

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

VINCENT A. WISEMAN)	
Claimant)	
VS.)	
)	Docket No. 1,046,266
CORPORATE EXPRESS DOC)	
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the September 24, 2009, preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded temporary total disability compensation (TTD) from June 30, 2009, through September 17, 2009, after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent on April 17, 2009, and that timely notice of that accident was provided by claimant to his supervisors.

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, 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 September 23, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in finding that claimant sustained personal injury by accident which arose out of and in the course of his employment with respondent on April 17, 2009? Respondent contends that claimant did not advise his supervisor of a work-related accident for several weeks after the alleged date claimed. Additionally, claimant initially sought medical treatment with his personal chiropractor and

family physician. Claimant responded that he had suffered these types of pains in the past and a brief period of chiropractic care had resolved the problem within one to two days. However, in this instance the chiropractic care failed to relieve claimant's symptoms.

2. Did claimant provide timely notice of this accident? Again, respondent contends claimant's actions after the alleged accident do not support a finding that claimant advised respondent of the alleged accident for several weeks after the incident that occurred when claimant was attempting to lift a printing head. However, claimant contends he talked to his supervisors on several occasions, and that they were aware that he was having back problems and those back problems stemmed from his job. The initial contact with his immediate supervisor was alleged to have occurred within five days of the claimed accident.

FINDINGS OF FACT

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

Claimant had worked as a printing press operator for respondent for over twelve years. On April 17, 2009, while attempting to lift a printing head, claimant suffered what he described as a pull in his low back. Claimant finished his shift that day. The next morning, claimant had difficulty getting out of bed. He went to his chiropractor, Dr. Keenan, but discovered that Dr. Keenan had retired. Claimant then sought treatment with another chiropractor, Dr. Teeple, in Basehor, Kansas, on April 22, 2009. Claimant testified that after this initial chiropractic treatment, claimant discussed his ongoing back problems with his supervisor, Larry Gilmore. Mr. Gilmore had also suffered from back pain in the past. Claimant thought that Mr. Gilmore knew the back pain originated from the job, but was not absolutely sure. Claimant ultimately received treatment from four chiropractors, with no improvement. Claimant then went to his family doctor and was given a 10-day steroid treatment, again with no improvement. Claimant testified that he again discussed his back problems on May 12 and June 3, 2009, with Mr. Gilmore and also with Pat King, another supervisor. Claimant's discussions with Mr. King allegedly occurred during smoke breaks, as both claimant and Mr. King smoked.

Claimant testified that after one of these conversations, he was referred by respondent to Concentra Medical Center (Concentra) for treatment. The earliest Concentra medical report is dated June 3, 2009. Medical reports from the Shawnee Mission Physicians Group date from May 12, 2009, with claimant coming under the care of Philip Martin, M.D. There are no chiropractic reports in this record. The medical reports in this record detail a timeline associated with the start of claimant's symptoms but do not discuss the cause or indicate a work connection.

At Concentra, claimant was treated by Gary N. Thomsen, M.D. Claimant was diagnosed with lumbar disc dislocation and lumbar strain. Claimant was provided restrictions of no lifting over 10 pounds, no prolonged standing or walking, no push/pull over 20 pounds and no bending more than two times per hour. Respondent was unable to meet these restrictions. Claimant stopped working as of June 3, 2009, but remained on the payroll until June 30, 2009, when respondent's plant closed. Claimant was then paid severance pay beginning June 30 and was still being paid at the time of the preliminary hearing on September 23, 2009.

During one of the conversations with Mr. Gilmore, claimant was asked if he had informed Andrea Ewing, in respondent's human resources department (HR), of his accident. Claimant had not talked to Ms. Ewing, so he went to HR and filled out the proper paperwork to allow him to go to Concentra for treatment. Claimant was under the impression that Ms. Ewing was already aware of his injury, as the paperwork was already filled out by her. Claimant had to provide very little information from this accident. When claimant was injured on one prior occasion, he had to provide most of the information to fill out the paperwork.

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

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

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).

³ K.S.A. 2008 Supp. 44-501(a).

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

Claimant describes an accident which allegedly occurred as claimant was lifting a heavy printing head. The trauma claimant experienced was not significant, but claimant did experience symptoms in his low back as he was lifting. This testimony is uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.⁵

This Board Member finds claimant's testimony regarding the accident persuasive. The finding by the ALJ that claimant suffered an accidental injury which arose out of and in the course of his employment is affirmed.

Respondent also contests the timeliness of the notice of this accident.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.⁶

Claimant had experienced similar symptoms in the past, and chiropractic treatment had helped resolve the problem within one to two days. However, this time the chiropractic treatments proved ineffective. Claimant testified that he talked to his supervisor, Larry Gilmore, within five days of the accident. Claimant also testified to several conversations with Pat King, another supervisor. This testimony is uncontradicted. Claimant thought that Mr. Gilmore understood the back pain was from work. While not absolutely definitive, this testimony is enough to convince this Board Member that the conversations did occur and Mr. Gilmore was aware of the work connection. Had respondent desired to contradict this testimony, it would have been easy to present Mr. Gilmore's and/or Mr. King's testimony in rebuttal. Neither testified in this matter. The conversation on April 22, 2009, with Mr. Gilmore is within the 10-day notice time limit of K.S.A. 44-520. Therefore, claimant's notice to respondent would be timely. The finding by the ALJ on this issue is affirmed.

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 *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

⁶ K.S.A. 44-520.

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.⁷ 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 by a preponderance of the evidence that he suffered an accidental injury on April 17, 2009, while working for respondent and that timely notice of this accident was given to claimant's supervisor.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated September 24, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

HONORABLE GARY M. KORTE

c: Dennis L. Horner, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁷ K.S.A. 44-534a.