

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

ANTHONY N. EALY)	
Claimant)	
VS.)	
)	Docket No. 1,041,925
CLARE BRIDGE OF LEAWOOD)	
Respondent)	
AND)	
)	
AMERICAN CASUALTY COMPANY OF READING, PA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the October 16, 2008, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

Claimant alleges he injured his right shoulder, neck and low back working for respondent on August 25, 2008, when he was moving a case of pickles. In the Preliminary Decision, Judge Roberts determined claimant sustained a work-related injury and, therefore, granted his request for both temporary total disability benefits and medical benefits.

Respondent and its insurance carrier contend the Judge erred. They argue claimant lied in an interview with a claims adjuster and at the preliminary hearing about earlier neck and back injuries, earlier neck and back treatment, earlier treatment with a chiropractor, and other matters and, therefore, claimant is not credible. They also argue the Board should consider on this appeal a letter from claimant's attorney received by the Judge after the Preliminary Decision was issued. Accordingly, respondent and its insurance carrier "assert that it is in the interest of justice, public policy in Kansas and the credibility of the Division itself that the Preliminary Decision of Judge Yates Roberts be reversed."¹ In

¹ Respondent's Brief at 8 (filed Nov. 3, 2008).

addition, respondent and its insurance carrier request this matter be referred for "investigation and prosecution for fraud and abuse, as well as for perjury."²

Conversely, claimant contends the Board should affirm the Preliminary Decision. Although claimant now maintains there is additional evidence the Judge should hear regarding peripheral matters, the evidence before the Judge established that claimant injured himself at work as alleged.

The only issue before the Board on this appeal is whether the evidence presented to the Judge established that claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the evidence presented to the Judge, the undersigned Board Member finds:

Claimant worked for respondent as a dining service coordinator. On August 25, 2008, claimant allegedly began feeling numbness in his fingers after removing a box of pickles from a shelf. Claimant testified, in part:

We had an inspection that was scheduled to come in any time soon, and before the inspection we had an inspector come in to tell us what needed to be done before the inspectors would come, and there was a list of things I had to go through.

So I was starting to go through the list. So I started moving things around and taking things off the top shelf, which had to be 8 inches -- 8 inches from the ceiling for the sprinklers in case of a fire.

So as I started to go up the steps, I grabbed a box, and as I was coming down, the box [of jarred pickles] went backwards and I tried to keep it from falling backwards because if it had fell, it would have broke. So when I did that, I noticed that I had tensed on my right side.

So I came down a step stool and went to go sit down, and then I noticed that I started to feel numbness in my fingers. So then I went to my -- to the secretary.³

² *Id.*

³ P.H. Trans. at 7, 8.

Claimant immediately reported the alleged incident to respondent, which referred him to Concentra Medical Center (Concentra). Claimant went to Concentra the day of the alleged incident and the next day. The records from Concentra from August 25 and 26, 2008, contain a history that claimant had been diagnosed with cervical strain, pain in his upper arm and lumbar strain that had been caused when he was reorganizing a storage room, to wit:

I was re-organizing the storage room. I was was [sic] lifting a 25# box up on my shoulder when I started to fall backwards.

Claimant was restricted to light duty work, which respondent offered to honor until September 2, 2008, when respondent's insurance carrier interviewed claimant and promptly denied his claim. It is not clear from the record whether claimant worked between August 25 and September 2, 2008, as there is conflicting evidence in the record. On September 2, 2008, respondent and its insurance carrier also stopped the medical treatment claimant was receiving. Claimant has not worked anywhere since September 2, 2008.

At the preliminary hearing, claimant denied previously injuring either his neck or back.⁴ Likewise, he denied ever receiving treatment for his neck or back and denied ever going to a chiropractor.⁵ At the preliminary hearing, claimant was also asked if he recalled being served in a lawsuit by Hammond Chiropractic Center and he answered that he did not remember.⁶ In addition, he testified he did not know anything about a judgment entered against him for unemployment and security fraud and that he had never been accused of unemployment fraud or wrongfully collecting unemployment benefits.⁷ Respondent and its insurance carrier represent that these are false statements but no evidence was offered to impeach that testimony.

At the preliminary hearing respondent and its insurance carrier offered a transcript of the statement that was taken from claimant on September 2, 2008. In that interview claimant initially denied driving or going anywhere over the previous weekend. He also denied going to the store that weekend but he then admitted he had gone to Walmart to get a prescription and for his wife to buy groceries. That transcript reads, in part:

⁴ *Id.* at 15.

⁵ *Id.*

⁶ *Id.* at 25.

⁷ *Id.* at 26.

Q. Did you drive over the weekend?

A. Who me?

Q. Yes you.

A. No.

Q. Did you go anywhere over the weekend?

A. No.

Q. Did you go to the store over the weekend?

A. No.

Q. Did you go to Walmart?

A. ?_____?

Q. No did you?

A. Yeah.

Q. Did you drive?

A. Yep.

Q. So did you go anywhere this weekend?

A. To Walmart. Because I had to get my prescription from Walmart.⁸

Respondent and its insurance carrier also ask the Board to consider a letter claimant's attorney forwarded Judge Roberts after the Preliminary Decision was entered. Likewise, respondent and its insurance carrier request the Board to take notice of other claims claimant has filed with the Division of Workers Compensation.

CONCLUSIONS OF LAW

The letter from claimant's counsel to Judge Roberts is not evidence that may be considered on this appeal. The Workers Compensation Act specifically provides that

⁸ *Id.*, Resp. Ex. C at 9, 10.

Board review is limited to the issues and record presented to the administrative law judge.⁹ Likewise, the Board will not for the first time on review take notice of other administrative proceedings that were not first presented to the administrative law judge. Accordingly, the evidence for determining whether claimant has satisfied his burden of proof is that contained in the transcript of the October 16, 2008, preliminary hearing and the attached exhibits.

Although respondent and its insurance carrier may later prove claimant has been less than forthright in his testimony regarding earlier injuries and treatment and other matters, the record at this juncture establishes that it is more probably true than not that claimant sustained an injury at work on August 25, 2008, that he promptly reported to respondent and for which he sought medical treatment. The Judge, who observed claimant testify under intense cross-examination by respondent's counsel, was apparently persuaded by claimant's testimony and description of the accident as she granted claimant's request for benefits. And considering only the evidence in the record at this juncture, the undersigned is likewise persuaded that claimant has satisfied his burden of proof.

But respondent and its insurance carrier are not without recourse. The Workers Compensation Act is designed in such manner that the parties will have additional opportunities to introduce relevant evidence and develop their theories of the claim. Moreover, the Act provides that under certain circumstances employers and their insurance carriers may recoup benefits that are later shown to be wrongfully paid. Finally, any party may report any potential fraudulent or abusive act to the Director of the Division of Workers Compensation.

In conclusion, the Preliminary Decision should be affirmed.

By statute, 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. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the October 16, 2008, Preliminary Decision entered by Judge Roberts.

⁹ K.S.A. 2007 Supp. 44-555c(a).

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge