

2. Is there sufficient evidence in this record to prove that claimant is in need of medical treatment? Does the Board have jurisdiction, on appeal from a preliminary hearing Order, to consider this issue?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working as a laborer for respondent on January 8, 2007. Claimant's job duties included light repair work, plumbing, painting and lawn work. Claimant alleges that while working for respondent, he suffered a series of injuries to his ribs on his right side, and to his right shoulder, left ankle, neck, low back and right leg. The ALJ, finding claimant to not be a credible witness, denied claimant's request for benefits, holding that claimant had failed to prove that he suffered "an accidental injury"¹ while working for respondent.

Claimant testified that his daily duties aggravated his injuries the entire time he worked for respondent. There was one specific event on claimant's last day that allegedly caused claimant significant pain. Claimant testified that on that day, claimant was pulling trees out of the ground for respondent, using a tractor. It was while pulling trees that the jolting of the tractor caused him pain. Claimant did not complete the work day on that last day, August 10, 2007. Instead, claimant was involved in an altercation with a resident of respondent's apartment complex and was suspended by respondent's project manager, Anthony (Tony) Jaramillo.

On that same afternoon, claimant went to the emergency room at St. Francis Health Center seeking treatment for his rib pain. Claimant testified that he sat at the emergency room from about 3:00 p.m. until about 9:00 p.m. without ever receiving treatment. Claimant went home at 9:00 p.m., but was in such pain that he called an ambulance at 10:00 p.m. and was returned to St. Francis Health Center. The ambulance report of that date, noting right side rib pain, indicated that claimant had been performing hard labor for 5 days and was digging out trees. But the report indicated that there had been no recent trauma.

When claimant arrived at St. Francis Health Center, he initially was diagnosed with heat exhaustion. He described rib pain and also left ankle pain. The ambulance log also contained an indication that claimant had suffered a fall, but the report did not explain the circumstances of the fall.

¹ Order (Nov. 5, 2007) at 1.

Claimant was referred to Matthew E. Bohm, M.D., at the Cotton-O'Neil Clinic for follow-up treatment. The nurse's comment from Cotton-O'Neil Clinic from August 14, 2007, indicated a fractured rib. The report from Dr. Bohm of that same date indicated rib pain with a several week duration and no specific injury. The nurse's note of August 16, 2007, indicated right rib pain from two days before. The nurse's note of August 20, 2007, indicated right rib and shoulder pain, with a duration of three weeks. The note from Katie Stockwell, the nurse practitioner, indicated claimant was also experiencing low back and right leg pain at that time. Claimant was referred for physical therapy (PT).

The PT was provided at the Stormont-Vail Regional Health Center. The PT notes from August 23, 2007, indicated pain in claimant's right ribs, right shoulder and neck. These notes also discuss a prior left ankle fusion with bone graft and a lumbar disectomy at L5-S1. The PT notes also indicate a recent fall, but again no explanation is provided. The notes from August 28, 2007, indicate pain in claimant's right shoulder, ribs and leg, and pain in his neck and left ankle. These notes also discuss a fall, with no added explanation.

Claimant did not report his problems to respondent on August 10, 2007. On that date, claimant was involved in an altercation with a resident of respondent's apartment complex. This was the third such altercation involving claimant. The matter was reported to Mr. Jaramillo, and claimant was contacted on his cell phone and advised that as of approximately 1:00 p.m. on August 10, he was suspended. Mr. Jaramillo called claimant again at approximately 2:00 to 2:30 p.m. and requested that claimant bring his keys back to respondent's facility. Claimant complied and then left. Claimant made no mention of any work-related injury while returning the keys. It was after this last phone call and after dropping off the keys that claimant went to the emergency room the first time.

The following Monday, August 13, claimant reported the accident to Mr. Jaramillo and an accident report was completed by claimant and Mr. Jaramillo. Mr. Jaramillo, who was claimant's immediate supervisor, testified that Monday, the 13th, was the first time he was made aware that claimant was alleging that he suffered any injuries while working for respondent. He disputed that claimant was pulling out trees for respondent. Instead, claimant was pulling out bushes with the help of a tractor. There was no indication that claimant suffered any type of injury while performing these duties.

Mr. Jaramillo did testify that claimant had called him on August 9 and requested the entire day of August 10 off of work in order for claimant to obtain his drivers license. Mr. Jaramillo refused to give claimant the day off, offering instead to give claimant two hours off. This upset claimant. Mr. Jaramillo told him to come to the office and they would talk about it.

PRINCIPLES OF LAW AND ANALYSIS

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.²

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.³

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.⁴

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."⁵

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits. Here, claimant originally complained about right side rib pain. However, over a very short period of time, his complaints expanded to include his right shoulder, low back, right leg, neck and left ankle. The extent of claimant's complaints is significant considering he was in contact with Mr. Jaramillo less than an hour before first going to the emergency room and made no complaints of injury or pain to Mr. Jaramillo. The ALJ did not find claimant to be credible, and this Board Member agrees. Claimant has failed to prove that he suffered accidental injury arising out of and in the course of his

² K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2006 Supp. 44-501(a).

⁵ *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).

employment with respondent. This finding renders the issue dealing with claimant's request for ongoing medical treatment moot.

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.⁶ 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.

CONCLUSIONS

Claimant has failed to prove that he suffered accidental injuries arising out of and in the course of his employment with respondent. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated November 5, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

HONORABLE GARY M. KORTE

c: Judy A. Pope, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁶ K.S.A. 44-534a.