

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

<b>ROBERT P. COX</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,040
<b>SEDGWICK COUNTY</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requests review of the February 25, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

**ISSUES**

The ALJ awarded claimant benefits<sup>1</sup> after concluding claimant sustained injury arising out of and in the course of employment with respondent.

The respondent requests review of the preliminary hearing Order and alleges claimant's injury occurred while he was performing an activity of daily living. As such, respondent argues the injury is not compensable pursuant to K.S.A. 44-508(e).

The claimant requests the preliminary hearing Order be affirmed.

The issue is:

- Whether claimant met with personal injury by accident arising out of and in the course of his employment with the respondent on November 3, 2009.

**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:

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<sup>1</sup> The ALJ authorized Dr. John Fanning as the treating physician and also ordered all medical paid including reimbursement.

Claimant was employed by respondent as a detention officer. As a detention officer, claimant oversaw the care and well being of approximately 52 to 56 inmates. The inmates are housed in pods, which consist of an upper level housing unit and a lower level housing unit. As part of claimant's work activities, he was required to make physical rounds approximately every hour or 6 to 8 times per day. To make rounds, claimant was required to walk around the housing units including walking up and down the stairs separating the upper and lower housing units. Depending upon claimant's particular work assignment, he was required to be on his feet 70 to 85 percent of his workday.

On November 3, 2009, toward the end of his workday, claimant was hurrying to complete the final round of the day so that he could get back downstairs and complete his paperwork before his replacement appeared for the next shift. In coming down the stairs, claimant got to the next to the last step and he stepped down with his right foot and felt a pop in the right foot and a sharp pain that shot from the right side of his ankle area up to his little toe.<sup>2</sup> Claimant suggests that he stepped wrong at the point his right foot popped.<sup>3</sup> The stairs claimant was descending were of metal grate. As a result of the November 3, 2009 work accident, claimant suffered a torn tendon.

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" 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 when it is apparent to the rational mind, upon consideration of all circumstances, that there is 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.<sup>4</sup>

Respondent asserts that claimant's injury was a result of activities of daily living, which does not qualify as a personal injury pursuant to K.S.A. 44-508(e).

K.S.A. 2009 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such

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<sup>2</sup> P.H. Trans. at 9, 10.

<sup>3</sup> *Id.*, at 19.

<sup>4</sup> *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

A close reading of the statute reveals a reference to disability (not injury) which results from normal activities of day-to-day living. The respondent's argument fails to note the use of the word "disability" in this reference rather than "injury."

A definition of "disability" cannot be found in the Workers Compensation Act. The Kansas Supreme Court in *Boeckmann*<sup>5</sup> found the claimant's disability was caused by his everyday activities. The medical evidence in *Boeckmann* showed that with every breath he took, his degenerative hip condition was getting worse. Thus, his disability was not caused by an injury but, rather, his disability was caused by being alive. Consequently, workers compensation benefits were denied.

More recently, the Kansas Court of Appeals in *McCready*<sup>6</sup> noted the use of the word "disability" in K.S.A. 44-508(e).

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee *suffers disability* as a result of the natural aging process or by the normal activities of day-to-day living.

It is important to point out that the statute refers to a disability (not the injury) which is a result of the natural aging process or normal activities. . . .<sup>7</sup>

There is no evidence in the record compiled to date that suggests claimant suffers a disability as a result of the aging process or activities of day-to-day living. Neither party alleges a disability. Further, there is no medical evidence suggesting that claimant suffered a disability as a result of the normal aging process or normal activities of day-to-day living.

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<sup>5</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

<sup>6</sup> *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

<sup>7</sup> *Id.*, at 90 (alteration in original).

Additionally, claimant's work activities of walking up and down metal grate stairs 6 to 8 times a day and being on his feet 70 to 85 percent of his shift do not constitute normal activities of day-to-day living.

After reviewing and considering the parties' briefs, the administrative file and the record compiled to date, this Board Member affirms the ALJ's preliminary hearing Order concluding claimant was injured out of and in the course of his employment with the respondent on November 3, 2009.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, this Board Member finds, decides and orders the preliminary hearing Order of ALJ John D. Clark entered on February 25, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2010.

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CAROL L. FOREMAN  
BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant  
Robert G. Martin, Attorney for Respondent  
John D. Clark, Administrative Law Judge

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<sup>8</sup> K.S.A. 44-534a.