BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOSHUA W. PAYNE	)	
Claimant	)	
V.	)	
	)	Docket No. 1,071,176
NEENAN CO.	)	
Respondent	)	
AND	)	
	)	
MERIDIAN SECURITY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 10, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Steven J. Quinn, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from December 2, 2014, with exhibits attached; the Deposition of Jimmy Mulloy, dated December 22, 2014; the Deposition of Jamie Wallace, dated December 22, 2014; and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's preliminary hearing requests after finding claimant failed to sustain his burden of proving personal injury by accident arising out of and in the course of his employment with respondent.

Claimant argues the ALJ ignored uncontradicted evidence of injury when she denied an accident occurred. Claimant requests the Board remand this case to the ALJ for an order approving Dr. Rhoades for treatment and for temporary total disability compensation (TTD)

to be paid at the statutory rate from the date of Dr. Rhoades' exam on November 14, 2014, forward.

Respondent argues the preliminary hearing Order of the ALJ should be affirmed.

The issue on appeal is whether claimant proved he suffered personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

Claimant drove a truck for respondent between Topeka and Kansas City. Claimant testified that on August 7, 2014, he was attempting to step up into his box truck when he felt an explosion in his left knee. He described the pain in his knee as sharp and excruciating that shot down into his calf and back up into his thigh, leaving him with consistent throbbing and aching. Claimant indicated the step up into the truck is about two to three normal steps in terms of height and he has to grab the door handle to pull himself up and into the cab of the truck. At the time of the accident, claimant weighed between 265 and 270 pounds.

Claimant testified he immediately reported the accident to Jimmy Mulloy, a supervisor for respondent, and was told “that sucks”. Claimant testified there was no doubt in his mind that Jimmy knew he injured himself. He also reported the accident to Jamie Wallace the warehouse manager and a dispatcher for respondent in the Kansas City, Missouri, office. Claimant continued to work that day and when he returned to Topeka, he told another driver named Ryan about his accident. Claimant also told Bret Scheck, his immediate boss at the warehouse, by way of a voicemail. Claimant testified that, after the accident, he told several people at his job he was hurt and needed help. Claimant denied any prior problems with his legs. Claimant finished his work on the date of accident, worked the next day, August 8, 2014, and also the following Monday and Tuesday, August 11 and 12.

On August 13, 2014, claimant sought medical treatment on his own at Express Care. Claimant reported he injured himself getting in and out of his truck. On August 18, 2014, claimant spoke with Brent Hutton, the branch manager and was given the paperwork necessary to file a claim with the insurance company. Claimant later received a letter from the insurance company authorizing him to meet with Dr. Rhoades, who assigned restrictions, which claimant was not able to follow and still perform his job.

Claimant's employment with respondent was terminated 11 days after he reported his injury. He was told by Mr. Hutton, he was being terminated for missing too many days of work during his 90 day probation period. Claimant testified this was his second time working for respondent, beginning on May 1, so 90 days would have expired July 30, 2014. Claimant denied being written up for absenteeism during this employment period. On direct-examination, claimant testified the first he learned of any issue with his work attendance was when he was terminated on August 18, 2014, after he had completed his probationary period. However, on cross-examination, claimant acknowledged he had missed a couple of days during his 90 day probationary period not discussed in his earlier testimony.

On cross-examination, claimant testified that he had worked for respondent during a previous period of time. While working that time, claimant suffered an on-the-job injury. Respondent provided light duty and provided medical treatment for those injuries. Claimant was terminated from respondent by Mr. Hutton during that employment period.

Mr. Hutton testified he first met claimant in 2007 when claimant was hired as a driver. Mr. Hutton testified claimant was ultimately terminated for not following instructions, among other things. Despite being fired, claimant was rehired. Claimant had a 90 day probationary period to prove himself. Mr. Hutton indicated he was not aware of any issues with claimant's performance or attendance during that 90 day period. He spoke with claimant's immediate supervisor, Bret Scheck, on numerous occasions about claimant and his job performance. He admitted there were concerns about claimant missing more days than were allowed and Mr. Scheck recommended terminating claimant, but Mr. Hutton chose not to because he had lost track of the fact that claimant's 90 days were up. Mr. Hutton admits claimant was not written up during his 90 day probation period, but claimant's employment was going to be terminated anyway because he didn't feel like claimant wanted the job. Mr. Hutton indicated that claimant's termination had nothing to do with the reported injury. Mr. Hutton first learned of claimant's injury on August 13.

Mr. Mulloy testified the last time he saw claimant was on August 7, 2014. Mr. Mulloy could not recall if claimant, at any point on August 7, mentioned injuring his knee while working. However, prior to that day he remembers claimant mentioning having difficulty with sore legs, which turned out to be a strained muscle from running with his son. Claimant never reported an injury. He would comment that something was bothering him and then would explain the problem.

Mr. Wallace doesn't recall claimant ever notifying him of anything involving his leg. He then testified claimant did not work Thursday August 14, because of his injury, but claimant did not mention any injury to him on August 7, which was the last time he saw claimant. He testified claimant often complained about being sore for this and that. Mr. Wallace indicated that if someone were to report an injury to him he would tell his immediate supervisor, Mike Haley.

Claimant saw Jeffrey Atwood, M.D., on August 13, 2014, at Express Care, with complaints of left knee pain. Claimant reported feeling a sharp pain in his left knee as he was stepping up into his truck a week earlier. There was no indication at the appointment that this was to be reported as a workers compensation situation. Claimant was given pain medication and told to ice and elevate the knee for a few days. If not better after few days, claimant was to contact his primary physician or an orthopedist.

A notation was made on September 19, 2014, indicating the clinic was trying to get in touch with claimant about signing some release forms and about there being some confusion about whether this knee pain was work-related. The notation indicated that workers compensation had not been notified at the time of the initial visit that claimant's pain was work-related.

Claimant met with Daniel Zimmerman, M.D., for an examination on October 7, 2014, at his attorney's request. Claimant's chief complaint was the left knee injury which was reported to have occurred on August 6, 2014. Claimant reported limited activities because of his left knee discomfort. Dr. Zimmerman opined claimant injured his left knee in the course of his employment with respondent. The prevailing factor causing claimant's left knee difficulties was the August 6, 2014, accident at respondent.

Dr. Zimmerman limited claimant to lifting 20 pounds on a occasional basis and 10 pounds on a frequent basis, recommended claimant avoid frequent flexing of the left knee and avoid bending, stooping, squatting, crawling, kneeling and twisting activities that would likely increase pain and discomfort of the knee. Dr. Zimmerman recommended an MRI and an appointment with an orthopedist.

Claimant met with Charles E. Rhoades, M.D., for an examination on November 19, 2014, at respondent's request. Claimant's chief complaint was left knee pain. Dr. Rhoades diagnosed left knee pain with probable patellofemoral chondral lesion vs. meniscal pathology. It was his opinion that claimant's complaints and diagnosis are related to the August 7, 2014, work injury. He recommended an MRI and, if positive, a left knee arthroscopy for medial meniscectomy and/or chondroplasty. Dr. Rhoades suggested light duty with restrictions of alternate sitting and standing as needed for pain control and limited kneeling, squatting, climbing or crawling and no ladder work. He felt the prevailing factor for the diagnosis and need for treatment was the August 7, 2014, accident.

PRINCIPLES OF LAW AND ANALYSIS

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

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) 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(d) states:

> (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.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

> (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) . . .
> (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.

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

> (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.

Claimant alleges an accident on August 7, 2014. However, none of claimant's co-workers or supervisors were able to substantiate claimant's claims from the alleged date of accident. Additionally, as noted by the ALJ, claimant continued to perform his regular duties of driving trucks and making deliveries, which necessitated he climb in and out of his truck several times per day, through August 13, 2014.

Claimant sought no medical treatment until the August 13, 2014, examination by Dr. Atwood at Express Care. Even then, there was no request to involve workers compensation, even though claimant had earlier suffered a work-related accident for which respondent provided immediate medical care.

As noted by the ALJ, claimant's actions immediately after the alleged accident, where he continued to perform his normal duties and failed to seek medical treatment for almost a week are not the actions of a man who has suffered an injury resulting in an explosion of pain which he described as sharp and excruciating. This Board Member finds claimant's description of the alleged accident to be suspect at best. The denial of benefits by the ALJ is affirmed.

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.[1] 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.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove he suffered personal injury by accident which arose out of and in the course of his employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 10, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Rebecca Sanders, Administrative Law Judge

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[1] K.S.A. 2013 Supp. 44-534a.