

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

CARL R. GLENN)	
Claimant)	
)	
VS.)	
)	
NATIONAL GYPSUM CO.)	
Respondent)	Docket No. 1,042,099
)	
AND)	
)	
ACE AMERICAN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 23, 2008 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant was injured out of and in the course of his employment with respondent on June 23, 2008, and that respondent was timely notified of this injury. The ALJ assigned R.W. Meador, D.O. as the authorized treating physician and ordered all medical to be paid, including reimbursing the claimant for his out-of-pocket expenses. Temporary total disability benefits were also ordered for the period June 28, 2008 until September 24, 2008.

The respondent argues that the claimant failed to meet his burden in proving that he sustained personal injury arising out of and in the course of his employment, that he failed to provide timely notice of his injury and failed to establish just cause to extend the time for the claimant to provide notice of his injury. Respondent requests that the Board reverse the ALJ and deny compensation altogether.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Claimant alleges he was injured while working on June 23, 2008. He contends he cut his hand while trying to unclog a bundler. He self treated in the foreman's office and decided not to report the injury because he believed it to be minor and oftentimes such injuries occur during the regular course of his job. Over time the scratch became infected and on June 30, 2008 he sought emergency treatment. He advised the physician that the cut occurred at work. That same day he returned to work with an off-work statement, giving the document to Nick Burns, the administrative manager for respondent.

Although Mr. Burns denies that claimant expressly told him that he had scratched his hand *while working* and it had become infected, claimant maintains that he told Mr. Burns what had happened. According to claimant, Mr. Burns told him no claim could be made as claimant had failed to report the injury on the day it happened. Mr. Burns denies this. Mr. Burns asserts that the first time he was aware that claimant was asserting a work related accident was sometime in August 2008, after claimant was terminated.

Claimant's direct supervisor Richard Keller testified that he did not see claimant with blood on his clothing or a bandage on his hand until 3-4 days after June 23, 2008. He further denied that claimant told him of any accident and only after claimant was terminated did he learn of the workers compensation claim.

After personally observing claimant and hearing both parties' witnesses testify, the ALJ granted claimant's request for benefits specifically finding that claimant gave notice in a timely fashion and satisfied his evidentiary burden of establishing an accident that arose out of and in the course of his employment on June 23, 2008.

Respondent has appealed this Order and maintains, in essence, that claimant is a liar. Based upon Mr. Keller's reported observation that claimant had no blood on his clothes on June 23, 2008, it was Mr. Burns' "impression" that claimant's injury occurred at home¹. Accordingly, respondent urges the Board to reverse the ALJ's Order. Respondent also argues that even if there were an accident, claimant failed to properly and timely notify respondent until August, 2008, well after the 10 days afforded by the statute.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

¹ Respondent's Brief at 15 (filed Nov. 17, 2008).

right depends.² “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.”³

K.S.A. 44-520 provides:

Notice of injury. 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.

This Board Member has considered all of the evidence contained within the record and affirms the ALJ’s decision on both the issues in dispute. A decision in this claim turns upon the credibility of those individuals who testified. There is evidence to support each party’s position.

The Board has, in the past, found that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed claimant’s testimony over the respondent’s representatives. This member of the Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. And in doing so, this Board member concludes that the ALJ’s Order should be affirmed.

² K.S.A. 2007 Supp. 44-501(a).

³ K.S.A. 2007 Supp. 44-508(g).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁴ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated October 23, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

⁴ K.S.A. 44-534a.