

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

MICHAEL HARRIS)	
Claimant)	
VS.)	
)	Docket No. 1,043,959
ISS FACILITY SERVICES HOLDING)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the March 4, 2009, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded temporary total disability compensation (TTD) and ongoing medical treatment after the ALJ determined that claimant had provided timely notice of the accident.

Claimant appeared by his attorney, Frederick J. Patton of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Meredith L. Moser of Kansas City, Missouri.

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 March 4, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant provide respondent with timely notice of his accident?

FINDINGS OF FACT

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

Claimant worked part time for respondent's janitorial service. On October 14, 2008, claimant injured his right shoulder and upper right back while lifting a bag of trash. Claimant testified that he notified his supervisor, Cindy Handy, of the injury. This contact was by telephone and was, at most, no more than 3 to 4 days after the accident. In another place in the preliminary hearing transcript it appears that claimant alleges he may have notified Ms. Handy on the date of accident, or the next day. Ms. Handy did not testify in this matter.

Claimant sought medical treatment from his personal doctor, Mark A. Thomas, M.D. When claimant appeared at the office of Dr. Thomas, he was actually examined by Korri L. Napier, M.D., with the first examination taking place on October 16, 2008.

There is confusion regarding when claimant notified both Ms. Handy and Donna Flowers, the person who sent claimant to St. Francis for authorized medical care. That authorized medical treatment began on November 5, 2008. However, claimant testified that he told Ms. Handy before November 5, 2008, and that Ms. Handy was to tell Ms. Flowers. Claimant's testimony is consistent that he told Ms. Handy, his supervisor, within 3 to 4 days of the accident, at most. Respondent argues that claimant also testified that this occurred within a very short time before claimant was sent to St. Francis. It is clear that claimant was occasionally confused, but he was adamant about the contact with Ms. Handy and the time frame within which it occurred. Absent contradictory testimony from Ms. Handy, the testimony of claimant is found to be persuasive.

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. 44-501 and K.S.A. 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

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.⁴

Claimant's testimony that he notified his supervisor, Ms. Handy, within 3 to 4 days of the accident and discussed the work-related injury is persuasive. This Board Member finds the determination by the ALJ that claimant provided timely notice of his accident should be affirmed.

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.⁵ 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 provided timely notice of his accident to his supervisor, Cindy Handy. This satisfies the requirements of K.S.A. 44-520. The award of benefits by the ALJ is affirmed.

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 March 4, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

³ K.S.A. 44-501(a).

⁴ K.S.A. 44-520.

⁵ K.S.A. 44-534a.

Dated this ____ day of May, 2009.

HONORABLE GARY M. KORTE

c: Frederick J. Patton, Attorney for Claimant
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge