

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

CHARLES FLOYD, II)	
Claimant)	
VS.)	
)	Docket No. 1,052,522
EMPORIA ROOFING CO., LTD)	
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) requests review of the September 25, 2010, Order for Compensation entered by Administrative Law Judge Brad E. Avery.

APPEARANCES

Gary K. Albin, of Wichita, Kansas, appeared for the claimant. Michael C. Helbert, of Emporia, Kansas, appeared for respondent. Derek R. Chappell, of Ottawa, Kansas, appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The record consists of the May 31, 2011, Deposition of Charles W. Floyd, II (Claimant); the June 3, 2011, Preliminary Hearing Transcript; the January 17, 2012, Discovery Deposition of Kathleen Ausemus; the January 17, 2012, Discovery Deposition of Sandra Buckbee, with attached exhibits; the January 17, 2012, Discovery Deposition of Stanley R. Ausemus, with attached exhibits; the January 20, 2012, Preliminary Hearing Transcript, with attached exhibits; the September 20, 2012, Preliminary Hearing Transcript, with attached exhibits; the March 26, 2012, court ordered IME report of Glenn M.

Amundson, M.D., and the documents of record filed with the division. The parties agreed to include all of this as part of the record.

ISSUES

The ALJ found claimant suffered an accident injury arising out of and in the course of his employment. He also found claimant a credible witness and held that his testimony was consistent with the medical records. The ALJ went on to order temporary total disability at \$240.01 per week commencing February 9, 2010, until further order, until claimant reaches maximum medical improvement or until claimant returns to gainful employment. The ALJ also ordered medical treatment with Dr. Amundson to be paid by respondent until further order or until claimant reaches maximum medical improvement.

The Fund requests review of whether claimant suffered accidental injury and whether that injury arose out of and in the course of his employment. The Fund argues the ALJ's award of temporary total disability and medical is unwarranted and inequitable given the fact that claimant has never been given an off-work note from any medical provider he has seen for his alleged work-related accident. Additionally, claimant's testimony is not credible enough to satisfy his burden of proof that he suffered a work-related accident in October 2007. The Fund contends the ALJ's Order should be reversed.

Respondent argues that claimant did not satisfy his burden of proof of an alleged work-related accident or that it occurred in the course of his employment. Therefore the ALJ's Order should be reversed.

Claimant argues the Order should be affirmed.

FINDINGS OF FACT

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

Claimant worked for respondent for six months in 2007 from April to October. Claimant applied for the job with respondent through its owner, Charles Le Clair, who also happened to be claimant's next door neighbor at the time. Claimant testified that he had worked on six or seven roofing jobs prior to being hired by respondent. Those prior jobs were with family and friends. They were not actual employment situations. When hired by respondent, claimant was told he would be making \$9 an hour. Claimant started with residential work and after about four months was moved to industrial work. Claimant's supervisor in the residential jobs was Brian. His duties involved tearing off the old shingles and applying new tarp and shingles. He also helped with job cleanup.

Claimant testified that on October 10, 2007, he suffered injury to his low back and right leg while working on a commercial roof. He testified he was working with Ron

Yankovich¹ and Duane Arndt. Ron was the job supervisor. Claimant's duties that day included finishing the roof by gluing down rubber pieces. The materials for the roof were to be placed on the roof by crane. However, on this job they ended up short on material. A 20 by 40 foot rubber piece was cut and folded and claimant was asked to carry the rubber up a ladder to the roof of a two story building. Ron was behind claimant to keep him from falling. As he was making his way up the ladder his right foot slid off the third rung and he twisted. Claimant's right leg slid all the way to the ground. But his left leg remained on the third rung of the ladder with the rubber still on his shoulder. The piece of rubber weighed 150 to 200 pounds. Claimant didn't drop the rubber because Ron was right behind and it would have killed him.² Claimant testified that Ron helped steady him when he nearly fell from the ladder.

As the result of this incident, claimant felt a burning and pulling sensation in the lower right side of his back at the belt line. He thought he had pulled a muscle. Claimant took a deep breath and carried the rubber the rest of the way up the ladder to the roof. Claimant testified that he was not asked to carry anything else that day because Ron and Duane could tell that his back was hurting. He did not complain about his pain, but did tell them that he felt like he had pulled a muscle or something. At the end of the day, on the ride back to the shop, claimant's back started to tense up, but he didn't say anything. He clocked out and went home.

The next day, October 11, 2007, claimant awoke with numbness in his right leg. He called Charles Le Clair and reported that he thought he had pulled a muscle the day before. He asked permission to take the day off to seek treatment at the health department because he doesn't have insurance. Claimant did not mention that it was work-related. He was asked to keep Mr. Le Clair informed.

Claimant went to Flint Hills Community Health Center on October 10, 2007. The medical records from that date indicate that claimant had been having the pain in his back for three days, with the injury allegedly occurring on a Wednesday.³ Claimant is not sure of the exact date of injury, but is sure he sought treatment the next day.⁴ He doesn't remember telling the Health Center that he had the pain for three days before he came in. He was being worked in at the Health Center so it is possible that a few days passed before he was seen. He could not be sure since it was three years ago. Claimant was examined and told that he likely pulled a muscle or tendon. He was treated and told to return in seven days for an MRI if he was not better. Claimant is alleging that he was

¹ Later identified as Ron Youniacutt.

² Claimant's Depo. (May 31, 2011) at 35-36.

³ P.H. Trans. (Jan. 20, 2012), Cl. Ex. 1.

⁴ Claimant's Depo. (May 31, 2011) at 42.

experiencing right leg pain at the time of the exam. However, the Medical Center records contain only indications of numbness in the fourth and fifth toes of claimant's left foot. The right leg is not mentioned. Claimant's straight leg test was positive on the left side.

The numbness and tingling in claimant's right leg went down to his toes. He also had tingling in his left foot. Claimant had an MRI on October 16, 2007, which displayed a slight disc protrusion at L4-5 on the left side. After the MRI, the technician recommended he take the results to an attorney, if this was a work-related injury. Claimant went to see Stanley Ausemus that same day and hired him to handle his workers compensation claim. The written claim letter from Mr. Ausemus was dated October 16, 2007, and identified a date of accident of October 3, 2007. A note dated October 19, 2007, from Mr. Ausemus' office indicates Mr. Le Clair came into the office and reported that claimant had advised the foreman that he fell off a roof while working for himself. "Charlie says he hasn't worked for him for several weeks."⁵

Mr. Ausemus sent claimant to see Dr. Stein on February 9, 2010. At that time claimant's chief complaints were back pain with right flank, rib pain and pain down both lower extremities, right greater than left. Claimant's right knee reflex was mildly decreased. Dr. Stein reviewed the MRI report from 2007, noting the left midline disk protrusion at L4-5. During the heel-toe walk claimant doubled over acutely, holding his right rib cage. Claimant gave Dr. Stein a history of injuring both his low back and his right rib cage from the work-related accident in October 2007. Dr. Stein was unable to provide a specific diagnosis or explain claimant's symptoms from the radiology report and MRI findings, coupled with his examination of claimant.⁶

Claimant has not worked since October 2007 and hasn't looked for work as he doesn't feel he is physically able to work. Claimant was under the impression that he was not to go back to work until his claim was taken care of and to avoid further injury.⁷ He also doesn't feel that anyone would hire him. Claimant has stiffness in his back when he wakes up and if he sits for too long. Sometimes his right leg goes numb from the groin to his knee and then he gets tingling in his feet.⁸ He testified it feels like someone is holding a blowtorch to the back of his right shoulder. Claimant's right shoulder started displaying symptoms in 2010. He thought it was a pinched nerve. Claimant denies having any back or psychological problems prior to October 2007. Claimant testified that he had not seen a physician from 2000 to 2007 when he suffered his alleged work accident and went to the

⁵ Stanley R. Ausemus Depo. (Jan. 17, 2012), Ex. 2.

⁶ *Id.*, Ex. 5.

⁷ P.H. Trans. (Sept. 20, 2012) at 10.

⁸ Claimant's Depo. (May 31, 2011) at 55.

health department.⁹ Claimant has more recently seen a physician as part of his attempt to obtain social security disability benefits for his back.

When claimant was working for respondent he would, on occasion, work jobs on the side for friends and anyone who needed help. On approximately October 5, 2007, claimant was helping his friend Lam Lomboy-Boone tear shingles off his one story house. He did not help with the re-roofing. He was not paid for his efforts. He did tear the back of his leg on a nail while ripping the shingles off. He did not seek treatment as it was just a scratch. Claimant also did some roofing work for his uncle Don Mathena, his mom and stepdad, and Sandra and Sam Buckley. He suffered no other injuries while working those jobs.

Claimant tries to avoid strenuous activity. He no longer drives and let his license expire. He testified that, since he met with Dr. Stein, it is getting tougher to perform activities of daily living. Claimant is a one to two pack a day smoker. He no longer drinks alcohol due to financial reasons, although Dr. Stein's February 9, 2010, report indicates claimant drinks 24 beers per week. His mother pays all of his bills and pays for his food.

Before working for respondent, claimant worked as a brick tender for Heartland Masonry for a year and a half. Claimant also did body work for Harris Auto Body from 1991 to 2001 and worked for Dolly Madison as a wrapper operator for six or seven months in between working for Heartland and Harris Auto Body. Claimant denies any injuries or accidents while working at the auto body shop or for Heartland.

Sandra Buckbee, claimant's mother, knew claimant was claiming an injury to his back in October 2007 while working, because he called her and mentioned he had fallen from a ladder. Ms. Buckbee testified claimant asked what he should do and she advised claimant to go to the health department. Claimant wasn't able to get into the health department right away and he asked Ms. Buckbee to come into town and get him an appointment and take him in. After claimant was seen at the health department, he came out with a note that stated that he needed to be off work. He immediately took the note to Mr. Le Clair. Claimant and Mr. Le Clair talked for a few minutes and when he got back in the car, he told his mother that Mr. Le Clair told him to call in when he was feeling better. Ms. Buckbee witnessed claimant talking to Mr. Le Clair and saw claimant give him the note from the health department. This exchange occurred in Mr. Le Clair's shop, behind his house. However, Ms. Buckbee acknowledged that she had never met Mr. Le Clair and stayed in the car during the exchange. That was her only contact with Mr. Le Clair.

Kathleen Ausemus, wife of attorney Stanley Ausemus, assists her husband's law practice by helping with the workers compensation cases. She testified that she helps with the clients. It is part of Mrs. Ausemus' job to organize everything in the firm's workers

⁹ *Id.* at 18-19.

compensation files. Mrs. Ausemus is familiar with Charles Le Clair, the respondent in this appeal, because he has done work on the firm's building and they have had dealings with him for many years.

It was her impression that Mr. Le Clair did not believe claimant was injured while working for him. Mr. Le Clair came into the office to speak with Mr. Ausemus on October 18 or 19, 2007, but he was unable to speak with Mr. Ausemus who was out of the office. Ms. Ausemus spoke with him instead. Mr. Le Clair stated he knew claimant had been injured. But he believed that it was on another job as claimant had not worked for Mr. Le Clair for three weeks. Mrs. Ausemus created a memo to the file memorializing her conversation with Mr. Le Clair. Mr. Le Clair signed this memo on March 1, 2012.¹⁰

Stanley Ausemus testified that the claimant had come to him in October 2007 inquiring how to file a workers compensation claim. Mr. Ausemus's staff prepared the paperwork and sent out a demand letter to respondent on behalf of claimant. Mr. Charles Le Clair respondent's owner, came into the office on October 19, 2007, stating that claimant didn't get hurt working for respondent, but rather while working for someone else. Mr. Ausemus felt uncomfortable representing claimant. He was concerned about filing a potentially fraudulent claim without more information.

Mr. Ausemus contacted claimant requesting more information before filing the application for hearing. Claimant came to Mr. Ausemus' office on October 23, 2007, and advised Mr. Ausemus that he had witnesses. Claimant never produced the witnesses and was not heard from for two years regarding this workers compensation claim.

Claimant alleges he kept in weekly contact with Mr. Ausemus between October 2007 and January 2010 and was told that the respondent's work comp attorneys would not contact Mr. Ausemus and that is why there was no activity on his claim for two years.¹¹

After two years of no contact, claimant returned to Mr. Ausemus' office and provided information supporting his claim. But Mr. Ausemus was still not sure of the claim because of the statement from Mr. Le Clair insisting claimant was never injured. The job foreman, Ronald Youniacutt, also provided a statement saying claimant never reported an on the job injury. Claimant never provided a reason for waiting two years to pursue a claim, stating only that his claim for social security disability had been denied.

Mr. Ausemus admitted that he has a business/personal relationship with Mr. Le Clair. Mr. Le Clair has done roofing work for Mr. Ausemus' office building, home and father's building. The claim was ultimately filed on claimant's behalf by another attorney.

¹⁰ Stanley R. Ausemus Depo. (Jan. 17, 2012), Ex. 3.

¹¹ P.H. Trans. (Jan. 20, 2012) at 30-31.

Claimant acknowledged there was a period of time when there was little communication between himself and his attorney, Stanley Ausemus, because claimant was attempting to obtain social security disability compensation. His initial claim was denied and he filed an appeal with the aid of the Parmele Law Office. As soon as claimant learned his social security disability claim had been denied he turned his attention back to his workers compensation claim. Claimant contacted Mr. Ausemus, who sent him to Dr. Stein.

When claimant was examined at the Flint Hills Community Health Center on October 10, 2007 his symptoms were in his low back with numbness in the fourth and fifth toes of claimant's left foot. There was no indication of right rib or right leg pain in 2007. The MRI scan of the lumbar spine from 2007 indicated a small protrusion of the disk to the left midline at L4-5. When Dr. Stein examined claimant in February 2010 claimant's complaints were to the low back, right-side of the ribs and right thigh and foot. Claimant's leg pain was bilateral, but with the right pain greater than the left. Dr. Stein reported that the radiology report on the lumbar MRI scan did not explain claimant's symptomatology and he had no specific diagnosis to explain claimant's symptomatology.

Claimant sought chiropractic treatment in October 2011. Claimant testified that he felt he would benefit from spinal decompression and mentioned this to the doctor when he went to the Back To Health Chiropractic clinic in September 2011. Claimant received a series of chiropractic adjustments through October and November, 2011. However, the office notes fail to identify the reason for those adjustments. They were paid for by claimant's mother Ms. Buckbee.

Claimant reported physical problems of numbness in his right leg, sharp pain in his low back, and stiffness when he wakes up in the morning. Claimant testified that the chiropractic therapy he received relieved the sharp back pain and he is able to twist and bend a little bit better. Claimant was told that he could come in as needed, as often as once a week or as little as every 6 months. Claimant would probably go for further treatment if he could afford it as he continues to have a pulling sensation in his back. He testified that this sensation is not bad enough that he can't deal with it. He acknowledged that the right leg numbness resolved.

Charles Le Clair, owner of Emporia Roofing, testified that claimant previously worked for the company as a roofer. Mr. Le Clair was first notified that claimant was claiming an on the job injury from Stanley Ausemus. Mr. Le Clair had previously done some roofing work for Mr. Ausemus. He assured Mr. Ausemus that claimant had not been injured on the job and provided a statement detailing what he believed the situation to be. Mr. Le Clair testified that when he learned claimant was alleging a work injury, he went in to the Ausemus Law office on October 19, 2007.

Mr. Le Clair advised Mr. Ausemus that claimant was working on another job at 720 West Street in Emporia and that was not an Emporia Roofing job. He testified that Mr. Youniacutt gave claimant a ride to that address on more than one occasion. In fact, Mr. Youniacutt took claimant to that house the day before the alleged date of accident with respondent. Mr. Youniacutt did not testify in this matter, but did provide a statement dated March 1, 2010, which was admitted into evidence at the September 20, 2012, preliminary hearing.¹² Mr. Youniacutt denied that claimant ever reported a job related injury to him. The statement provided by Mr. Youniacutt discussed a back injury suffered by claimant when he fell off a roof at a house claimant was working on, separate from respondent's job.

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.¹³

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.¹⁴

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.¹⁵

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

¹² P.H. Trans. (Sept. 20, 2012), Resp. Ex. A; Stanley R. Ausemus Depo. (Jan. 17, 2012), Ex. 4.

¹³ K.S.A. 44-501 and K.S.A. 44-508(g).

¹⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁵ K.S.A. 44-501(a).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”¹⁶

Claimant alleges an injury on October 10, 2007, while working for respondent. The ALJ, in an Order For Compensation, granted benefits after finding that claimant did suffer an accidental injury, arising out of and in the course of his employment with respondent and that claimant was a “credible witness and his testimony was consistent with the medical records”. Normally, the Board will give some deference to a finding of credibility of a witness by an ALJ. However, in this instance, several questions remain. Claimant alleges a date of accident on October 10, 2007, yet the medical reports of that date from Flint Hills Community Health Center indicate claimant’s date of accident occurred three days prior. Additionally, the original October 16, 2007, letter from Mr. Ausemus used a date of accident of October 3, 2007.

On October 19, 2007, Mr. Le Clair provided a statement to the Ausemus Law Firm denying the accident occurred and stating that claimant had not worked for him for three weeks. Claimant promised to provide Mr. Ausemus with witnesses to the accident and then had no contact with Mr. Ausemus for over two years. Claimant’s only excuse for this absence was that he was pursuing social security disability. Both Mr. Le Clair and Mr. Youniacutt provided statements to the court denying the accident occurred and alleging that claimant was actually working at a different location on the alleged date of accident. Mr. Youniacutt even gave claimant a ride to that location on more than one occasion. Additionally, claimant described the accident as having occurred directly in front of Mr. Youniacutt. Yet, Mr. Youniacutt denied any knowledge of the alleged accident.

Finally, and most significantly, Dr. Stein provided his report of February 9, 2010, which casts doubt on claimant’s injury claims. When claimant was examined in October 2007 his symptoms were in the low back with numbness in the fourth and fifth toes of claimant’s left foot. There was no indication of right rib pain in 2007. The MRI scan of the lumbar spine from 2007 indicated a small protrusion of the disk to the left midline at L4-5. When Dr. Stein examined claimant in February 2010 claimant’s complaints were to the low back, right-side of the ribs and right thigh and foot. Claimant’s leg pain was bilateral, but with the right pain greater than the left. Dr. Stein reported that the radiology report on the lumbar MRI scan did not explain claimant’s symptomatology and he had no specific diagnosis to explain claimant’s symptomatology.

For the above reasons, this Board Member finds that claimant has not satisfied his burden of proving that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The award of benefits in this matter is reversed.

¹⁶ *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).

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.¹⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 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 personal injury by accident which arose out of and in the course of his employment with respondent. The award of preliminary benefits in this matter is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order for Compensation of Administrative Law Judge Brad E. Avery dated September 25, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

¹⁷ K.S.A. 2011 Supp. 44-534a.