

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

STEVEN W. ROBERTS)
Claimant)
VS.)
BURKHART ENTERPRISES,)
D/B/A SERVICE MASTER)
Respondent)
AND)
CINCINNATI INDEMNITY COMPANY)
Insurance Carrier)

Docket No. 1,038,621

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 17, 2008, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Stanley R. Juhnke, of Hutchinson, Kansas, appeared for claimant. D. Steven Marsh, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was entitled to medical care. Respondent was ordered to provide claimant with a list of three qualified physicians from which claimant could designate an authorized treating physician. The ALJ also ordered respondent to pay claimant temporary total at the rate of \$180.98 per week from February 7, 2008, until claimant is released to return to work, has been offered accommodated work, or has attained maximum medical improvement.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 2, 2008, Preliminary Hearing and the exhibits, the transcript of the discovery deposition of claimant taken March 13, 2008, the transcript of the deposition of Robert Burkhart taken April 14, 2008, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests the Board find that claimant failed to meet his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment. In the alternative, respondent argues that claimant failed to provide timely notice of his alleged injury pursuant to K.S.A. 44-520.

Claimant asserts that he has met his burden of proof that he suffered personal injury by accident which arose out of and in the course of his employment. Claimant further contends that he provided proper notice to respondent of his work-related accident.

The issues for the Board's review are:

(1) Did claimant sustain an accident that arose out of and in the course of his employment with respondent?

(2) If so, did claimant provide respondent with timely notice of his work-related accident?

FINDINGS OF FACT

Claimant worked for respondent as a custodian at the Hutchinson Mall, working from 10 p.m. until 6 a.m. He volunteered to work the three-day period after Thanksgiving 2007, because the person scheduled wanted to take some time off. Claimant testified that the work load the day after Thanksgiving, November 23, was particularly heavy because of the number of shoppers. He had to take more bags of trash to the dumpster, pull benches apart for cleaning, and use a heavy rotor machine in the restrooms. He stated the food court was especially dirty, and he had to move the furniture and sanitize the entire floor.

Claimant testified that when he returned home after his shift on November 23, he was quite sore, which he attributed to his workload. The next day, November 24, he noticed his body was still more sore than usual, and he felt pain in his shoulders and low back. By Sunday evening, November 25, he started noticing inflammation in his shoulders between his shoulder blades. He continued to work until December 5 into December 6. He stated that whenever he got busy working, he would start having pain.

On the morning of December 6, claimant knew he was hurt. He stayed in bed and then went to the emergency room on Saturday, December 8. He said he told the personnel at the hospital that the pain he was having was caused by his work activity. The emergency room records do not mention an accident at work or that the injury suffered by claimant is work related. The records indicate that claimant told the hospital personnel that his condition had been coming on for about a week. When asked why he said he had pain for one week when he is claiming he had been injured two weeks earlier, claimant said he

was not thinking clearly because he was in so much pain when he went to the emergency room. Claimant returned to the emergency room on December 19 complaining of pain in his right hip due to sciatic nerve damage. He told hospital personnel he had symptoms for 18 days. When asked again about the discrepancy about the date of the onset of his symptoms, claimant explained that he was pretty sure his low back did not hurt until the last days he worked for respondent.

Claimant saw Dr. Jerold Albright on December 19 and complained of pain in his low back that radiated down his right leg, with an onset of pain 10 days earlier. Claimant told Dr. Albright that he was not aware of any injury but that he did cleaning at the mall and was on his feet for long periods of time.

Claimant stated that he had a previous back problem in the summer of 2006 when he coughed wrong and injured his mid back in an area higher than his current ruptured disc. He was hospitalized, treated and released and has had no problems since. He also injured his low back while working in 1991. Claimant said it was not a permanent injury and was just a sore back at the time. He did not recall a low back injury in 1995 but said if he had one, it was just sore from working and was not permanent.

Claimant testified he called his supervisor, Michael Burkhart, on December 9 and told him that he had been restricted from working. He told Mr. Burkhart that he was hurting badly and that he had been told he had sciatic nerve damage. He claims he told Mr. Burkhart that he was hurting because he had been rotoring, carrying extra trash, and working extra hard. Claimant testified that he asked to fill out an accident report, but Mr. Burkhart asked him to hold off and see if he got better. Claimant said he spoke with Mr. Burkhart by telephone twice after that conversation.

Michael Burkhart testified that claimant called him on Sunday, December 9 and said he had been to the emergency room with problems to his leg and foot. Mr. Burkhart denied telling claimant to sit tight to see if he got better. Claimant called him again on December 14 and told him he was going back to see the doctor and that he had not improved. Mr. Burkhart next spoke with claimant on December 20. Claimant said he was not going to be returning to work, and Mr. Burkhart told him he would need a doctor's release before returning. According to Mr. Burkhart, claimant did not indicate in any of those conversations that his physical problems were related to his work activity or were caused by the extra work he performed after Thanksgiving. Mr. Burkhart next spoke with claimant on December 29. Claimant said he was not getting better and indicated for the first time that his problems were caused by his higher-than-normal work load the week of Thanksgiving.

Robert Burkhart, respondent's owner, testified that he saw claimant on December 7 when claimant came to pick up his paycheck. Claimant told him his leg was hurting and the doctor had told him he needed to take three or four days off work. Robert Burkhart

also had a conversation with claimant on December 27, at which time claimant said he thought he would be back to work the next week. Claimant again called Robert Burkhart on January 3, 2008. He said he was not coming back to work and that he had an MRI scheduled. Mr. Burkhart told claimant to sit tight until after the MRI before deciding what to do about his employment and whether he should schedule him to work. Claimant did not ask for respondent to pay for the MRI. Nothing was said about claimant's condition being work related. Claimant filled out an accident report on January 14, 2008. This was the first Mr. Burkhart knew that claimant was claiming a work-related injury. At that time, Robert Burkhart tried to find out how claimant came to be hurt, but claimant never really told him how he was hurt.

Robert Burkhart testified that information concerning workers compensation is posted in the office in an area that can be seen even if an employee is just coming in to pick up a paycheck. Also, all employees are given a handbook when hired that sets out how a work-related injury is to be reported.

Claimant filed an Application for Hearing claiming injuries to his back and general body caused by lifting trash containers and running floor machines. He claimed a date of injury of "November 23, 2007 through and including December 5, 2007."¹

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

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.² Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³

¹ Form K-WC E-1, Application for Hearing filed February 7, 2008.

² K.S.A. 2007 Supp. 44-501(a).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

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 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.⁴

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2007 Supp. 44-508(d) states:

"Accident" means 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. In cases where the accident occurs as a result of a series of events,

⁴ *Id.* at 278.

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.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ 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.⁶

ANALYSIS

Although not stated in his Order, the ALJ must have determined that claimant's injuries arose out of and in the course of his employment with respondent and that timely notice of accident was given because he awarded benefits. In so doing, the ALJ obviously found claimant's testimony to be credible. Having reviewed the record compiled to date, this Board Member likewise finds claimant credible and finds that the ALJ's preliminary Order should be affirmed.

Claimant is alleging a series of accidents beginning November 23, 2007, and ending December 5, 2007. It is undisputed that claimant's job involved manual labor and that his tasks were heavier and more difficult during the holiday period because of the increase in shoppers at the mall. Claimant also was working more hours over the Thanksgiving weekend. This is when his symptoms began. Although the medical records contain a variety of dates of onset for his symptoms, this is explained by the fact that claimant did not suffer a single accident on a specific date but, rather, he suffered a series of accidents over a period of time while performing his normal job duties. In addition, his symptoms came on gradually and not all at once. This could explain not only the discrepancy in the dates but also the delay in reporting the injuries as work related. Initially, claimant

⁵ 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).

⁶ K.S.A. 2007 Supp. 44-555c(k).

attributed symptoms to muscle soreness, which he expected to resolve. When it became apparent that his injuries were more than just sore muscles, claimant reported his condition to his supervisor, Mr. Burkhart. Claimant insists that his conversation took place on or about December 9, 2007, which would have been within 10 days of claimant's last day of work. Claimant's last day of work was the shift that started the night of December 5, 2007, and ended the morning of December 6, 2007. But if claimant did not give notice until December 29, 2007, as respondent alleges, then claimant would not have given notice within 10 days of his last day worked. However, claimant's last day of work is no longer the bright line rule for the date of accident for a series.

In cases involving injuries resulting from repetitive traumas or a series of microtraumas, the date of accident is defined as the date the authorized physician takes the employee off work due to the injury or restricts the employee from work. Otherwise, the date of injury is the earliest of the date the employee gives written notice to the employer of the injury or the date the condition is diagnosed as work related. In this case, claimant did not have an authorized physician, so there is no date when the authorized physician took him off work or gave him restrictions. The date claimant first gave respondent written notice of his injury would have been January 14, 2008, when he filled out the accident report. Claimant testified at the April 2, 2008, preliminary hearing that he told the emergency room doctors at Hutchinson Hospital on December 8 that his condition was work related. But he also testified that he had not seen those records. It appears that the date claimant's condition was first diagnosed as work related and that fact was communicated in writing to claimant would have been after January 14, 2008. Therefore, for purposes of giving notice, claimant's date of accident was January 14, 2008. There is no dispute that claimant gave written notice of accident on that date. Accordingly, notice was timely.

CONCLUSION

(1) Claimant suffered personal injury by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant provided respondent with timely notice of his accidents.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 17, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Stanley R. Juhnke, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge