

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

THOMAS EVELAND)	
Claimant)	
)	
VS.)	
)	
CEREAL FOOD PROCESSORS, INC.)	
Respondent)	Docket No. 1,054,946
)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY OF AMERICA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the May 24, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dale V. Slape, of Wichita, Kansas, appeared for claimant. Sylvia B. Penner, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered a personal injury by accident on February 8, 2011, that arose out of and in the course of his employment. The ALJ found that the respondent had statutory notice of claimant's accident. He ordered temporary total disability benefits to be paid commencing February 9, 2011, and that the medical expense of Dr. Flutter be paid as unauthorized.

The record on appeal consists of the transcript of the May 4, 2011, discovery deposition of the claimant, and an exhibit thereto; the transcript of the May 24, 2011, Preliminary Hearing and exhibits thereto together with the pleadings contained in the administrative file.

ISSUES

Respondent appeals the ALJ's finding that claimant sustained a personal injury by accident that arose out of and in the course his employment, and argues that claimant did not give timely notice of the accident or series of accidents, and therefore the ALJ's order of benefits should be reversed.

Claimant argues that he sustained personal injury by accident arising out of and in the course of his employment with respondent and that he gave respondent timely notice of the accident, therefore the ALJ's order should be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain an injury or injuries in an accident or series of accidents that arose out of and in the course of his employment with respondent?

(2) If so, did claimant give respondent timely notice of his accident and/or series of accidents?

3) Whether the ALJ erred in ordering respondent to furnish the names of three physicians for the claimant to select a treating physician, in ordering temporary total disability compensation and ordering respondent to pay claimant's medical expense from Dr. Fluter.¹

FINDINGS OF FACT

While working for respondent, claimant alleges he injured his back on February 8, 2011. Respondent has a "man lift" which is similar to an elevator. The man lift continuously moves between floors at a slow rate of speed so that employees can get on or off without stopping, and also can ride up or down at the same time. Claimant alleges that the man lift jerked as he was riding to the seventh floor and he felt a sharp burning pain in the middle of his shoulder blades that shot into his right arm and shoulder. He was alone on the man lift when the incident occurred.

Claimant testified he got off the man lift and went to the shop and reported he was in severe pain to his supervisor, Dave Mog. Claimant requested permission from Mr. Mog to leave work and seek treatment from a chiropractor. Claimant indicated he did not tell Mr.

¹ This issue was included in the claimant's brief, but not respondent's. Respondent simply stated that because claimant didn't provide timely notice it was impossible for it to investigate the claim or provide medical treatment. This is not an issue that the Board has jurisdiction to review on an appeal from a preliminary order.

Mog that he injured himself on the man lift. Claimant testified that he understood the process of reporting a workplace accident.²

Claimant saw Dr. Dennis Guy, a chiropractor, on February 8 and February 10, 2011. Claimant testified he described the man lift incident to Dr. Guy on February 8, 2011³, and indicated that his back was inflamed when he saw Dr. Guy on February 10, 2011, but Dr. Guy would not provide further treatment. Dr. Guy's records are not in evidence.

Claimant was able to see his primary care physician, Dr. James Keller, on February 10, 2011. He testified that he told Dr. Keller about the incident on the man lift.⁴ Dr. Keller's report states, "He awoke Sunday and again on Tuesday with a stiff neck right-sided from sleeping on it wrong has been to his chiropractor on 2 separate occasions with adjustments and now is worse is getting a little tingling in his right fingers and arm, he gets relief if he puts the arm back behind his head."⁵ Dr. Keller diagnosed claimant with cervicgia aggravated by chiropractic adjustments.

Because Dr. Keller was not in claimant's health insurance network, claimant had to change physicians. Claimant was examined by Dr. Scott A. Street on February 17, 2011. Claimant told Dr. Street that he was riding up a man lift at work when he felt a jarring sensation. Dr. Street's report indicates claimant complained of pain that starts under his right shoulder blade and wraps around to his chest. Claimant indicated he was primarily sore, but the pain was occasionally sharp and achy in nature. Claimant also complained of numbness and tingling down his right arm and into his second and third fingers. Dr. Street's assessment was that claimant had right shoulder pain, numbness and biceps tendinitis.

On February 17, 2011, Dr. Street wrote a letter "To Whom it May Concern" indicating claimant was off of work due to being under doctor's care and could not return to work until evaluated by physical therapy.⁶ On February 23, 2011, Dr. Street referred claimant for occupational therapy three times a week. On February 24, 2011, Dr. Street completed and signed an Attending Physician's Report, which temporarily restricted claimant from using his right arm.

At the request of his attorney, claimant was seen by Dr. George G. Flutter, a pain management specialist, on April 27, 2011. Dr. Flutter, reviewed claimant's medical records,

² Claimant's Discovery Depo. at 32-33.

³ *Id.* at 42.

⁴ P.H. Trans. at 23.

⁵ *Id.*, Ex. 1; P.H. Trans., Cl. Ex 4.

⁶ P.H. Trans., Cl. Ex 3 at 2.

obtained a history from claimant and physically examined claimant. Dr. Fluter indicated that within a degree of medical probability, there is a causal/contributory connection between claimant's condition and the specific event on the man lift that occurred at work on February 8, 2011. Dr. Fluter assessed claimant as having neck/upper back/right upper extremity pain, cervicothoracic strain/sprain, myofascial pain affecting the neck/upper back and shoulder girdle and probable right upper extremity radiculitis.

Claimant prepared handwritten notes that recorded events from February 6, 2011 through March 1, 2011. On February 6, 2011, claimant recorded he woke up with a stiff neck and went to work. On February 7, 2011, he recorded that he had no problem with stiffness. He then detailed the incident on the man lift that occurred on February 8, 2011.⁷ Claimant testified that he had an ache between his shoulder blades and a stiff neck before the incident on the man lift.⁸

Claimant testified he began receiving adjustments from a chiropractor in the mid 1980s for low back pain. He continued the adjustments until 1991, when he discontinued chiropractic treatment. Claimant resumed chiropractic treatment for his lower back in 2008. He also testified that he began having neck problems off and on during the last three or four years.⁹ Dr. Guy provided treatment which primarily included adjustments of the spine. Until the February 8, 2011, incident, claimant indicated his pain was limited to his neck and lower back.

Claimant testified that on February 17, 2011, he had Dr. Street complete a UMR insurance form. There was no evidence presented as to what UMR stands for. Sometime after February 18, 2011, claimant submitted the UMR form to respondent. The UMR form has a section to be completed by the employee, and under date and description, claimant wrote, "2-8-11 Woke up with pain between shoulders and arm."¹⁰ Claimant also testified that on February 18, 2011, he took the February 17, 2011, letter from Dr. Street to Dave Mog,¹¹ and alleges that on February 18, 2011, he told Dave Mog about the incident on the man lift.¹² Upon cross-examination, claimant indicated that the forms he gave Mr. Mog on February 18, 2011, however, the forms were not signed by Dr. Street until February 23 and 24, 2011 so it is unclear when the forms were actually

⁷ *Id.*, Cl. Ex. 6.

⁸ *Id.* at 26-27.

⁹ Claimant's Discovery Depo. at 24-25.

¹⁰ P.H. Trans., Resp. Ex 1.

¹¹ *Id.* at 22-23.

¹² *Id.* at 15.

submitted.¹³ Claimant testified that Mr. Mog said that respondent could not accommodate his restrictions. Claimant has not worked since the date of the incident.

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.¹⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁵

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.¹⁶

¹³ *Id.* at 26

¹⁴ K.S.A. 2010 Supp. 44-501(a).

¹⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹⁶ *Id.* at 278.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁷ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁸ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁹

“A claimant’s testimony alone is sufficient evidence of his own physical condition.”²⁰
“Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker’s injury.”²¹

K.S.A. 2010 Supp. 44-508(d) states:

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

¹⁷ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁸ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

²⁰ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

²¹ *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999).

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.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.²² This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.²³

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁴ 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.²⁵

ANALYSIS

²² K.S.A. 2009 Supp. 44-551(i)(2)(A).

²³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

²⁴ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

²⁵ K.S.A. 2010 Supp. 44-555c(k).

This claim is before the Board on an appeal from a preliminary hearing order. Therefore, there is no issue as to whether claimant's injuries are permanent or if he has increased permanent impairment over and above his earlier injuries. At this stage of the proceedings, even a temporary aggravation can be compensable. Claimant sought, and the ALJ awarded, medical treatment and temporary total disability compensation. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.²⁶ In addition K.S.A. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

The ALJ found claimant met with personal injury by accident arising out of and in the course of his employment. Claimant testified he suffered an injury by accident on a man lift at work. It is true that claimant did not immediately tell his supervisor Mr. Mog he was injured on the man lift, nor did claimant tell Dr. Keller the injury occurred at work. Claimant did tell Dr. Street on February 17, 2011, that the injury occurred on the man lift. Dr. Flutter opined there was a causal connection between claimant's injury and the incident at work.

The ALJ apparently found claimant's testimony to be credible and awarded benefits. The Board generally gives some deference to an ALJ's determination of credibility, particularly when the ALJ had the opportunity to personally observe the witness testify. The evidence contradicting claimant's testimony and version of events include the claimant's failure to report the incident to his supervisor on the date it occurred, not telling Drs. Guy and Keller his injury was work-related, the fact claimant initially sought treatment on his own, and the discrepancy concerning notifying his supervisor on February 18, 2011 and the UMR report. Claimant indicated he told Drs. Guy and Keller about the incident on the man lift, and doesn't know why it is not in their notes. Claimant also stated that on February 18, 2011, he took the letter from Dr. Street dated February 17, 2011, to Dave Mog.

Giving some deference to the ALJ's determination of claimant's credibility and thereby accepting claimant's explanations for the inconsistencies and contradictions in the record, this Board Member finds that claimant has met his burden of proving he suffered personal injury by accident arising out of and in the course of his employment with respondent.

Ideally, claimant should have reported the incident to his employer immediately and requested medical treatment under workers compensation. Claimant testified that he gave notice to his employer on February 18, 2011, which is within the statutory time period. The

²⁶ K.S.A. 44-551(b)(2)(A).

ALJ apparently found claimant's testimony credible. As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*²⁷, appellate courts are ill suited to assess credibility 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."²⁸ This Board Member gives deference to the ALJ's findings and conclusions that and finds that claimant gave timely notice.

CONCLUSION

(1) Claimant sustained personal injuries by a series of accidents that arose out of and in the course of his employment with respondent.

(2) Claimant gave respondent timely notice of his series of accidents.

(3) Whether claimant is in need of medical treatment and whether claimant is temporarily and totally disabled are not issues that the Board has jurisdiction to review on an appeal from a preliminary order.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation of Administrative Law Judge John D. Clark dated May 24, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

²⁷ *De La Luz Guzman-Lepe v National Beef Packing Company, Inc.*, No. 103,869, 2011 WL 1878130. (Unpublished Kansas Court of Appeals opinion filed May 6, 2011).

²⁸ *State v. Scaife*, 286 Kan. 614,624, 186 P.3d 755 (2008)