

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

**SHIRLEY A. COLLINS** )  
Claimant )  
VS. )  
**SONA, INC.** )  
Respondent ) Docket No. **1,039,246**  
AND )  
**TRAVELERS INDEMNITY CO.** )  
Insurance Carrier )

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**SHIRLEY A. COLLINS** )  
Claimant )  
VS. )  
**COMFORT INN** )  
Respondent ) Docket No. **1,039,248**  
AND )  
**FIRSTCOMP INSURANCE CO.** )  
Insurance Carrier )

**ORDER**

Respondent, Sona, Inc., and its insurance carrier, Travelers Indemnity Co., request review of the May 15, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant sustained an accidental injury arising out of and in the course of employment through her last day employed with Sona,

Inc. The ALJ further ordered Sona Inc. to provide claimant's medical treatment with Dr. J. Mark Melhorn.

Sona, Inc. requests review of whether claimant's accidental injury arose out of and in the course of employment with Sona, Inc. Sona, Inc. argues that claimant first sought medical treatment while working for Comfort Inn and therefore Comfort Inn is liable to pay claimant's benefits.

Comfort Inn argues that claimant first reported her condition and requested treatment while employed with Sona, Inc. And that her employment with Comfort Inn did not worsen her condition. Consequently, Comfort Inn requests the Board to affirm the ALJ's Order.

Claimant argues the ALJ's Order should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

These two claims were consolidated for preliminary hearing. In Docket No. 1,039,246, claimant alleged she suffered repetitive injuries to her bilateral upper extremities while working for Sona, Inc., (Econolodge) from May 11, 2007 through August 2007. In Docket No. 1,039,248, claimant alleged she suffered repetitive injuries to her bilateral upper extremities while working for Comfort Inn beginning August 7, 2007 and each and every day worked. Each respondent hotel had the same ownership but were separate business entities with separate workers compensation insurance carriers.

Claimant began her employment with Sona, Inc. on May 11, 2007, working at an Econolodge hotel. She was employed as a housekeeper and her job duties included making beds, cleaning rooms, dusting, picking up, dumping trash, and loading her cleaning cart. Claimant testified she worked 25-30 hours a week earning \$6 an hour.

While working for Sona, Inc., she began to have numbness and tingling in her hands as well as swelling. She was also dropping things. Claimant told Robin Hutchins<sup>1</sup>, the respondent's general manager, sometime during the end of June or first of July that she was having problems with her hands. Claimant told Ms. Hutchins that she thought she had carpal tunnel but no treatment was provided. Claimant later asked Ms. Hutchins if she could get braces and was told to find out what they would cost. She provided that

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<sup>1</sup> Ms. Hutchins was also the general manager for the respondent Comfort Inn.

information to Ms. Hutchins but was never provided braces nor provided any medical treatment while working for Sona, Inc.

Ms. Hutchins agreed that claimant reported the problems she was having with her hands while working at Econolodge. Ms. Hutchins had told the owner and was waiting for authorization to provide claimant with medical treatment.

Apparently, there was a change in ownership at the Econolodge. Because Ms. Hutchins was also general manager at the respondent Comfort Inn, the claimant asked her if there were any jobs available at that business. She was then offered a position in the kitchen at Comfort Inn. On August 5, 2007, claimant began working for Comfort Inn. Her job duties included preparing food, setting it up, stocking, washing dishes, cleaning, dumping trash as well as sweeping and mopping the front lobby. She worked 20-25 hours a week earning \$6.25 an hour.

On August 31, 2007, claimant sought treatment on her own at the Guadalupe Clinic but a scheduled nerve conduction test was canceled when she indicated that she thought her condition was work-related. Claimant then told Ms. Hutchins she was going to OccMed Associates for treatment. At that medical facility claimant waited for two hours before Ms. Hutchins finally authorized medical treatment. Claimant was diagnosed with severe bilateral carpal tunnel syndrome.

When claimant was seen at OccMed Associates by Dr. Ronald Davis on December 12, 2007, she was provided bilateral wrist splints as well as pain medication. Claimant was told to wear the splints when possible. On December 19, 2007, claimant was provided a different set of wrist splints as the first set did not fit properly. A surgical consult was recommended. Claimant said that her cooking duties did not cause her symptoms and instead it was the housekeeping duties that involved repetitive activities. She further added that her symptoms remained the same at Comfort Inn. Under restrictions, it was noted that she may perform laundry tasks while wearing wrist splints. On January 10, 2008, Dr. Davis noted that claimant's bilateral carpal tunnel was neither caused nor aggravated by her job at Comfort Inn.

Claimant continued to work for Comfort Inn until approximately March 13, 2008, when she obtained other employment. Ms. Hutchins stated that Comfort Inn was able to accommodate claimant's restrictions. And claimant testified that her cooking job duties at Comfort Inn did not make her condition worse. Claimant testified:

Q. Well, what it looks like what happened was he made this quotation that says, "She feels the repetitive work of making beds and cooking caused these symptoms," and that you later clarified that and told him that the cooking did not cause the symptoms?

A. Okay, yeah, because I did clarify when I seen that.

Q. Do you remember having that discussion?

A. Yeah, I do now, because I said I don't think the cooking has made it worse, because I was putting light things in the microwave.

Q. Okay. Would it be a true statement that your symptoms in your hands and wrists, as far as the pain and the tingling and the numbness, were pretty well established by the time you moved to the Comfort Inn?

A. Yes.<sup>2</sup>

The claimant reported the onset of her symptoms to her supervisor while employed by Sona, Inc. She requested but was not provided braces. The supervisor had contacted the respondent's owner regarding authorization to provide claimant with medical treatment but that authorization was never provided. Claimant further testified that her condition did not worsen when she went to work for Comfort Inn. Dr. Davis testified that claimant's employment at Comfort Inn neither caused nor aggravated her bilateral carpal tunnel syndrome. Based upon the record compiled to date, claimant has met her burden of proof that she suffered accidental injury arising out of and in the course of her employment with Sona, Inc.

Respondent Sona, Inc. relies upon K.S.A. 44-508(d) as support for its argument that claimant's date of accident under that statute occurred while she was employed by Comfort Inn and accordingly that respondent should be responsible for her treatment. This Board Member disagrees. The issue is whether claimant suffered accidental injury arising out of and in the course of her employment for either respondent Sona, Inc., or respondent Comfort Inn. And the evidence overwhelmingly established that claimant suffered her injury while employed by Sona, Inc., but did not aggravate that condition at her later employment with Comfort Inn.

K.S.A. 2007 Supp. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

'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

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<sup>2</sup> P.H. Trans. at 25-26.

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, 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.<sup>3</sup> (Emphasis added.)

K.S.A. 2007 Supp. 44-508(d) offers a series of possible “accident dates” for a repetitive trauma injury dependent upon a case-by-case determination of which of the alternative factual situations established by statute have occurred.

In view of recent Supreme Court determinations regarding strict construction of statutes, a majority of Board members have now concluded that the plain language of the statute does not prevent finding an accident date after the last day worked.

When dealing with injuries that are caused by overuse or repetitive microtrauma, it can be difficult to determine the injury’s date of commencement and conclusion. However, the date of accident dispute traditionally hinges upon situations where claimants have undergone microtrauma injuries over a period of days, weeks or months, with the determination of the date of accident being a legal fiction, rather than a specific traumatic event.

Case law established the legal fiction of a single accident date in order to determine what law would apply to the claim, as well as whether timely notice or written claim was provided. But this does not mean that the injury, in fact, occurred on only one day. Under the statute, a claimant can receive medical treatment before the date of accident, as treatment may be undertaken well in advance of claimant receiving written notice that the condition is “diagnosed as work related.” Again, a single date of accident for a repetitive trauma injury is simply a legal fiction. And the fact that the date may be after the last day worked or the employment relationship terminated is not prohibited by the statute. To the

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<sup>3</sup> K.S.A. 2007 Supp. 44-508(d).

contrary, the only prohibition is against the date of accident being the date of or the day before the date of the regular hearing.

In the instant case, claimant was never restricted nor taken off work by an authorized physician while employed by Sona, Inc. Absent those facts, the next possible accident date is the earliest of either the date of claimant's receipt in writing of notification that her condition was diagnosed as work related or the date she gave written notice of the injury to the employer. There is no evidence claimant received written notification from her physician that her condition was diagnosed as work related. Consequently, under the plain language of the statute, claimant's date of accident would be when she made written claim to her employer Sona, Inc., for the series of microtraumas occurring through her last day worked. And, in this instance, that date would occur after her employment with Sona, Inc., had terminated.

As previously noted, this is not a case where claimant continued to suffer repetitive injury at her later job with Comfort Inn. And, the fact that the date of accident under the statute would have been different had the accidental injuries occurred while claimant was employed at Comfort Inn does not control the date of accident for the injuries which occurred while claimant was employed with Sona, Inc.

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.<sup>4</sup> 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 when the appeal is from a final order.<sup>5</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated May 15, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2008.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

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<sup>4</sup> K.S.A. 44-534a.

<sup>5</sup> K.S.A. 2007 Supp. 44-555c(k).

**SHIRLEY A. COLLINS**

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**DOCKET NOS. 1,039,246  
& 1,039,248**

c: James A. Cline, Attorney for Claimant  
William L. Townsley, Attorney for Sona, Inc./Travelers Indemnity Co.  
Ronald Laskowski, Attorney for Comfort Inc./Firstcomp Insurance Co.  
John D. Clark, Administrative Law Judge