



In late July 2005, a dispute between claimant and her supervisor led to claimant's termination of her employment with respondent, with her last day of work being July 28, 2005. Claimant first sought medical treatment on October 13, 2005, with David J. Fitzgerald, D.O., of Liberal, Kansas. Claimant was referred to orthopedic surgeon Suhail Ansari, M.D., for an evaluation on October 20, 2005. Dr. Ansari diagnosed claimant with bilateral carpal tunnel syndrome. Claimant advised the doctor that her symptoms were related to her driving. Claimant advised that she had to drive with one hand hanging down while driving with the other. She then had to alternate her hands. During Dr. Ansari's examination, he noted a strongly positive bilateral Phalen's, but an examination of claimant's elbows and shoulders was "unremarkable".<sup>2</sup> Dr. Ansari recommended nerve conduction tests.

Claimant was next examined by orthopedic surgeon J. E. Harrington, D.O., on October 28, 2005. Claimant described pain, numbness and loss of grip in her upper extremities bilaterally. However, Dr. Harrington tested claimant, finding a negative Phalen's and full painless active range of motion. Claimant's negative percussion test over the carpal tunnel was positive bilaterally for dysesthesias in the medial *[sic]* nerve distribution. Claimant advised Dr. Harrington that driving on weekdays and writing over the weekends at her old job were contributing factors.

Claimant was next examined by Dr. Harrington on November 8, 2005. Claimant's percussion tests remained positive bilaterally in the medial *[sic]* nerve distribution, but the NCT tests were normal. Claimant's ulnar nerve signals at the bilateral elbows and the left wrist were very slow. Claimant was diagnosed with cubital tunnel syndrome bilaterally at the elbow and ulnar nerve entrapment. Dr. Harrington provided a letter to respondent's insurance company on January 26, 2006. In that letter, Dr. Harrington noted that he found no median nerve pathology at claimant's wrists. He did not support or concur with the recommendation for carpal tunnel surgery. He also noted that claimant made no reference to her employment as a cause of her condition. He volunteered that there would be no relationship between her occupation and her nerve disorder. Dr. Harrington recommended that claimant be evaluated for a possible systemic source of her upper extremity problems.

Claimant was examined by board certified neurological surgeon Jeffrey D. Cone, M.D., on February 7, 2006. Claimant described ongoing upper extremity symptoms with a 15-month duration. Claimant advised Dr. Cone that her problems were related to her work activities of moving car safety seats into and out of her car "on many, many occasions".<sup>3</sup> Claimant failed to advise Dr. Cone of her driving activities with respondent. Dr. Cone found claimant's job as a child support employee contributed to her "diagnosis". Dr. Cone's letter of February 9, 2006, indicated that claimant's condition continued to

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<sup>2</sup> P.H. Trans. (July 18, 2006), Cl. Ex. 2.

<sup>3</sup> P.H. Trans. (July 18, 2006), Cl. Ex. 1.

worsen with time. Claimant described tingling and numbness in her hands with progressive weakness in her grips and aching in both elbows.

Claimant contends that her upper extremity conditions are a result of her work for respondent, with respondent contending the job duties claimant performed for respondent were not sufficiently strenuous to cause or contribute to claimant's problems.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>4</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>7</sup>

Claimant originally contended that her problems with her upper extremities stemmed from the constant driving associated with her job. Claimant later changed her testimony, contending that the taking out and putting in of car seats was the offending action. Kelly Honas, respondent's program contact manager, disputed claimant's allegation that she had to regularly move the child car seats. Ms. Honas testified that claimant only had to handle

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<sup>4</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>5</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>6</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>7</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

the car seats occasionally, having to transfer the six children once per week, and sharing that responsibility with another worker.

Dr. Harrington opined that claimant's activities were not the cause of her problems, recommending instead that claimant be tested for a systemic source of her problem. Dr. Cone, on the other hand, found claimant's handling of the child seats to be a contributing factor in the development of her problems. But Dr. Cone was led to believe that claimant handled the car seats on "many, many occasions". This record does not support Dr. Cone's understanding of claimant's activities. Claimant did not tell Dr. Cone of the driving problems, and failed to mention the car seats to Dr. Harrington.

This Board Member also finds it troubling that claimant's condition has continued to worsen long after claimant left respondent's employment. Claimant did not even seek medical treatment for approximately two and a half months after leaving respondent. Additionally, claimant's condition is expanding. When she was examined by Dr. Ansari on October 20, 2005, she had no elbow or shoulder complaints. Dr. Ansari's examination of her elbows and shoulders was unremarkable. By the time claimant was examined by Dr. Cone, her symptoms had spread to cover a good part of her upper extremities, with tingling and numbness in her hands and aching in both elbows.

The ALJ denied claimant's request for benefits, finding that claimant had not sustained her burden of proving her arm problems were work-related. This ALJ had the opportunity to observe this claimant testify in person on two occasions, and also had the opportunity to observe three of respondent's representatives testify at preliminary hearing. It appears the ALJ was not convinced by claimant's testimony, apparently finding the testimony of respondent's representatives to be more credible. The Board has, on occasion, given deference to an administrative law judge's assessment of witness credibility when the administrative law judge has the opportunity to observe that testimony in person. In this instance, the Board affirms the ALJ's finding that claimant has not proven that her ongoing conditions are the result of her work for respondent. Therefore, the ALJ's denial of benefits in this matter should be affirmed.

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>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, 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**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated January 9, 2007, should be, and is hereby, affirmed.

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<sup>8</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

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

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
James P. Wolf, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge