

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

KARA S. BARLETT)	
Claimant)	
)	
VS.)	
)	
WEBCO MANUFACTURING, INC.)	
Respondent)	Docket No. 1,049,682
)	
AND)	
)	
ACCIDENT FUND NATIONAL INS.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 8, 2010, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Clark H. Davis, of Olathe, Kansas, appeared for claimant. Bill W. Richerson, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's frequent use of her hands and wrists in her work led to the development of carpal tunnel syndrome. Respondent was ordered to provide claimant with medical treatment for her bilateral carpal tunnel syndrome with Dr. Regina Nouhan.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 7, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant failed to present evidence that there was a causal link between her work activities and the development of her bilateral carpal tunnel syndrome. Respondent contends the only way to find in claimant's favor was to presume there was a causal link between her repetitive hand activities in her work activities and her

bilateral carpal tunnel syndrome. Accordingly, respondent asks the Board to reverse the ALJ's Order of April 8, 2010.

Claimant asks that the Board affirm the ALJ's Order.

The issue for the Board's review is: Did claimant's medical condition and need for treatment arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant has been employed by respondent, a business that fabricates sheet metal, since November 3, 2008. Previous to that she had worked for 22 1/2 years at B/E Aerospace. Claimant started working at respondent as a scheduling manager, but she now also works as the purchasing manager. She works 5 to 6 days a week and normally works 9 to 10 hours per day. At times, she has worked 12 to 14 hour days, and at times she takes her work home. She estimated that all but two to two and a half hours a day are spent at her desk, either typing emails, entering data into a computer or using a 10-key calculator. Although she is left-handed, she uses the 10-key calculator with her right hand and makes notes of her computations with her left hand.

Claimant testified that on Monday, September 28, 2009, she woke up in the middle of the night with severe pain in her left arm and elbow. She went to work that morning and told her boss, Gary Rettman, that she would have to see a doctor. She saw Dr. John Saxer, her primary care physician, who prescribed pain medication and anti-inflammatory medication. In October 2009, she was referred by Dr. Saxer to Dr. Gordon Kelley for a nerve conduction study on her left arm. The study showed that she was suffering from mild carpal tunnel syndrome and tendinitis. She has been treated with physical therapy and injections and wears a wrist splint, and Dr. Saxer recommended she see a surgeon.

Claimant also has pain in her right arm, but it is not as severe as the pain in her left arm. She believes the problems in her right arm and hand are worsening.

On March 3, 2010, claimant was seen by Dr. Regina Nouhan, a plastic surgeon. Claimant told Dr. Nouhan that she does a lot of keying and writing in her job at respondent and that she works 10 to 14 hours a day. Dr. Nouhan diagnosed her with bilateral carpal tunnel syndrome, worse on the left than right. In her medical report of March 3, 2010, Dr. Nouhan opined: "I do think the patient's problems are largely related to her current work . . ."¹ Dr. Nouhan recommended a left carpal tunnel release and a right carpal tunnel injection.

¹ P.H. Trans., Cl. Ex. 3.

On March 16, 2010, claimant was seen by Dr. John Moore, another plastic surgeon, at the request of respondent. Dr. Moore also diagnosed claimant with bilateral carpal tunnel syndrome. He believed that claimant's left side condition had gone from mild to moderate over the past months and thought her right side would follow the same path over the next year. He recommended bilateral carpal tunnel releases. Relative to causation of claimant's condition, Dr. Moore stated:

In reviewing her job duties, all of the objective scientific studies have not found a relationship between the type of repetitive computer and writing work that she does and the causation of carpal tunnel syndrome. While it is possible to find people that give the opposite opinion, there is no scientific medical evidence that it is true and all of the evidence actually points to the opposite.

I think that [claimant's] tenosynovitis is causing the problem with her left index finger and her carpal tunnel syndrome but I think it is idiopathic in nature²

Claimant testified that when she worked at B/E Aerospace, she did much the same type of work as she now performs at respondent, and that during that period she did not have problems with her upper extremities. Claimant said at B/E Aerospace, she did more keyboarding and less writing. Claimant also stated that she and her husband own a liquor store and rental properties, and she does some of the administrative work for those businesses and had never suffered problems doing that work. She said she works about two to four hours during weekends doing work for the family businesses.

Gary Rettman testified that he is president of respondent and has been with the company since December 1980. He testified that as long as he has been with respondent, there had never been a carpal tunnel claim that he knew of, although several people do as much or more data entry type work as does claimant.

Ruth Terrones testified that she was formerly employed at respondent in the position of purchasing manager. She trained claimant to take over her job when she retired. She said that while she worked as purchasing manager, she spent 50 to 60 percent of the time at her desk and the other times she was doing other activities. Ms. Terrones performed the job of purchasing manager with only one arm because of a birth defect. She testified that she never had a problem with carpal tunnel syndrome and was not aware of any other employee of respondent who ever made a claim for carpal tunnel syndrome.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

² P.H. Trans., Resp. Ex. B at 2.

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "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."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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 there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁶ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁷ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁸

³ K.S.A. 2009 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁵ *Id.* at 278.

⁶ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁷ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁸ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

The Kansas Supreme Court in *Strasser*⁹ wrote in pertinent part:

The workmen's compensation act prescribes no standard of health for workmen, and where a workman sustains an accidental injury arising out of and in the course of his employment he is not to be denied compensation merely because of a pre-existing physical condition, for it is well settled that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction.

"A claimant's testimony alone is sufficient evidence of his own physical condition."¹⁰ "Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker's injury."¹¹ A factfinder must decide what medical opinion is most credible.¹²

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ 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), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

ANALYSIS

Claimant relates her bilateral upper extremity conditions to her work with respondent. Her authorized treating physician, Dr. Nouhan, likewise relates her current problems to her work. Although there is an expert medical opinion to the contrary, this Board Member finds that claimant has met her burden of proving her condition is, at least in part, work related.

⁹ *Strasser v. Jones*, 186 Kan. 507, Syl. ¶ 2, 350 P.2d 779 (1960). *Id.* at

¹⁰ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

¹¹ *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999).

¹² See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

¹³ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹⁴ K.S.A. 2009 Supp. 44-555c(k).

CONCLUSION

Claimant's current condition and need for medical treatment are the result of a series of accidents and injuries that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 8, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge