

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

TREV E. RYBACKI)	
Claimant)	
)	
VS.)	
)	
PARTS ASSOCIATES, INC.)	
Respondent)	Docket No. 1,027,617
)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY OF CONNECTICUT)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the December 12, 2006 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was injured out of and in the course of his employment with the respondent and entitled to temporary total disability compensation from July 31, 2005 to March 6, 2006. The ALJ also ordered medical treatment to be paid by respondent until claimant has reached maximum medical improvement, and ordered the respondent to pay claimant's medical bills and medical mileage in the amount of \$1,016.00.

The respondent requests review of whether the claimant's injury arose out of and in the course of employment, and whether the claimant provided timely notice. Succinctly put, respondent maintains claimant was not acting in furtherance of its business on the day of his accident. Instead, claimant was merely driving home for lunch when he became distracted and struck a bridge, seriously injuring himself. And, respondent further argues that although it learned of the accident, it was not given notice of the alleged work-related nature of the claim until approximately 3 weeks after the accident. Respondent argues this

claim is neither compensable, nor did claimant give timely notice of his injury. Thus, respondent contends that ALJ should be reversed and the claimant denied compensation.

Claimant argues that 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, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a traveling salesman selling various shop supplies such as nuts, bolts, and paint. Claimant was paid a flat salary for his services plus a commission based upon his sales. His job required him to work Monday through Friday and he was not required to work weekends. However, claimant was hoping to grow the business in his area and he indicated he felt compelled to work on the weekends as that would enhance his commissions.¹

On July 31, 2005, a Sunday morning, the claimant left his house in the hopes of meeting a potential client, Mr. Reed, who he knew to be difficult to reach. Claimant went to Mr. Reed's home and the two agreed to meet after lunch. Thereafter, claimant drove around and eventually ended up in Kalvesta, Kansas, in the hopes of meeting another potential customer, Syd Hodges, whom he believed was going to be in town. While purchasing gas, in preparation for his day on Monday, claimant met with Mr. Hodges.

After awhile, claimant left that location and proceeded home to get a soda and retrieve more of respondent's samples for purposes of meeting with Mr. Reed in the early afternoon. As he was driving down the road towards his home, where the samples were located, claimant became distracted and hit a bridge, seriously injuring himself.

Claimant asked his wife to contact respondent and advise them of the accident. Precisely what she said and how respondent responded is unclear from the record. Claimant was sent a "get well" card from respondent. Thereafter, on August 1st, the claimant filed a PIP claim with his insurance company, American Family, believing that his claim was not work-related.

After about 3 weeks claimant spoke to his supervisor Dan Estille. The two talked about the claimant's progress, about the accident, and the claimant testified that he asked if the accident was a workmen's compensation claim. According to claimant, Mr. Estille said he didn't know.² Whether this was or was not a compensable event was examined,

¹ P.H. Trans. at 35.

² *Id.* at 12-13.

and eventually the claim was denied. Although, it is undisputed that claimant spoke to Mr. Reed and Mr. Hodges on the day of his accident and that those efforts were made in furtherance of respondent's business.

Respondent concedes that the Kansas Appellate Courts have provided an exception to the "going and coming" rule when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.³ However, respondent argues that even though travel is inherent in claimant's job, that does not transform every act while in the vehicle into a compensable event.⁴ Respondent characterizes the issue as follows:

Can an [sic] traveling salesperson who is not expected to work weekends bring himself within the workers compensation act by driving around on a Sunday morning ostensibly in search of potential customers?⁵

Respondent's characterization does not fully comprehend the facts of this case. While it is true that claimant was not *expected* to work weekends, he was attempting to grow this business in order to enhance his commissions. In an effort to do this, he sought out two potential customers on Sunday morning. While on the way home to retrieve more samples to show Mr. Reed at their upcoming appointment claimant was injured in an automobile accident. As a traveling salesman this is precisely the sort of risk such an employee would be subjected to. Much like *Messenger*, claimant was exposed to the risks of the road while in furtherance of respondent's business interests. That makes his claim compensable. The ALJ's preliminary hearing Order is affirmed on this issue.

As for timely notice of the injury, this Board Member finds that while claimant has failed to establish that he advised respondent of the work-related nature of his accident within 10 days, he has nonetheless established "just cause" for his delayed notice. K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant

³ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

⁴ Respondent's Brief 6 (filed Jan. 18, 2007).

⁵ *Id.* at 7.

shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

This statute provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

Here, respondent concedes it knew of claimant's accident within the 10 day period. Rather, it is the connection to work that it denies. It was not until August 31, 2005 that claimant asserted his accident was work-related although it was discussed before that. And after a period of ambiguity and vacillation, respondent's insurance carrier finally denied claimant's claim based upon his delay in notification. Apparently respondent's carrier initiated a investigation into the facts and circumstances surrounding claimant's claim and there is no indication in the record that claimant was anything but truthful in his recitation of the event. Although it was Sunday, claimant was working on growing respondent's business. He met with potential customers. He had purchased gas for his Monday calls and was on his way to pick up more samples to show to his afternoon appointment. The fact that the legal implications left him uncertain as to the compensability of this accident is understandable. As noted by the ALJ, it is often difficult to ascertain whether those who regularly travel are within the course and scope of their employment at any given time. Accordingly, this Board Member finds the ALJ's conclusions should be 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.⁶ 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.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated December 12, 2006, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

BOARD MEMBER

c: Terry J. Malone, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

⁶ K.S.A. 44-534a.