

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

KARLA K. WEIS)	
Claimant)	
VS.)	
)	Docket No. 1,042,724
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent appeals the December 9, 2008, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded medical treatment with Corey A. Trease, M.D., as the authorized treating physician and temporary total disability compensation (TTD) after the ALJ determined that claimant's injury arose from an accident which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Mitchell D. Wulfekoetter of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Bryce D. Benedict of Topeka, 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 December 8, 2008, with attachments; and the documents filed of record in this matter.

ISSUE

Did the ALJ exceed her jurisdiction in finding that claimant's injury arose out of and in the course of her employment with respondent? Respondent argues that claimant's injury resulted from a simple twisted ankle while claimant was walking on a sidewalk. Thus, the injury resulted from an activity of daily living. Claimant argues that her injury

occurred as she walked between buildings on respondent's property and that she was on an errand for her supervisor. Therefore, the accident and resulting injury are compensable.

FINDINGS OF FACT

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

Claimant was working as a corrections officer at the Atchison Juvenile Correctional Facility on September 26, 2008. Claimant was walking from one building to another on respondent's grounds when she walked too close to the curb and stepped off the sidewalk, rolling her right ankle. Claimant felt a break in her right foot, experiencing immediate pain. Claimant was helped to one of the buildings, a nurse was called and claimant was then taken to the emergency room at the Atchison Hospital where she was diagnosed with a fracture of the right fifth metatarsal. Claimant told the emergency room doctor that she was assisting another guard walk, as that guard was pregnant. The accident happened when claimant tried to step out of the way of the pregnant guard. Claimant was placed in a cast shoe and provided crutches. She was told not to bear full weight on the foot for about four weeks. Claimant obtained followup medical treatment with Corey A. Trease, M.D., of the Orthopedic & Sports Medicine Center. Claimant attempted to return to work for respondent at light duty, but respondent did not have light duty available. Claimant has not worked since the date of accident.

The curb in question was described as being 3 to 4 inches high. Claimant acknowledged that she walked on sidewalks with curbs in her town. There is no indication in this record that claimant had preexisting problems with her ankle.

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

¹ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

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

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.,

. . . 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

There is no dispute that claimant was in the course of her employment when this accident occurred. She was on respondent’s property on an errand at the instruction of her supervisor. The question in dispute is whether this injury arose out of her employment, or whether her disability resulted from the normal activities of daily living and, thus, not compensable.

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.⁵

K.S.A. 2008 Supp. 44-508(d) defines “accident” as,

. . . 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 designed to effectuate the

³ K.S.A. 2008 Supp. 44-501(a).

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 K.S.A. 2008 Supp. 44-501(g).

purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.⁶

K.S.A. 2008 Supp. 44-508(e) states:

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.⁷

Respondent contends that the simple act of walking on a sidewalk is a normal activity of daily living and that a disability resulting from that act should be non-compensable. The phrase "normal activities of day-to-day living" was extensively analyzed in *Johnson*.⁸ In *Johnson*, the claimant injured her left knee while standing to retrieve a file. The claimant had a history of three or four incidents of left knee pain. While this Board Member acknowledges that the ruling in *Johnson* applies to normal activity incidents, there are aspects of this injury which are dissimilar to *Johnson*. This claimant had no history of ankle problems, while the claimant in *Johnson* had preexisting problems. Also, here, the claimant was assisting her pregnant co-worker walk and reported to the emergency room that she tried to step out of the way of her co-worker, which may have led to her being too close to the curb. Both facts distinguish the facts and ruling in *Johnson*. Moreover, K.S.A. 2008 Supp. 44-508(e) distinguishes injuries where the disability results from the activities of daily living, not where the accident resulted from the activities of daily living.

This Board Member finds that claimant has proven that not only did her accident occur in the course of her employment, but also arose out of that employment. The defense that claimant's injury occurred while claimant was participating in a normal day-to-day activity does not apply to this situation. Therefore, the Preliminary Hearing Order of the ALJ should be affirmed.

⁶ K.S.A. 2008 Supp. 44-508(d).

⁷ K.S.A. 2008 Supp. 44-508(e).

⁸ *Johnson v. Johnson County*, 36 Kan. App 2d. 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

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.⁹ 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), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that her injury to her right ankle arose out of and in the course of her employment. Respondent has not satisfied its burden that claimant's injury was the result of day-to-day activities.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated December 9, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

HONORABLE GARY M. KORTE

c: Mitchell D. Wulfekoetter, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

⁹ K.S.A. 44-534a.