BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GISELLE WOODS Claimant VS. **MANPOWER** d/b/a **WICHITA SERVICES, INC.**[1] Respondent AND **TRANSPORTATION INSURANCE CO.** Insurance Carrier	)	Docket No. 1,026,858
GISELLE WOODS Claimant VS. **SEDGWICK PLAZA RETIREMENT CTR** Respondent AND **LIBERTY MUTUAL INSURANCE** Insurance Carrier	)	Docket No. 1,033,526

ORDER

Respondent Manpower and its insurance carrier Transportation Insurance (collectively referred to as Manpower) request review of the February 18, 2008 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

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[1] Manpower is also known by the name Wichita Services. But for the purposes of this appeal this Order will refer to this respondent as Manpower as that was the name of the employer listed on the E-3 Application for preliminary hearing filed January 17, 2006.

ISSUES

The ALJ concluded that the "[t]he evidence is clear and uncontroverted that claimant did not experience her shortness of breath, breathing problems, speech problems, reflux problems nor her persistent, chronic cough prior to her chemical exposure at Via Christi[2] and Sedgwick Plaza."[3] The ALJ went on to find that the claimant's work activities aggravated, exacerbated or intensified her underlying condition and entitles the claimant to medical benefits.[4] Accordingly, the ALJ ordered payment of the medications prescribed by Dr. Doornbos and assessed the cost of claimant's medical treatment to Manpower.

Manpower requests review of this decision and alleges a number of errors. First, Manpower contends that claimant failed to follow the statutory requirements necessary for a preliminary hearing and that the ALJ exceeded her jurisdiction in hearing this matter. Second, assuming there is jurisdiction Manpower contests that claimant's occupational disease arose out of and in the course of her employment with Manpower. Third, that the ALJ erred in ordering ongoing medical benefits after claimant has achieved maximum medical improvement. Fourth, Manpower takes issue with the ALJ's decision to order it to pay benefits in violation of K.S.A. 44-5a06 or in failing to apportion the benefits as between Manpower and claimant's subsequent employer. In sum, Manpower believes that claimant's respiratory ailment was temporary in nature and does not warrant a permanent impairment or ongoing medical benefits and that any benefits owed should be apportioned as between the two employers identified in the two separately docketed claims.

Sedgwick Plaza (collectively referred to as Sedgwick Plaza), claimant's subsequent employer, and its carrier generally adopt Manpower's arguments, but contends that there is no basis for assigning liability against Sedgwick Plaza and therefore, the ALJ's Order should be affirmed.

Claimant contends the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

This Board Member finds that the ALJ's preliminary hearing Order sets out findings of fact that are detailed, accurate, and fully supported by the record. Therefore, the ALJ's findings of fact are hereby adopted as this Member's own as if specifically set forth herein.

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[2] Claimant was employed by Manpower and assigned to work at Via Christi Medical Center.

[3] ALJ Order (Feb. 18, 2008) at 4.

[4] *Id.*

Highly summarized, claimant had no prior history of respiratory problems before working for Manpower, an employment agency. In late summer of 2005, claimant began working for Manpower as a housekeeper at Via Christi Medical Center. That job exposed claimant to a variety of cleaning chemicals. Approximately 3 months after beginning that job, claimant was experiencing periods of shortness of breath and an inability to breathe. Claimant attributed her problems to her working environment and filed a claim against Manpower.[5]

Claimant was taken off work by Dr. Hughes in early November 2005 and Manpower referred claimant to Dr. Doornbos for an evaluation which occurred on November 28, 2005. Dr. Doornbos prescribed a number of medications to alleviate claimant's symptoms.

The compensability of claimant's claim was apparently challenged in a preliminary hearing forum, but an Order was issued on March 14, 2006 which directed Manpower to provide treatment through Dr. Doornbos, along with payment of outstanding medical bills and temporary total disability benefits.

Claimant returned to the workforce in May 2006 as a cook for Sedgwick Plaza. During the course of that employment, claimant was again exposed to chemicals that caused her respiratory problems to flare up. She continued at that job until February 2007 when she was let go as they could not place her in any position that would eliminate her chemical exposure. Claimant also filed a claim against Sedgwick Plaza.[6]

Claimant has continued to use her medications since leaving her employment with Sedgwick Plaza and continues to see Dr. Doornbos. However, Manpower has unilaterally refused to continue to pay for claimant's medical treatment or the medications prescribed by Dr. Doornbos as it contends that claimant's condition was temporary in nature, that as of November 4, 2007 she achieved maximum medical improvement and that she has no resulting permanent impairment.

That refusal led to a hearing in both docketed claims which was held on January 8, 2008. That hearing was predicated upon a pleading entitled "motion" and at the hearing, claimant made it clear that the only issue to be addressed was Manpower's unwillingness to pay for her ongoing medication expense. No objection was asserted by either of the employers as to the absence of a statutorily required demand or the filing of an E-3 and the hearing was held.

Following the hearing the ALJ issued her Order directing Manpower to pay the outstanding medical bills. The ALJ concluded that claimant had no earlier history of

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[5] This claim is represented in Docket No. 1,026,858.

[6] This claim is represented in Docket No. 1,033,526.

respiratory problems and only after her employment with Manpower did she have her respiratory complaints. The ALJ recognized that all of claimant's complaints were not *caused* by the chemical exposure with Manpower. Rather, she concluded that "claimant's work injuries [sic] aggravated, exacerbated or intensified her underlying condition, and she is entitled to medical benefits . . . which resulted from the work place exposure."[7]

After reviewing the record as a whole, including the parties' briefs, this Board Member finds the ALJ's preliminary hearing Order should be affirmed.

As for Manpower's initial argument as to the lack of jurisdiction, this contention might have been valid had Manpower objected to the hearing before the ALJ. But no objection was voiced and the hearing proceeded. Thus, any objection was waived.

The remaining arguments voiced by Manpower are equally uncompelling. Manpower asserts that the ALJ erred "by determining that claimant's occupational disease arose out of and in the course of her employment with Manpower."[8] This argument was not squarely presented to the ALJ. Manpower's counsel made it clear that the only issue before the ALJ was the payment of the outstanding medical bills associated with Dr. Doornbos' care for claimant's occupational disease. At the hearing, counsel for Manpower put forth his argument justifying his client's refusal to pay for any further medications:

> Your Honor, it is our position that Dr. Doornbos, while the authorized treating physician, has determined as of November 4, 2007 that Ms. Woods is at maximum medical improvement and also as part of that determination made the determination that any exposure that she had while working for Wichita Services or Sedgwick Plaza Retirement Center were simply temporary exacerbations of an underlying problem.
>
> Since she is no longer working for either one of those employers at this time, the determination that she was at maximum medical improvement and only a temporary exacerbation was the reason why any further medication was terminated, based on what Dr. Doornbos had said.[9]

Based upon this recitation of its position, Manpower's defense to its unilateral decision to cease paying for claimant's medical treatments stemmed not from any contention that her condition was unrelated to her work activities but because Dr. Doornbos had released her. But in its written brief to the Board, Manpower articulated its argument as one involving the compensability of claimant's present need for treatment.

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[7] ALJ Order (Feb. 18, 2008) at 4.

[8] Application for Review at 1 (filed Feb. 26, 2008).

[9] P.H. Trans. at 6-7.

This member of the Board is not persuaded by Manpower's argument. Dr. Doornbos has opined that claimant's "disability is not the direct result of any of her occupational exposures, but rather of her underlying situation with her gastrointestinal system interacting with her respiratory system."[10] But, he went on to say that "*I think the episodes of chemical exposure that occurred at work, both at St. Francis and at Sedgwick Plaza, led to temporary worsening and flaring of her respiratory status...*"[11] His opinion substantiates the ALJ's finding that Manpower, the employer who assigned claimant to work at the St. Francis Hospital, should provide ongoing medical treatment and not arbitrarily terminate those benefits. Arguably the subsequent employer might well have some responsibility for those benefits depending on the facts. But again, that issue was not brought before the ALJ.

Manpower also argues that the ALJ erred in "ordering future medical after the claimant reached MMI in a preliminary hearing."[12] Suffice it to say that the ALJ's Order merely directed Manpower and its carrier *to do what it had already been ordered to do*, namely to provide medical treatment through Dr. Doornbos. Dr. Doornbos prescribed medications and claimant continued to take those medications even after November 4, 2006, at his direction. There is nothing within the medical records that suggests that she does not require those medications. To the contrary, as she is exposed to chemicals during the course of her life and has respiratory flare ups, the medications are needed.

The ALJ concluded, following a preliminary hearing, that Manpower was the employer who was responsible for the aggravation or exacerbation of her respiratory and gastrointestinal symptoms. Whether claimant was at MMI is irrelevant as medical treatment is a right independent of the conclusion of active treatment, particularly given the waxing and waning of claimant's symptoms and whether the condition is temporary or permanent. And it is worth noting that Dr. Doornbos had recommended further evaluation with a gastroenterologist that has yet to be provided. Manpower's arguments are unpersuasive and provide no basis for reversing the ALJ's preliminary hearing Order.

Finally, Manpower takes issue with the ALJ's failure to apportion benefits between the two employers in violation of K.S.A. 44-5a06. Again, this argument was not asserted at the hearing before the ALJ and it will not be considered in this appeal.

The ALJ's preliminary hearing Order is affirmed in all respects.

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[10] P.H. Trans., Ex. 1 at 3.

[11] *Id*. (Emphasis added).

[12] Application for Review at 2 (filed Feb. 26, 2008).

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.[13] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 18, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Terry J. Torline, Attorney for Manpower and Transportation Insurance Co.
James P. Wolf, Attorney for Sedgwick Plaza Retirement Center and Liberty Mutual
Nelsonna Potts Barnes, Administrative Law Judge

[13] K.S.A. 44-534a.