

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

<b>TODD A. GREGG</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,792
<b>366 USD</b>	)	
Respondent	)	
AND	)	
	)	
<b>TWIN CITY FIRE INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the July 28, 2010, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was denied temporary benefits after the ALJ determined that claimant had failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Anemarie D. Mura 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 July 23, 2010, with attachments, and the documents filed of record in this matter.

**ISSUE**

Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Claimant alleges that he slipped and fell, breaking his left wrist, while going to the school gym to take down bleachers. Respondent contends that claimant's multiple descriptions of the situation discredit his testimony. Additionally, respondent contends that claimant had attended a game in the gym as a spectator and not for any job-related purpose, was not scheduled to work that night, and was specifically

instructed by his supervisor to take down the bleachers the next morning. Therefore, the fall in the school parking lot was not work related.

#### FINDINGS OF FACT

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

Claimant had been employed as a custodian for respondent for about two years when, on February 2, 2010, claimant slipped and fell in respondent's parking lot, breaking his left wrist. Claimant normally worked the 9:00 a.m. to 6:00 p.m. shift. However, claimant alleges that on the date of accident he was assigned by Noah Francis, the school principal, to break down the bleachers in the gym after a night basketball game. Claimant testified that school began at 8:15 a.m. and would already be in session when claimant arrived at 9:00 a.m. Therefore, the bleachers needed to be broken down that night after the game. Claimant testified that he went to his office to get a wrench to use on the bleachers. As he walked across the parking lot to the gym, he slipped on ice and fell. Claimant drove home after the fall, and his wife took him to the emergency room at the Coffee County Hospital. Claimant called Mr. Francis after arriving home from the emergency room and advised him of the injury and the fact that claimant would not be able to work for three days.

Claimant testified that he would normally arrive at a ball game in the fourth quarter, per the instructions of respondent's employees. Claimant testified that he went to the office of the school and talked to Mr. Francis the next day. He told him that he fell while working. Claimant testified that he would keep track of his time and turn the hours he worked in to the office. However, on the night of the accident, claimant did not record his hours. There is no indication that claimant claimed hours of employment from that night at any time thereafter.

Claimant came under the care of Dr. John D. Atkin of the Yates Center Medical Center. Claimant was placed in a forearm splint and arm sling, and returned to work light duty. Claimant testified that he continued to perform his regular duties, although with one arm being limited. Claimant testified that he was unable to perform the job duties satisfactorily and, as the result, was let go by respondent. Claimant's last day was February 19, 2010. Claimant was released on March 15, 2010, by Dr. Atkin to full duty with the precaution to use his wrist splint only during the most strenuous activities. Claimant advised Dr. Atkin that he was working in the oil fields and was experiencing very little discomfort.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation on April 12, 2010. Claimant advised Dr. Prostic

that he was still experiencing pain in his left wrist and continued to use the splint most of the time. Claimant stated that he was still out of work. Claimant was diagnosed with a healed fracture of the distal radius with 15 to 20 degrees of dorsal angulation and a non-union of the ulnar styloid. Claimant had experienced a permanent loss of grip and, if symptoms were unacceptable, an osteotomy was discussed as a possibility in the future.

Several members of respondent's school district testified at the preliminary hearing. Rusty Arnold, superintendent of schools, was told by claimant, the day after the accident, that claimant had broken his wrist. But, claimant did not tell him the injury was work related. The first time Mr. Arnold was advised that claimant was alleging a work-related injury was on March 5, 2010, when claimant brought in a claim form. (The form K-WC 15, Written Claim for Workers Compensation, was signed by Mr. Arnold on March 8, 2010, and marked as Respondent's Exhibit B to the preliminary hearing.) Mr. Arnold testified that Oren Tracey, another school district employee, was the person who worked the games for respondent. Claimant had not been asked to work after games, except in December when a tournament was scheduled. The tournament involved back-to-back days which required added custodial responsibilities. The night of February 2, 2010, claimant had not been asked to work. Mr. Arnold acknowledged that claimant had not submitted a time sheet for the night of February 2, 2010. He also testified that claimant often came to night games because he had a son in school.

On cross-examination, Mr. Arnold acknowledged that claimant was responsible to answer to the principal of the school. Claimant would also answer to the head custodian, Oren Tracey, who would also be considered as claimant's supervisor. While Mr. Arnold acknowledges that claimant was at the game that night and may have talked to him and Mr. Tracey, they did not talk about work. One or two days later, claimant told him that he had broken his wrist at the game.

Oren Tracey, respondent's head custodian, denies telling claimant to work the night of February 2, 2010. He did see claimant at that game sometime prior to the end of the first half. Claimant told him that he was going to tear down the bleachers, and Mr. Tracey advised that it was to be done in the morning.

Finally, Noah Francis, the principal of the high school where claimant worked, testified. He denied that claimant was scheduled to work the night of February 2, 2010, and testified that claimant was not instructed to tear down the bleachers after the game. He agreed that the only time claimant was asked to work after a game was during the tournament in December. Mr. Francis received a telephone call from claimant's wife later that night advising that claimant had suffered the injury. There was no claim that claimant suffered the injury while working.

Mr. Francis testified that claimant had been reprimanded several times for not working his regular schedule and not performing his job duties as assigned. Respondent's

Exhibit C to the preliminary hearing contained letters dated December 14, 2009, and January 20, 2010, discussing claimant's failure to follow the work schedule to which he was assigned. Additionally, the letters note claimant's failure to properly carry out his assigned duties. Claimant was ultimately terminated due to his failure to properly perform the duties of his job and due to his modifying his work hours without permission.

Mr. Francis acknowledges that claimant fell on school property and broke his left wrist on the night of February 2, 2010. However, he was told by claimant's wife that claimant fell while walking out to his vehicle. The telephone call occurred sometime between 11:00 p.m. and midnight on the night of the accident. Mr. Francis denied that he had requested that claimant come in and work the night of the accident. Respondent had been experiencing problems with claimant not working his regular schedule. Claimant had been advised specifically to work his assigned work schedule between 9:00 a.m. and 5:30 p.m.

Mr. Tracey was assigned the duty of cleaning the bleachers and cleaning the gym when necessary. This, at times, would take until midnight. Claimant would then be responsible for tearing down the bleachers the next morning. It takes approximately 30 minutes to tear down the bleachers. It would be impossible for claimant to tear down the bleachers while Mr. Tracey was cleaning them.

#### **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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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<sup>1</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2009 Supp. 44-501(a).

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 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.”<sup>4</sup>

Claimant alleges that he was assigned the duty of tearing down the bleachers after the game on the night of February 2, 2010. Respondent’s representatives deny that claimant was so assigned. Claimant’s regular hours were from 9:00 a.m. to 5:30 p.m. Thus, any accident at night while attending a basketball game would have to be due to a special assignment from claimant’s supervisor. Both the school principal and the head custodian deny that claimant was assigned to work after the game on the date of accident. In fact, Mr. Tracey, the head custodian, specifically told claimant to tear down the bleachers the next morning. Additionally, it would have been impossible for claimant to tear down the bleachers while Mr. Tracey was cleaning them, which normally took until midnight.

Here, the dispute between claimant’s testimony and that of respondent’s employees is key to resolving the compensability of this matter. The Board will, many times, give deference to the ALJ in determining the credibility of witnesses, especially in instances such as this, where all witnesses testified in the presence of the ALJ. In this instance, the ALJ found claimant’s testimony lacking. This Board Member agrees that the testimony of Mr. Francis, Mr. Tracey and Mr. Arnold is the most persuasive. Claimant has failed to prove that his accident on the night of February 2, 2010, occurred during a time when he was actually performing work for respondent. The evidence supports a finding that claimant was simply attending a basketball game as a spectator and not for any work-related purpose. Therefore, the accident did not arise out of or in the course of claimant’s employment with respondent. The denial of benefits by the ALJ is affirmed.

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,

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<sup>4</sup> *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).

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

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.

**CONCLUSIONS**

Claimant has failed to prove that he suffered an accident which arose out of and in the course of his employment with respondent. The denial of benefits by the ALJ is affirmed.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated July 28, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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

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HONORABLE GARY M. KORTE

c: William L. Phalen, Attorney for Claimant  
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge