

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

LOREN T. VANDORN)	
Claimant)	
VS.)	
)	Docket No. 1,040,888
O'BRIEN READY MIX)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the September 27, 2010, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded the payment of medical bills that were attached to the preliminary hearing transcript and marked as Claimant's Exhibit 1. The Application for Hearing K-WC E-1 which was filed on July 3, 2008, listing an accident date of April 10, 2008, to claimant's eye with viral meningitis as a complication, was assigned Docket No. 1,040,888. The preliminary hearing transcript from September 24, 2010, lists both docket numbers. However, the Order of the ALJ on September 27, 2010, which allows the payment of the medical bills associated with the viral meningitis, lists only Docket No. 1,040,889. Docket No. 1,040,889 with an E-1 filed on July 3, 2008, lists an accident date of May 30, 2008, with injuries to claimant's abdomen, groin, testicles and all other parts affected. The Order of September 27, 2010, appears to have listed the wrong docket number. This error will be corrected by the Board with the issuance of its order.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Ronald A. Prichard of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 24, 2010, with attachments; the transcript of the Deposition of Loren Thomas Vandorn taken September 18, 2009; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in ordering the payment of medical bills which had been incurred over two years prior to the preliminary hearing? Respondent argues that an issue dealing with medical bills incurred two years before the preliminary hearing is an issue reserved for the regular hearing. A preliminary hearing is intended for the consideration of a claimant's entitlement to the need for temporary total disability compensation (TTD) and the need for contemporaneous medical treatment, not for a determination as to the responsibility for medical bills long past incurred.
2. Respondent contends the injuries necessitating these medical expenses were not causally related to claimant's original injury.
3. Does the Board have jurisdiction to hear these issues on appeal from a preliminary hearing Order? Claimant argues that the above issues are not ones over which the Board takes jurisdiction on an appeal from a preliminary hearing order.

FINDINGS OF FACT

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

Claimant was a driver of a concrete truck for respondent. One of his duties was to clean the concrete off of the truck after a delivery. On April 10, 2008, while using a high pressure sprayer to clean his truck, claimant was struck in the right eye with a piece of concrete. At the time, claimant was rinsing muriatic acid off his truck. At the same time, another driver was using an air chisel to remove dried concrete from his truck. Claimant was not sure if the concrete which lodged in his eye was from his truck or the other truck. However, he thinks it came from the other truck. This activity occurred on respondent's property.

When the chip struck claimant in his eye, he stopped working and informed his supervisor, Rodney Lloyd, of the accident. Mr. Lloyd said that he had no accident forms and told claimant to go back to work. Claimant finished his shift that day and tried to wash out his eye with eyewash. Claimant also talked to respondent's employee Duane O'Brien and informed him of the accident and the lack of accident forms.

Claimant returned to work the next day and advised Mr. Lloyd of the continuing problem. Claimant requested medical treatment and was told treatment needed to be approved by Mr. O'Brien, who could not be reached. Claimant was not provided medical treatment. He self treated with eyewash at work and once with saline solution at home. After requesting medical treatment for his eye for 3-4 days, claimant finally went to the emergency room at Mt. Carmel Regional Medical Center on his own. Claimant reported having the eye injury along with multiple hallucinations in the night. At the ER, claimant was

provided treatment, including a spinal tap and blood work. The actual eye exam did not occur for 3-4 days after the ER visit. The ER did admit claimant to the hospital where he spent four days being treated for viral meningitis.

After being released from the hospital claimant was sent by the ER doctor to Dr. Brooks, an eye specialist. However, by this time, claimant said that he no longer felt the object in his eye. Dr. Brooks did a complete eye examination and determined that claimant had suffered a change in his vision. Claimant was unable to remember the extent of the change. Claimant's last examination with Dr. Brooks was in April 2008.

Claimant had a follow-up appointment with Dr. Bernesta Williams after being released from the hospital. This occurred on June 5, 2008. Dr. Williams was the attending doctor in the ER the night claimant was admitted and remained his doctor through his hospital stay. Dr. Williams' name appears on many of the medical statements attached to the preliminary hearing transcript.

It is interesting that the transcript of claimant's deposition taken on September 18, 2009, lists only Docket No. 1,040,888. However, questions dealing with the accident on May 30, 2008, are included in the transcript.

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.¹

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.²

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.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

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

³ K.S.A. 2007 Supp. 44-501(a).

. . . 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."⁴

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁵

Respondent disputes whether claimant's viral meningitis was caused by the injury to claimant's eye on April 10, 2008. Claimant initially contends that this issue is one over which the Board cannot take jurisdiction on an appeal from a preliminary hearing order.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

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 written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

K.S.A. 2009 Supp. 44-551(i)(2)(A) states:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the

⁴ *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).

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁶ K.S.A. 44-534a(a)(2).

administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

This Board Member acknowledges that the Board's jurisdiction to review preliminary hearing orders is limited. However, the Board has held that whether a claimant's condition and need for medical treatment is due to the work-related accident gives rise to the jurisdictional issue of whether claimant's injury arose out of and in the course of his employment with respondent.⁷ Here, the Board has the jurisdiction to consider whether the viral meningitis claimant contracted was the result of the eye injury on April 10, 2008.

The medical statements attached to the preliminary hearing transcript give little guidance on this issue. Most of the documents attached to the preliminary hearing transcript are only bills for the hospital stay after claimant's visit to the ER. The only document giving any insight into the cause of the viral meningitis is the Accidental Injury Claim Form – Physician's Statement which is Claimant's Exhibit 2 to the preliminary hearing transcript. The note on the form states that claimant was cleaning a truck at work when he got something in his eye which "led to viral meningitis. 4 days hospital". This document dated June 5, 2008, appears to contain the signature of Dr. Williams.

A claimant's testimony alone is sufficient evidence of his own physical condition.⁸

The medical evidence coupled with claimant's testimony regarding the accident and the incidents leading to his hospitalization are sufficient, in this instance, to satisfy claimant's burden of proving that the viral meningitis was the result of the work-related eye injury on April 10, 2008.

Respondent contends that the order allowing the medical bills to be paid two years after the medical treatment was provided violates the provisions of K.S.A. 44-534a.

Here, the ALJ determined that medical bills were related to the accident, which the Board agrees. However, whether the ALJ erred in ordering the payment of those medical bills two years after they were incurred is an issue over which the Board would not take jurisdiction on an appeal from a preliminary hearing order. Respondent's appeal of this issue is dismissed.

⁷ *Cable v. Century Concrete, Inc.*, No. 1,027,595, 2007 WL 4661998 (Kan. WCAB Dec. 14, 2007); see also *Nave v. Fiberglass Engineering, Inc.*, No. 1,027,018, 2007 WL 2586181 (Kan. WCAB Aug. 20, 2007).

⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁹

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.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proof that the injury suffered to his right eye on April 10, 2008, led to viral meningitis and a four-day hospital stay. The order by the ALJ allowing the payment of those bills remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 27, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁹ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *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).

¹⁰ K.S.A. 44-534a.