

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

<b>LEE ANN HECKMAN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>AMES CONSTRUCTION, INC.</b>	)	
Respondent	)	Docket No. <b>1,050,602</b>
	)	
AND	)	
	)	
<b>TRAVELERS CASUALTY INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the May 19, 2010 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment with respondent. The ALJ ordered respondent to pay temporary total disability compensation and medical treatment.

Respondent requested review. Respondent's application for review raised the issues of whether claimant suffered accidental injury arising out of and in the course of employment and whether the ALJ exceeded his jurisdiction in awarding temporary total disability compensation. In its brief to the Board, respondent does not address the issue of accident arising out of and in the course of employment and only argues that because claimant's notice of intent did not request temporary total disability compensation, the ALJ exceeded his jurisdiction by awarding such benefits.

Claimant argues that the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

Claimant was employed as a flagger/cleaner for respondent. As a flagger her job was to stand by the side of the road with a metal sign which either stopped or slowed traffic through a road construction area.

On April 27, 2010, claimant was flagging traffic when a rock flew up and hit her in the head and as she reacted by grabbing her face the wind blew her metal sign which also struck her in the head. Claimant thought she blacked out for a few seconds but when she revived she began vomiting. Michael Brown, respondent's survey manager, testified claimant waved for him to come over to her. He said that when he got to her, claimant was on her knees and slumped over her lunch pail. Claimant told him that she had been hit by a rock. He contacted Carla Brown, respondent's safety coordinator, who transported claimant to respondent's headquarters. Claimant completed an incident report. But she did not request medical treatment. Ms. Brown testified that when she met with claimant she was told that claimant had been hit in the forehead with a rock. Ms. Brown took a couple of pictures of claimant the same day as the accident. And noted she did not observe any abrasions or swelling at that time.

The next day claimant's foreman and Ms. Brown went to claimant's home to check on her. The claimant's version and Ms. Brown's version of the conversation differed regarding whether claimant requested medical treatment. Ms. Brown testified that claimant did not ask for medical treatment. But she agreed she noticed a small swollen area on claimant's forehead. And on April 29, 2010, claimant was terminated from respondent's employ.

Claimant requested medical treatment on April 30th and May 3, 2010, with no response from respondent. So she sought medical treatment on her own at Lawrence Memorial Hospital's emergency room. Claimant testified that she is currently still having headaches, pain into her neck, and blurred vision in her right eye as well as not being able to keep foods down. She further testified she did not have any of these problems before her accident.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>1</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>2</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>3</sup> The existence, nature and

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<sup>1</sup> K.S.A. 2009 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>2</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>3</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

extent of the disability of an injured workman is a question of fact.<sup>4</sup> A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.<sup>5</sup> The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.<sup>6</sup>

Claimant testified that as she was performing her work duties she was struck in the head by a rock. Ms. Brown did not believe claimant's story apparently because claimant did not initially have any contusions on her face after the incident. And Ms. Brown denied that claimant had requested treatment the next day after the incident. Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In awarding claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed claimant's testimony over the respondent's representative's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Based upon the evidence compiled to date, this Board Member concludes claimant has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment.

Respondent next argues the ALJ exceeded his jurisdiction awarding claimant temporary total disability compensation when those benefits were not requested in the claimant's notice of intent as required by statute.

K.S.A. 44-534a(a)(1) provides in pertinent part:

At least seven days prior to filing an application for a preliminary hearing the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing.

The claimant's notice of intent only contained a request for immediate medical treatment. The preliminary hearing was held on May 18, 2010. Before the hearing commenced, there was an off-the-record discussion. After the parties went on the record, the ALJ stated:

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<sup>4</sup> *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

<sup>5</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>6</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

**JUDGE AVERY:** Okay. Counsel, we had discussions off the record. Claimant is seeking medical treatment with Doctor Hirschman with all referrals, temporary total from 4-27-10 until further order. There has been an agreement on average weekly wage of \$604 per week for today's purposes. This was an alleged 4-27-10 injury. The respondent denies claimant met with personal injury by accident on that date. Respondent denies the alleged accidental injury arose out of and occurred in the course of employment. Respondent admits timely notice. Respondent admits relationship of employer/employee, coverage by the Act and timely written claim. Any additions, modifications or corrections to that before we get started?

**MR. LYSAUGHT:** No, Judge.

**MR. PRICHARD:** I do not believe so, Your Honor.<sup>7</sup>

It was clear from the recitation of issues that claimant was seeking temporary total disability compensation. And Judge Avery specifically afforded the parties the opportunity to make any corrections to his recitation of the issues. But respondent failed to make a timely objection that claimant's notice of intent did not request temporary total disability compensation.

The Board is not granted original jurisdiction over workers compensation issues but is limited to considering issues initially decided by an administrative law judge.<sup>8</sup> K.S.A. 44-555c(a) limits the Board's review to "questions of law and fact as presented, had and introduced before the administrative law judge." As noted, a review of the record fails to identify any objection to the proceedings raised in a timely fashion by respondent. As the ALJ was not given the opportunity to rule on the objections respondent now raises, the Board will not address such objections on appeal. Stated another way, respondent waived any objections to the procedures or issues to be determined at the preliminary hearing.

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>9</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), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>10</sup>

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<sup>7</sup> P.H. Trans. at 5-6.

<sup>8</sup> K.S.A. 2009 Supp. 44-555c(a).

<sup>9</sup> K.S.A. 44-534a.

<sup>10</sup> K.S.A. 2009 Supp. 44-555c(k).

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 19, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of July 2010.

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DAVID A. SHUFELT  
BOARD MEMBER

c: J. Donald Lysaught Jr., Attorney for Claimant  
Christopher M. Crank, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge