

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

GABRIEL MEDINA)	
Claimant)	
)	
VS.)	
)	
A-1 CONCRETE & CONSTRUCTION)	
Respondent)	Docket No. 1,038,116
)	
AND)	
)	
ALLIED INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 14, 2008, preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. James A. Cline, of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary total disability compensation for a period of one week and to pay for medical treatment to claimant's back until further order or until claimant is certified as having reached maximum medical improvement. Respondent was further ordered to pay all outstanding medical bills incurred for treatment of claimant's back condition.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 9, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant's allegation that he was struck in the back by a backhoe was a fabrication. Respondent argues that claimant was not injured by an accident that arose out of and in the course of his employment and that workers compensation benefits should be denied.

Claimant contends that the ALJ correctly determined that he proved he sustained a compensable injury that arose out of and in the course of his employment and that he was entitled to benefits.

The issue for the Board's review is: Did claimant suffer injury by accident which arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant testified that on October 23, 2007, he was injured when he was struck in the back by a backhoe when he was in a trench digging out dirt. His supervisor, Clyde Schmidt, was operating the backhoe. The trench was about three or four feet deep, and claimant was bent over shoveling out dirt when the backhoe operator lowered the bucket down, striking him in the middle of the back. He told a coworker at lunch about the incident, but did not tell Mr. Schmidt until the end of his shift that day. Claimant testified that he slipped and fell at work a couple days before this incident but did not seek medical treatment as a result of that fall.

Claimant said he did not feel any pain at the time he was hit by the backhoe but started feeling pain about a half hour later. His pain went from his shoulder down to his buttocks on the right side and in his back.

The next day, October 24, claimant sought treatment from a chiropractor. The chiropractic notes indicate that he told the chiropractor that he had fallen at work on Friday, October 19, but did not have pain in his back until the next day. Claimant further told the chiropractor that on October 23, he had been hit in the back by a backhoe, making his pain worse. He was given an off-work slip, which he took to Mr. Schmidt. Claimant was off work for two and a half weeks. He was being treated by a chiropractor and was receiving physical therapy. Claimant continues to have pain in his low back and occasionally has numbness in his right leg.

A few days before his accident, claimant had asked Mr. Schmidt if he could take off work and go to Mexico. Mr. Schmidt told him he was needed at work and did not let him take time off work. Claimant denied being upset about not being able to take off. Mr. Schmidt testified that claimant was a little bit upset but not terribly upset.

Mr. Schmidt is the owner and operator of respondent. He stated that he did not recollect hitting claimant with a backhoe on October 23, 2007. Claimant did not scream or call out that he was about to be hit by the backhoe. Mr. Schmidt said that when he is operating a backhoe, he is looking straight ahead at the bucket and the trench. If he would have hit claimant with the backhoe, he would have known it. He admits that claimant was working in the trench while he was operating the backhoe. Claimant told him he had been hit by the backhoe the evening of October 23. Mr. Schmidt asked where he had been hit, and claimant indicated his back. Mr. Schmidt did not see any bruises, abrasions, or any

other sign that claimant had been injured. He also said that claimant's wife brought papers in from claimant's chiropractor and told him that claimant had fallen two weeks earlier.

Claimant was seen by Dr. Pedro Murati on February 19, 2008, and gave the following history:

[Claimant] was involved in a work-related injury during his employment with A1 Concrete, where he was employed for approximately one year as a laborer. He indicates that he is still employed there with the same job title, but without work restrictions at this time. The claimant states that on 10-23-07 he was working in Greensburg and his supervisor was pushing dirt with a backhoe. He reports that his supervisor did not see him and hit him on the right side of his back with the scooper on the backhoe. He reports experiencing mild pain at the time of the injury, but notes that by lunch time, his pain had increased. He notified his supervisor at the end of his work-day, but no accident report was filled out. . . .¹

After examining claimant, Dr. Murati opined that "claimant's current diagnoses are within all reasonable medical probability a direct result from the work-related injury that occurred on 10-23-06 [*sic*] during his employment with A1 Concrete."²

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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 there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the

¹ P.H. Trans., Cl. Ex. 1 at 1.

² *Id.*, Cl. Ex. 1 at 2.

³ K.S.A. 2007 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

nature, conditions, obligations, and incidents of the employment. 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 worker was at work in the employer’s service.⁵

By statute, 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. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Claimant testified about the circumstances of his accident and injury consistent with what he told his supervisor on the same day of the accident and with what he told his chiropractor the next day. Claimant also said he first reported his injury to a coworker named Marcos, but Marcos did not testify. There is no contrary testimony other than from claimant’s supervisor, Mr. Schmidt, who was the backhoe operator. Mr. Schmidt acknowledged that claimant reported the accident and injury to him on the day it occurred but did not think the accident could have occurred as alleged without him knowing it. Respondent also finds it implausible that claimant could have been struck by a backhoe and not cried out and not have had any visible signs of trauma, such as scratches, cuts or bruises. However, neither the chiropractor nor Dr. Murati said that they disbelieved claimant or that his history was inconsistent with his injury.

The ALJ apparently found claimant credible because she awarded preliminary benefits based upon his testimony. The Board generally gives some deference to the ALJ’s determination of credibility where the ALJ had the opportunity to observe the witnesses testify in person. This Board Member finds it is appropriate to do so in this instance as well.

CONCLUSION

Based upon the record presented to date, the undersigned Board Member finds claimant has met his burden of proving he suffered personal injury by accident on the date alleged that arose out of and in the course of his employment with respondent.

⁵ *Id.* at 278.

⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

⁷ K.S.A. 2007 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated April 14, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James A. Cline, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge