BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JENNIFER HOLT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,032,686
RAYTHEON AIRCRAFT SERVICES INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORP	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 16, 2007 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was awarded temporary total disability benefits beginning August 17, 2006, until released, after the Administrative Law Judge (ALJ) found claimant had suffered accidental injuries each and every day through August 16, 2006. M. Camden Whitaker, M.D., was appointed as claimant's authorized treating physician.

Claimant appeared by her attorney, Joni J. Franklin of Wichita, Kansas. Respondent and its insurance company appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas. The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Preliminary Hearing transcript of March 29, 2007, with attachments, and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment with respondent? Respondent contends claimant suffered a prior injury to her low back in October 2004 while moving furniture at home. Claimant also sought chiropractic care on several occasions before she began working for respondent. Claimant contends her earlier back problems were temporary, and even if not,

her work for respondent aggravated her problems with her low back, leading to the present need for treatment.

2. What is the appropriate date of accident? Claimant contends she suffered a series of accidental injuries beginning February 1, 2006, and extending through her last day worked with respondent on August 17, 2006. Respondent argues claimant's back injuries are not work related.

3. Did claimant provide respondent with timely notice of his accident? Claimant testified that she told her immediate supervisor, Gary McIlguaham; the line service supervisor, Brandon Pickett; respondent's operations supervisor, Jeffrey Fernandez; and Nancy Benefiel, from respondent's human relations department, of her ongoing problems. Mr. Fernandez and Ms. Benefiel testified they were not told of ongoing problems related to claimant's work duties until after claimant's termination. Neither Mr. McIlguaham nor Mr. Pickett testified.

4. Did claimant provide timely written claim?

5. Did the ALJ exceed his jurisdiction in ordering temporary total disability compensation for weeks during which claimant received vacation pay and/or short-term disability compensation?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be modified to show a last day worked of August 17, 2006, with an appropriate starting date for temporary total disability of August 18, 2006, but should otherwise be affirmed.

Claimant began working for respondent on August 5, 2005, in the customer service department. This was primarily sedentary work. In October 2005, claimant transferred to working outdoors, performing manual labor. By February 2006, claimant was experiencing significant pain in her low back, which claimant attributed to her work for respondent.

Claimant talked with her supervisor, Gary McIlguaham, about her problems on several occasions, but no medical treatment was offered. Mr. McIlguaham did not testify in this matter and is no longer an employee of respondent. Claimant also talked to Brandon Pickett about her need for medical treatment. Mr. Pickett, while still an employee

of respondent, did not testify in this matter. Claimant also talked to Mr. Fernandez and Ms. Benefiel, both of whom did testify in this matter. While both Mr. Fernandez and Ms. Benefiel remember claimant's ongoing back complaints, both deny being told by claimant that her problems were work related. Medical treatment was never offered and claimant was never asked to fill out an accident report. Mr. Fernandez acknowledged that he was not claimant's supervisor since he worked the day shift and claimant came to work usually as he was going home. But they did occasionally have contact. This contact never resulted in a conversation regarding a work-related injury. Claimant could not recall if she told Mr. Fernandez that her problems were work related.

When claimant discussed her pain with Ms. Benefiel, claimant was given the option of applying for short-term disability, or she could quit her job with respondent. Claimant elected to apply for the disability payments. Workers compensation benefits were never discussed. The short-term disability form filled out by claimant and Ms. Benefiel noted claimant's condition as not being "employment" related.

Claimant first sought chiropractic care on her own. When this proved unhelpful, she went to Timothy Koehler, D.O., her family doctor, and ultimately was referred first to Dr. Melean, a surgeon, and then to M. Camden Whitaker, M.D., of the Kansas Joint and Spine Institute. Dr. Whitaker first saw claimant on November 1, 2006. The history presented indicated low back pain since May of that year and noted claimant's work required manual labor, with lifting activities. X-rays and an MRI were performed and claimant was diagnosed with a moderate to large posterior central disk protrusion at L5-S1. She also had lumbar degenerative disc disease at L5-S1. Claimant filed her E-1 Application For Hearing with the Kansas Division of Workers Compensation on January 16, 2007, the same day claimant's attorney served respondent with written claim for workers compensation benefits.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

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.[2]

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[1] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> 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.[3]

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."[4]

K.S.A. 2006 Supp. 44-508(d) defines "accident" as,

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[5]

K.S.A. 2006 Supp. 44-508(d) goes on to state:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident

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[3] K.S.A. 2006 Supp. 44-501(a).

[4] *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).

[5] K.S.A. 2006 Supp. 44-508(d).

> be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[6]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[7]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[8]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[9]

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[10]

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

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[6] K.S.A. 2006 Supp. 44-508(d).

[7] K.S.A. 2006 Supp. 44-508(e).

[8] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[9] K.S.A. 44-520.

[10] K.S.A. 44-520a(a).

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[11]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[12]

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.[13] 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.

ANALYSIS

Claimant testified to the onset of symptoms while performing heavy physical labor for respondent. Her testimony in this regard is persuasive. This Board Member finds claimant has proven that her ongoing back complaints stem from her work with respondent. Even if claimant had preexisting problems, the aggravation from her work for respondent would make the condition compensable. Claimant testified to having numerous conversations with Mr. McIlguaham, her supervisor, about her ongoing back pain. Mr. McIlguaham was not available to testify in this matter, so claimant's testimony is uncontradicted regarding those conversations. Both Mr. Fernandez and Ms. Benefiel agreed that the person to whom claimant should be reporting workers compensation injuries was Mr. McIlguaham. While both Ms. Benefiel and Mr. Fernandez agree claimant discussed her back pain, they dispute that claimant reported the pain and problems as work related. The ALJ had the opportunity to observe all three testify in this matter. This gave the ALJ the opportunity to assess the credibility of that testimony. The Board will generally give some credence to an administrative law judge's ability to judge the credibility of live testimony. Here, the ALJ found claimant to be the more credible regarding the

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[11] K.S.A. 44-534a(a)(2).

[12] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

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

content of various and disputed conversations between claimant and the other witnesses. This Board Member also finds claimant's testimony to be the more persuasive regarding the amount and timing of the notice provided to respondent.

Claimant was neither taken off work nor restricted from performing her regular duties by her authorized treating physician. Therefore, the date of accident under K.S.A. 2006 Supp. 44-508(d) is the earliest of either the date claimant gave written notice to respondent or the date the condition was diagnosed as work related. As neither of those events occurred while claimant was still working for respondent, the date of accident must be determined "based on all the evidence and circumstances."[14] This Board Member finds the date of accident to be the last day claimant performed her job duties for respondent, August 17, 2006.

Claimant provided written claim to respondent on January 16, 2007. This is within 200 days of claimant's last day worked on August 17, 2006.

CONCLUSIONS

Claimant suffered accidental injury arising out of and in the course of her employment with respondent through a series of microtraumas ending on her last day worked, August 17, 2006. Notice and written claim were timely provided.

Respondent's objection to the order for temporary total disability compensation is not an issue over which the Board takes jurisdiction on appeal from a preliminary hearing order. Therefore, respondent's appeal of that issue is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated April 16, 2007, should be, and is hereby, modified with regard to the last day worked and the resulting start of the temporary total disability, but affirmed in all other regards. Respondents's appeal of the temporary total disability award is dismissed.

IT IS SO ORDERED.

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[14] K.S.A. 2006 Supp. 44-508(d).

Dated this ____ day of July, 2007.

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BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge