

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

**MARSHA L. FARR** )  
Claimant )  
VS. )  
**QUEST SERVICES, INC.** )  
Respondent )  
AND )  
**ACCIDENT FUND INS. CO. OF AMERICA** )  
Insurance Carrier )

Docket No. **1,063,178**

**ORDER**

Claimant requests review of the January 23, 2014, preliminary hearing Order Denying Compensation entered by Administrative Law Judge (ALJ) Brad Avery. Michael Patton, of Emporia, Kansas, appeared for claimant. Ronald Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, dated February 15, 2013; preliminary hearing transcript, with exhibits dated January 17, 2014; the deposition transcript of Marsha Farr dated January 21, 2013; the deposition of Suzie Vanderslice dated February 8, 2013; and, all pleadings contained in the administrative file.

The ALJ found "[c]laimant failed in her burden of proof that she suffered a personal injury by accident on the date alleged that arose out of and occurred in the course of her employment with the respondent."

**ISSUES**

Claimant requests review of whether the ALJ erred in finding claimant failed to prove she suffered a personal injury by accident arising out of and in the course of her employment. Claimant contends the ALJ should have ordered respondent to provide temporary total disability benefits, provide medical treatment and pay unauthorized medical.

Respondent argues the ALJ's Order Denying Compensation should be affirmed.

The issues for Board review are:

1. Did claimant sustain a personal injury by accident on October 3, 2011, arising out of and in the course of employment with respondent?
2. If so, is claimant entitled to:
  - A. temporary total disability benefits,
  - B. medical treatment, and
  - C. unauthorized medical treatment to be paid by respondent?

#### FINDINGS OF FACT

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

Claimant was employed as a direct support personnel by respondent. Her job was to assist mentally challenged clients in their homes with breakfast, medications, etc. so that the clients would be ready to go to the day programs. She would also drive a van to pick up the clients and transport them to where they needed to go.

On October 3, 2011, at about 7:45 a.m., claimant was tasked with taking handicapped clients to a day program. Claimant drove respondent's van to the client's residence at Quail Creek to provide the client a ride to a day program. The client was in a wheelchair and the van can hold only one wheelchair at a time. While transferring the client from her wheelchair located in the van into a seat, claimant stood the client up to move her and the client started falling. Claimant fell with the client, so the client would not get hurt. Claimant testified she felt something pull in her lower back and felt a sharp quick, pain. She estimated the client weighed 250 pounds. Claimant testified that at the time, she thought she had a pulled muscle in her lower back.

Prior to her alleged October 3, 2011 accident, claimant had a history of back issues. On June 10, 17 and 24, 2010, claimant saw Heather McCullough, ARNP, for low back pain radiating into the legs. She then sought treatment from Dr. Larris R. Noble of the Emporia Chiropractic Center, P.A. on November 29, 2010, for back pain. The chiropractor's notes indicated claimant moved in October and fell asleep on the couch after washing dishes. Claimant returned to Emporia Chiropractic on March 5 and 9, 2011, for right hip and leg pain.

At her deposition, claimant indicated she injured her back at work in April 2011, when she was “lifting laundry or something and twisted it”<sup>1</sup> and she sought chiropractic treatment. Claimant testified she sustained no other injuries at work besides the April 2011 and October 3, 2011 injuries.

At the January 17, 2014, preliminary hearing, claimant was asked if she had more than one incident involving the same client. Claimant testified:

Q. What about the July incident?

A. There wasn't one in July. I was thinking it was July for some reason.

Q. What about [client's name omitted]?

A. That was in October.

B. Did you have more than one incident with her?

A. No.<sup>2</sup>

Claimant later admitted she completed an Employee Statement of Injury/Illness after sustaining a work-related back injury on July 11, 2011. Claimant testified there were two similar incidents, one on July 11 and another on October 3, 2011. In both incidents, claimant injured her back while moving the same client from her wheelchair to the van seat while the van was in front of the client's home at Quail Creek. Claimant testified her back ache went away after the July 2011 incident and she never sought medical treatment. Claimant acknowledged respondent required employees who sustained a work injury to complete a written accident report, but that she did not do so for the October 3, 2011 work incident.

Claimant testified at 8:30 a.m., on the date of the accident, she told her supervisor, Susanna “Suzie” Vanderslice, about what happened. Claimant indicated she went to see Ms. Vanderslice and intended to complete a written accident report. Claimant did not ask for medical treatment at that time or indicate she wanted workers compensation benefits. Her explanation for not doing so is as follows:

**JUDGE AVERY:** Okay. And why didn't you ask her?

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<sup>1</sup> Claimant Depo. at 53.

<sup>2</sup> P.H. Trans. (Jan. 17, 2014) at 8.

**THE WITNESS:** Because when I told Suzie Vanderslice what happened, she said, if you keep getting hurt, they're not going to let you work here anymore. So that discouraged me from doing anything further at that time.

**JUDGE AVERY:** When did this occur?

**THE WITNESS:** This was October 3rd, the day it happened.

**JUDGE AVERY:** So when you told her about your accident, and she then said, if you keep getting hurt, you're not going to be working here anymore?

**THE WITNESS:** Yes.<sup>3</sup>

Ms. Vanderslice testified respondent had a policy regarding injured clients and staff as follows:

[A]ny time that there would be any type of accident, incident, meaning anything out of the ordinary, we were to fill out an incident or accident report for the individual as well as the staff and then they were directed to go to HR, which was the main corporate office which is in Hartford, Kansas.<sup>4</sup>

Ms. Vanderslice testified she did not have a conversation with claimant on October 3, 2011, regarding her work injury. Had claimant reported a work accident, Ms. Vanderslice would have require claimant to complete an accident report. Ms. Vanderslice testified:

Q. Okay. Now, Marsha Farr also testified that you told her that if she kept getting hurt on the job that you didn't want her to work there any more. Did you ever tell her that?

A. No. No.

Q. And that she discouraged -- that you discouraged her, from the way she put it, pursuing this injury?

A. No.<sup>5</sup>

Claimant testified she was required to document her travel in a daily log book. The daily log book does not show that on October 3, 2011, claimant was at Quail Creek.

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<sup>3</sup> *Id.* at 13-14.

<sup>4</sup> Vanderslice Depo. at 7.

<sup>5</sup> Vanderslice Depo. at 13.

On March 23, 2012, she sought medical treatment, on her own, with Dr. Brent Hrabik at Newman Regional Medical Center for low back complaints. She advised the doctor that she had injured herself while helping a client into a van seat. The doctor's notes from that visit do not mention a work injury, but indicated claimant had low back pain since October 2011. Dr. Hrabik saw claimant until at least May 15, 2012. Claimant acknowledged she did not tell Newman that her medical treatment would be covered by workers compensation. Dr. Hrabik referred claimant to Dr. Steffen, who gave claimant two epidural shots.

On cross-examination, claimant acknowledged she saw Diane Wrenn, ARNP, on October 5, 2011, for low back pain and told Ms. Wrenn of moving over the weekend on October 1. Claimant admitted she told Ms. Wrenn the back symptoms began on October 4, 2011. Claimant testified that while moving, she only drove the moving truck.

At the time of the preliminary hearing, claimant was still having pain in her back as well as constant numbness in her foot and leg. The last day claimant worked for respondent was May 26, 2013, because she could no longer perform her job duties. Claimant has not worked since being terminated and received unemployment compensation until October 1, 2013.

On February 6, 2013, at the request of respondent, claimant was evaluated by Dr. Chris Fevurly. The doctor reviewed claimant's prior medical and chiropractic records, took a medical history and physically examined claimant. Dr. Fevurly's report indicated claimant sought treatment from Ms. Wrenn on October 5, 2011, for lumbago, but Ms. Wrenn's note did not mention claimant sustained a work injury. Dr. Fevurly's report indicated claimant saw Dr. Lane Smith, a chiropractor, for low back pain six times from October 12 through November 1, 2011. Dr. Fevurly's report indicated claimant did not seek treatment again for her low back until she saw Dr. Hrabik on March 12, 2012. Dr. Fevurly's report indicated claimant denied any significant pre-existing history of back pain, but did see a chiropractor occasionally in 2009 for back aches.

With regard to causation, Dr. Fevurly stated:

There is no medical record evidence for a work related injury. The claimed work injury on 10/3/11 is not supported by the available medical records and thus, no one can say within a reasonable degree of medical certainty the work event caused the preexisting degenerative disc disease at L5-S1 to progress to a disc herniation producing right S1 radiculopathy.<sup>6</sup>

At the request of her counsel, claimant was evaluated by Dr. C. Reiff Brown on July 17, 2013. Dr. Brown's report indicates he reviewed claimant's medical records, took

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<sup>6</sup> P.H. Trans. (Jan. 17, 2014), Resp. Ex. A. at 5-6.

a medical history and physically examined claimant. Dr. Brown diagnosed claimant with degenerative desiccation at L5-S1 with a large central disk protrusion favoring the right side with nerve root impingement at the foramen. Dr. Brown opined claimant's October 3, 2011, accident was the prevailing factor causing her injury, medical condition and future impairment.

The ALJ ordered claimant undergo an independent medical evaluation by Dr. Harold A. Hess. Dr. Hess reviewed claimant's medical records, took a history and physically examined him on December 6, 2013. The doctor's impression was a central and right L5-S1 disk herniation producing a right lumbar radiculopathy. Dr. Hess' report indicated he questioned claimant about Ms. Wrenn's October 5, 2011 notes. The doctor concluded: "Relying upon the history of the patient, it is my opinion, within a reasonable degree of medical certainty, that the prevailing factor in this patient's current medical condition and symptoms is her work-related injury of October 3, 2011."<sup>7</sup>

The reports of Drs. Brown, Fevurly and Hess make no indication of the July 11, 2011 work injury that claimant reported. It should also be noted that neither the records of Dr. Smith nor Ms. Wrenn were placed into evidence.

#### **PRINCIPLES OF LAW AND ANALYSIS**

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.<sup>8</sup> "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 unless a higher burden of proof is specifically required by this act."<sup>9</sup>

The Board concurs with the ALJ that very little, if anything supports claimant's version of an accidental injury occurring at work on October 3, 2011. Claimant initially denied the July 11, 2011 incident occurred. When confronted with an Employee Statement of Injury/Illness describing an incident nearly identical with the one on October 3, 2011, claimant testified she sustained two separate accidental injuries involving the same client, occurring the same manner. Nor did claimant disclose the July 11, 2011 incident to Drs. Brown, Fevurly and Hess.

Prior to the incident on October 3, 2011, claimant had a recent history of back pain and sought chiropractic and medical treatment. On October 5, 2011, claimant told Ms.

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<sup>7</sup> *Id.*, Cl. Ex. 4 at 3.

<sup>8</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>9</sup> K.S.A. 2011 Supp. 44-508(h)

Wrenn about moving over the weekend and began experiencing back symptoms on October 4, 2011. Simply put, there are too many omissions, inconsistencies and questions in claimant's testimony for her version of events to be plausible. This Board Member finds claimant failed to prove she sustained a personal injury by accident on October 3, 2011, arising out of and in the course of her employment with respondent. All other issues raised by claimant on appeal are moot.

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>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

**WHEREFORE**, the undersigned Board Member finds that the January 23, 2014, preliminary hearing Order Denying Compensation entered by ALJ Brad Avery is affirmed.

**IT IS SO ORDERED.**

Dated this 30th day of April, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Honorable Brad Avery, ALJ

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<sup>10</sup> K.S.A. 44-534a.

<sup>11</sup> K.S.A. 2011 Supp. 44-555c(k).