

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

RANDALL L. KERNS)
Claimant)
)
VS.)
)
MCCULLOUGH DEVELOPMENT)
Respondent)
)
AND)
)
TRAVELERS INDEMNITY CO.)
Insurance Carrier)

Docket No. **1,040,414**

ORDER

Respondent and its insurance carrier request review of the February 24, 2009 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained accidental injury arising out of and in the course of employment and therefore ordered respondent to provide claimant medical treatment as well as temporary total disability compensation.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment and whether claimant is entitled to temporary total disability compensation. Respondent notes claimant has a longstanding low back condition and argues there is not sufficient evidence to indicate claimant suffered a new injury arising out of and in the course of employment. Respondent further argues that after claimant's employment was terminated he received unemployment benefits which indicates that he was able and available for employment. Therefore, he is not temporarily totally disabled.

Claimant requests the Board to affirm the ALJ's Order. Claimant argues that he has met his burden of proof to establish he suffered a new accidental injury to his back as corroborated by the only medical records introduced at the preliminary hearing. Claimant further argues the Board does not have jurisdiction to address the issue of his entitlement to temporary total disability compensation.

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:

Randall Kerns testified he had injured his low back in 1997 and has continued to receive medical treatment from Dr. Stephen Hendler for the last seven or eight years. He further testified that he is not able to sit or stand on his feet for extended periods of time. And on occasion his right leg gives out. He has been on pain medication since 1997 and has had radicular pain into the right leg since 1997.

Kerns was hired as a maintenance supervisor for respondent in April or May 2007. His job duties included directing employees on repairs for the different housing complexes, maintaining air condition systems, and keeping parts and supplies on hand. Respondent was aware of claimant's low back problems at the time he was hired and provided accommodations based on claimant's medium duty restrictions.

On February 6, 2008, Kerns was waiting for someone from the gas company to put a new meter in for a resident. As he waited he was told by his supervisor, Vicki Kauzlarich, the property manager to do something and not just stand around. So Kerns shoveled snow while waiting on the gas man. Kerns shoveled snow off and on for approximately 2 to 2.5 hours.

Claimant testified:

Q. So it's your testimony that Vicki instructed you to go ahead and shovel snow?

A. Yes.

Q. Okay. Did you advise her you couldn't shovel snow?

A. We talked about my injuries and stuff and she said do it for a few minutes, if it starts to bother you, take a break, go back at it, just don't be standing around there waiting on the gas company. So I did as much as I thought I could. I would stop every time I would start to feel a little catch and quit, and the next morning I couldn't hardly walk.

Q. Okay. Was there anyone around besides you at the time, any other employees?

A. No, not till the gas guy showed up.

Q. How long did you shovel snow waiting for the gas guy to show up?

A. About two, two and a half hours, that was the time spanned, I wasn't shoveling that entire time.

Q. Okay. Once the gas guy showed up you quit shoveling and went in to work with him?

A. Attended to that process, yes.

Q. Did you report any accident or problem to Vicki that day?

A. That day, no, just went home.¹

Kauzlarich denied that she told claimant to shovel snow and instead testified that when she was told Kerns was shoveling snow, she told him to stop.

The following day Kerns' back pain had increased and he had a co-worker assisting him at work. When Kauzlarich got to the apartment complex to see how the snow removal was progressing she questioned why the co-worker was helping Kerns instead of working outside shoveling snow. When Kerns explained that he needed someone to help him because of his back pain, Kauzlarich told him to go home and not to return to work until he had a doctor's slip releasing him to work. Kerns testified:

Q. When Vicki got to the job site, then did she come talk to you about snow removal?

A. Yes.

Q. And what discussion took place on the 7th?

A. She said, why isn't Brin out here shoveling snow? And I told her, because I want him working with me. And she said, that's not acceptable. I said, what's wrong? I'm like, my back's hurting really bad from shoveling snow yesterday. She said, well, if you're hurting, go home and get a note before you come back. And she wouldn't talk to me about it or nothing, she just rolled her window up and drove off. Wouldn't give me an explanation or anything.

Q. So you told her on the 7th that your back was hurting from shoveling snow the day before?

A. Yeah.

Q. And she told you to go home and get a doctor's note before you came back?

¹ Kerns Depo. at 24-25.

A. Right, instead of sending me to the doctor she said, go home, get a note.²

Kauzlarich's version of the discussion on the seventh differs in that she did not recall Kerns complaining about his back although she agreed it was possible. But she did send claimant home and told him to get a doctor's release with restrictions to determine exactly what Kerns could do.

Kerns obtained a return to work note from Dr. Hendler which indicated Kerns had restrictions under OSHA's medium physical demand category. Kerns testified that he provided that to Kauzlarich but was not allowed to return to work because she did not understand what the restrictions meant. Kerns told Kauzlarich to contact Dr. Hendler to obtain an explanation of the restrictions. On February 18, 2008, Kauzlarich told Kerns to bring in his keys and his employment was terminated.

Kerns testified he filed for unemployment benefits and received them for approximately four weeks. He testified that he filed for unemployment benefits because he felt he was capable of working with his restrictions. He has not worked since February 18, 2008. He is attending Johnson County Community College through a vocational rehabilitation program.

In a letter dated February 9, 2009, Dr. Hendler indicated that Kerns' work injury on February 6, 2008, not only aggravated his preexisting condition from the 1997 accident but also resulted in a new and distinct injury. Dr. Hendler wrote, in pertinent part:

The treatment I recommended for Mr. Kerns on March 21, 2008 was primarily due to the work injury of February 6, 2008 as he described it to me. This injury produced both an obvious aggravation of the pre-existing sacro-iliac dysfunction (from the December 18, 1997 event) and a new diagnosis piriformis syndrome.

In my opinion the February 6, 2008 accident resulted in a new and distinct injury. The mechanism of that injury as described to me is consistent with the symptoms and problems Mr. Kerns reports and could have produced the current symptoms whether or not he had a prior injury. While it is possible that the previous injury of December 18, 1997 could have predisposed Mr. Kerns to the new injury of February 6, 2008, the work incident of February 6, 2008 could easily have resulted in the diagnosed conditions in the absence of his previous back problems.³

Respondent argues that there is insufficient evidence to establish that Kerns has suffered a new injury as he has had the same low back complaints since 1997. Based upon the evidence compiled to date, this Board Member disagrees. There is no real

² Kerns Depo. at 28-29.

³ P.H. Trans., Cl. Ex. 2.

dispute that Kerns shoveled snow on February 6, 2008. Likewise, it is not seriously disputed that the following day he told his supervisor about his complaints and was sent home. And Dr. Hendler's uncontradicted medical opinion is that Kerns suffered a new and distinct injury to his low back as a result of shoveling snow on February 6, 2008. This Board Member finds Kerns has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on February 6, 2008.

The respondent next argues that the ALJ does not have the authority to order temporary total disability benefits where it is shown that Kerns received unemployment benefits for the same time period he alleges entitlement to temporary total disability compensation. Respondent contends such evidence is obviously inconsistent with the assertion that Kerns is temporarily and totally disabled. It does not, however, establish in all cases that Kerns is not temporarily and totally disabled. An order for temporary total benefits, even in light of such testimony, does not exceed the jurisdiction of the ALJ and accordingly is not subject to review on appeal.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?⁴

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.⁵ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly, but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision, but the right to enter upon inquiry and make a decision.⁶

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Therefore, the Judge did not exceed his jurisdiction. The issue of whether Kerns' medical condition and employment situation entitles him to receive

⁴ K.S.A. 44-534a(a)(2).

⁵ K.S.A. 2008 Supp. 44-551(2)(A).

⁶ See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is temporarily and totally disabled. The respondent, however, may raise those issues to the Judge when the claim is ready for final award.

This Board Member finds that the ALJ did have the jurisdiction to decide Kerns' entitlement to temporary total disability compensation at the preliminary hearing, and the Board does not have jurisdiction to consider that issue at this time. The respondent's appeal as to that issue is, therefore, dismissed.

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.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated February 24, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of May 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: Timothy G. Riling, Attorney for Claimant
Jeffery E. King, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2008 Supp. 44-555c(k).