

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

TARHONDA J. BARBER)	
Claimant)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,067,643
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance fund (respondent) appealed the January 16, 2014, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery. Jan L. Fisher of Topeka, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 9, 2014, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges injury by accident on September 7, 2013. The preliminary hearing Order requires respondent to provide medical care for claimant with Dr. Sankoorikal and pay temporary total disability benefits at the rate of \$457.34 per week commencing October 27, 2013. The preliminary hearing Order provides:

The Court finds that based on claimant's testimony and the dvd provided, it is more likely than not that claimant was injured when she was attempting to remove the handcuffs from the inmate, as described above. The Court finds claimant suffered personal injury by accident that arose out of and occurred in the course of her employment with the respondent. The accidental injury was the

prevailing factor causing claimant's injury, medical condition and disability per the opinion of Dr. Prostic. (Claimant's ex. 2, p. 2).¹

Respondent contends claimant was unsure if her injuries occurred as she was assisting placing handcuffs on a juvenile or while assisting in removing the juvenile's handcuffs. Respondent then concludes no accident occurred because K.S.A. 2013 Supp. 44-508(d) requires an accident must be identifiable by time and place of occurrence. Respondent asserts claimant did not prove a compensable accident because her accident did not produce, at the time, symptoms of her left wrist and shoulder injuries as required by K.S.A. 2013 Supp. 44-508(d). Respondent argues claimant failed to prove a causal connection between the conditions under which work is required to be performed and the resulting accident as required by K.S.A. 2013 Supp. 44-508(f)(2)(B)(i). Respondent's final defense is that claimant failed to prove her accident was the prevailing factor causing her injury and medical condition.

Claimant contends as a result of her September 7, 2013, accident, she sustained left wrist and shoulder injuries. She asks the Board to affirm the preliminary hearing Order.

The issues to be determined are:

1. Did claimant's alleged September 7, 2013, accident(s), at the time, produce symptoms of an injury as required by K.S.A. 2013 Supp. 44-508(d)?
2. Was claimant's accident(s) identifiable by time and place of occurrence?
3. Did claimant prove a causal connection between the conditions under which work is required to be performed and the resulting accident(s) as required by K.S.A. 2013 Supp. 44-508(f)(2)(B)(i)?
4. Did claimant prove her accident(s) was the prevailing factor causing her injury and medical condition?

FINDINGS OF FACT

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

On September 7, 2013, claimant was employed by respondent as a Juvenile Corrections Officer II. She worked at the Kansas Juvenile Correctional Complex, a lock-down facility where dangerous juveniles are held. During her shift, claimant made rounds, supervised the other guards and completed paperwork.

¹ ALJ Order at 3.

At approximately 8:10 to 8:15 p.m. claimant received a radio call for assistance in P unit, which held inmates with the most severe behavioral issues. When claimant arrived, a juvenile was sitting in the commons area, refusing to go into his room. The incident with the juvenile was video recorded. Claimant testified she initially used a soft touch, trying to escort the juvenile into his room. As claimant escorted the juvenile to his room, he began resisting.

Two male officers arrived at the scene and took the juvenile, who resisted claimant, to the ground. Claimant testified that as shift supervisor, she did not usually get involved in such incidents. The shift supervisor watches the incident so they can complete the use of force report and paperwork. Claimant primarily supervised the two officers in taking the juvenile down to the ground. However, after the juvenile was on the ground, claimant assisted in holding his hands straight behind his back and locking and double-locking the handcuffs. While claimant was assisting with the handcuffs, the juvenile was resisting by moving his shoulders and arms. After handcuffs were placed on the juvenile, he calmed down.

The juvenile was escorted to his room, but before he was placed in his room, the room was stripped. While this occurred, claimant began resisting again by making himself rigid. This incident was not captured on the video recording as it occurred in an area without a video camera. Claimant was able to talk the juvenile into entering his room. Claimant indicated she was not experiencing any symptoms at that point because there was a lot going on and she was excited.

The juvenile entered his room wearing handcuffs and the door was closed. The juvenile was required to put his hands through a slot in the door to have the handcuffs removed. At the time, an officer was assisting claimant. As the juvenile had his hands through the slot, claimant grabbed the handcuffs in the middle in order to remove them. Claimant testified the juvenile was struggling while she was removing the handcuffs.

When asked when she started feeling problems, claimant testified, "I started feeling problems, um, you know, when I left the facility at eleven o'clock. I noticed a tenderness in my [left] wrist and forearm."² Claimant did not complete an accident report, as she initially thought it was not a substantial injury. Claimant testified the next morning, September 8, 2013, she took a shower and could not "even move my left arm, my wrist."³ She indicated the only pain she noticed was in her wrist because it was so severe. Claimant testified the pain went above her elbow to the shoulder. She later testified the pain only went an inch or two above her elbow.

² P.H. Trans. at 32.

³ *Id.* at 33.

That same day, September 8, 2013, claimant completed an accident report and was sent by respondent for medical care. Claimant was seen that day at St. Francis Health Center. Notes from that visit indicated claimant presented with a left wrist injury that had occurred the previous night at work and complained of pain in the left distal forearm and wrist region. The notes also state, "She denies other injury or trauma."⁴ The notes made no mention of left shoulder complaints or a left shoulder injury, but indicated claimant had good left shoulder and elbow range of motion. Claimant indicated she was given restrictions, but respondent did not honor them.

Claimant testified that about two days after she went to St. Francis, she began experiencing left shoulder pain. She indicated the pain came on gradually and came down from the shoulder. During those two days, claimant did not work and did not engage in any physical activities.

Claimant returned to St. Francis on September 11, 2013, where she saw Dr. Laurel A. Vogt. Notes from that visit indicated claimant's primary problem was pain in the left wrist, but also indicated it was accompanied by pain radiating up the arm to the shoulder. Dr. Vogt noted there was tenderness to palpation over the anterior shoulder joint and proximal biceps muscle. Dr. Vogt's diagnoses were left wrist sprain and contusion and a left shoulder strain.

Claimant testified that at some point, respondent denied her claim. She then went to her family doctor, who gave her restrictions. Claimant indicated respondent did not honor the restrictions.

After an off-the-record discussion, claimant gave additional testimony regarding when she first noticed symptoms. Claimant testified her shift ended at 9:30 p.m. on September 7, 2013, but she stayed until 11 p.m. to complete paperwork from the incident. Claimant indicated she felt tenderness and soreness in her left wrist and forearm as she was typing on the computer and doing paperwork. Claimant testified her emotional state at the time the incident occurred was, "Very excited, wanted to get things taken care of, wanted to make sure nobody was injured."⁵ Claimant also testified her adrenaline level was high.

On cross-examination, claimant testified she did not believe there was an injury to her left arm during the incident when the juvenile was on the ground and being handcuffed. However, claimant indicated she bent down several times in the commons area to assist placing handcuffs on the juvenile and during this series of incidents she hurt her left arm or wrist. Up until the time the juvenile put his hands through the slot in the door, claimant

⁴ *Id.*, Cl. Ex. 1.

⁵ P.H. Trans. at 42.

did not notice any pain or problems in her left arm or wrist as she was excited and her adrenaline level was high. Claimant indicated she believes she was most significantly hurt when she was standing outside the door of the juvenile's room and removing his handcuffs. Claimant testified her reason for that belief is because the juvenile was "struggling really, really hard then."⁶

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic, an orthopedic physician, on December 11, 2013. Dr. Prostic indicated claimant reported no past history of neck or left upper extremity difficulties. The doctor noted an MRI of the shoulder showed abnormality of the rotator cuff with minimal fluid in the subdeltoid bursa and degenerative changes and hypertrophy of the acromioclavicular joint, and a cervical spine MRI was unremarkable. He opined: "The work-related injury sustained September 7, 2013 while employed by the Kansas Juvenile Correctional Complex is the prevailing factor in the injury, the medical condition, and the need for medical treatment."⁷

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.⁸ "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."⁹

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

Respondent asserts claimant's left wrist injury symptoms did not occur until two and one-half hours after her second accident on September 7, 2013. Therefore, claimant's

⁶ *Id.* at 46.

⁷ *Id.*, Cl. Ex. 2 at 3.

⁸ K.S.A. 2013 Supp. 44-501b(c).

⁹ K.S.A. 2013 Supp. 44-508(h).

accidents did not produce, at the time, symptoms of her injury. The Board has previously dealt with this issue in *Johnson*¹⁰ and *King*.¹¹

In *Johnson*, Mr. Johnson testified at the first preliminary hearing that he fell on April 4, 2012, hitting his chest on a bathtub while assisting a client at work, but that he did not have any pain or symptoms the remainder of the day. The next day, April 5, Mr. Johnson worked his full shift. That night, his back was tingling and felt funny. On April 6, Mr. Johnson could not get out of bed due to severe back pain. Mr. Johnson reported the accident to his supervisor and on April 9, he completed an accident report. The Board Member who decided *Johnson* found claimant's injury was not compensable, stating:

The amended statute eliminated the sentence that contained the phrase that the elements of an accident are not to be construed in a strict and literal sense and replaced that sentence with the phrase that requires the accident to be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single [sic] work shift. Moreover, the accident must be the prevailing factor in causing the injury. In statutory construction a material change in a statute made by an amendatory act is presumed to change the original statute. [Footnote citing *Shapiro v. Kansas Public Emp. Retirement System*, 211 Kan. 452, Syl. ¶ 2, 507 P.2d 281 (1973).] Moreover, in *Bergstrom* [Footnote citing *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).], the Supreme Court noted that when a workers compensation statute is plain and unambiguous, effect must be given to its express language. Under the new amended definition, in order to qualify as an accident under the act there must be symptoms of an injury at the time of the occurrence.

Applying the new definition of accident to the facts of this case results in a finding that because claimant did not have any symptoms of an injury at the time of the occurrence, the incident at work does not meet the new statutory definition of accident. The unfortunate consequence is that under the new definition of accident, claimant has failed to meet his burden of proof that he suffered a compensable "accident" at work. The ALJ's Order is reversed.

Subsequently, another preliminary hearing was held in *Johnson*. Mr. Johnson and his wife testified that claimant experienced symptoms during his shift after the accident. The ALJ found Mr. Johnson's symptoms more than likely manifested at the time of the accident. Respondent appealed and the Board Member affirmed the ALJ, stating, "While claimant was indecisive and his testimony sometimes confusing, there is sufficient

¹⁰ *Johnson v. State of Kansas*, No. 1,060,601, 2012 WL 4763707 (Kan. WCAB Sept. 14, 2012).

¹¹ *King v. Sealy Corporation*, No. 1,059,645, 2012 WL 6101120 (Kan. WCAB Nov. 15, 2012).

evidence that he experienced low back symptoms at the time of the accident or shortly thereafter as required by K.S.A. 2011 Supp. 44-508(d).¹²

The same issue arose in *King*. On October 19, 2011, Mr. King moved approximately 120 mattresses and box springs from their location in a trailer to the end of the trailer and felt no pain or other symptoms. The next day, Mr. King woke up with no grip in his right hand and pain shooting down his right arm that started at the base of his neck between his shoulder blades. The Board Member who issued the Board's Order in *King* cited the Board's September 14, 2012, Order in *Johnson*¹³ and stated: "Experiencing symptoms upon awakening the morning after the work shift ended does not constitute symptoms being produced 'at the time' of the injury."¹⁴

The facts in the current claim are different than those in the first *Johnson* case and *King*. Here, claimant experienced symptoms at work on the same day as her accidents, while in the first *Johnson* preliminary hearing and *King*, the evidence was that Mr. Johnson and Mr. King did not have symptoms of an injury until the day after their injuries or later. This Board Member finds claimant's accident, at the time, produced symptoms of an injury as required by K.S.A. 2013 Supp. 44-508(d).

This Board Member acknowledges claimant did not begin experiencing left shoulder symptoms until several days after her accidents on September 7, 2013. However, K.S.A. 2013 Supp. 44-508(d) does not require that all of claimant's symptoms must manifest themselves at the time of the accident, only that claimant must have symptoms of an injury at the time of the accident. This Board Member finds claimant had symptoms of an injury, her left wrist injury, shortly after her two accidents. Therefore, claimant sustained an accident as defined by K.S.A. 2013 Supp. 44-508(d).

This Board Member also finds claimant's accidents are identifiable by time and place of occurrence. Respondent is correct that K.S.A. 2013 Supp. 44-508(d) requires that an accident be identifiable by time and place of occurrence. Claimant identified two accidents that occurred on September 7, 2013. The first was when the juvenile was on the ground and claimant assisted in placing handcuffs on the juvenile and the second was when she removed the handcuffs. While claimant was not certain which of the two accidents caused her injuries, she indicated she was most significantly hurt after the second accident. This Board Member finds claimant's testimony sufficient to establish the time and place of her accidents.

¹² *Johnson v. State of Kansas*, No. 1,060,601, 2013 WL 3368488 (Kan. WCAB June 19, 2013).

¹³ *Johnson v. State of Kansas*, No. 1,060,601, 2012 WL 4763707 (Kan. WCAB Sept. 14, 2012).

¹⁴ *King, supra*.

Respondent argues claimant failed to prove her accident arose out of and in the course of her employment because she failed to establish an accident as defined by K.S.A. 2013 Supp. 44-508(d). Respondent argues that because the symptoms of the left wrist and shoulder injuries did not occur at the time of the accident, claimant failed to prove the accident was the prevailing factor causing claimant's injury and medical condition. Using the same argument, respondent asserts claimant failed to prove there was a causal connection between the conditions under which she performed her work and the resulting accident. Respondent is merely repeating its argument that claimant's symptoms of injury did not occur at the time of her accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ 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(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, the undersigned Board Member affirms the January 16, 2014, preliminary hearing Order for Compensation entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of May, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
janfisher@mcwala.com

Nathan D. Burghart, Attorney for Respondent and its Insurance Fund
nate@burghartlaw.com; stacey@burghartlaw.com

Honorable Brad E. Avery, Administrative Law Judge

¹⁵ K.S.A. 2013 Supp. 44-534a.

¹⁶ K.S.A. 2013 Supp. 44-555c(j).