

Respondent asks the Board to deny the claim for lack of timely notice. Respondent asserts claimant failed to prove she met with personal injury by accident on May 2, 2013, arising out of and in the course of her employment and that her accident was the prevailing factor causing claimant's injury, medical condition and disability.

Claimant asks the Board to affirm the preliminary hearing Order.

The issues before the Board are:

1. Did claimant provide timely notice of her accident?
2. Did claimant prove she met with personal injury by accident on May 2, 2013, arising out of and in the course of her employment with respondent? Specifically, was claimant's accident the prevailing factor causing claimant's injury, medical condition and disability?

FINDINGS OF FACT

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

Claimant was a truck driver and hauled coal, ash and rock. On Thursday, May 2, 2013, claimant went from respondent's business in Pittsburg, Kansas, to Centralia, Oklahoma, and got a load of coal. She then proceeded to Sibley, Missouri, and delivered the coal. At Sibley, after delivering the coal, claimant used a front-end loader to load the trailer with ash. Claimant was required to operate the loader herself to load the ash. When she got out of the loader, claimant skipped the last one or two rungs of the ladder used to enter and leave the cab of the loader and jumped to the ground, a distance of less than two feet. Upon hitting the ground, claimant's left foot began hurting. Claimant then delivered the ash to a location near Pittsburg and afterward returned to respondent's business.

After arriving back at respondent, claimant was seen limping by her supervisor, Bob Kunshek, and a co-worker, Bob Crumby. Claimant testified she told Mr. Crumby and two other co-workers, John and Mandy, of the accident. At the preliminary hearing, claimant acknowledged she called Mandy about the incident and Mandy was not at work. Claimant thought the pain would go away and she finished working that day and worked the next day, Friday, May 3, 2013.

Claimant testified she kept a monthly log book that had a log sheet for each day. Each daily log sheet had an original white top sheet and a yellow carbon. Claimant testified she was not allowed to write anything on the original except where she was going and what she did. Each day, claimant placed that day's original white sheet in a folder located in respondent's office. The yellow copy of the daily log sheet would remain in the log book. Claimant testified she made a notation in the log book on May 2, 2013, on the

yellow copy that she hurt her foot jumping off the loader. Several copies of claimant's yellow daily log sheets were made part of the record. The copy of claimant's yellow daily log sheet dated May 2, 2013, has written on it: "Jumped off loader hurt foot."¹ Claimant testified she made the notation on the yellow copy and not on the original white log sheet because of respondent's restrictions as to what could be written on the original sheet. Another of claimant's log sheets completed sometime in June 2013, apparently for that entire month, includes the following notation: "Off duty med leave/work comp."²

At her October 28, 2013, deposition, claimant testified she told Mr. Kunshek about the accident on the afternoon of May 3, 2013:

Q. And what did you tell Mr. Kunshek at that time?

A. I told him that -- what happened. I told him that I jumped out of the loader and he looked at me funny. And I said, Well, I either jumped off the loader or jumped off the porch, and I very doubtly (sic) jumped off my porch, which he knew I didn't. And that's when he said, Well, don't use your Work Comp, use your Blue Cross and your Aflac. And it's all -- he's got recorders in the office, it should all be recorded, unless they erased it or whatever.

Q. So you acknowledge that you mentioned something that maybe it happened jumping off your porch at home?

A. Yeah, but if you see my porch at home, you would know that I didn't jump off the porch at home. It's very high. I would not jump off of it. I've never jumped off that porch actually. I just said that to him because there was somebody else in the office -- I don't remember who it was -- but somebody else was in the office and I -- when I said it, and I laughed about it or I jumped off my porch and I laughed, I was laughing about it.³

At the preliminary hearing, claimant's testimony was similar:

THE COURT: What did you tell Bob Kunshek on Friday?

A. I told Bob I had a doctor's appointment Monday morning for my med refill and for my foot.

THE COURT: What did you say?

¹ Claimant Depo. (Dec. 13, 2013), Ex. 3.

² *Id.*, Ex. 5.

³ Claimant Depo. (Oct. 28, 2013) at 28.

A. I told him what happened. He asked me what happened and I told him I jumped off the loader and I said, I jumped off the loader at Sibley, oh no, I jumped off my porch. I was joking to make a joke about it, which I can't jump off of my porch, but yes, I told him Friday.

THE COURT: I'm a little confused so what exactly did you tell Bob as to how you hurt your foot?

A. I told him that --

THE COURT: Besides the joke.

A. I told him that you know, after getting loaded I jumped down and I just landed wrong and I'm going to have my doctor look at it.⁴

Claimant testified when she previously sustained a work injury while working for respondent, Mr. Kunshek told her not to report a workers compensation injury. She has also heard him tell co-workers not to report workers compensation injuries.

At the preliminary hearing, the transcript of a July 10, 2013, interview of claimant conducted by an insurance adjuster for respondent's workers compensation insurance carrier was made an exhibit. Claimant told the adjuster of informing Mr. Kunshek of the accident on Friday, May 3, 2013. Claimant did not relate to the adjuster of joking about sustaining the injury while jumping off her porch.

Mr. Kunshek testified he was told by claimant on Friday, May 3, 2013, or that weekend that she hurt her foot while jumping off her porch at home. Mr. Kunshek indicated he first learned claimant was alleging a work injury in July 2013, when Mr. Kunshek received a notice in the mail from claimant's attorney. Mr. Kunshek denied ever telling an employee not to report a workers compensation injury.

On the Monday following the accident, May 6, claimant went to her family nurse practitioner, M. Cathy Swearengin, for the left foot injury. Ms. Swearengin took claimant off work for six weeks. Claimant filed paperwork with Blue Cross and AFLAC, but indicated the injury was work related. Consequently, Blue Cross and AFLAC would not cover her injury.

At the end of the six-week period, claimant's left foot was worse, so she sought treatment from Dr. Richard P. Hudson, a podiatrist. Dr. Hudson first saw claimant on June 13, 2013, and indicated that radiographic studies showed no stress fracture. The doctor initially treated claimant conservatively with prescription medication and an injection. On July 1, 2013, Dr. Hudson indicated claimant's symptoms were consistent with a Morton's

⁴ P.H. Trans. at 18.

neuroma in the 3rd inner space left and he recommended surgery to excise the affected nerve. Claimant testified she told Dr. Hudson the foot injury occurred at work.

On September 13, 2013, at the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic. Dr. Prostic indicated claimant sustained an injury to her left foot on May 2, 2013, and his diagnosis was a Morton's neuroma. The doctor noted that treatment alternatives included steroid injections or excision of the Morton's neuroma. Dr. Prostic opined, "The work related injury sustained May 2, 2013 while employed by Kunshek Chat & Coal, Inc. is the prevailing factor in the injury, the medical condition, and the need for medical treatment."⁵

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.⁶ "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."⁷

The Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,⁸ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. The Kansas Supreme Court has stated: "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."⁹

The ALJ had the opportunity to assess the testimony, credibility and veracity of claimant and Mr. Kunshek. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant was credible and provided timely notice to respondent. Mr. Kunshek acknowledged he was told by claimant on or about May 3, 2013, of sustaining a foot injury. However, according to

⁵ P.H. Trans., Cl. Ex. 1 at 2.

⁶ K.S.A. 2013 Supp. 44-501b(c).

⁷ K.S.A. 2013 Supp. 44-508(h).

⁸ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

⁹ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

Mr. Kunshek, claimant indicated her left foot was injured from jumping off the porch at her home. When making his decision, the ALJ apparently found claimant more credible than Mr. Kunshek. This Board Member concurs with the ALJ's finding claimant provided timely notice of her accident to respondent.

This Board Member concludes claimant met with personal injury by accident on May 2, 2013, arising out of and in the course of her employment with respondent and that her accident was the prevailing factor causing claimant's injury, medical condition and disability. Claimant's testimony concerning her May 2, 2013, accident is uncontroverted. Respondent argues there were no witnesses to the accident. The Board, on past occasions, has found claims compensable where only the claimant witnessed the accident.¹⁰

Dr. Prostic's opinion is uncontroverted that claimant's May 2, 2013, work accident was the prevailing factor causing her injury, medical condition, and need for medical treatment. Respondent presented insufficient evidence to contradict Dr. Prostic's opinion. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.¹¹ This Board Member can find nothing in the record indicating Dr. Prostic's opinion on prevailing factor was improbable, unreasonable or untrustworthy. Consequently, this Board Member affirms the ALJ's finding that claimant proved her May 2, 2013, work accident was the prevailing factor causing claimant's injury, medical condition and disability.

In summary, claimant proved by a preponderance of the evidence she gave timely notice of her accident and she met with personal injury by accident arising out of and in the course of her employment with respondent, including her May 2, 2013, accident was the prevailing factor causing her injury, medical condition and disability.

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. 2013 Supp. 44-551(I)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

¹⁰ *Huffman v. Exodyne*, No. 1,053,501, 2012 WL 758303 (Kan. WCAB Feb. 24, 2012); *Smith v. Wal-Mart*, No. 1,021,100, 2005 WL 1634427 (Kan. WCAB June 10, 2005); *McKinzie v. Midwest Regional Credit Union*, No. 241,689, 1999 WL 557589 (Kan. WCAB June 21, 1999) and *Nguyen v. The Boeing Company – Wichita*, No. 196,787, 1995 WL 598256 (Kan. WCAB Sept. 1, 1995).

¹¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹² K.S.A. 2013 Supp. 44-534a.

¹³ K.S.A. 2013 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member affirms the December 23, 2013, preliminary hearing Order entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Troy A. Unruh, Attorney for Claimant
tunruh@wntlaw.com

Katie M. Black, Attorney for Respondent and its Insurance Carrier
kblack@mvplaw.com; mvpkc@mvplaw.com

Honorable Brad E. Avery, Administrative Law Judge