medical treatment.

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:

Claimant was a paraprofessional employed by respondent at Highland Park High School (HPHS). She testified that on August 16, 2005, she was walking down a ramp at the school when she slipped and fell to her knees. A little while later she was bending over a desk and felt her right knee pop. No one witnessed the fall and although claimant met that day with the school's principal, she did not report the injury to him or anyone else that day. Claimant returned to the school the next day, August 17, and talked to Sharie Waters, an associate principal at HPHS. Claimant testified that she resigned her position at respondent that day and asked to review and get copies of parts of her personnel file. Claimant contends that she also tried to tell Ms. Waters about her accident and asked for an accident report form, but was told she would have to speak with the principal, Mr. Cushinberry, who was out of town. Ms. Waters acknowledged that claimant requested that she be allowed to review her personnel file and make copies of part of it. Ms. Waters told claimant that she would have to visit with the principal before she would be allowed to review her personnel file. However, Ms. Waters denied that claimant mentioned a fall and said claimant did not request a form to report an accident.

Claimant also met with Karla Nolan, director of personnel at respondent, on August 17, 2005, for her exit interview. Claimant reported that she was leaving her position because she wanted to return to school. Claimant admits she did not tell Ms. Nolan that she had fallen and been injured at work the day before.

In addition, when claimant went to her family physician in November 2005, she made no mention of a knee injury.

Claimant had previously fallen at her work with respondent on August 19, 2004. Claimant testified she reported her fall at that time, but that her claim was denied and she was required to send her medical bills to her health insurance carrier. Claimant said that she did not want to bother with requesting medical treatment from respondent for the August 16, 2005 accident because of her experience the year before. So instead of requesting medical treatment from her employer herself, she went through her attorney to request medical treatment.

As stated above, the ALJ's Order bears only docket number 1,025,112. Claimant's Application for Hearing in docket number 1,025,112 claims dates of accident of "on or

about August 19, 2004 and continuing through last date of employment.”¹ It also alleges injuries to “both knees, bilateral legs and back.” The Application for Preliminary Hearing alleges the same dates of accident.² However, claimant’s Application for Hearing in docket number 1,025,113 alleges a series of accidents beginning “August 16, 2005 and continuing through the last day of employment.”³ The 7 day demand and notice letter of August 25, 2005 by claimant’s attorney to respondent states that the August 16, 2005 injury may be an aggravation of “her August 2004 injury to both knees and back.” It appears that the preliminary hearing was either intended to cover both accidents, or only the August 16, 2005 accident, which is docket number 1,025,113. The alleged dates of accident and situs of the injuries were apparently discussed before the preliminary hearing.

JUDGE AVERY: Okay, Counsel, we had discussions off the record, the claimant is seeking medical treatment with Doctor Sankoorikal for her right knee. This is an alleged August 16th the year 2005 accident. Respondent denies the claimant met with personal injury by accident on that date, respondent denies the accidental injury arose out of and occurred in the course of employment, respondent admits timely notice, relationship of employer-employee, coverage by the act and timely written claim. Okay, any additions, modifications or corrections to the record before we get started?⁴

But during her preliminary testimony claimant seemed to be saying she is also requesting medical treatment for the August 2004 accident.

Q. Okay. Why didn’t you go back to the school district and ask for medical treatment yourself?

A. I didn’t want to -- I didn’t want to bother with them from the way that they treated me before when I fell on my knees in ‘04 and I went to see their doctor under their permission and so forth, and then they turned around and denied it and sent everything to my health insurance.

Q. Did they actually send you a denial letter on that one?

A. She claims she did, but I never received it, so I had to go pick it up.

Q. Do I represent you on that claim as well?

A. I hope you do.

Q. Is that -- is that why you requested medical treatment through me?

A. Yes.⁵

¹ Form K-WC E-1 (filed Sept. 15, 2005) in docket no. 1,025,112.

² Form K-WC E-3 (filed Sept. 15, 2005) in docket no. 1,025,112.

³ Form K-WC E-1 (filed Sept. 15, 2005) in docket no. 1,025,113.

⁴ P.H. Trans. at 5-6.

⁵ *Id.* at 10.

Respondent's attorney tried to question claimant concerning statements she made to her physicians when being treated for her injuries suffered in August 2004. Claimant's attorney objected on the basis of relevance. Respondent's attorney argued that his questions went to the question of claimant's credibility. The ALJ stated:

Well, we're not here on that [August 2004] claim though, so we're not—her credibility in that claim has not been adjudicated, has not been decided. I don't want to hear evidence regarding that claim, so let's just stick to today's claim.⁶

Later, respondent's attorney argued:

Your Honor, they've brought up in their direct testimony the fact that treatment for the '04 claim was denied, and counsel hinted that the reason that the notice was given through his office rather than directly was because of the way she was treated in '04. I think what happened in '04 is highly relevant, and it goes to show that this lady has reported previously an accident occurring at work and then gave three different histories to three different physicians about a completely different event causing injury to her knees rather than an accident that happened.

JUDGE AVERY: Well, again, whether she did or did not is not relevant to what happened or did not happen on August 16th of 2005.⁷

Counsel for claimant then stated that this preliminary hearing was only to obtain treatment for the right knee. Both parties and the ALJ obviously believed that they were there to litigate the right knee injury claimant alleges she suffered on August 16, 2005. As that accident and injury is the subject of Docket number 1,025,113, the Board is including that docket number on this Order.

Respondent argues that although the ALJ would not allow him to ask claimant about her medical treatment for her 2004 injury, the medical records admitted in evidence at the hearing show that she gave inconsistent statements about the history of her left knee condition.

A report dated October 13, 2004, from Donnett Streeter, ARNP, stated that claimant was being seen for "left knee pain that has been bothering her for about 3 months without an injury."⁸

Dr. John Gilbert's report dated October 21, 2004 states:

⁶ *Id.* at 22.

⁷ *Id.* at 23.

⁸ *Id.*, Resp. Ex. A at 29.

[Claimant] reports that for about a month, she has been experiencing pain in her left knee, usually when she tries to bend or straighten the knee, or stand from a sitting position. She says the knee is particularly painful when she walks or goes up and down stairs. She denies history of any specific precipitating cause, injury, or activity.⁹

Dr. Jacqueline Kenoly's report dated December 6, 2004, sets out:

Patient comes in to talk about left knee pain. She had an MRI of her left knee ordered by Dr. Gilbert at Topeka Imaging on 11-12-04. It showed a small medial meniscus, suggesting tear or erosion of the medial meniscus. She states that her insurance, Blue Cross Blue Shield, denied payment because it was coded as patient fell out of a car, and she states she did not say that. She is trying to get it covered. Patient did have a car accident in July of '04 and she did fall August of '04, but prior to that she had complained of left leg pain at office visits here dating as far back as 12-03-03 and she does have osteoarthritis of the knee.¹⁰

A report from Dr. Ronald Stitt, Jr., dated December 21, 2004 states: "[T]his patient has had pain in the left knee, which has been present for about a year. Her pain is spontaneous in onset. There is no definite inciting event."¹¹

Claimant also admitted at the hearing that she had been in a car accident in July of 2004, although it is not clear what injuries were suffered in that accident.

Respondent contends that these medical records show that claimant has not provided consistent or truthful statements regarding her work-related knee injuries. Accordingly, respondent asserts that accepting claimant's testimony alone is not sufficient credible evidence to meet her burden of proof of an accident occurring at work on August 16, 2005.

Before the Board can consider the question regarding the ALJ's ruling concerning the relevancy of testimony and limiting respondent's cross examination of the claimant, it must first consider whether it has jurisdiction to review that evidentiary ruling on an appeal from a preliminary hearing. The Workers Compensation Act provides that "no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence including testimony on the disputed issues."¹² In this case, the ALJ ruled that respondent's questions did not go to a disputed issue.

⁹ *Id.*, Resp. Ex. A at 39.

¹⁰ *Id.*, Resp. Ex. A at 31.

¹¹ *Id.*, Resp. Ex. A at 15.

¹² K.S.A. 44-534a(a)(2).

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. K.S.A. 44-551 requires that the dispute must give rise to an issue of whether the Administrative Law Judge exceeded his jurisdiction or the dispute must concern one of the jurisdictional issues listed in K.S.A. 44-534a, which are: (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; (4) whether certain defenses apply.

Respondent acknowledged at the preliminary hearing that the questions about claimant's statements to health care providers concerning her alleged August 2004 knee injuries did not directly go to the issue of whether or not claimant suffered a right knee injury from a work-related accident in August 2005. But, the questions were intended to impeach the credibility of claimant's testimony. Nevertheless, the ALJ's evidentiary ruling is not an issue listed in the preliminary hearing statute. Therefore, the question becomes whether the ALJ exceeded his jurisdiction.

As with other evidentiary questions at preliminary hearing, the Judge is charged with the responsibility of determining whether the evidence proffered has sufficient relevance to be considered, knowing that the hearing is summary in nature. The Board finds the Administrative Law Judge has the authority at a preliminary hearing to determine whether the respondent's question would elicit relevant information.

The Board finds the ALJ did not act arbitrarily or capriciously in his exclusion of the line of questioning and, accordingly, neither abused his discretion nor acted outside the scope of his jurisdiction. Therefore, the Board conclude it does not have jurisdiction to review the ALJ's preliminary hearing ruling on the objection to respondent's questions.

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Claimant's testimony is confusing and seemingly self-contradictory. It is also contradicted by the testimony of Ms. Waters. It is troubling that of all the co-workers and administrative personnel claimant had contact with on the date of accident, she failed to mention the accident or injury to any of them. Likewise, she did not report the accident the next day when she met with the personnel director and neither Ms. Waters, nor Ms. Nolan have any recollection of claimant exhibiting any signs of injury that day. But there is no testimony that directly contradicts the claimant's testimony that she fell at work on August 16, 2005 and that she injured her right knee as a result of that accident. The ALJ apparently believed claimant because he awarded benefits. Generally, the Board gives

some deference to an ALJ's determination of credibility in those instances where he had the opportunity to observe the witnesses in person testimony. After giving such deference to the ALJ's determination, the Board finds by the barest of margins that claimant has met her burden of proof that she sustained a work-related injury to her right knee by accident on August 16, 2005.

WHEREFORE, it is the finding, decision and order of the Board that the Order For Medical Treatment by Administrative Law Judge Brad E. Avery dated November 22, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director