

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

**PETER JOSEPH FOY** )  
Claimant )  
VS. )  
**KANSAS COACHWORKS, LTD.** )  
Respondent )  
AND )  
**REPUBLIC INDEMNITY CO. OF AMER.** )  
Insurance Carrier )

Docket No. **1,051,265**

**ORDER**

Claimant requests review of the September 17, 2010 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

The claimant alleged he suffered repetitive injuries to his back through his last day worked for respondent. But he did not give notice of a work-related injury or request medical treatment until after he voluntarily quit his employment due to a dispute regarding a drug test.

The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that his accidental injury arose out of and in the course of his employment. Claimant requests review of whether the ALJ erred in finding that claimant did not have a compensable work injury. Respondent argues the ALJ's Order should be affirmed.

The sole issue raised on this appeal from a preliminary hearing is whether claimant met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent.

**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 collision technician for respondent. His job consisted of metal and body work which included wrecked vehicles, frame alignments, and replacing panels. Claimant was required to lift and kneel on a daily basis for removing or installing doors, bumpers, rear lift gates, and hatches.

Claimant testified that he started having a stabbing pain in his lower back and then it went to his right hip and thigh. He also began having a stinging sensation in his left buttocks. Claimant testified the pain would wax and wane. Claimant testified that the pain started about a year and a half before he finally sought medical treatment. And claimant agreed that his back pain was really bad for a year before he asked for medical treatment. Claimant further testified that respondent's president was aware he had back pain and that his back hurt when lifting heavy items. He stated that everyone at work knew he had back pain including Beverly Denk and David Irwin. But claimant also agreed that he did not provide notice that his job was causing his back to hurt until after he quit work.

Catherine Smith, respondent's president, testified that over a three month time period she had noticed a change in claimant's demeanor and he had made multiple mistakes while working. She also was informed by a couple of claimant's co-workers that claimant was smoking marijuana in respondent's parking lot on his lunch hour. Consequently, she met with claimant and asked him to take a drug test. The meeting was in the morning and later that afternoon claimant went to OHS CompCare to take the test. But the initial sample claimant provided for urinary analysis was insufficient to test and claimant was asked to stay until he could provide an additional sample. Claimant became angry and left. When contacted by Ms. Smith he quit his job. Claimant admitted that had he completed the drug test it would have been positive for marijuana.

Claimant testified that he faxed a request for medical treatment within 10 days of his last day worked. When no medical treatment was provided claimant sought treatment with Dr. Denny Thomas. When claimant saw Dr. Thomas on April 26, 2010, he complained of lower back pain which radiates into the right leg for the past two years. The doctor's medical report further contained a history that "Used to work at Kansas Coachworks. He quit one month ago, which he states was not at all back related."<sup>1</sup> Claimant was referred for an MRI which revealed a moderate posterior disk bulge at L4-5. At the follow-up visit with Dr. Thomas on May 10, 2010, claimant told the doctor that his back pain was work-related.

At the request of claimant's attorney, Dr. Edward Prostic performed an examination and evaluation of claimant on May 25, 2010. Dr. Prostic opined that during the course of claimant's employment with respondent he suffered repetitive trauma to his low back which aggravated the degenerative disk at L4-5.

Claimant then sought unemployment benefits and filled out a multiple page application which never mentioned a back injury or back pain. And the application

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<sup>1</sup> P.H. Trans., Resp. Ex. A.

specifically noted, regarding the request for a drug sample, that claimant had not hurt himself at work or been involved in an accident.

Ms. Smith contradicted claimant's testimony that he had told her about his back pain. She testified she was not aware that claimant had any complaints of back pain and that claimant had never told her that he was unable to perform his job duties because of back pain. She further testified she had not intended to terminate claimant's employment had he tested positive and instead she would have provided rehabilitation as she had for other employees. Finally, she noted she was present at claimant's unemployment hearing and when he was asked if he had ever sustained a work-related injury his response was that he never got hurt on the job.

David Irwin, respondent's shop foreman, testified that he could not recall any occasion when claimant had discussed back pain or that claimant had indicated he could not perform job duties because of back pain.

Beverly Denk, respondent's vice-president, testified that she could not recall that she was ever made aware claimant had complaints of back pain or that he could not perform certain job duties because of back pain.

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>2</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>3</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>4</sup>

The Board finds that 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 determining that claimant had failed to meet his burden of proof that he sustained accidental injury arising out of and in the course of his employment the ALJ believed respondent's representatives testimony over claimant's testimony. The Board concludes that some deference may be given to the ALJ's

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

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

<sup>4</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

The ALJ analyzed the evidence and noted: (1) when claimant first sought treatment he did not mention a work-related injury; (2) although he alleged he complained about back pain to various co-workers they all denied that he had ever mentioned back pain; and (3) claimant did not provide notice of accidental injury or file a workers compensation claim until after he failed to provide an adequate sample for a drug test and had then voluntarily terminated his employment. Consequently, the ALJ determined claimant had not met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent.

Moreover, when claimant was applying for unemployment compensation he neither mentioned back complaints nor a work-related back injury. And it is difficult to understand why claimant waited a year to seek medical treatment for a back condition described as really bad. Especially when he had received medical treatment for a work-related hand injury without any adverse employment consequences. This Board Member finds claimant has failed to meet his burden of proof that he suffered a work-related accidental injury.

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, 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>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated September 17, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this 23rd day of November 2010.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Michael P. Bandrè, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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

<sup>6</sup> K.S.A. 2009 Supp. 44-555c(k).