

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

<b>GEORGIA HAVENS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,885
<b>MARVINS FOOD SAVER</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the July 30, 2010, preliminary hearing Order of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) from May 10, 2010, and authorized medical treatment with Dr. Shelton<sup>1</sup> as the authorized treating physician.

Claimant appeared by her attorney, Charles W. Hess of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Daniel S. Bell of Kansas City, Missouri.

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 21, 2010, with attachments, and the documents filed of record in this matter.

**ISSUES**

Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? These issues are not directly addressed by the ALJ in his Order of July 30, 2010. However, the fact that he awarded benefits in the form of medical treatment and TTD infers that his determination of these issues was in

---

<sup>1</sup> Order (July 30, 2010) at 1.

claimant's favor. Respondent contends that claimant has a long history of upper extremity, shoulder and back complaints and claimant's denial of this history negatively impacts her credibility on these issues. Claimant contends that the description of the accident and resulting injury are uncontradicted in this record. Therefore, any preexisting conditions would be irrelevant once it is established that claimant aggravated or accelerated the prior physical problems.

#### FINDINGS OF FACT

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

Claimant began working for respondent on April 1, 2010, in its deli department, preparing salads, cooking and cleaning the deep fryers. On April 22, 2010, while removing the filters from the fryers, claimant suffered an injury to her shoulders, neck, and low back. There were no witnesses to this accident. Claimant did not tell anyone of the incident that night. Instead, claimant said that she told Tracy,<sup>2</sup> the deli manager, the next day and later told Jerry Mitchell, the store manager. Danny Williams, a co-worker of claimant, testified that he normally lifted the filters for claimant because they were heavy and claimant had, before the date of accident, complained of back pain. However, on the alleged date of accident, he was not available and claimant knew that the filters needed to be cleaned.

When claimant told Mr. Mitchell of the incident, he denied claimant's request for medical treatment. Mr. Mitchell testified at the preliminary hearing that the first time he was made aware of the alleged accident was on the day the accident report was prepared. This Employer's Report of Accident, marked as claimant's exhibit 3 to the preliminary hearing, has a prepared date of April 29, 2010. The report indicates that claimant's back popped when she lifted the fryer bin.

At the preliminary hearing, claimant denied having filed prior workers compensation claims. On cross-examination, it was pointed out that claimant had suffered prior work-related accidents and filed prior claims for injuries to her shoulders, upper extremities, low back and left knee. Additionally, on respondent's exhibit 4 to the preliminary hearing, an Application for Employment, claimant represented that she had never received workers compensation or disability payments and had no physical conditions which might limit her ability to perform the duties of the job for which she was applying. Respondent contends that these prior injuries and claims cast doubt on whether claimant actually suffered the injury alleged. Additionally, claimant's failure to admit to the prior injuries and claims casts doubt on claimant's credibility. Thus, respondent further argues claimant should be denied benefits for this alleged accident.

---

<sup>2</sup> P.H. Trans. at 12.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an evaluation on June 9, 2010. Claimant provided Dr. Murati with a history of a prior rotator cuff surgery which she alleged was not work related, but provided no other history of accident or injury beyond that alleged to have occurred while working for respondent. Claimant was diagnosed with myofascial pain syndrome of the cervical and thoracic paraspinals, low back pain with radiculopathy, bilateral carpal tunnel syndrome, an apparent re-tear of the rotator cuff and a permanent aggravation of claimant's right thumb MCP and CMC DJD. Dr. Murati opined that all of claimant's current diagnoses are the result of the work-related injury on April 22, 2010.

### 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>3</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>4</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>5</sup>

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>6</sup>

---

<sup>3</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>6</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).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>7</sup>

In this instance, the description of the accident as provided by claimant is uncontradicted due to the fact there were no witnesses to the incident. In addition, the activity described by claimant was one which she was required to perform as part of her job. While it was the practice of Danny Williams, claimant's co-worker, to perform that task for claimant, he was not present on the date of the alleged accident and claimant was forced to clean the filters herself.

This Board Member acknowledges that claimant has a long history of problems very similar to the ones alleged to have resulted from this accident. However, the existence of prior problems will not cause a claimant to lose workers compensation benefits if a work-related aggravation occurs.

Claimant does not come across as the most credible in this matter. But claimant's testimony, coupled with the medical opinion of Dr. Murati, the only medical causation opinion in this record, persuades this Board Member that claimant did experience the accident as described. Therefore, the preliminary award of benefits by the ALJ will be 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>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.

#### **CONCLUSIONS**

Claimant has proven, by a slim preponderance of the credible evidence, that she suffered the accident and resulting injuries on April 22, 2010, as claimed, and that the accident did arise out of and in the course of her employment with respondent. Therefore, the preliminary award of benefits is affirmed.

---

<sup>7</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

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

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated July 30, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

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

---

HONORABLE GARY M. KORTE

c: Charles W. Hess, Attorney for Claimant  
Daniel S. Bell, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge