

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

HERBERT HUGHES
Claimant

VS.

AMERICAN PHOENIX COMPANY, INC.
Respondent

AND

CIGNA PROPERTY & CASUALTY
Insurance Carrier



Docket No. 198,776

ORDER

Claimant appeals from a preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated January 19, 1996.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary compensation benefits. The Administrative Law Judge found that the claimant had failed to prove by a preponderance of the credible evidence that the injuries he received in an automobile accident on June 1, 1994 arose out of and in the course of his employment with the respondent. This is the single issue that is before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

The issue raised by the claimant grants the Appeals Board jurisdiction to review a preliminary hearing order. See K.S.A. 44-534a(a)(2).

The fact that the claimant was injured in a one-vehicle accident on June 1, 1994 is not disputed by the respondent. However, the respondent does argue that the injuries claimant received in such accident are not compensable as claimant was not performing his work duties for the respondent at the time of the accident. Claimant, however, asserts that he was performing his regular job duties for the respondent when the accident occurred and he should be provided medical treatment and temporary total disability benefits by the respondent.

Claimant started working for American Phoenix Company, Inc., the respondent, on March 21, 1994. Mr. Fred Green, the owner of American Phoenix Company, Inc., testified that the claimant reported directly to him for his work assignments. Mr. Green testified that claimant was hired as what he classified as a "flunky" to do odd jobs which consisted mainly of mechanical-type work. During the period of time immediately prior to the date of accident, June 1, 1994, claimant's main responsibility was to start and maintain a machine, owned by the respondent, that was installed at the Kansas City Power and Light Company Power Plant (Power Plant), located in La Cygne, Kansas. The purpose of the machine was to separate waste from a sludge pond. Claimant testified that he started working each day at approximately 6:00 or 6:30 a.m., and was paid travel time between his home and the Power Plant. Claimant and Mr. Green both testified that part of claimant's job was to purchase various parts at various locations when needed to keep the waste-separator machine operating properly.

The main controversy in this case centers around whether claimant, on the date of his accident, was traveling to the Power Plant to perform his regular job duties of starting and maintaining the waste-separator machine. Claimant testified that the night before his accident, May 31, 1994, he stayed at a friend's house in Ottawa, Kansas. On the morning of June 1, 1994, he left his friend's house and purchased pipe fittings at Town and Country Lumber Yard in Ottawa, Kansas, for the waste-separator machine. Claimant then left the lumber yard for the Power Plant. Claimant testified that on his way to the Power Plant he was injured when he had to leave the highway in order to avoid hitting a cow in the middle of the highway.

Mr. Green, on the other hand, testified that the claimant was not working for the respondent on the day of the accident as he had granted claimant's request to be off work that day in order for the claimant to help a girlfriend move. The respondent also had Bruce Beckman, superintendent of operations at the Power Plant, testify on respondent's behalf. Mr. Beckman was at the respondent's office on the evening of May 31, 1994, for the purpose of discussing with Mr. Green the progress of the process of separating waste at the Power Plant. Mr. Beckman testified that claimant was also present when he was discussing the waste-separation procedure with Mr. Green. Mr. Beckman testified that the waste-separator machine was not scheduled to run on June 1, 1994 and, for that reason, he did not expect claimant to be at the Power Plant on June 1, 1994. He also testified that the claimant made a request to Mr. Green at the conclusion of the conversation but he did not hear the specific request.

An injury arises "out of" the employment when there is a causal connection between the conditions of the work and the resulting injury. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the employee was at work for the employer. See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973). In this case, if the claimant was traveling to the Power Plant at the direction of the respondent on the day of his accident, June 1, 1994, the accident would have occurred while he was working for the respondent and his resulting injuries would be compensable. The claimant, respondent and Mr. Beckman all testified in person before the Administrative Law Judge. The Administrative Law Judge, therefore, had the opportunity to judge the credibility of all the witnesses. Whether claimant was in the course of his employment on the day of the accident turns on whether you believe the claimant or whether you believe the respondent. Accordingly, since the Administrative Law Judge had the opportunity to personally judge the witnesses' credibility, the Appeals Board gives some deference to his judgement in this regard. Based on the record as a whole, for preliminary hearing purposes, the Appeals Board finds that the decision of the Administrative Law Judge denying claimant preliminary compensation benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated January 19, 1996, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Herbert Hughes, Pro Se
Marcia Yates, Kansas City, MO
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director