

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

LINDA LEE GREEN)	
Claimant)	
)	
VS.)	
)	
HARDEES FOOD SYSTEMS INC.)	
Respondent)	Docket No. 255,324
)	
AND)	
)	
TRAVELERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Robert H. Foerschler's Award dated February 26, 2002. The Board heard oral argument on August 6, 2002.

APPEARANCES

Michael H. Stang of Mission, Kansas, appeared for the claimant. Stephen P. Doherty of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined claimant had suffered an accidental injury arising out of and in the course of employment on February 10, 2000.¹ The Judge further

¹At Regular Hearing the parties stipulated claimant suffered an accidental injury on February 10, 2000. The Award erroneously lists the year 2001 as the accident date. It is undisputed that the alleged incident occurred in the year 2000 and the year 2001 was a typographical error in the Award.

determined claimant had given timely notice and awarded claimant compensation for a 12 percent permanent partial general body disability.

The respondent and its insurance carrier request review and argue claimant failed to establish she suffered accidental injury arising out of and in the course of employment and that she failed to provide timely notice of her alleged work-related accident. In the alternative, the respondent and its insurance carrier argue claimant's permanent partial disability award should be decreased to a 10 percent functional impairment.

Conversely, the claimant argues the Administrative Law Judge's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes the Administrative Law Judge's Award should be affirmed. The Board finds the Administrative Law Judge has set out in his Award detailed and accurate findings of fact and conclusions of law supported by the record. There is no need to reiterate those findings and conclusions in this Order. Therefore, the Board adopts those findings and conclusions as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, 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."

K.S.A. 508(g) defines burden of proof as follows: "'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."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all of the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence.²

Respondent initially argues claimant failed to establish she suffered an accidental injury arising out of and in the course of her employment on February 10, 2000. At the Regular Hearing the Judge noted it was admitted claimant was injured by accident on

²Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

February 10, 2000. The respondent clarified that it was not disputing claimant was moving boxes on that date but that it disputed the incident caused the disability claimed.

As the evidence developed during the Regular Hearing, respondent attempted to alter its position and deny the accident because of the claimant's testimony regarding the time sequence between when the accident occurred, when she notified her supervisor and when she first sought medical treatment.

Claimant testified that on the morning of February 10, 2000, as she was lifting boxes and placing them on a shelf she felt something like a pulled muscle in her back. Claimant took some Tylenol and the next morning her back was a little worse. Claimant continued working and her back continued to worsen.

About three or four days later claimant's district manager came in to do some paperwork and she asked the claimant what was wrong because she had seen the claimant walking bent over. Claimant told her that she thought she had pulled a muscle while storing freight. The district manager asked the claimant if she had gone to the doctor and the claimant responded she had not because she thought it was just a pulled muscle.

The district manager, Blanca Robbennolt, denied claimant advised her that her back condition was related to lifting boxes at work, however, she did not dispute that she had a conversation with claimant approximately February 13th, 14th or 15th. Ms. Robbennolt further testified:

Q. So at the time in early February that she indicated to you that she was injured, she has testified that she told you it was work related at that point. Do you agree?

A. I disagree.

Q. Now, I want to make sure that we are clear on the difference between whether that conversation didn't happen or I don't recall that conversation happening, okay. Which one is it from your perspective, is it that conversation didn't happen, she did not tell me that it was work related, or is it that I don't recall?

A. I don't recall.³

The Board is not unmindful of the fact that claimant further testified she saw her doctor a week after the conversation with her supervisor. The date of that appointment would alter the time frame for the accident from February to March. Nonetheless, the

³Deposition of Blanca Robbennolt, dated September 27, 2001, at 24-25.

claimant consistently testified she advised her supervisor of the injury a few days after the incident occurred and she further noted she may have called the doctor's office requesting medication a week after the conversation but before she actually had the doctor's appointment. Moreover, Ms. Robbennolt's testimony that the conversation occurred in mid-February corroborates claimant's testimony. The fact that claimant may have been mistaken about the time sequence between the conversation and her doctor's appointment does not refute the preponderance of the evidence that she suffered the work-related accident on or about February 10, 2000.

K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that three or four days after the incident she had told her supervisor she had hurt her back while putting up freight. Although the supervisor denied claimant had advised her that the back injury was work-related, the supervisor did recall having a conversation about claimant's back pain. As previously noted, the supervisor further admitted she could not recall whether claimant had stated the injury occurred from lifting at work. The claimant has met her burden of proof to establish she suffered a work-related injury to her back on or about February 10, 2000, and that she provided timely notice of her injury during her conversation with her supervisor approximately three or four days after the incident lifting the boxes.⁴

⁴The Administrative Law Judge concluded timely notice was provided within 75 days of the accident date and that there was just cause based upon the fact the severity and permanence of the injury was not appreciated until Dr. Holladay recommended surgery. The Board finds that analysis sound but concludes claimant gave timely notice within the statutory 10-day limit which renders the issue of just cause moot.

The remaining issue is the nature and extent of disability. The claimant is still employed by the respondent and is not alleging a work disability. Accordingly, the issue is the percentage of claimant's functional impairment.

K.S.A. 44-510e(a) defines functional impairment as:

... the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The record contains two medical opinions regarding claimant's functional impairment. Claimant was examined by P. Brent Koprivica, M.D., and Michael J. Poppa, D.O. Dr. Koprivica rated claimant's permanent impairment at 17 percent to the body as a whole pursuant to the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides). Dr. Poppa rated claimant's permanent impairment at 10 percent to the body as a whole pursuant to the Fourth Edition of the AMA Guides.

Dr. Koprivica used the range of motion model in arriving at his percentage of impairment because he noted claimant had ongoing residual weakness from the S1 innervated muscle groups. He further noted claimant was accommodating her condition by avoiding lifting and carrying and her decreased tolerance to sitting. Lastly, the doctor opined the impact on claimant's daily activities of living were greater than the 10 percent claimant would be assigned using the DRE category model of the AMA Guides.

Dr. Poppa rated claimant using the DRE category model of the AMA Guides which he noted is the preferred method for rating purposes.

Both doctors utilized the AMA Guides and the percentage of impairment ranged from 10 to 17 percent. The Administrative Law Judge concluded the appropriate impairment rating would be 10 percent plus the 2 percent Dr. Koprivica assigned for the claimant's neurological deficit due to loss of S1 strength. Although the AMA Guides indicate it is preferable to utilize the DRE categories, the AMA Guides further indicate that it is also appropriate to combine physical examination findings in some instances. Accordingly, the Board adopts the Administrative Law Judge's determination that claimant met her burden of proof to establish a 12 percent permanent partial functional impairment of the body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 26, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation