

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

STEVEN RAY YINGLING)	
Claimant)	
)	
VS.)	
)	
BILL'S MOVING AND STORAGE)	
Uninsured Respondent)	Docket No. 1,034,841
)	
AND)	
)	
WORKERS COMPENSATION FUND)	
Fund)	

ORDER

Respondent Bill Rogers, d/b/a Bill's Moving and Storage, requests review of the July 13, 2007 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) concluded that claimant sustained his burden to establish a series of accidents culminating on May 29, 2007 (the date claimant filed and served his written claim). He went on to grant claimant's request for temporary total disability benefits based on an average weekly wage of \$412, medical care and the payment of medical expenses incurred to date. The ALJ also determined that the respondent, who is admittedly uninsured, is financially solvent and able to pay the outstanding medical bills. Thus, the Kansas Workers Compensation Fund (Fund) has no liability in this matter, except for the costs of the transcript of the proceedings.

Respondent, who is now represented but was not at the preliminary hearing, requests review of a variety of issues. The Application for Review lists the following items:

1. Whether [the] claimant suffered [an] accidental injury;
2. Whether claimant's injury arose out of and in the course of employment;
3. Whether claimant gave timely and proper notice;

4. Whether claimant gave timely and proper written claim;
5. Whether the employer is subject to the provisions of the Kansas Workers Compensation Act (\$20,0000 annual payroll to non-family members);
6. Whether claimant is insolvent as defined by K.S.A. 44-532a(a); and
7. Any other jurisdictional findings by the Administrative Law Judge Bruce E. Moore.¹

Highly summarized, respondent contends that claimant failed to meet his evidentiary burdens, either as to an acute, specific injury or as to a series of injuries arising out of and in the course of his employment with respondent. Respondent also argues that claimant failed to give timely notice. And to the extent any benefits are owed, respondent maintains he is insolvent and the Fund should be made responsible.

Claimant urges the Board to affirm the bulk of the ALJ's preliminary hearing Order, although claimant concurs with the respondent that the Fund should be ordered to pay claimant's benefits as the respondent is, based upon the financial information offered at the hearing, demonstrably insolvent.

The Fund asserts the same arguments as respondent, adding that the ALJ correctly concluded that Bill Rogers, d/b/a Bill's Moving and Storage, was not insolvent. The Fund also asserts the ALJ erred in calculating the claimant's average weekly wage, by improperly including cash payments over and above the \$360 per week respondent acknowledges were paid.

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:

Claimant was the manager for Bill Rogers' business, Bill's Moving and Storage. Mr. Rogers ran the business on a daily basis but, by all accounts, he relied heavily on claimant handle scheduling and customer relations as well as most if not all of the physical aspects of the moving business. Mr. Rogers also owns another business, a used appliance store, as well as a number of rental houses.

Claimant has worked for respondent for a number of years and Mr. Rogers acknowledges claimant has, at various times, told him that his back hurts. And Mr. Rogers admits that he understood that those back complaints were due to work activities.

¹ Respondent's Brief at 1-2 (filed Aug. 20, 2007).

Claimant initiated this action pleading a March 2007 accident as well as a second accident “[e]ach workday from March 1, through 4/6/07”.² But when this matter proceeded to a preliminary hearing, claimant altered his allegations somewhat, by specifically identifying an accident delivering a refrigerator on March 17, 2007 followed by a series of accidents arising out of his daily work activities which continued up until his last day of work on April 17, 2007. Claimant also testified at length about a second specific accident occurring on April 9, 2007 while working for respondent when he and his brother were moving a piano. It was this second discrete accident moving the piano that claimant attributes the most severe of his symptoms and the need for not only emergency treatment but surgery.

Claimant testified that he gave Mr. Rogers notice of both discrete events just after they happened. In the case of the March 17, 2007 accident, he testified that he told Mr. Rogers a couple of days later and that he was going to see one of the business’ customers, a chiropractor. According to claimant, Mr. Rogers offered him some of his pain killers.³ Claimant also explained that when he hurt his back moving the piano, he contacted Mr. Rogers the next day, via cell phone. Mr. Rogers agrees he was out of town on vacation and the two regularly spoke while Mr. Rogers was out of town.

Nevertheless, Mr. Rogers denies knowing anything about either of the specific injuries identified by claimant. Indeed, the handwritten schedule for the moving business does not include any notation about delivering a refrigerator on March 17, 2007, nor of the delivery of a piano on April 17, 2007. Claimant says that the lack of a notation is not unusual. The refrigerator was a job that came out of Mr. Rogers appliance business, a job that would not be noted. And the piano moving job was one that claimant scheduled informally while he was running the schedule for Mr. Rogers. Mr. Rogers concedes claimant complained about his back on a number of occasions over the years and that he, even offered claimant his own pain medication. And Mr. Rogers candidly admits that claimant’s back problems are due to his work activities, as he could find no other explanation for them.

Mr. Rogers also admits that he had no workers compensation insurance while claimant was actively working for him and suggests that he is unable to pay the claimant’s outstanding medical bills, which total approximately \$20,000. The respondent’s tax returns reveal financial information that suggest respondent is “in the black”.

After a rather lengthy preliminary hearing, the ALJ determined that claimant established a compensable injury and was entitled to the benefits he was seeking. The

² E-1 Application for Hearing filed with the Division on May 25, 2007 and received by the respondent on May 29, 2007.

³ P.H. Trans. at 25.

Order does not explicitly say whether he found a single acute compensable injury on March 17, 2007 and/or April 17, 2007 or even a series of accidents. But the transcript reveals the following rationale:

If I treat this as a series and disregard the specific accident dates that you've alleged but in my view have been unable to prove, then we have a series through May 29 of 2000 (sic), and if the board is correct in its interpretation of the notice statute, then you had -- you gave timely notice of your accidents when you gave your written notice of your claimed injuries, which by the way, failed to mention a March 21 [sic] accident or an April 9 [sic] accident.

In any event, I find you suffered personal injury by accident arising out of and in the course of your employment and that notice was timely and, therefore, you're entitled to workers' compensation benefits. . . ⁴

Thus it would seem that the ALJ concluded claimant had met his burden of establishing a series of repetitive injuries culminating in a legal "date of accident" of May 29, 2007, the date the E-1 was received by respondent.

Before weighing in on the substantive issues posed by respondent, this Board Member must consider whether there is jurisdiction to review any or all of the issues presented. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and when the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁵

Here, respondent asserts a number of issues including the allegation that the ALJ erred in failing to conclude he was insolvent, thus triggering Fund liability for the claimant's workers compensation benefits. And in response to this appeal, the Fund has alleged error on all the same issues as well as claimant's average weekly wage. Neither of these

⁴ *Id.* at 79.

⁵ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

present jurisdictional issues for appeal.⁶ Accordingly, those aspects of respondent's appeal (and the Fund's argument for modification) are dismissed.

Turning now to the balance of the arguments, which are aimed at the underlying compensability of the claimant's claim and for which the Board does have jurisdiction, this Board Member has considered the entire record as a whole, along with the parties' briefs to the Board and finds the ALJ's Preliminary Hearing Order should be affirmed.

This Board Member has no difficulty affirming the ALJ's conclusion that claimant established that he suffered an accidental injury. Indeed, there is no other explanation within this record for claimant's injury and Mr. Rogers admits claimant complained many times about back pain. While Mr. Rogers denies the specific instances claimant alleges, his testimony still helps establish the repetitive nature of claimant's job and the fact that he realized claimant's work was causing him back problems. Thus, the conclusion that claimant suffered an accidental injury is affirmed.

Similarly, the ALJ's conclusion that claimant's accidental injury arose out of and in the course of his employment is also easily affirmed. In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" 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 when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.⁷

As with the previous issue, Mr. Rogers concedes that he understood that claimant's work as a mover gave rise to claimant's back problems. That, coupled with claimant's testimony, satisfied the evidentiary burdens in this member's view, at least at this juncture of the claim. Accordingly, the ALJ's conclusion is affirmed.

Respondent and the Fund both contend that claimant's notice of injury was not timely and respondent's application for review lists as an issue the timeliness of claimant's written claim. The argument regarding written claim is moot because Mr. Rogers *stipulated* at the hearing that claimant provided a timely written claim. The fact that respondent was not represented at that time does not invalidate that stipulation.

⁶ *Hilton v. Key Construction and Hilton Lath & Stucco, Inc.*, Docket No. 1,004,313, 2003 WL 21962899 (Kan. WCAB July 17, 2005); *Appelhans v. Yardley Roofing*, Docket No. 1,032,959, 2007 WL 2586187 (Kan. WCAB Aug. 16, 2007).

⁷ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

In order to resolve the question about the timeliness of claimant's notice, a conclusion about the date of accident must necessarily be made. The ALJ's Order suggests that he viewed the claimant's injury as one that involved a series of repetitive injuries, thus implicating the recently enacted version of K.S.A. 2006 Supp. 44-508(d), which provides as follows:

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 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.

The ALJ concluded that the earliest triggering event was the filing and service of an E-1 upon the respondent, an event that occurred on May 29, 2007. This was then determined to be the legal "date of accident" for purposes of determining the timeliness of claimant's notice and written claim.⁸ He then went on to find that claimant's claim was timely.

The gist of respondent's argument in this appeal, that claimant failed to notify Mr. Rogers of his acute accidental injuries as required by K.S.A. 44-520, fails to acknowledge the entirety of claimant's testimony and the implications of the new statute set forth above. Under these facts and the present statute governing repetitive injuries, once the accident date was determined to be May 29, 2007, the date service of the E-1 was accomplished, that document served the dual purpose of satisfying the notice provision of K.S.A. 44-520 and the written claim statute, K.S.A. 44-520a.⁹ The ALJ noted his displeasure with this conclusion, based on an earlier Board opinion.

⁸ Again, the timeliness of claimant's written claim was not at issue because both the respondent and the Fund stipulated to its timeliness at the preliminary hearing.

⁹ Some have called this an absurd result, inasmuch as claimant's date of accident is well over a month after he last worked for respondent. And this Board Member tends to agree. Nonetheless, the Kansas Supreme Court has recently renewed its view that a court must give effect to the express language of a statute, rather than determine what the law should or should not be. "The court will not speculate on legislative intent and will not read the statute to add something not readily found in it." (*Graham vs. Dokter Trucking Group*, Docket No. 95,650 (Kansas Supreme Court opinion filed July 13, 2007)).

This Board Member has considered the entire record and finds, as did the ALJ, that claimant established an accident date of May 29, 2007 for his series of repetitive injuries to his back. Accordingly, the ALJ's conclusion relating to the timeliness of claimant's notice is 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.¹⁰ 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 Bruce E. Moore dated July 13, 2007, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Scott J. Mann, Attorney for Uninsured Respondent
Lawrence E. Nordling, Attorney for the Fund
Bruce E. Moore, Administrative Law Judge

¹⁰ K.S.A. 44-534a.