

On February 19, 2010, claimant's attorney filed an application for review of the ALJ's Order requesting that the Board review whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent and whether the claim is compensable. The same day, claimant's attorney filed a notice of withdrawal from this appeal.²

Respondent argues that the Order should be affirmed as claimant failed to sustain his burden of proof that he suffered personal injury by accident arising out of and in the course of his employment and absent that, claimant's argument at the hearing that he is incapacitated under K.S.A. 44-509 cannot apply.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed by this respondent for approximately one month from June to July 2005.³ He last worked for respondent on July 7, 2005. As of July 8, 2005 he left respondent's employment due to a nervous breakdown and was subsequently diagnosed as a paranoid schizophrenic. He has not worked anywhere since that time although exhibits entered into evidence show that claimant was taking online classes at the University of Phoenix from at least from April 2009 through May 21, 2009.

Claimant's first visit to Dr. Harry Morris was on July 6, 2009 and he apparently diagnosed the claimant with bilateral carpal tunnel syndrome at that time, although his records are not in the record.⁴ Thereafter, on August 26, 2009, claimant filed his application for hearing asserting a number of injuries, not just a bilateral carpal tunnel syndrome. However, when testifying, claimant doesn't recall making any complaints other than numbness and tingling in his arms which he says has gotten worse over the years.⁵ He also attributes his back pain to his carpal tunnel syndrome.⁶ There are a significant

² There is no order in the file indicating claimant's attorney's motion was granted, nor is there a brief in the file in support of claimant's application for review.

³ Claimant was employed by respondent's predecessor, Boeing, for some undefined period of time, possibly a number of years. Due to claimant's illness, he is unsure of the precise dates although he testified that he does not recall receiving any workers compensation benefits during that period of employment. (Claimant's Discovery Depo. at 10.)

⁴ P.H. Trans. at 24-25.

⁵ Claimant's Discovery Depo. at 13-14.

⁶ *Id.* at 15.

number of medical records but they deal with his psychological condition, his treatment and progress.

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.⁷ “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.”⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹

Here, the ALJ concluded that claimant failed to sustain his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment with respondent. His ruling is supported by the fact that claimant last worked for respondent (or anyone for that matter) in July 2005 and has most recently engaged in online computer classes as recently as April and May 2009. Claimant was diagnosed with bilateral carpal tunnel on July 6, 2009. The ALJ was simply not persuaded that claimant’s work activities last done in 2005 had any causal connection to his present diagnosis. This Board Member agrees. There is simply no evidence that would support claimant’s contention. Indeed, there is no description of claimant’s job duties for respondent, and he is unable to say or indirectly prove that he had ongoing complaints while performing those work duties. For these reasons, the ALJ’s preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated February 5, 2010, is affirmed.

⁷ K.S.A. 2009 Supp. 44-501(a).

⁸ K.S.A. 42009 Supp. 44-508(g).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

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Gregory D. Griffin, Claimant, 2375 North Somerset, #102, Wichita, KS 67204
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John D. Clark, Administrative Law Judge