

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

JAMES K. CURRY)	
Claimant)	
VS.)	
)	Docket No. 1,051,135
DURHAM D & M, LLC)	
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the February 18, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

Whether the Administrative Law Judge erred in finding claimant was an employee on the date of accident.

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:

This is the second time this claim has come before the Board. In an August 12, 2010, preliminary hearing Order for Compensation entered in this claim, the ALJ found that claimant suffered an injury from a series of accidents that arose out of and in the course of employment. He found the date of accident to be June 14, 2010, the date of written notice to respondent, and, accordingly, found notice to be timely. The ALJ ordered temporary total disability benefits to be paid commencing June 14, 2010, until further order, or until claimant has been certified as having reached maximum medical improvement, or until claimant has returned to gainful employment, whichever occurs first. The ALJ further ordered respondent to provide claimant with medical treatment with Dr. Curtis.

Respondent appealed the August 12, 2010, Order for Compensation to the Board and argued the ALJ erred in finding claimant had an accident date outside the series alleged by him. Respondent also argued claimant failed to give timely notice. In an Order dated October 28, 2010, a member of this Board affirmed the ALJ's Order for Compensation.

Respondent filed an Application for Preliminary Hearing on November 22, 2010, and a preliminary hearing was held on February 17, 2011. At that hearing respondent argued claimant was no longer an employee of the respondent on June 14, 2010. At the February 17, 2011, preliminary hearing Clinton Pepper, a safety training supervisor with the employer, testified that claimant had been terminated in October of 2009.¹ Claimant admits he was no longer employed by respondent on June 14, 2010.

The ALJ stated in the preliminary hearing Order dated February 18, 2011, that "[t]he accident date [June 14, 2010] is a legal fiction established by statute. K.S.A. 44-508(d)."² The legislature created K.S.A. 44-508(d) and the Kansas Supreme Court in *Bergstrom*³ requires a literal reading of that statute. K.S.A. 2009 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

¹ P.H. Trans. (Feb. 17, 2011) at 6.

² ALJ Order (Feb. 18, 2011) at 1.

³ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

Respondent's argument that claimant was not employed by the respondent on the date of accident ignores the fact claimant became injured during the period of his employment. The ALJ found claimant suffered a series of accidental injuries that arose out of and in the course of his employment and a member of this Board affirmed that decision. K.S.A. 2009 Supp. 44-501(a) specifically makes an employer liable to pay compensation to a worker where he or she suffers personal injury by accident arising out of and in the course of employment.

This issue was previously addressed by the Board in *Colbert*,⁴ wherein the respondent argued the claimant (who alleged a repetitive series injury) was not an employee on the date of accident. Because of the legal fiction created by K.S.A. 44-508(d), one of the potential dates of accident was determined to be after the claimant was no longer working for the respondent. A member of this Board held:

Respondent contends that claimant was not an employee on the date of accident. Respondent does not deny that claimant was working for it up to the last day on May 4, 2010, just that the date of accident occurred after claimant left respondent's employ. The above analysis defeats this argument. The date of accident is a legal fiction when dealing with a series of microtraumas. While the end result of a date of accident being after claimant last worked for respondent seems strange, the legislative intent in trying to give guidance for determining the date when dealing with a long series of traumas is understandable. Both the Kansas legislature and the Kansas courts have struggled with this dilemma for decades.⁵

Accordingly, this Board Member finds there was an employer-employee relationship when claimant suffered his series of accidental injuries.

In its Application for Review, respondent listed "Whether the court erred [by] not establishing the temporary total rate at the statutory minimum, as the claimant had no earnings for the 26 weeks prior to the date of the alleged accident"⁶ as an issue for review. Although respondent also noted this issue in its Notice of Intent filed with its Application for Preliminary Hearing on November 22, 2010, the issue was not raised at the February 17, 2011, preliminary hearing and ALJ Avery did not address it in the February 18, 2011, Order. Additionally, respondent did not address this issue in its brief for this appeal. This issue is considered abandoned at this juncture of the proceedings. Moreover, this is an appeal from a preliminary hearing order. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred

⁴ *Colbert v. Rubbermaid, Inc. a/k/a Newell Rubbermaid*, No. 1,050,684, 2010 WL 4449317 (Kan. WCAB Oct. 29, 2010).

⁵ *Id.*

⁶ Application for Review (filed Feb. 22, 2011) at 1.

in his finding that temporary total disability benefits were awarded or that the amount of weekly temporary total disability benefits is incorrect is not a jurisdictional issue this Board can consider.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

CONCLUSION

(1) There existed an employer-employee relationship between respondent and claimant when claimant suffered his series of accidental injuries with a date of accident of June 14, 2010.

(2) This is an appeal from a preliminary hearing Order and this Board does not have jurisdiction pursuant to K.S.A. 44-534a(a)(2) to address the issue of the rate of temporary total disability payments.

ORDER

WHEREFORE, the undersigned Board Member affirms the February 18, 2011, Order entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2010 Supp. 44-555c(k).