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

LONNIE L. PARKER Claimant V. **DEFFENBAUGH INDUSTRIES, INC.** Respondent AND **FARMINGTON CASUALTY COMPANY** Insurance Carrier	))))))))))	Docket Nos. 1,069,143, 1,069,144 & 1,069,145

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Kenneth J. Hursh's August 28, 2014 preliminary hearing Order. Keith V. Yarwood of Kansas City, Missouri, appeared for claimant. Clifford K. Stubbs of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the judge and consists of the transcript of the preliminary hearing and exhibits thereto, claimant's discovery deposition transcript and all pleadings contained in the administrative file.

ISSUES

This appeal involves three separate docketed claims. In Docket Number 1,069,143, claimant alleges a low back injury on November 8, 2013, from picking up an unexpectedly heavy item – wet magazines in a trash bag. In Docket Number 1,069,144, claimant alleges a low back injury on January 27, 2014, from moving a dumpster through snow. In Docket Number 1,069,145, claimant alleges a low back injury by repetitive trauma on January 27, 2014, and every day worked before and after.

The judge found claimant's injury arose out of and in the course of his employment and notice for the November 8, 2013 injury by accident was timely. The judge did not specify under which docket number or numbers the benefits were ordered.

Respondent requests the Order be reversed, arguing claimant failed to provide timely notice for the November 8, 2013 injury and failed to prove the prevailing factor requirement contained in K.S.A. 2013 Supp. 44-508(f). Respondent also argues the Order is deficient because the judge did not specify to which docket number or numbers the benefits awarded pertained. Claimant maintains the Order should be affirmed.

The issues for this Board Member's review are:

1. Did claimant provide timely notice for an injury by accident that occurred on November 8, 2013?

2. Did claimant prove any accident or repetitive trauma was the prevailing factor in causing his medical condition and need for medical treatment?

3. Does the Board have jurisdiction to hear respondent's argument that the preliminary hearing Order is deficient because the judge did not specify which docket number or numbers the benefits awarded pertained?

FINDINGS OF FACT

Claimant has worked for respondent since December 2001 as a driver. In describing his duties, claimant testified:

> I'd come in, we'd do our meeting, our stretches, and then go out and do pre-trip on the truck and then head out to a route. We'd go and commence doing the route, stopping and getting trash cans, bags, getting in and out, helping the help - - helper, you know, clean up messes. Some trash cans and totes are heavy and some of them aren't. Some of them, we have to wrap the overhead winch around it to pick them up.
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> Then I'd also come onto apartment complexes where we maneuver heavy dumpsters in and out of their stalls. Some of them had broken wheels, and through the snow if there's snow out there, if it's raining. It's a lot of getting in and out of the truck, going back and forth.[1]

Claimant received chiropractic treatment in the past, but testified he did not consider himself as having back problems.

Claimant testified that on Friday, November 8, 2013, he injured his low back after grabbing and attempting to throw a black trash bag full of wet magazines during the last stop of the day. He described his pain as a burning, stinging sensation. Claimant testified he was unable to report the incident because by the time he returned to the office, everyone had gone home. He spent the weekend resting his back. Claimant testified the following Monday, he told Will Craddock, the Wyandotte County supervisor, "go easy on me today, I aggravated my back Friday on that special pick up."[2]

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[1] P.H. Trans. at 7.

[2] Claimant Depo. at 17.

Although respondent's policy states he is to report any work accident to his immediate supervisor, claimant testified he was unable to locate Christopher Wright, his immediate supervisor. He described Mr. Craddock as a 5'9" or 5'10" skinny, black man with no beard.[3] Claimant testified he did not request medical treatment because he "just wanted to let somebody know"[4] what had happened. Afterwards, he indicated Mr. Craddock did not say anything and just turned and walked off. His back continued to bother him throughout that Monday, but he was able to finish his shift.

Claimant testified that on Tuesday, he attempted to contact Mr. Wright to let him know he would not be in. When Mr. Wright was unavailable, he called and left a message on the sick hotline that he would not be in because he had hurt his back on Friday and aggravated it on Monday. According to claimant, shortly thereafter, Mr. Wright returned claimant's call and claimant told him he had "aggravated, hurt [his] back Friday picking up that special and aggravated it on Monday."[5] According to claimant, he called in again on Wednesday and spoke with Mr. Craddock telling him he had hurt his back on Friday and aggravated it on Monday. Claimant does not recall asking for medical treatment during these conversations and indicated no treatment was offered. As he was told he would need a doctor's excuse for missing two days of work, claimant went to Kearney Chiropractor Center on November 13, 2013, and obtained an off work slip.[6] According to claimant, his chiropractor recommended he obtain a second opinion.

Claimant returned to work on November 14, 2013. He indicated no accident report was filled out and "[n]obody acknowledged it. When I'd tell them I aggravated my back, they'd just walk off."[7]

Claimant went on his own to the Urgency Room for a second opinion on November 23, 2013. He was seen by Max Goodwin, M.D. Claimant complained of left-sided pain and tenderness from L5 to the coccyx, with radiation down the buttocks/posterior left leg. The mechanism of injury was listed as, "picking up boxes, lift trash bag c̄ magazines."[8] An x-ray of the lumbar spine showed no evidence of spondylolisthesis or fracture. Claimant was diagnosed with a lumbar strain and prescribed medication. Dr. Goodwin recommended physical therapy and advised claimant to follow-up with his primary care physician.

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[3] The judge noted this description may actually concern Christopher Wright. (ALJ Order at 1).

[4] Claimant Depo. at 20.

[5] *Id*. at 21.

[6] P.H. Trans., Ex. 1.

[7] Claimant Depo. at 22.

[8] P.H. Trans., Ex. A at 18.

Claimant testified that following his return to the Urgency Room on December 1, 2013, he presented his physical therapy prescription to Mr. Wright and Robert Hunter, the supervisor in charge of residential jobs. Claimant testified when he mentioned to Mr. Hunter that he was not going to be able to make physical therapy because of his schedule, Mr. Hunter said, "that's too bad."[9]

While claimant testified he was never asymptomatic, he continued to work his regular job with no restrictions. In describing his symptoms, claimant testified:

> Q. And at this time, again this is last November, tell me how your back was feeling, what type of symptoms, where the pain was and what type of pain it was.
>
> A. It was lower back, and the more I used it, it started getting where it would start like shocking me a little bit.
>
> Q. Where would it shock you?
>
> A. In the lower back. And then when it would do that, it got to where it was wadding my muscles up in my back. The more I did it, the more it started hurting.[10]

According to claimant, on Monday, January 27, 2014,[11] he was pushing a dumpster through the snow on to the curb when he reaggravated his back and fell to the ground with severe low back pain. He reported the incident to dispatch who sent Mr. Wright out to the accident site with a replacement driver.

In describing his symptoms, claimant testified:

> Q. The back pain that you've told me about after the January 27, 2014, accident where you were pushing dumpsters on that snowy day, was the pain in the same part of your back as before?
>
> A. Yes.
>
> Q. Tell me how it was different, if it was different at all. Or was it exactly the same?

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[9] *Id*. at 18.

[10] Claimant Depo. at 22.

[11] The medical records reflect that the date of accident was February 3, 2014. Claimant acknowledged the date of accident was February 3, 2014. (P.H. Trans. at 28).

A. Exactly the same as it was the first, as the first injury. Just hurt worse and down my leg.

Q. And which leg did it go down?

A. Right leg.

Q. How soon after this January 27, 2014, accident, as best you can recall, was it that this leg pain started? Did it happen right away or did it take a week or two, if you remember?

A. I think it took a few days. Because at that time it was more in, you know, it was more so up in the back and caused my muscles all to wad up. Felt like being stuck with a cattle prod.[12]

Because the medical clinic used by respondent was already closed and subsequently due to inclement weather, claimant was unable to get medical treatment until Thursday, February 6, 2014, when he was examined by Kim Bogart, M.D. Claimant provided the following history:

> DOI originally 11/15/13. PT states he was throwing trash . . . had picked up a bag of wet magazines and twisted to throw it. He had immediate pain to low back. . . . He states he told his supervisor Chris Wright and Chris walked away and did not fill out an incident report. He states he just ignored it. . . . He said . . . he started going to a chiropractor and did 3-4 sessions. It did not seem to work. He states the chiropractor told him that he might have a [bulging] disc problem. He has not seen the chiropractor for about 2 mo. He contnued [sic] to work full duty with difficulty and continued pain. . . .
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> Pt states that he then aggrevated [sic] the low back pain on Monday 2/3/14 around 1430. He states that he was pushing a dumptster [sic] up and over the curb lips. He states that this one time it "caught his low back and he dropped to the ground on his knees with pain". He reported it to his supervisor again Chris Wright and Robert Hunter. They told him to come to the clinic for eval on 2/4/14. . . .
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> PT C/O pain to bilat low back. Pt states on [2/3/14] with the incident he did have pain that radiated to his bilat lower legs/calf region. It only lasted 30 min then that radiation of pain got better. . . . He states after that occasionally he gets pain to right calf region, but last time he had that was yesterday. He denies numbness or tingling. He denies any weakness to his legs or feet. . . . Pt has also been ambulating with a cane for the past 3 days.[13]

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[12] Claimant Depo. at 27.

[13] P.H. Trans., Ex. A at 10.

Claimant was diagnosed with low back pain. Dr. Bogart indicated claimant's original injury occurred on November 15, 2013, with reaggravation on February 3, 2014, with pain radiating into his right lower extremity. Dr. Bogart ordered physical therapy, prescribed medication and placed claimant on light duty with restrictions of no lifting/pushing/pulling over 10 pounds, no bending at the waist and no squatting, kneeling, climbing or prolonged standing or walking.

Claimant returned to Dr. Bogart on February 11, 2014. Dr. Bogart noted claimant was just starting his medication and physical therapy due to authorization issues. Dr. Bogart recommended an MRI if claimant had no improvement after two weeks of therapy.

Claimant attended physical therapy on February 12, 13 and 18, 2014. At the time of the initial visit, claimant reported his pain as an 8 out of 10 on the pain scale, with the last visit being a 7 out of 10. At the last two therapy sessions, the physical therapist noted claimant showed "exaggerated pain behaviors."[14]

On May 23, 2014, claimant was seen at his attorney's request by Harold Hess, M.D. Dr. Hess obtained a history, reviewed medical records and performed a physical examination. Dr. Hess noted two accidents, one on or around November 8, 2013, and the second on January 27, 2014. Dr. Hess noted the second accident caused a marked increase in claimant's back pain, with occasional pain radiation and tingling down the right leg posteriorly to the calf. Dr. Hess recommended an MRI scan, followed by injections, physical therapy and possible surgical intervention. Dr. Hess imposed sedentary restrictions. In addressing prevailing factor, Dr. Hess stated:

> It is my opinion that the injury of November 8, 2013 and again on January 27, 2014 is the direct, proximate, and prevailing factor causing both the patient's current medical condition and the disability suffered by the patient, as well as his symptoms.[15]

In mid-late March 2014, claimant requested and received leave from respondent under the Family Medical Leave Act. He apparently has not worked since June 27, 2014. Claimant currently experiences muscle tightness and/or a dull ache in his low back with tingling down his right leg, although he has left leg symptoms to a lesser degree. He takes ibuprofen which seems to relieve his symptoms. He is not currently under any active medical care.

Three witnesses – claimant, Mr. Wright and Mr. Craddock – testified at the preliminary hearing. Claimant generally testified that he told his supervisors about the November 2013 injury and its workplace origin. However, the following dialogue occurred:

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[14] *Id.*., Ex. A at 24, 26.

[15] Hess Report at 2.

> Q. And the question that I have for you is, there's a difference between saying, my back hurts, and, my back hurts from lifting the wet magazines last Friday.
>
> As you sit here today, do you recall which you said? Did you say my back was hurting, or my back was hurting from lifting the wet magazines last Friday?
>
> A. I told them it was from - - you know, aggravated from the last Friday, and I told Will to go easy on me, to go easy on me that Monday.[16]

Mr. Wright, respondent's residential supervisor for 20 years, acknowledged having called claimant in mid-November 2013 because he had missed a couple of days of work. According to Mr. Wright, at that time, claimant said his back was hurting, but did not say it was due to a work accident. Mr. Wright denied claimant ever told him about a work accident in November 2013 when he was lifting a trash bag of wet magazines. He indicated in January or February 2014, he received a call to pick claimant up because he had injured himself. In describing how a worker obtains medical treatment for a work-related injury, Mr. Wright testified: "He . . . fills out a statement, I fill out a statement. We turn that in to safety and we take a report to the clinic."[17]

Mr. Craddock, also a residential supervisor, denied claimant told him he sustained an injury in November 2013 or that he had back problems. Mr. Craddock testified if an employee mentioned his back hurt, he would conclude it might be a work-related injury.

The judge's preliminary hearing Order states, in relevant part:

> In the respondent's version of events, the claimant withheld from the respondent information about a work related event on November 8 until the claimant went to the company clinic in February. However, the claimant provided the details of the November incident to the Urgency Room shortly after the incident. It is possible the claimant chose to divulge the particulars of the work injury to the Urgency Room while hiding them from the respondent, but this scenario seems unlikely. The court thinks the claimant mentioned the source of his back pain to the respondent the same as he did to the Urgency Room. It is held the claimant reported the alleged November 8, 2013 work accident within 20 days as required by K.S.A. 44-520.
>
> The remaining question is whether the claimant has an injury for which either work accident was the prevailing causative factor. Dr. Hess' opinion that both events were the prevailing factor is incompatible with the K.S.A. 44-508(g) definition of "prevailing" as "primary in relation to any other factor." If the two events are equally causative, then neither one is "primary." But the respondent's clinic also noted a condition worthy of further evaluation by MRI.

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[16] P.H. Trans. at 34.

[17] *Id*. at 40.

The record in this case was complicated, but at this preliminary stage the evidence shows the claimant has low back pain that arose in the course and scope of his employment and which was timely reported. Medical consensus on the next step is an MRI. Hopefully, an MRI will reveal whether the source of the claimant's back pain is an acute injury or an aggravation of a preexisting condition.

The respondent and insurance carrier shall authorize an MRI with an appropriate medical provider. If the parties cannot reach an agreement on compensability after the MRI results are reviewed by physicians, the parties may schedule another preliminary hearing on the compensability issue without filing another E-3 application for preliminary hearing.

The claimant is subject to a sedentary work restriction from Dr. Hess and has not been offered accommodated employment. The respondent and insurance carrier shall pay the claimant temporary total disability benefits from June 27, 2014 until the above ordered MRI is completed. Once the MRI is completed, the claimant's eligibility for benefits may be reexamined.

Respondent filed a timely appeal.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) provides:

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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

(d) "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.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by
the parties.

(h) “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.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

. . .

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

1. Claimant provided timely notice for his November 8, 2013 injury by accident.

Respondent's two witnesses summarily denied receiving notice of a November 8, 2013 injury by accident. Claimant's testimony was generally consistent, but his last testimony on the issue is that he told his supervisors "it was . . . aggravated from the last Friday" and "to go easy on me . . . ." Such testimony, in isolation, could be viewed as showing claimant did not relay to his supervisors a work-related connection to his injury or the full particulars required by notice. Nevertheless, the judge sided with claimant's testimony over that of respondent's witnesses. Perhaps the judge concluded that the bulk of claimant's otherwise consistent testimony outweighed his last somewhat equivocal statement regarding the content of what he told his supervisors.

The judge had the unenviable task of weighing conflicting evidence regarding notice. This is an extremely close call, but the Board frequently gives some credence to a judge's first-hand opportunity to assess live testimony. While the judge did not specifically make credibility determinations, he agreed with claimant's version of events. This Board Member sees the judge's logic of concluding claimant likely provided consistent particulars of a work injury to both the Urgency Room staff and his supervisors, as it would make little sense for claimant to provide conflicting stories. However, there is also a noted inconsistency of respondent allegedly ignoring claimant's complaints in November 2013, yet promptly responding to his February 2014 complaints, including sending claimant for medical treatment. Nonetheless, based on deferring to the judge's first-hand opportunity to hear live testimony, this Board Member concludes, by the barest of margins, claimant provided notice of his November 8, 2013 injury by accident.

2. Claimant proved the prevailing factor for his current need for medical treatment was his February 3, 2014 injury by accident.

Respondent notes Dr. Hess opined both accidents were the prevailing factor in causing claimant's current medical condition, disability and symptoms. Respondent argues Dr. Hess' opinion means that both events were equally causative, such that neither is prevailing with respect to other factors. The judge's Order also mentions that if two events are equally causative, neither is primary. However, the judge did not address whether claimant proved the prevailing factor requirement, instead ordering a lumbar MRI based on the medical evidence. The judge indicated the parties were free to schedule another preliminary hearing regarding compensability after the MRI results have been issued.

Insofar as the judge cannot award temporary total disability benefits absent a finding of compensability,[18] this Board Member interprets the judge's preliminary hearing Order as finding the case compensable, including that claimant met the prevailing factor requirement.

Whether a claimant successfully establishes the prevailing factor requirement is not limited to expert medical opinions. A claimant's testimony and medical records, among other non-exclusive evidence, may be considered when addressing the statutory requirement to consider "all relevant evidence." Along these lines, claimant testified that his second accident caused his condition to worsen.[19] The medical records support claimant's testimony that the second event was the greater cause for his current injury and need for medical treatment. Claimant missed significant work and had work restrictions subsequent to the second accident, but not on account of the first accident. He only had an x-ray after the first accident, but now an MRI is recommended. Claimant has right lower extremity radicular symptoms that are new and different due to the second accident.

This Board Member concludes that the totality of the evidence establishes claimant's second accident was the prevailing factor in his current injury and medical condition.[20]

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[18] See K.S.A. 44-534a(a)(2).

[19] Whether claimant's second accident caused an injury that is a sole aggravation of a preexisting condition is not an issue on appeal.

[20] This Board Member makes no comment, findings or conclusions as to whether the initial accident was the prevailing factor for his then-current injury and medical condition prior to the second accident. This Board Member further makes no comment, findings or conclusions as to the claimed injury by repetitive trauma before and after January 27, 2014.

3. The Board lacks jurisdiction to consider respondent's argument that the preliminary hearing Order is deficient.

Respondent argues the preliminary hearing Order is deficient because the judge did not specify under which docket number benefits were ordered. While it would be preferable for this Board Member to know under which docket number or numbers benefits were awarded, such issue is not appealable from a preliminary hearing.

CONCLUSIONS

1. Claimant provided timely notice for his November 8, 2013 injury by accident.

2. The prevailing factor in causing claimant's current medical condition and need for medical treatment is his February 3, 2014 accidental injury.

3. The Board lacks jurisdiction to consider respondent's argument that the judge must specify which docket number or numbers for which the preliminary hearing Order pertains.

WHEREFORE, the undersigned Board Member affirms the August 28, 2014 preliminary hearing Order and dismisses respondent's appeal of issue number three.[21]

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Kenneth J. Hursh

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[21] 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. 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), unlike appeals of final orders, which are considered by all five members of the Board.