



heavy lifting as machines performed that function and the work was done at a level that did not require bending unless a tool or tire was dropped on the floor.

It was undisputed that claimant suffered a pulled groin muscle at work on December 30, 2008. He was provided medical treatment and returned to accommodated employment. He was released to return to full-duty work on January 16, 2009.

Claimant testified that he had to alter how he performed his work due to his groin injury. And he testified that after he performed his job at a faster pace, as directed by his supervisor so he could attend a meeting on February 5, 2009, he noticed an onset of back pain. But he also had testified that after he returned to his regular job duties on January 16, 2009 through his last day worked on February 5, 2009, he had back pain.

Claimant agreed that he did not tell any supervisor about back pain from January 16, 2009 through February 5, 2009, nor did he tell his supervisors of a specific onset of back pain on February 5, 2009. After the meeting on February 5, 2009, claimant went home and that night he went over to his ex-wife's house. When claimant started to get up from a couch, after watching television, he experienced a sharp pain in his back. The next day claimant was not required to work because he works 4-ten hour days and has Friday off. On Saturday, he wasn't any better so claimant sought treatment at Shawnee Mission Medical Center's emergency room. He received pain medication and was referred to Dr. Jeffrey T. MacMillan.

On Monday, February 9, 2009, claimant called John Rhoads, respondent's re-tread manager, to tell him that he would be unable to work. Claimant agreed that he did not tell Mr. Rhoads that he had hurt his back at work. Mr. Rhoads testified that claimant said he would be unable to work and that he had injured his back over the weekend.

Although claimant testified that he attempted to work for a short time on Tuesday, February 10, 2009, the respondent's time records indicate claimant took vacation leave that day.<sup>1</sup> And Mr. Rhoads testified that he had received a telephone call from claimant on February 10, 2009, and was told that claimant's back was still hurting so he was going to see his doctor. It was agreed that claimant would take vacation time that day.

On Wednesday, claimant had an appointment with Dr. MacMillan. The doctor took him off work for 72 hours. Claimant returned to work on February 16, 2009, with restrictions from Dr. MacMillan. Claimant testified that Mr. Rhoads told him he could not return to work until his restrictions were lifted. Mr. Rhoads testified that on February 16, 2009, he was operating a forklift when claimant approached him and handed him a doctor's slip with restrictions. Mr. Rhoads agreed he told the claimant that he had to be released without restrictions in order to return to work. And he further told claimant to wait

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<sup>1</sup> Rhoads Depo., Resp. Ex. 6.

a minute until he finished what he was doing with the forklift so they could discuss his time off and attendance. But claimant left the building. Claimant was later terminated from respondent's employment for more absences from work than allowed by the company policy regarding excused days without pay.

Mark Robinson, respondent's lead man in retread, testified that between January 16, 2009, and February 5, 2009, claimant never told him that he was having pain in his lower back or had injured it at work. Mr. Robinson further testified that the job does not require significant lifting as machines lift the tires claimant worked on.

Claimant testified that he never told anyone about his back pain because he was afraid he would be fired. But he had initially testified that he never mentioned his back pain because he was dealing with issues regarding his son and ex-wife. And claimant agreed that his employment had not been affected when he reported his groin injury.

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 right depends.<sup>2</sup> "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."<sup>3</sup>

The ALJ concluded claimant failed to meet his burden of proof to establish that he suffered accidental injury to his back arising out of and in the course of his employment with respondent on or before February 5, 2009. This Board Member agrees.

Initially, it should be noted that claimant provided inconsistent testimony regarding not only the onset of his back pain but also the reasons why he failed to notify respondent that he had injured his back at work. And the claimant agreed that he did not tell any supervisor that he had injured his back at work. Mr. Rhoads testified that claimant said he had injured his back over the weekend when he was not working. Moreover, the emergency room records contain a history of back pain for three days with no recent injury. And the records indicate that claimant had a past history that he had hurt his back on the job two years ago.<sup>4</sup>

The claimant was aware of the procedure to notify respondent if he suffered a work-related injury. Claimant had followed that procedure when he injured his groin. But his back complaint did not result in notification of injury to his employer, instead, claimant's supervisor was told that he had injured his back over the weekend. And claimant agreed

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<sup>2</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>3</sup> K.S.A. 2008 Supp. 44-508(g).

<sup>4</sup> P.H. Trans., Cl. Ex. 1.

that the specific onset of debilitating back pain occurred when he got up off a couch at his ex-wife's residence. The contemporaneous emergency room records do not indicate a recent work-related accidental injury but, interestingly do indicate claimant had a previous history of a work-related back injury. Stated another way, claimant never told respondent he had injured his back at work nor did he list a work-related injury as the cause for his back pain when he went to the emergency room even though he did mention a previous back injury. This Board Member concludes, based upon the record compiled to date, claimant has failed to meet his burden of proof that he suffered accidental injury to his back arising out of and in the course of his employment on or before February 5, 2009.

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.<sup>5</sup> 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), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated May 12, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July 2009.

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DAVID A. SHUFELT  
BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant  
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2008 Supp. 44-555c(k).