

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

|                                                       |   |                      |
|-------------------------------------------------------|---|----------------------|
| <b>LILLIAN GARCIA</b>                                 | ) |                      |
| Claimant                                              | ) |                      |
|                                                       | ) |                      |
| VS.                                                   | ) |                      |
|                                                       | ) |                      |
| <b>MEDICALODGES, INC.</b>                             | ) |                      |
| Respondent                                            | ) | Docket No. 1,025,541 |
|                                                       | ) |                      |
| AND                                                   | ) |                      |
|                                                       | ) |                      |
| <b>TRAVELERS PROPERTY CASUALTY<br/>CO. OF AMERICA</b> | ) |                      |
| Insurance Carrier                                     | ) |                      |

**ORDER**

Claimant requests review of the December 20, 2006 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant has “still failed to prove by the preponderance of the credible evidence that she hurt her back and/or upper extremities while working on September 17, 2005. The claimant’s requests for medical treatment and temporary total benefits are, again, denied”.<sup>1</sup>

The claimant requests review of whether the ALJ erred in finding that she failed to prove by a preponderance of the credible evidence that she sustained personal injury by accident arising out of and the course of her employment. Essentially the claimant argues that while the ALJ pointed out the inconsistencies in her witnesses, “the ALJ chose to . . . accept [r]espondent’s theory without adequately reviewing the [r]espondent’s witnesses’

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<sup>1</sup> ALJ Order (Dec. 20, 2006) at 2-3.

testimony.”<sup>2</sup> And had he done so he would have concluded that claimant sufficiently met her burden of establishing personal injury by accident arising out of and in the course of her employment with respondent.

Respondent argues the ALJ should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this member of the Board concludes the ALJ’s preliminary hearing Order should be affirmed.

This is the second preliminary hearing to be held in this matter. In the first hearing, claimant testified as to the facts and circumstances surrounding her alleged accident on September 17, 2005, while lifting a patient in respondent’s facility.<sup>3</sup> Included among the evidence presented by the parties was the testimony of the claimant as well as that of Susan Voorhees and several other of respondent’s employees. The ALJ reviewed that testimony and concluded the following:

Based on the preponderance of the evidence at this point, it is held that the claimant did not suffer an injury arising out of and in the course of employment. The timing of the claimant’s first corroborated report of injury casts doubt on the claimant’s version of events. The claimant provided no good reason for failing to complete an accident report for several days, and then only after her termination.<sup>4</sup>

Following the hearing, the claimant recruited a number of witnesses to testify on her behalf in the hopes of corroborating her version of events and the existence of an injury on September 17, 2005. At least some of these witnesses met in a group and discussed the case in advance of their depositions. And then at the second preliminary hearing, at which claimant renewed her request for benefits, those depositions were offered in support of her claim.

After reviewing the deposition testimony, the ALJ made the following observations and conclusions:

The claimant’s testimony was corroborated by three witnesses who contradict themselves and the claimant about who was present at what time and what was said or not said. One witness without obvious credibility issues supported the

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<sup>2</sup> Claimant’s Brief at 5 (filed Jan. 29, 2007).

<sup>3</sup> The ALJ succinctly summarized the testimony in both his preliminary hearing Orders and this Board Member will not needlessly repeat that testimony herein.

<sup>4</sup> ALJ Order (Dec. 7, 2005) at 2.

claimant's testimony. This must be weighed against the previous six witnesses who contradicted the claimant's testimony. The claimant still failed to prove by the preponderance of credible evidence that she hurt her back and/or upper extremities while working on September 17, 2005.<sup>5</sup>

Claimant contends the ALJ erred in focusing just on the inconsistencies in her witnesses and by failing to consider the inconsistencies in respondent's witnesses' testimony. But it is clear from the statement above, that the ALJ *did* consider the earlier testimony and weighed that against that offered by the one uninterested employee. His earlier order goes into detail about the testimony of those witnesses as did this most recent order. And while he did not expressly set forth each and every inconsistency, it is clear that he weighed the relative weight of the witnesses' testimony, along with their intended motivations and inconsistencies.

This Board Member has reviewed all of the testimony offered by both parties and finds the ALJ's preliminary hearing Order should be affirmed. In the past the Board has found that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person at the first preliminary hearing. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. At the second preliminary hearing, he did not have that same advantage, but he nonetheless reviewed the testimony of claimant's witnesses and considered that testimony along with that from the earlier hearing which he personally observed.

This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge at least some of the witnesses' credibility by personally observing them testify. And after reviewing all of the testimony, this member is not persuaded that claimant has established that it is more probably true than not that she sustained an accidental injury arising out of and in the course of her employment with respondent on September 17, 2005. Accordingly, the ALJ's preliminary hearing order of December 20, 2006 is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>6</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

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<sup>5</sup> ALJ Order (Dec. 20, 2006) at 2.

<sup>6</sup> K.S.A. 44-534a.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 20, 2006, is affirmed.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Blake Hudson, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge