

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

RODNEY HUNTER)	
Claimant)	
VS.)	
)	Docket No. 217,644
MANPOWER TEMPORARY SERVICE)	
Respondent)	
AND)	
)	
FIREMAN'S FUND INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the preliminary hearing Order dated December 18, 1996, and the Order dated January 9, 1997, both entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

By Order dated December 18, 1996, the Administrative Law Judge awarded claimant temporary total and medical benefits for an alleged August 14, 1996, work-related accident. By Order dated January 9, 1997, the Administrative Law Judge found that only those temporary total disability and medical benefits that either represented payment for disability or for treatment before the date of the original preliminary hearing Order, December 18, 1996, were stayed pending the original Order's appeal.

The respondent and its insurance carrier requested review of both Orders. The issues now before the Appeals Board are:

- (1) Whether claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on August 14, 1996.

- (2) Whether claimant's present need for medical treatment is the result of that alleged accident.
- (3) Whether claimant provided respondent with timely notice of accident.
- (4) Does the Administrative Law Judge have the authority to authorize an out-of-state physician to provide medical treatment?
- (5) What benefits are payable during the pendency of an appeal of a preliminary hearing order to the Appeals Board?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, for preliminary hearing purposes the Appeals Board finds as follows:

Both Orders entered by the Administrative Law Judge should be affirmed.

(1), (2), (3) Claimant testified he injured his back on August 14, 1996, while working for the respondent, a temporary employment service. On that date claimant was working for the respondent in a Foot Locker warehouse. At the end of his shift, Foot Locker required claimant to perform bending and stretching exercises. During those exercises, claimant experienced sharp back pain and so advised the Foot Locker employee who was leading the exercise session.

Claimant testified that the pain worsened later that evening at home. Because of the pain, claimant sought medical treatment that night at the Geary Community Hospital emergency room. The next morning, August 15, claimant alleges he telephoned respondent to report his back complaints. Regarding notice to respondent, claimant testified as follows:

"Q. And at some point did you tell anyone at Manpower that you'd injured yourself on August 14th?

"A. Not on August 14th. The next morning I got up about 9, I called them and I talked to the lady, Kristin.

"Q. What's her name?

"A. Kristin.

"Q. Do you remember her last name?

"A. No, I don't. And I was like, you know, I had a problem with my back yesterday doing some exercises. She was like, well, you can just bring it in whenever you pick your check up or whatever. And I was like, no, I'm going to go ahead and bring it in. So I drove up there about--

"Q. What do you mean 'bring it in,' what are you talking about?

"A. The receipt or-- it's kind of like a receipt or some documentation.

"Q. I've handed you what's been marked as Defendant's Exhibit D. Is that a copy of what you handed to her?

"A. Yeah.

"Q. And did she ask you whether you were going to turn this into work comp?

"A. No, she didn't. She just put it in the file. She said we'll put it in your file, if you have any problems or whatever. And I said okay and I left.

"Q. Did she ask you whether it was work-related or have any conversation with you about that?

"A. No. Because I told her over the phone that they had us doing those exercises or whatever and that was about it and she was like okay."

At the preliminary hearing claimant introduced medical records from the hospital emergency room. Those documents indicate claimant sought treatment on August 14, 1996, at approximately 10 p.m., and refer to claimant performing exercises while working at Foot Locker earlier that day. Claimant believes the next day, August 15, he delivered to respondent the emergency room medical slip which he had obtained which contained the doctor's diagnosis, orders, and instructions. Claimant denies respondent's allegation that he told respondent he did not injure his back at work.

Respondent argues claimant failed to prove that he sustained an injury at work, or, in the alternative, that the present need for medical treatment is related to any accident he sustained while working for the respondent. Respondent bases those contentions upon the fact that claimant worked for a limited period for two employers after August 14, 1996, and had a flare-up of back pain while living in Texas. Therefore, the respondent contends the claimant's injuries could not be the result of an accident sustained while working for the

respondent. In support of its position, respondent introduced office notes prepared by a former employee which indicate that claimant called in to report his back complaints on August 16, 1996, and, more importantly, indicate claimant denied he hurt his back at work.

The Administrative Law Judge granted claimant's request for temporary total disability and medical benefits. As indicated by statements made at the preliminary hearing, the Administrative Law Judge reasoned that the emergency room records proved claimant told the emergency room personnel that he hurt his back while exercising at work. Also, other medical records from a Texas emergency room confirm claimant reported to it on September 5, 1996, that he had been experiencing back pain for at least two weeks. After considering all the evidence presented, the Administrative Law Judge found that claimant provided timely notice of accident and rejected respondent's contention that claimant attempted to conceal from respondent he had injured his back at work.

The Administrative Law Judge found claimant's version of the facts to be persuasive. Because the Administrative Law Judge was in the unique and enviable position to personally observe claimant testify and assess his demeanor and credibility, in this instance the Appeals Board gives some deference to the Administrative Law Judge's findings. Based upon a review of the entire record compiled to date, the Appeals Board also finds that claimant sustained personal injury arising out of and in the course of employment with the respondent on August 14, 1996, and that claimant gave respondent timely notice of accident within ten days of its occurrence. Because there is no persuasive evidence of injury other than that of August 14, 1996, the Appeals Board finds that claimant's present symptomatology is directly related to the August 14, 1996, incident.

(4) Respondent and its insurance carrier alleged the Administrative Law Judge did not have the authority to appoint an out-of-state doctor as an authorized treating physician. The Appeals Board disagrees. K.S.A. 1996 Supp. 44-510 requires the respondent and its insurance carrier to provide such medical services as may reasonably be necessary to treat claimant. The Workers Compensation Act does not prohibit out-of-state treatment. The location of the prospective medical services is only one of many factors to be considered when determining the reasonableness of the treatment.

The Appeals Board finds that the Administrative Law Judge has the authority to appoint out-of-state doctors as authorized treating physicians. Therefore, the Appeals Board does not have jurisdiction under either K.S.A. 1996 Supp. 44-534a or K.S.A. 1996 Supp. 44-551 to address respondent's objections to the treating physician at this juncture of the proceeding.

(5) Respondent and its insurance carrier contend the Administrative Law Judge erred by finding the temporary total disability and medical benefits awarded in the December 18, 1996, Order were immediately due and payable despite that Order's appeal to the Appeals Board. In support of that argument, respondent cites K.S.A. 1996 Supp. 44-551(b)(2)(B) which provides:

"If an order on review is not issued by the board within the applicable time period prescribed by subsection (b)(2)(A), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, except that no payments shall be made under this provision for any period before the first day after such time period. Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute."

Conversely, claimant relies upon the preliminary hearing statute, K.S.A. 1996 Supp. 44-534a(a)(2), which provides in part:

"If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award."

The Appeals Board finds that appeals of preliminary hearing findings are governed by K.S.A. 1996 Supp. 44-534a and, therefore, an appeal of a preliminary hearing does not stay the payment of temporary total disability and medical compensation that becomes due on or after the effective date of the preliminary hearing award. Therefore, the Appeals Board finds that the findings made in the Administrative Law Judge's January 9, 1997, Order are correct. Should the respondent and its insurance carrier fail to make payment as provided by K.S.A. 1996 Supp. 44-534a during the pendency of the preliminary hearing review, they risk penalty proceedings under K.S.A. 44-512a or more serious sanctions under other provisions of the Act.

(6) In their brief, respondent and its insurance carrier also requested the Appeals Board to address the issue whether the Administrative Law Judge exceeded his jurisdiction by ordering temporary total disability benefits. Because K.S.A. 1996 Supp. 44-534a specifically empowers administrative law judges to grant preliminary hearing awards of temporary total disability benefits, at this juncture that issue is neither reviewable under K.S.A. 1996 Supp. 44-551 nor as a jurisdictional issue under K.S.A. 1996 Supp. 44-534a.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that both the preliminary hearing Order dated December 18, 1996, and the Order dated January 9, 1997, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Seth G. Valerius, Topeka, KS
- Terry J. Torline, Wichita, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director