

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

DEMETRIUS T. GREEN

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

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Docket No. 1,043,309

ORDER

Claimant appealed the July 9, 2009, preliminary hearing Order Denying Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

This is a claim for food poisoning allegedly occurring from claimant's consumption of contaminated food at a cafeteria on respondent's premises on June 26, 2008.

In the July 9, 2009, Order Denying Medical Treatment, Judge Fuller found claimant failed to prove his alleged medical condition arose out of and in the course of his employment. Accordingly, the Judge denied claimant's request for payment of outstanding medical bills.

Claimant contends he fell ill from eating food from the cafeteria on respondent's premises. Therefore, claimant maintains he has proven he sustained injury arising out of and in the course of employment with respondent. Accordingly, claimant requests the Board to reverse the July 9, 2009, Order, find this case compensable, and order respondent to pay claimant's medical bills from this unsavory incident.

Conversely, respondent requests the Board to affirm the preliminary hearing Order. Respondent maintains there is no medical testimony that claimant suffered from food poisoning. Respondent argues that claimant's blood sugar was low when he reported to respondent's Health Services on June 26, 2008, and he did not report that he had food poisoning or had eaten bad food. Moreover, respondent contends there were no other reports of food poisoning among numerous employees who had eaten in the cafeteria on or about June 26, 2008. In short, respondent argues the only reason claimant ended up seeking medical treatment was that he was experiencing a diabetic reaction.

The only issue before the Board on this appeal is whether it is more probably true than not that claimant fell ill from eating at respondent's cafeteria on the evening of June 26, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant began working for respondent on June 17, 2008. While at work on June 26, 2008, claimant ate a chicken taco that he obtained from a cafeteria at respondent's meat processing plant. Shortly afterwards, claimant began experiencing stomach symptoms. He reported abdominal pain to the plant nurse, who tested his blood sugar and sent him home. Claimant, whose shift is from 3:05 to 11:45 p.m., believes he ate the chicken taco around 8:00 p.m. He reported to the plant nurse around 9:25 p.m.

After leaving work claimant began vomiting and having diarrhea. Claimant's fiancée called an ambulance upon seeing him "going in and out" (being unable to focus).¹ Consequently, during the early morning hours of June 27 claimant was taken to St. Catherine Hospital in Garden City, Kansas. The hospital's Patient Summary Sheet notes the reason for claimant's visit was diabetic reaction. On the other hand, the Emergency Physician Record from the hospital indicates claimant had nausea, vomiting, and diarrhea and that he "[a]te chicken taco around 20:00."²

The emergency room physician at St. Catherine Hospital diagnosed "[u]nstable angina, T wave changes, gastro-enteritis [and] diab. mell."³ The doctor immediately transferred claimant by air ambulance to the Kansas Heart Hospital in Wichita, Kansas, where he was admitted for a heart evaluation. The Kansas Heart Hospital recorded a history that claimant had fallen ill after eating a chicken taco while at respondent's plant:

The patient is a 35-year-old African-American male who just moved to Garden City, Kansas from Chicago approximately 1-1/2 weeks ago. He has no primary care physician there. He was at work at the Tyson Processing Plant in Garden City [sic], Kansas. During his break at 8:00 p.m. on June 26, 2008, he ate a chicken taco. Approximately one hour later he began to get sick to his stomach and began to throw up. He remained at work, but continued to have nausea and vomiting until

¹ P.H. Trans. at 7.

² *Id.*, Cl. Ex. 1.

³ *Id.*

approximately 3:00 a.m. when he presented to the St. Catherine's Hospital Emergency Room in Garden City, Kansas. An electrocardiogram at St. Catherine's Hospital suggested T-wave inversion in the anterior-septal leads. . . .⁴

The next day, June 28, 2008, the Kansas Heart Hospital discharged claimant. The discharge diagnoses were nausea and vomiting, likely secondary to food poisoning; abnormal EKG; non-insulin dependent diabetes mellitus; and tobacco dependency disorder. Dr. Jason T. Tauke from the Kansas Heart Hospital noted claimant's symptoms were likely caused by a gastrointestinal problem "probably due to food poisoning as a result of the food that he had eaten on the evening of 06/26/08."⁵ In addition, claimant testified the doctor who treated him at St. Catherine Hospital also told him he had a bout of food poisoning.⁶

Respondent has two cafeterias at its Holcomb, Kansas, plant where claimant works. The cafeterias are operated by United Vending & Food Service (also referred to as United Food and Vending in this record). Respondent's employees are not permitted to leave the plant during their 30-minute lunch break. In addition to eating from the cafeterias, respondent's employees may purchase items from a vending machine or they may bring their own lunch. But neither refrigeration nor a secure location is provided for the food items brought from home. Respondent's employees are specifically prohibited from keeping food in their lockers. The cafeterias are only used by respondent's management, employees, and official visitors.

Deborah Boren, a nurse who has worked for respondent for more than a year, has never heard anyone complain of the food at the cafeterias in respondent's plant. Conversely, nurse Mary Lou Montez, who has worked for respondent for more than three years, has seen employees who were complaining that the cafeteria food had caused gastrointestinal illnesses. She does not recall, however, that any employees complained of the food around the time of claimant's alleged food-related illness.

Daniel Hoggard, who is head of respondent's human resources group and medical services, testified he checked with his nurse manager and there were no other complaints of food-related illness around the time of claimant's alleged illness. Mr. Hoggard, who assumed his present position in about July 2008, was not aware that the Kansas Department of Health and Environment wrote United Vending & Food Services on April 1, 2008, that inspections on March 4 and March 19, 2008, identified serious food safety

⁴ *Id.*, Cl. Ex. 3.

⁵ *Id.*

⁶ Green Depo. at 24.

deficiencies, some of which exposed customers to an unnecessary risk for food-borne disease. The letter also threatened potential fines, license suspension, and license revocation. Mr. Hoggard was also not aware of a June 30, 2008, inspection that cited five critical violations or aware of an April 2007 inspection that found four critical violations.

Considering the present record, there is no reason to doubt claimant's testimony that the doctor at St. Catherine Hospital diagnosed food poisoning. Likewise, Dr. Tauke from the Kansas Heart Hospital diagnosed claimant's gastrointestinal problem as probably from food poisoning. At this juncture, there is no reason to doubt that the source of claimant's food poisoning was from respondent's cafeteria. Claimant was not ill before he went to work on the afternoon of June 26, 2008, and he did not fall ill until consuming the chicken taco from the cafeteria. There is also no reason to doubt claimant's testimony at this juncture that he does not experience abdominal distress on those occasions when his blood sugar is abnormal. Finally, respondent's food vendor has a history of being cited for serious food safety deficiencies. Consequently, the undersigned finds it is more probably true than not that claimant acquired a food-borne disease from respondent's cafeteria on June 26, 2008, that resulted in emergency medical treatment and his transfer to the Kansas Heart Hospital.

The undersigned also finds that claimant's food-borne illness arose out of and in the course of his employment with respondent. Before an accident arises out of employment, there must be a direct relationship between the accident and the nature, conditions, obligations, or incidents of the employment.⁷

This court has had occasion many times to consider the phrase "out of" the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .

This general rule has been elaborated to the effect that an injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.

An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. . . . [T]he foregoing tests exclude an injury not fairly traceable to the employment and not coming from a hazard to which the workman would have been equally exposed apart from the employment.⁸

⁷ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

⁸ *Siebert v. Hoch*, 199 Kan. 299, 303-304, 428 P.2d 825 (1967) (citations omitted).

Whether a causal relationship exists between an injury and the nature, conditions, obligations or incidents of the employment is a question of fact to be decided on a case-by-case basis. Claimant could not leave the plant for lunch. Therefore, due to his employment with respondent he was subject to the risk of food-borne illness from eating in respondent's cafeteria. And lunch breaks are deemed to be incidental to employment. In short, claimant's food poisoning arose in the course of his employment. Moreover, *Larson's*⁹ indicates injuries (in this case food poisoning) occurring on the premises during a regular lunch hour arise in the course of employment.

Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he or she pleases.

There are at least four situations in which the course of employment goes beyond an employee's fixed hours of work: the time spent going and coming on the premises; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises, and unpaid lunch hours on the premises. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, above all, the employee is within the spatial limits of his or her employment.¹⁰

In conclusion, claimant is entitled to receive benefits, including medical benefits, under the Kansas Workers Compensation Act for the gastrointestinal illness and symptoms he acquired on June 26, 2008, from eating in respondent's cafeteria.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ 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.

⁹ 2 *Larson's Workers' Compensation Law* § 21.02[1][a] (2009).

¹⁰ *Id.*, at 21-3, 21-4 (footnotes omitted).

¹¹ K.S.A. 44-534a.

WHEREFORE, the undersigned Board Member reverses the July 9, 2009, preliminary hearing Order entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Michael Snider, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge