



The claimant alleged he suffered a series of repetitive injuries to his low back beginning July 2010 through his last day worked on October 20, 2010. Claimant started working as a paint supervisor for respondent in January 2010. Claimant testified that he had been previously diagnosed with degenerative disk disease in his lower back but did not have any restrictions. Claimant further testified:

Q. How did you hurt your back?

A. Just from the general labor duties. Hauling an 80-pound sandblast hose around or throwing 90-pound bags of sand up into the sandblaster.

Q. Was there a certain day while you were doing that work when you hurt your back?

A. No. It would just -- progressively it had just gotten sore. I'd go home and take Advil and then just progressively it would just get worse.

Q. When did you first notice the back soreness?

A. About the end of July, beginning of August is when I noticed that it was really starting to hurt.

Q. Of 2010?

A. 2010.<sup>1</sup>

Claimant agreed that he did not tell anyone at Ken's Welding that his back was sore after lifting the sand bags. Nor did he request medical treatment. But claimant testified that he had been told at a safety meeting not to report work-related injuries.

When claimant sought treatment from his personal physician there was no claim of a back injury and instead the record noted claimant was being seen for follow-up for his low back pain. And although claimant last worked for respondent on October 20, 2010, he did not claim a work-related injury until January 7, 2011.

Jose Ledecma, a co-worker of claimant, testified that he had likewise been advised in a safety meeting not to report work injuries. But when Mr. Ledecma suffered an injury he testified that Mr. Rob Wallace instructed him to go to the hospital and that he would pay for everything. However, the bill was denied by respondent. Mr. Ledecma then submitted it to his private health insurance.

Kenneth Wallace, respondent's owner, testified that he asked Mr. Ledecma to file an accident report and never received a response. He further testified that he was not

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<sup>1</sup> Berglund Depo. at 13-14.

aware of employees being instructed not to report on-the-job injuries. But Mr. Wallace was concerned about work injuries due to three or four that occurred in a short period of time.

Steven Ropp, claimant's supervisor, testified that claimant never notified him of an on-the-job back injury. Mr. Ropp terminated claimant due to his job performance. Mr. Ropp was aware that claimant was going to Wichita for back treatments. And Mr. Ropp denied that employees were told not to report work injuries.

Robert Wallace, respondent's project manager, testified:

Q. When you hired him, did Mr. Berglund inform you that he had a prior back injury?

A. Yes.

Q. Did he also inquire or let you know that because of that prior back injury, he would need to treat every Friday, or every other Friday?

A. I believe it was every other Friday in Wichita, yes.

Q. All right. Did Mr. Berglund ever come to you and claim an on-the-job injury at any time while working at Ken's Welding?

A. No.

Q. Did he ever come to you and make any complaints about his back at any time while he was working at Ken's Welding?

A. Not to me.<sup>2</sup>

Although claimant testified that he had a preexisting back condition he denied that it was significant or was due to injury. During his discovery deposition the claimant testified that he had never hurt his back before and denied that, when hired by respondent, he told them he had a prior back injury. In the medical records regarding treatment claimant received in November 2010, there is a notation that he told a nurse he had injured his back a year ago, or November 2009.

During the preliminary hearing, the ALJ asked the claimant if he had any doubt that his back problems were caused by work. Claimant responded that he had no doubt. When asked why he had not reported his injury after he was fired, claimant simply responded he did not know. And although diagnosed with degenerative disk disease claimant denied he had been treated. Later, the ALJ further questioned claimant:

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<sup>2</sup> P.H. Trans. at 71.

Q. Why, sir, did you fail to disclose your prior treatments for back complaints dating back to January of 2009?

A. I did not see anybody except Dr. Hart on my current back issue.

Q. That wasn't the question. Let's not play games.

A. I'm not playing games, sir.

Q. I asked you if you had any prior treatment for your back, and you said you hadn't had any prior treatment for your back before Dr. Hart in October of 2010, and that wasn't true was it?

A. No, sir.

Q. You'd been treating with Dr. Wolff for about a year.

A. Yes, sir.<sup>3</sup>

The ALJ analyzed the evidence in the following fashion:

Claimant has a long history of back complaints, and has been treating for those complaints even before beginning his employment with Respondent. Claimant told a representative of Respondent and a health care provider that he had suffered a back injury in 2009, something he now denies. Claimant never reported to his primary care physician, Dr. Hart, or the physician he was seeing for back complaints. Claimant never reported work-related injury to Respondent or requested medical care. Claimant first reported a work-related cause for his back complaints in January, 2011, three months after he had been terminated by Respondent. That report was made after Claimant had retained counsel. Claimant was less than candid and forthcoming when asked about prior injuries to or treatment of low back complaints. Claimant's claim depends on his credibility, but he has none.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible. The claimant's version of events was contradicted by the medical records as well as respondent's witnesses who testified concerning the facts and circumstances surrounding the alleged accident. Where there is conflicting testimony, as in this case, the credibility of the respective witnesses is even more important to the determination of the issues in dispute. In denying claimant's request for preliminary benefits, the ALJ believed respondent's witnesses over the testimony of claimant and his witness. In his Order, the ALJ specifically stated that claimant had no credibility. Consequently, the ALJ found that claimant failed to prove he suffered an accidental injury at work that arose out of and in the course of his employment with respondent.

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<sup>3</sup> P.H. Trans. at 76-77.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*<sup>4</sup>, appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."<sup>5</sup>

Here, the ALJ had the opportunity to personally observe the claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ was able to observe the testimony in person. Having reviewed the entire record presented to date, this Board Member agrees that claimant has failed to prove he suffered a work-related accident.

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.<sup>6</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 when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 8, 2011, is affirmed.

**IT IS SO ORDERED.**

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

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
Michael D. Streit, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>4</sup> *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

<sup>5</sup> *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2010 Supp. 44-555c(k).