BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CONNIE E. TRAYLOR Claimant	)))	
VS.	))	Docket Nos. **1,053,321 &** **1,057,562**
DILLON COMPANIES Self-Insured Respondent	))	

ORDER

Respondent requests review of the November 13, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Dennis L. Phelps, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

In Docket No. 1,053,321, claimant allegedly sustained a head and neck injury on November 11, 2008. The ALJ found that claimant satisfied the written claim requirement of K.S.A. 44-520a by the filling out an accident report for the November 11, 2008 injury. The ALJ did a poor job of identifying the docket in which he made the order for respondent to designate an authorized treating physician to comply with the treatment recommendations of Dr. John Pazell. Since Dr. Pazell saw claimant on only one occasion, in May 2011, which was before the August 2011 date of accident, this Board member finds that the order for medical treatment relates to Docket No. 1,053,321.

In Docket No. 1,057,562, the ALJ stated that claimant picked up a bucket of cake icing and felt a pop in her neck on August 4, 2011. The ALJ did not order any workers compensation benefits in Docket No. 1,057,562, nor did he make any findings related to prevailing factor or whether the accident caused a new injury or aggravated claimant's previous injury.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated October 30, 2012, and all pleadings contained in the administrative file.

ISSUES

In Docket No. 1,053,321, respondent requests review of whether claimant provided timely written claim for the November 11, 2008, date of accident. In Docket No. 1,057,652, even though the ALJ made no orders in that docketed claim, respondent argues that

claimant failed to suffer a personal injury on August 4, 2011, or if she did, she simply aggravated the November 2008 injury, which would not be compensable under K.S.A. 2011 Supp. 44-508(f)(1).

Claimant argues the ALJ's Order should be affirmed.

The issues raised on review are:

1. Did claimant serve a timely written claim in Docket No. 1,053,321?

2. Did claimant suffer personal injury by accident on August 4, 2011 (Docket No. 1,057,562)? If so, did she merely aggravate the injury suffered on November 11, 2008?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In June 2008, claimant began working for respondent part-time as a cake decorator. On November 11, 2008, claimant was helping move racks of bread. The racks were about 8 feet high, and the top rack was double stacked with plastic trays of bread. As claimant moved the rack of bread through a doorway, the trays on the top fell off the rack and hit claimant on the head and neck. A coworker witnessed the accident and reported it to the bakery manager, who notified the store manager, Don Weigel. This accident was assigned Docket No. 1,053,321.

Claimant testified she completed some documents that were requested by respondent, one of which was an Associate Work Related Injury/Illness Report. Another was an Employee Incident Root Cause Analysis.[1]

> Q. [by claimant's attorney] And what was your purpose or intention in filling this out?
>
> A. [by claimant] To have them take care of my head and neck injuries, workmen's comp claim.
>
> Q. And who were you giving this form to?
>
> A. I was giving it to Don Weigel, our manager. And Nancy Martin because she was the one that called Sara Lee so --

[1] P.H. Trans., Cl. Ex. 1 at 1-2.

Q. And who is Nancy Martin?

A. She was the assistant manger at the time.[2]

One of the documents claimant signed for respondent on November 11, 2008, was a medical authorization, which authorized the release of medical information to respondent "regarding any physical, emotional or psychological problems, diagnosis, complaints, treatment or any other record or any other information or document that you have in your possession, custody or is under your control regarding the patient whose name appears below."[3] Claimant testified that her signature on the medical authorization was intended for the filing of her worker's compensation claim. Respondent's store manager, Mr. Weigel, referred claimant to Dr. Timothy Pauly for medical treatment. Claimant was examined by Dr. Pauly on November 11, 2008, and was diagnosed with a slight concussion. Claimant received some pain medication. A work-release form was signed by Dr. Pauly and taken by claimant back to respondent's human resource person.

Judge Moore ordered claimant to see Dr. John Pazell for an independent medical examination.[4] Dr. Pazell examined and evaluated claimant on May 20, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Pazell diagnosed claimant with a cervical disk herniation at C5-6 and C6-7, which was impinging on the C6-7 nerve roots. Dr. Pazell opined that claimant's neck injury was directly related to her work injury on November 11, 2008.

Claimant testified on cross-examination that she did not see a doctor between November 11, 2008, and March 30, 2010, for complaints associated with the November 2008 accident. Claimant testified:

> Q. [by respondent's attorney] So we would have gone then from November 11, 2008 until June 30, 2010 at which point in time you felt that your problems were still related to 2008; correct?
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> A. [by claimant] I didn't feel that they were, I knew that they were because I hadn't had an accident before or after that.[5]

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[2] P.H. Trans. at 24-25.

[3] *Id.*, Cl. Ex. 1 at 3.

[4] The case was originally assigned to ALJ Moore and was transferred to ALJ Klein.

[5] *Id.* at 51.

On August 4, 2011, claimant suffered another injury when she was picking up a bucket of cake icing to put into a cart and her neck popped. Claimant completed some paperwork and was then referred by respondent to a different company doctor, Dr. Albright. Dr. Albright prescribed some pain medicine and stretching exercises. This accident was assigned Docket No. 1,057,562.

As of the preliminary hearing on October 30, 2012, claimant was still having numbness in her left arm and hand, pain in the right side of her neck and shoulder. Claimant would like to treat with Dr. Fluter and also see a pain management specialist.

PRINCIPLES OF LAW

The written claim statute, K.S.A. 44-520a(a), provides in part:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[6] The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.[7] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation.[8] In *Fitzwater*, the Kansas Supreme Court described the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

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[6] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[7] *Pike v. Gas Service Co.*, 223 Kan. 408, Syl. ¶ 3, 573 P.2d 1055 (1978).

[8] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

ANALYSIS

Docket No. 1,053,321

On November 22, 2010, claimant filed an Application for Hearing with the Division of Workers Compensation alleging a series of injuries beginning November 11, 2008, and continuing each and every working day thereafter. It should be noted that the accident report completed by claimant on November 11, 2008, describes a single traumatic injury, not a series of repetitive micro traumas.[9]

A schedule outlining the payments and carrier activity in this claim shows that prior to the filing of the Application for Hearing, respondent's last medical compensation payment was made on April 23, 2009, to the Hutchinson Clinic.[10]

The only writing claimant relies on to prove written claim is the initial accident report completed on November 11, 2008. The only evidence in the record that addresses claimant's intent at the time she completed the accident report is the testimony of the claimant. Claimant testified that her intention at the time she completed the report was to have respondent take care of her head and neck injuries. Claimant's testimony in this regard is not challenged. The stated goal of wanting respondent to take care of her injuries was achieved. Based upon *Fitzwater,* this Board member finds that a timely written claim was made when claimant completed the accident report on November 11, 2008.

ALJ Moore ordered an IME with Dr. John Pazell on April 1, 2011. The IME was ordered to assist the ALJ in resolving the dispute among conflicting medical opinions. Dr. Pazell found the proximate cause of claimant's problems to be the November 11, 2008, injury. Additionally, Dr. Pazell recommended that claimant be referred to a neurosurgeon and a pain management specialist. This Board member adopts the finding of Dr. Pazell and finds that claimant is in need of medical treatment as the result of her November 11, 2008, injury.

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[9] P.H. Trans., Cl. Ex. 1.

[10] *Id.*, Cl. Ex. 6.

Docket No. 1,057,562

One of the issues raised on appeal is whether claimant suffered an injury by accident arising out of her employment on August 4, 2011, which is the date of accident alleged in Docket No. 1,057,562. Based upon the above findings made in Docket No. 1,053,321, issues related to Docket No. 1,057,562 will not be addressed in this Order.

CONCLUSION

In Docket No. 1,053,321, this Board member finds that claimant filed a timely written claim and is in need of medical treatment as the result of her November 11, 2008, 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.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member finds that the November 13, 2012, preliminary hearing Order entered by ALJ Thomas Klein is modified to reflect a finding that claimant suffered an injury by accident arising out of employment on November 11, 2008. Respondent is ordered to provide claimant medical treatment with a neurosurgeon and a pain management specialist pursuant to Dr. Pazell's recommendations.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

e: Dennis L. Phelps, Attorney for Claimant
phelpsden@aol.com
Matthew J. Schaefer, Attorney for the Self-Insured Respondent
mschaefer@mtsqh.com
Thomas Klein, Administrative Law Judge

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[11] K.S.A. 44-534a.

[12] K.S.A. 2012 Supp. 44-555c(k).