

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

ROBERT CANNON)	
Claimant)	
VS.)	
SANDERS CONSTRUCTION)	Docket No. 198,389
Respondent)	
AND)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from a Preliminary Hearing Order dated August 29, 1995, wherein Administrative Law Judge Steven J. Howard denied claimant benefits for an injury alleged on December 30, 1994.

ISSUES

Whether claimant met with personal injury by accident arising out of and in the course of his employment on the date alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

The above enumerated issue is one specified in K.S.A. 44-534a as appealable from a preliminary hearing and, thus, this matter is properly before the Appeals Board.

The evidence contained in the record is contradictory. Claimant alleges an injury to his little finger on December 30, 1994, while employed by respondent, Sanders Construction. Sanders Construction, represented by Mr. Darrell Sanders, Sr., and Mr. Darrell Sanders Jr., presented evidence that claimant could not have injured himself on the date alleged as claimant performed no work for respondent after December 23, 1994. The representatives of respondent went on to testify that Sanders Construction performs no work during the period December 25, 1994 through January 2, 1995, as they regularly shut down between Christmas and New Years with both Mr. Sanders, Sr., and Mr. Sanders, Jr., leaving the state during Christmas vacation.

Evidence of a letter from Mr. Sanders' attorney, Mr. Gary Sloan, further complicates matters by indicating that claimant and respondent possibly did work on December 30, 1994, but denying that claimant suffered any work-related injury to his finger. In reviewing the record, the Appeals Board notes that the Administrative Law Judge had the opportunity to assess the live testimony of not only the claimant, but also the testimony of Mr. Darrell Sanders, Sr., and Mr. Darrell Sanders, Jr., as well as the testimony of the claimant's wife. In observing this live testimony, the Administrative Law Judge is in a unique position to consider and assess the credibility of the witnesses. In assessing the credibility of the claimant and the credibility of the two (2) representatives of the respondent, the Administrative Law Judge found claimant's testimony to be lacking and the testimony of the respondent's representatives to be more credible. The Appeals Board acknowledges and recognizes the advantage of the Administrative Law Judge in his ability to assess this witness credibility and defers to the Administrative Law Judge's judgement in this regard.

The Appeals Board further finds that the evidence in the record, while confusing, does appear to indicate that respondent, Sanders Construction Company, did not work during the period December 25, 1994, through January 1, 1995. As such, an injury occurring on December 30, 1994, would not constitute an accidental injury arising out of and in the course of claimant's employment with respondent. The Appeals Board finds the evidence is sufficient to support such a finding and further finds that the Order of the Administrative Law Judge denying claimant benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard, dated August 29, 1995, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: J. Paul Maurin III, Kansas City, Kansas
Stephen P. Doherty, Kansas City, Kansas
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director