

his right hand. This welded together the edges of the roofing materials to create a welded seam. Claimant testified the work was repetitious in nature and he worked eight hours a day, five days a week with some overtime.¹

In July of 2010, claimant began experiencing pain in his arms, shoulder and neck. Respondent sent claimant to see Dr. Chris D. Fevurly, who gave claimant restrictions but allowed claimant to return to work. Claimant testified he saw Dr. Fevurly on July 27, 2010, and that Dr. Fevurly placed claimant on a ten-pound weight restriction, no overhead lifting or reaching, no repetitive use of either arm, and no repetitive bending or stooping.²

However, the medical records do not confirm the claimant's testimony concerning the sequence of events, and claimant's testimony is confusing. The medical records of Lawrence Memorial Hospital indicate claimant visited its emergency room on August 2, 2010. Claimant then saw Dr. Fevurly on August 2 or 3, 2010. Claimant also testified his symptoms got "real bad" in August of 2010 where he could hardly work and he talked to the secretary about going to Lawrence Memorial Hospital.³

Claimant saw Dr. Kevin Giblin at Lawrence Memorial Hospital emergency room on August 2, 2010, for repetitive strain injuries. Dr. Paul D. Morte, a neurologist, examined claimant on August 17, 2010, and performed nerve conduction and EMG studies of claimant's arms. The doctor indicated claimant had unexpected deep tendon reflexes in the face of a polyneuropathy which suggested the possibility of a compressive cervical myelopathy. He also noted claimant struck him as a "straight shooter" and the doctor recommended a cervical spine MRI.⁴

Respondent changed the type of work claimant was doing in an attempt to keep claimant within the restrictions placed upon him.⁵ Claimant continued to work for respondent until the end of November/first of December 2010.

At his attorney's request, claimant saw Dr. Edward J. Prostic, an orthopedic specialist, on December 7, 2010. Dr. Prostic found claimant had a positive provocative test for pronator tunnel syndrome in the left elbow. He indicated it was not clear whether the problem was an early presentation of myeloradiculopathy or peripheral nerve entrapment at the pronator and/or radial tunnels. Dr. Prostic indicated that during claimant's course

¹ P.H. Trans. at 7-11.

² *Id.*, at 16.

³ *Id.*, at 11.

⁴ *Id.*, Ex. 1.

⁵ *Id.*, at 11-12, 22-23.

of employment, claimant sustained repetitious minor trauma. A course of treatment for claimant was recommended by Dr. Prostic that included anti-inflammatory medicines and no heavy lifting or repetitious forceful gripping or twisting for one month.

At respondent's request, on December 21, 2010, claimant was seen by Dr. Phillip L. Baker, an orthopedic specialist. Dr. Baker did not have any x-rays of claimant and noted claimant's EMG showed changes compatible with primary neuropathy of the cervical spine. Despite recommending an MRI of the cervical spine, Dr. Baker opined claimant's injuries were not work related and indicated the activities claimant described were activities claimant experienced in the course of normal living.

Claimant's date of accident was determined by ALJ Avery to be July 27, 2010. Records of Dr. Fevurly, Dr. Baker and Dr. Prostic indicate an injury date of July 27, 2010. The ALJ issued an order dated February 24, 2011, referring claimant to Dr. Lynn Ketchum for an independent medical examination and stated: "The doctor is asked to render an opinion regarding whether claimant's need for medical treatment, if any, was caused, aggravated or accelerated by claimant's work activities through July 27, 2010."⁶ On the same date, a separate order was issued by the ALJ requiring respondent to pay claimant temporary total disability benefits at the rate of \$545 per week commencing February 22, 2011, until Dr. Ketchum's IME report is received.

Claimant contends in his Application for Hearing he suffered a "bilateral arms, hands and elbows" injury through a series "from April 2010 thru July 27, 2010" caused by "repetitive movements from performing roofing activities."⁷ At the preliminary hearing, respondent denied claimant met with personal injury by accident arising out of and in the course of his employment. In the preliminary hearing Order for Compensation dated February 24, 2011, ALJ Avery found claimant sustained an accidental injury that arose out of and in the course of his employment.

Respondent argues claimant's injury did not arise out of and in the course of his employment. Essentially, respondent wants the Board to determine that the ALJ erred in finding claimant met his burden of proving by a preponderance of the evidence that his injury was work related and suggests that claimant's excessive use of alcohol is the cause of his symptoms. In support of this allegation, respondent cites Dr. Morte's interpretation of claimant's EMG, which Dr. Morte indicated was positive for a sensorimotor polyneuropathy, probably related to alcohol. Dr. Baker appeared to concur with Dr. Morte's impression. Respondent also argues that because claimant's symptoms have remained the same, despite the fact he has not performed full duty work since August of 2010, is further proof claimant's symptoms are not work related.

⁶ ALJ Order Referring Claimant For Independent Medical Evaluation (Feb. 24, 2011) at 1.

⁷ Application for Hearing (filed Nov. 4, 2010).

Finally, respondent asserts that the ALJ's orders are contradictory. The first order requests a causation opinion by Dr. Ketchum, which implies the ALJ needs further information to determine if claimant's injuries arose out of and in the course of his employment. However, the ALJ then issued a second order finding compensability and awarding temporary total disability benefits.

Claimant essentially argues he met his burden of proving by a preponderance of the evidence that he met with personal injury by accident arising out of and in the course of his employment. Claimant also asserts the orders of the ALJ are not contradictory, as Dr. Morte suggests claimant may have a concomitant compression of the C7 nerve roots. Dr. Morte indicated claimant was a "straight shooter," and although the doctor's impressions included sensorimotor polyneuropathy that is probably alcohol related, Dr. Morte believes there is a possibility of a compressive cervical myelopathy that needs to be investigated.

Whether claimant suffered personal injury by accident arising out of and in the course of his employment

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ "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."⁹

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 is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹⁰

The ALJ found July 27, 2010, was claimant's date of accident. Most of the medical records reflect July 27, 2010, as claimant's date of injury. There is no evidence to dispute claimant's symptoms became sufficiently acute that he reported July 27, 2010, as his date of injury. Therefore, this Board Member concurs with the ALJ that claimant's date of accident is July 27, 2010.

Prior to claimant's injury on July 27, 2010, he was employed by respondent since 1978, a period of at least 31 years. During that time he was a roofer and was required to

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ K.S.A. 2010 Supp. 44-508(g).

¹⁰ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

perform repetitive work duties. Those duties included sealing seams of roofing material with a heat gun in one hand and a roller in the other. Dr. Giblin and Dr. Prostic indicated claimant suffered from repetitive use syndrome, which is credible given the repetitive nature of claimant's work activities. Dr. Fevurly and Dr. Prostic gave claimant work restrictions. Dr. Baker's implication that if claimant suffered an injury that said injury was caused by normal activities is unpersuasive, particularly in light of the fact he did not have x-rays to review. Dr. Baker did state an MRI of the cervical spine is in order to evaluate the spinal canal and the spinal cord.

Perhaps most persuasive of all was the statement of Dr. Morte that claimant was a "straight shooter." It is significant that the ALJ had the opportunity to observe the testimony of the claimant. Having determined claimant's injuries arose out of and in the course of his employment implies the ALJ found the testimony of claimant credible. This Board Member finds, in this instance, that some deference should be given to the ALJ's conclusions because he had the opportunity to assess the claimant's credibility when he testified. Therefore, this Board Member finds that on July 27, 2010, claimant met with personal injury by accident that arose out of and in the course of his employment.

Whether the ALJ erred by ordering an independent medical evaluation for a causation opinion while also issuing an order granting claimant temporary total disability benefits

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.¹¹ Because this Board Member affirmed the ALJ's decision that claimant's injury arose out of and in the course of employment, the Board does not have jurisdiction to address the issues of whether the ALJ erred in awarding claimant

¹¹ See K.S.A. 2010 Supp. 44-551.

temporary total disability benefits and appointing Dr. Lynn Ketchum as an independent medical examiner.

CONCLUSION

This Board Member finds claimant met with personal injury by accident that arose out of and in the course of his employment. The Board lacks jurisdiction to overturn the ALJ's preliminary hearing Order for Compensation granting claimant temporary total disability benefits and the Order Referring Claimant For Independent Medical Evaluation appointing an independent medical examiner.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² 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.¹³

WHEREFORE, the undersigned Board Member affirms the February 24, 2011, Order for Compensation entered by ALJ Avery. The undersigned Board Member dismisses the respondent's appeal of the February 24, 2011, Order Referring Claimant For Independent Medical Evaluation entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Clinton D. Collier, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹² K.S.A. 44-534a.

¹³ K.S.A. 2010 Supp. 44-555c(k).