

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

DICK L. SKINNER)	
Claimant)	
VS.)	
)	Docket No. 1,053,051
SINCLAIR MASONRY, INC.)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the January 4, 2011, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was granted medical treatment with Dr. Michael Chang as the authorized treating physician for not only the hernia suffered on July 2, 2010, but also for the low back complaints alleged by claimant to be work related. The ALJ found that both the hernia, which is not in dispute, and the low back complaints, which are strenuously contested, arose out of and in the course of claimant's employment with respondent as the result of the July 2, 2010, accident. Claimant was also awarded temporary total disability compensation (TTD) if taken off work and unauthorized medical compensation to cover the medical expenses generated from claimant's examination and treatment with George G. Fluter, M.D.

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the discovery deposition of Dick Skinner taken December 10, 2010; the transcript of Preliminary Hearing held January 4, 2011, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer personal injury by accident on July 2, 2010, which resulted in injuries to his low back? Respondent admits that the hernia suffered by claimant on

that date is compensable under the Kansas Workers Compensation Act (Act), but denies that claimant injured his low back on that date or any date thereafter through claimant's last day with respondent on October 13, 2010.¹ Claimant contends that the pain from the hernia masked the back pain. It was not until the hernia was successfully treated and the pain diminished that claimant noticed the low back pain.

FINDINGS OF FACT

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

Claimant began with respondent as a masonry foreman in August 2004. As foreman, he would supervise from 20 to 100 employees. This job did not require that he perform the actual labors of a mason as he would be too busy going from job to job. On Friday, July 2, 2010, claimant was lifting five-gallon containers of acid, transferring them to his truck from another truck so he could take them to Garden City, Kansas. Claimant transferred one bucket to his truck. As he was transferring a second bucket, he felt discomfort in the lower abdomen area. Claimant suspected that he suffered a hernia, as he had suffered three hernias in the past. The next morning, claimant noticed a bulge in his abdomen about the size of his fist. Claimant reported the problem to Jeff Lappin, "the safety and insurance guy",² on Monday (July 5, 2010). During the conversation, claimant discussed the hernia and the need for someone to look at it. Claimant acknowledges that he did not mention the back pain during this conversation.

Claimant went to his personal physician, Ronald F. Stevens, M.D., on July 9, 2010. Claimant reported the injury with the bucket of acid and advised the doctor of abdominal discomfort and the bulge in the left inguinal area. Claimant advised that the hernia was work related and the matter submitted as a workers compensation claim. There was no mention of low back pain in the doctor's notes. A note from July 9, 2010, does indicate that respondent was contacted regarding the possibility of hernia repair. During this time, claimant continued to work through August 24, 2010.

Claimant was referred to surgeon John M. McEachern, M.D., for treatment of the hernia on August 17, 2010. Hernia repair surgery was performed on August 30, 2010. The medical reports of Dr. McEachern discuss the hernia and the associated abdominal pain, but no mention is made of low back pain. At the September 10, 2010, examination, claimant reported improved appetite, one and a half weeks post surgery. Claimant requested, due to the amount of lifting associated with his job, that he be off work for six weeks. This request was granted. Claimant was scheduled for a return examination

¹ Claimant's last day worked was August 24, 2010. (Cl. Depo. at 11.) He was dismissed from work on October 13, 2010. (Cl. Depo. at 10.) His last day employed was October 24, 2010. (Cl. Depo. at 11.)

² Cl. Depo. at 18.

on October 4, 2010, with a probable return to work on October 11, 2010. A medical report of October 5, 2010, discusses the hernia repair and recovery, but makes no mention of the low back. A medical report dated October 7, 2010, identifies a “backache unspecified” in the diagnosis description section. X-rays taken on October 7, 2010, identified degenerative changes in the lower lumbar spine with mild anterior subluxation of L4-5.³ When claimant was examined by Dr. Stevens on October 7, 2010, claimant complained of low back pain and upper back pain with pain into the legs. However, claimant advised the doctor that he had no known injuries to his back. An MRI revealed a large left posterior disc extrusion at L5-S1 with grade 1 degenerative spondylolisthesis at L4-5 and moderate to severe stenosis of the canal. A right posterior disc protrusion at L1-2 was also identified. A referral to Dr. Chang was recommended.

Claimant testified that he noticed the back pain was getting worse after the hernia surgery. He notified his supervisor, Terry Davis, of the back pain after the surgery, sometime during the first week of October 2010.⁴ Claimant also told David Haynes, one of the owners, at the office, of the back pain. The initial treatment costs on October 7, 2010, were submitted to claimant’s health care provider. It was not submitted as a workers compensation claim.

On October 13, 2010, claimant had a meeting with respondent regarding his job. Claimant testified that a dispute arose between him and respondent over accumulated vacation leave and an incentive program. Claimant contended that respondent took the vacation time and incentive money away from him. Claimant was advised that the company did not like his attitude, and he and respondent parted company. Claimant’s low back problems were not discussed at the meeting.⁵ Claimant and respondent had no further contact through October 2010. Claimant did return some tools to respondent in early November 2010. However, claimant had no conversations at that time regarding his accident and resulting injuries. Claimant applied for unemployment, and it was not contested by respondent. Prior to the meeting on October 13, 2010, claimant had received no reprimands, either orally or in writing, and had been subject to no disciplinary action by respondent. He was told at the meeting that he had displayed a bad attitude for the three months leading up to the meeting. Claimant acknowledged that, prior to the October 13 meeting, he never approached respondent to advise of low back problems or to request medical treatment.

Claimant’s injury history is significant in this matter. Claimant had been receiving chiropractic adjustments to his back since as early as 1993 with Webb Chiropractic. Claimant received chiropractic adjustments to his low back in 1993, 1997 and 1999.

³ P.H. Trans., Resp. Ex. 2.

⁴ Cl. Depo. (Dec. 10, 2010) at 23.

⁵ Id. at 30.

X-rays taken on July 21, 2009, displayed slight anterolisthesis of L4-5 consistent with grade 1 degenerative spondylolisthesis. Marked facet arthrosis was also observed at that level. Claimant also received chiropractic manipulations for his low back in July, August and September 2009. These treatments were paid for through claimant's health insurance.

During the time leading to claimant's surgery, claimant was stationed in Garden City, Kansas. Claimant would return to Wichita, Kansas, on Thursday and would go to the office on Friday morning. Claimant testified that he had regular conversations with Terry Davis during that time. He would also talk to David Haynes and Justin Holcomb, another one of respondent's owners. During these conversations, claimant did not relate his back complaints to his job. He only advised of ongoing back pain.⁶ The first time claimant related his back complaints to his job was when he hired an attorney and that attorney provided respondent with a letter on October 20, 2010, indicating that claimant was filing for workers compensation benefits.⁷ At his deposition, claimant testified that when he was lifting the five-gallon containers of liquid (acid), he experienced hernia pain. He acknowledged that he did not voice complaints in the record of back pain because, as a bricklayer, he was used to having backaches. On cross-examination, claimant testified that he did have back discomfort after the July lifting incident, but thought it would go away. After the hernia surgery, he began feeling the back symptoms more than a normal backache. Claimant described the back pain as almost constant, with the level of symptoms waxing and waning. Claimant finally decided to pursue the back complaint after the October 13, 2010, meeting. But, he had not thought about doing so before the meeting.

At the time of the preliminary hearing on January 4, 2011, claimant testified that he experienced low back pain immediately after the lifting incident. He also alleged that he told the office staff, including supervisors and supervisor/owners, of the back pain. Claimant alleged that he told Terry Davis of the problems both before and after Mr. Davis left respondent. Claimant testified that he complained to the co-workers in Garden City of the back pain, commenting that the pain was getting worse. It is noted that claimant had obtained both back x-rays and an MRI of his back before the October 13, 2010, meeting.

Claimant alleges that he told Dr. Stevens of the ongoing back complaints, even though contemporaneous records contain no mention of the low back, only the hernia. The first mention of back complaints in the medical records occurred on October 7, 2010. After his meeting with respondent, claimant contacted the Wichita Clinic on October 19

⁶ Id. at 44.

⁷ Id. at 53.

and advised the Clinic that his back complaints were now to be pursued as a workers compensation claim.⁸

On cross-examination at the preliminary hearing, claimant acknowledged that Terry Davis, his supervisor, had retired from respondent prior to July 2, 2010, the date of accident in this matter. Claimant then testified that he still maintains contact with Mr. Davis. In fact, Mr. Davis took claimant to the hospital for his surgery and afterwards took claimant home.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist George G. Fluter, M.D., on December 2, 2010, for a medical evaluation. Claimant was diagnosed with the post hernia surgery, low back and bilateral leg pain with multilevel discopathy spondylosis and grade I spondylolisthesis at L4-5, lower level radiculopathy and an L5-S1 disc extrusion. Dr. Fluter was provided with a multitude of medical records for both the hernia and the low back. After examining claimant and reviewing the medical records, he determined that the injury on July 2, 2010, did not cause claimant's degenerative changes in the lumbar spine. He did find a causal/contributory relationship between claimant's current condition and the reported injury on July 2, 2010. Dr. Fluter opined that the degenerative changes affecting the lumbar spine, the disc protrusion/extrusions, "more likely than not, occurred as a result of the lifting activities."⁹

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.¹⁰

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.¹¹

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.¹²

⁸ P.H. Trans. at 20.

⁹ P.H. Trans., Cl. Ex. 1 at 4.

¹⁰ K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

¹¹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹² K.S.A. 2010 Supp. 44-501(a).

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.”¹³

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.¹⁴

Claimant contends that he suffered both a hernia and low back problems from the lifting incident on July 2, 2010. However, there is no mention of the low back in any record until October 7, 2010. Additionally, claimant contradicts himself when discussing when and how often he discussed the low back symptoms with respondent’s employees, supervisors and owners. But, claimant is the only person to testify in this matter. While his testimony is confusing and, at times, contradictory, it is the only testimony on which a determination can be made. Even the opinion of Dr. Flutter, claimant’s hired expert, is less than specific when discussing the cause of claimant’s back complaints. But, again, his is the only medical opinion in this record.

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.¹⁵

This Board Member acknowledges that it requires a liberal interpretation of this situation to bring this claimant’s low back complaints under the umbrella of the Act. But, with this record, and the legislature’s mandate, that is the end result. Claimant has satisfied his burden of proof, by the barest of margins, that he suffered an accidental injury

¹³ *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).

¹⁴ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹⁵ K.S.A. 2010 Supp. 44-501(g).

on July 2, 2010, which resulted in at least an aggravation of his low back problems. Therefore, the Order of the ALJ granting medical treatment for claimant's low back is 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.¹⁶ 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), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury on July 2, 2010, which resulted in an aggravation of his preexisting low back problems. Therefore, the Order of the ALJ granting benefits under the Act for claimant's ongoing low back complaints is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated January 4, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 2011.

HONORABLE GARY M. KORTE

c: Dale V. Slape, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

¹⁶ K.S.A. 44-534a.