BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY R. THOMAS Claimant	)	
VS.	)	
UNITED PARCEL SERVICE Respondent	)	Docket No. 1,032,218
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the April 3, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found claimant had sustained his burden of proof that his accidental injury arose out of and in the course of employment and that he provided timely notice to the respondent. The ALJ ordered respondent to provide medical treatment with Dr. Alan Maskowitz who was authorized as claimant's treating physician.

The respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) timely notice; and, (3) whether the ALJ exceeded her jurisdiction in granting benefits. Respondent argues claimant's current back complaints did not arise out of and in the course of employment and that timely notice was not provided to the respondent. In the alternative, respondent argues claimant's back condition is due to his bilateral knee injuries in Docket No. 242,058, at which time claimant was rated for his back and knees.

Claimant argues his back injury is a new and separate injury and therefore the ALJ's Order should be affirmed.

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 had worked 29 years for the respondent. Claimant had bilateral knee replacements as a result of a previous work-related accident. As a result claimant was provided accommodation and during the last five years, claimant's job duties included servicing and fueling tractors, semi tractors, package cars and bulk vans as well as unloading pallets from bulk vans. Claimant testified he initially had to slide the pallets onto the ground but then after the first of the year 2006, the unloading area changed and he had to lift, twist and then throw the pallets out of the truck over piles of pallets.

In March 2006 claimant began noticing that after unloading pallets his back would be sore the next day and then it would resolve. While he continued to work he noticed that his back was getting worse when he unloaded pallets so he sought medical treatment with a chiropractor on several occasions. He further testified that the days when he did not unload pallets his back was better. Claimant's back condition gradually worsened until on October 31, 2006, claimant finally notified his supervisor, Susan Henry, that he was having back problems due to unloading pallets. Ms. Henry advised claimant that she would find someone to assist him unloading the pallets. Johnny Walker, a co-worker, was assigned to assist with the task of unloading pallets. Also, on November 20, 2006, claimant had a conversation with Ms. Henry and Marvin Bass regarding taking the claimant off the job unloading pallets.

Marvin Bass, respondent's supervisor of twilight sort, testified claimant never told him about an injury or that his back was bothering him. Susan Henry-Crotchett, a part-time supervisor for respondent, testified claimant did have a conversation with her about taking him off the pallets. Ms. Henry-Crotchett testified she took claimant off the pallets the same day of their conversation. But she recalled that claimant asked to be taken off unloading pallets because he could not lift properly because of his knees. She denied he claimed injury to his back.

Johnny Walker, testified on claimant's behalf that he was aware the claimant was having problems with his back. He further testified that he started doing the pallets sometime in November.

Claimant testified he was not able to lift properly due to his knee replacements and therefore it was putting more strain on his back. Claimant's back pain persisted and on November 30, 2006, he was examined by Royce A. Morgan, a physician assistant for Dr. Alan Moskowitz. The claimant had been referred to Dr. Moskowitz by Dr. John Schurman who continued to provide follow-up treatment for claimant's knees. At the examination the claimant provided a history of an onset of back pain while lifting pallets at work which had gradually worsened. An MRI of claimant's back was performed on December 7, 2006. Dr. Moskowitz read the films and concluded it showed degenerative disk disease at both L4-L5 and L5-S1 with some very mild posterolateral disk protrusion at L5-S1 slightly to the left. Steroid injections were recommended. Claimant received some relief after the first steroid injection. Claimant decided to retire and his last day worked was December 29, 2006.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident.[1]

The claimant told his supervisor that lifting pallets was causing him back problems. He was immediately provided assistance performing that task as it was assigned to another employee. The claimant has met his burden of proof that he provided timely notice of his ongoing repetitive injuries on October 31, 2006.

The medical records contain a history that claimant was complaining of back pain from lifting the pallets at work. A co-worker corroborated the fact that claimant was complaining of back pain from that activity. Based upon the record compiled to date the claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

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.[2] 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), as opposed to being determined by the entire Board when the appeal is from a final order.[3]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 3, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2007.

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BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

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[1] See K.S.A. 44-520.

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

[3] K.S.A. 2006 Supp. 44-555c(k).