

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

<b>ROBERT W. GARRITY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>BRIDGES</b>	)	
Respondent	)	Docket No. 1,052,823
	)	
AND	)	
	)	
<b>WESCO INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (Bridges) requested review of the June 24, 2011, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment. The ALJ further found that claimant did not give Bridges notice of a work-related injury until August 20, 2010. The ALJ found claimant's statutory date of accident to be October 4, 2010, the date claimant gave written notice of his accident. But the ALJ stated it was clear claimant was giving notice of an accident that occurred on June 24, 2010, during a period he worked for Bridges, and held that Bridges was responsible for providing claimant with workers compensation benefits. Dr. James Lin was appointed as claimant's treating physician for treatment of his hernia. Bridges was ordered to choose an authorized treating physician to treat claimant for his other affected body parts.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 13, 2011, Preliminary Hearing and the exhibits and the discovery deposition of Robert W. Garrity taken November 29, 2010, together with the pleadings contained in the administrative file.

ISSUES

Bridges argues that claimant was not within the course of his employment at the time of his alleged injury on June 24, 2010. Rather, Bridges contends claimant was on the baseball field that evening performing a volunteer activity and was outside the scope of his employment. Bridges also claims that claimant was involved in horseplay at the time of the incident, and that activity did not arise out of claimant's employment, even though he was on the clock at the time of the alleged incident.

Bridges also contends it was not given timely notice of claimant's claimed injury of June 24, 2010, and there was no just cause to extend the 10-day notice period. Bridges argues the ALJ exceeded his jurisdiction in finding claimant's statutory date of accident to be October 4, 2010, because the allegations of injury involve a single traumatic event rather than a series. In the event the Board finds claimant suffered a series of repetitive traumas, the claim should be the responsibility of Mosaic, as claimant's last exposure would have occurred during his employment with Mosaic.

Claimant argues he sustained a series of injuries by accident arising out of and in the course of his employment with Bridges and Mosaic beginning June 24, 2010, and ending his last date of employment on July 30, 2010. Claimant contends that at the time of his initial injury on June 24, 2010, he was on the clock working for Bridges. He was on the field after a buddy ball game and was speaking to the parents of one of Bridges' clients about their child, who had become overheated during the game. As such, claimant argues he was performing one of his regular activities of employment. Claimant also asserts he was not engaging in horseplay at the time he was injured but, instead, he was hit from behind by one of Bridges' clients.

Claimant contends he gave Bridges timely notice of the accidental injury by reporting the incident to Sandy Davis within two days of the date of accident and again on July 5, when he spoke with her before going to the emergency room for treatment of his injuries. Claimant also contends he gave notice to Sandy Henry, the assistant supervisor for Bridges' Coffeyville location, within four or five days after the accident.

The issues for the Board's review are:

(1) Did claimant suffer a single date of accident on June 24, 2010, or a series of accidents beginning June 24, 2010, and continuing until his last day worked, July 30, 2010?

(2) Did claimant provide Bridges with timely notice of his alleged accidental injuries from either a single date of accident of June 24, 2010, or a series through his last day worked?

(3) Were claimant's activities at the time of his accident on June 24, 2010, within the course of his employment?

(4) Did claimant's accident on June 24, 2010, arise out of his employment or was it instead the result of horseplay?

(5) If claimant suffered a series of accidents through his last day worked, is Bridges responsible for payment of benefits in this workers compensation claim?

#### FINDINGS OF FACT

In April 2008, claimant began working for Bridges, a community center for developmentally challenged adults, as a direct support assistant. In his job, he was assigned to clients, for whom he would work as a care giver. His job duties included taking his assigned clients to recreational activities and assisting them in whatever activity in which the clients were participating.

On June 24, 2010, claimant had accompanied two of Bridges' clients to a "buddy ball" game. Buddy ball is a program designed so each player on a baseball team has a person beside him or her to be a buddy. The buddy's responsibility is to protect the player from flying balls and other people who might run into them and also to assist the player in participating in the game. When at a buddy ball game, claimant would normally stand by the pitcher, and he did so on June 24, 2010. He could not remember who pitched that night and cannot remember who he supervised.

Taking clients from Bridges' facility to the buddy ball games and participating in the games with them was part of his job. But he also volunteered as a coach of a buddy ball team, which was outside of his duties as an employee of Bridges. Claimant admitted that when he went to the buddy ball game on June 24, 2010, he went in two capacities, one as an employee of Bridges and the other as a volunteer coach. It was not controverted that claimant had clocked in to work at Bridges and was on the clock during the times before, during and after the game.

During the buddy ball game on June 24, one of Bridges' clients<sup>1</sup> became overheated and almost passed out. As soon as the game was over, claimant was speaking with the parents of the client who had become overheated. He and the parents were separated by a fence; he was still on the field and his back was to the infield. Suddenly Brett Mead, another of Bridges' clients,<sup>2</sup> tackled him from behind and knocked him to the ground. Claimant said he became unconscious, and when he woke up his right shoulder had been

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<sup>1</sup> This was not one of the clients for whom claimant was responsible on that evening.

<sup>2</sup> Claimant was not responsible for Mr. Mead on that evening.

dislocated, he was dizzy, and his neck and back were hurting. Claimant denied he and Mr. Mead were engaged in any horseplay and said the incident was unprovoked. He said Mr. Mead, a young man who weighs about 240 pounds, had been involved in previous incidents where he was rambunctious and had pushed people.

Claimant said while he was on the ground, someone who had been at the buddy ball game helped him pop his shoulder back in place. After that, he gathered together his two clients and returned to Bridges in the van. The van was driven by Renee Miller, one of claimant's coworkers. Ms. Miller was the person in charge of Mr. Mead on the evening of June 24. Claimant asked Ms. Miller if she was going to write up an incident report about Mr. Mead tackling him, but she did not think the incident was serious enough to report. Because Ms. Miller had the responsibility for Mr. Mead, it would have been her obligation to make an incident report.

Claimant's shift was not over until midnight, and he testified he continued to work until his shift ended. He said there is no supervisor at respondent between the hours of 8:30 p.m. and midnight. The day after the incident, claimant went to the office to drop off some paperwork and told the receptionist about the injury. He asked to see his boss, Sandy Davis, in order to report the accident, but he was told she would not be in the office that day. Claimant testified he was finally able to speak with Ms. Davis by phone about two days after the accident. He said he described the accident to Ms. Davis and told her he was stiff and sore. A couple of days after his initial conversation with Ms. Davis, he spoke with her again, at which time he told her he was still sore. He said they again discussed the accident at that time. Claimant also testified he spoke with Sandy Henry, Bridges' assistant supervisor at the Coffeyville facility, four or five days after he was hurt. Claimant also reported his accident to a person named Cindy or Connie, who managed the shop at Bridges.

On July 1, 2010, Bridges was bought out by Mosaic. Claimant had to undergo the interview process again, but he was rehired and continued to work, although his employer was Mosaic rather than Bridges. His job duties remained the same. However, under Mosaic, he became eligible for health insurance as a fringe benefit, which had not been available to him under Bridges.

On July 5, 2010, which was a few days after claimant spoke with Ms. Henry, he woke up with swelling in his testicle. He called Bridges and said he needed to go to the hospital because of a work-related injury, and he was told it was okay to go. The records from the emergency room indicate that claimant complained of tender right scrotum and right inguinal canal swelling/mass. The records set out a history that the condition "[o]ccurred some [sic] last week but got better. Started yesterday again and is now intolerable."<sup>3</sup> At the emergency room, claimant was diagnosed with a hernia. He was

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<sup>3</sup> P.H. Trans., Resp. (Bridges) Ex. 1 at 1.

given pain medication, his hernia was reduced back inside, and his intestine was unwrapped from around his testicle. However, the tear in his groin remains untreated and is still causing him difficulty. While at the hospital, claimant called Sandy Davis and asked about the health insurance plan. Ms. Davis gave the telephone to Amanda Guy, Mosaic's human resource manager. The bills from claimant's hospitalization were turned into and paid by claimant's health insurance.

Claimant's was terminated by Mosaic on July 31, 2010, for reasons not connected with his accident or injury.

Sandy Davis testified that she works for Mosaic as the program coordinator for Montgomery and Labette counties. She had previously worked for Bridges in the same capacity. She was claimant's supervisor both while at Bridges and Mosaic.

Ms. Davis said that claimant sometimes went to buddy ball games as an employee and other times not as an employee, depending on whether he was working his shift at the time. Claimant's duties at a buddy ball game would depend on the clients he was with. The two clients claimant was in charge of on June 24, 2010, would not have required claimant's physical presence on the field itself as an employee of Bridges because they have no physical limitations. Ms. Davis said claimant's responsibilities would have been to oversee them and keep an eye on them to be sure they did not do something inappropriate.

Ms. Davis said that in June 2010, the employees of Bridges were told they would be entitled to health insurance as a fringe benefit. She said claimant indicated he was happy to get health insurance so he could get a hernia fixed.<sup>4</sup> Claimant did not tell her how he got the hernia, and she did not ask. Ms. Davis was aware that sometime after July 1, when the health insurance kicked in, claimant received medical treatment for his hernia. Ms. Davis said that on August 20, claimant called because he was having problems with his health insurance refusing to pay his bills. Ms. Davis said she referred him to Ms. Guy. She then said claimant commented that his treatment should have been turned in as workers compensation, and this was the first time she heard claimant was contemplating a workers compensation claim. Claimant also commented to her that he and Mr. Mead had been roughhousing at a buddy ball game and that was how he was hurt. She later indicated the first she knew claimant was contending his hernia was injured in the incident while playing buddy ball was in November 2010 after claimant's discovery deposition was taken.

Ms. Davis stated that when an accident occurs at work, an incident report needs to be filled out by the staff and then she, as a supervisor, is to be notified with 24 hours as she needs to do a supervisor's report. She stated that an incident report should have been

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<sup>4</sup> Claimant denied making that statement.

made by Ms. Miller, the staff member in charge of Mr. Mead, but that was not done. After claimant told her he had been roughhousing with claimant at a buddy ball game, she contacted Ms. Miller, who confirmed there was an incident between Mr. Mead and claimant but that no incident report was made. Claimant told Ms. Davis he did not insist that Mr. Mead be written up because he did not want anyone to get in trouble. Ms. Davis said she reviews every incident report, so if Ms. Miller had done her job, she would have seen the incident report. Ms. Miller no longer works for Mosaic.

Amanda Guy, Mosaic's human resource manager,<sup>5</sup> testified that on or about July 5, 2010, claimant called and asked when he would get his insurance card because he needed to see a doctor about a hernia. She did not have the information while she was on the phone with claimant but she found the information and faxed it to the clinic where claimant was going. When Ms. Guy spoke with claimant on July 5, he did not mention that the hernia was a work-related condition. As human resource manager, information that an employee was hurt on the job is normally conveyed to her.

Sometime in the first part of August<sup>6</sup>, claimant called Ms. Guy to see if his claim had been denied. Ms. Guy had no information on it at the time. She followed up on the matter and found the treatment had been covered by the health insurance, other than deductible and co-pay. At the time of this conversation in early August, Ms. Guy had received no information from claimant or anyone else that the condition for which he had received medical treatment was work-related. The first time Ms. Guy knew that claimant was contending he had a work-related incident in late June 2010 was on August 20, 2010, when she received an email from Ms. Davis.

Claimant saw Dr. Edward Prostic on November 19, 2010, at the request of his attorney. After examining claimant's groin area, cervical spine and lumbar spine, Dr. Prostic opined:

On or about June 24, 2010 through the last date of employment July 30, 2010, Robert W. Garrity sustained injuries to his spine, right shoulder and right groin. He has an inguinal hernia that should be repaired surgically. He has sustained sprains and strains of his cervical and lumbar spine without radiculopathy. Only conservative care is indicated for the spinal injuries and will need to be deferred until after completion of treatment for his hernia.<sup>7</sup>

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<sup>5</sup> She had also been Human Resource Manager for Bridges.

<sup>6</sup> Ms. Guy later said the phone call was on or about August 4, 2010.

<sup>7</sup> P.H. Trans., Cl. Ex. 1 at 3.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts 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."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>8</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" 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 when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. 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 worker was at work in the employer's service.<sup>10</sup>

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.<sup>11</sup> Injury caused by horseplay does not normally arise out of employment and is not compensable. An injury to a nonparticipating employee from workplace horseplay

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<sup>8</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>9</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>10</sup> *Id.* at 278.

<sup>11</sup> *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

arises out of employment and is compensable under the Kansas Workers Compensation Act.<sup>12</sup>

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) and (e) state:

(d) "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

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<sup>12</sup> *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, Syl., 130 P.3d 111 (2006).

subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>13</sup> 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 as it is when the appeal is from a final order.<sup>14</sup>

#### **ANALYSIS AND CONCLUSION**

Claimant suffered a single distinct trauma on June 24, 2010, when he was tackled from behind and knocked to the ground by a client. Neither claimant nor any medical opinion explains how claimant's injuries were aggravated or made worse by claimant's subsequent work activities after June 24, 2010.

Having determined that claimant suffered a single trauma on June 24, 2010, and not a series of traumas, the issue of whether claimant gave respondent timely notice is governed by K.S.A. 44-520 without any reference to the date of accident provisions in K.S.A. 2010 Supp. 44-508(d) that control the determination of a date of accident for when the accident occurs as a result of a series of traumas. The ALJ likewise determined that claimant's accident occurred on June 24, 2010, but inexplicably utilized the provisions of K.S.A. 2010 Supp. 44-508(d) to find that the statutory date of accident was October 4, 2010, the date claimant gave written notice to respondent. This was error. Claimant's date of accident was June 24, 2010. As such, he had until July 9, 2010, to give notice within the 10-day period, excluding intervening weekends and holidays, unless his time is extended to 75 days for just cause.

Claimant neither argues that respondent had actual knowledge of his accident or that a failure to notify respondent of his accident was due to just cause. Rather, claimant testified that he spoke to his boss, Sandy Davis, two days after his accident and told her

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<sup>13</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. \_\_\_, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

<sup>14</sup> K.S.A. 2010 Supp. 44-555c(k).

about the accident. He said he spoke with her again two days later and repeated that he was still sore. Claimant said he also notified another supervisor, Sandy Henry, four or five days after the accident. Ms. Davis denies claimant even told her that he was injured in a work-related accident. She said she first became aware claimant was alleging a work-related hernia in November 2010. However, Ms. Davis admits she became aware of the incident involving claimant and Mr. Mead at the buddy ball game much sooner and even contacted Ms. Miller about the incident.

K.S.A. 44-520 requires notice of accident to be given to an employer, not notice of injury. Therefore when Ms. Davis or respondent became aware that claimant was alleging his hernia was caused by or aggravated by the June 24, 2010, accident is irrelevant to the issue of timely notice of accident. If Ms. Davis was told before July 9, 2010, about the June 24, 2010, incident involving claimant and Mr. Mead then notice was timely. It is not clear from Ms. Davis' testimony when she first became aware of the incident at the buddy ball game. Claimant's testimony, however, is that he discussed it with her no less than twice before July 9, 2010. In addition, claimant's testimony that he also reported the accident to Ms. Henry within four or five days after he was injured is uncontroverted.<sup>15</sup> Therefore, based on the record presented to date, this Board Member finds that claimant gave respondent timely notice of his June 24, 2010, accident.

This Board Member further finds that claimant's June 24, 2010, accident arose out of and in the course of his employment with respondent. Claimant was on the clock performing his regular job duties when the accident occurred. Furthermore, being blind-sided by a developmentally disabled client is not horseplay.

As it is determined that claimant's accident occurred on June 24, 2010, which was before Bridges sold its business to Mosaic, then Bridges and its insurance carrier are liable for the payment of the workers compensation benefits in this case.

### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated June 24, 2011, is modified to find that claimant's date of accident was June 24, 2010, and that claimant gave notice of accident within 10 days of June 24, 2010, but is otherwise affirmed.

**IT IS SO ORDERED.**

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<sup>15</sup> Claimant also testified he told the manager of the shop about his accident. But there is no evidence concerning whether the manager of the shop had any supervisory responsibilities with respondent.

Dated this \_\_\_\_\_ day of August, 2011.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge