

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

MILLY I. HAWKS)	
Claimant)	
)	
VS.)	
)	
JOSTENS PRINTING & PUBLISHING)	
Respondent)	Docket No. 256,626
)	
AND)	
)	
TRAVELERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent requests review of a preliminary Order entered by Administrative Law Judge Brad E. Avery on April 24, 2001.

ISSUES

The Administrative Law Judge found that claimant's accidental injury arose out of and in the course of employment and ordered medical treatment with Dr. Mumford.

The respondent raises the issue of whether the claimant's accidental injury arose out of and in the course of her employment. Respondent contends the claimant sustained injury after using Nautilus equipment at a fitness program.

Conversely, the claimant contends that she sustained a repetitive trauma accidental injury at work and not at the fitness program.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Milly I. Hawks was employed by respondent on February 8, 1987. She worked a number of jobs which included running the Xerox machine, a cutter, proof corrections, art scanning and then her last job was described as verifying. Claimant testified that she did a lot of repetitive motion with her wrists and arms in those jobs.

Claimant testified that she had been experiencing pain in her elbow since November 1999 but that she did not ask respondent to provide her medical treatment because she could not afford to be off work. When later asked by the Administrative Law Judge to explain when her symptoms began she replied the end of September 1999.

Claimant testified that she finally sought treatment on July 3, 2000, because she was experiencing shooting pains up and down her arm and thought she might be having cardiac problems.

The contemporaneous medical report of July 3, 2000, indicates that claimant complained of pain in the area of the left scapula and left arm with occasional shooting pain down her arm to below the elbow. The medical report further notes that claimant first noticed the symptoms three days after starting a fitness program that uses Nautilus equipment and that the symptoms had been fairly continuous since then. Claimant was diagnosed with muscle strain, provided with medication and advised to return if the symptoms persisted.

Claimant worked July 5 and July 6. Respondent terminated claimant on July 6, 2000, for failing to make her quota. She had been receiving warnings about failing to meet her quota since February and had failed to meet her quota in the week prior to being terminated.

The medical records dated July 7, 2000, indicate that claimant then contacted the nurse practitioner she had seen on July 3, 2000, and requested a letter confirming her arm problems were work related. She was informed that such a letter stating it was from work could not be justified when she started Nautilus three days prior to coming to the office for treatment. The contemporaneous medical record indicates that claimant voiced her understanding.

Claimant admitted she never claimed a work injury until after her termination from employment.

Q. You never claimed a work injury until after you left Josten's and after you had consulted an attorney. Is that correct?

A. No, I ---- I've claimed work injuries before, but not on this upper part of my arm. On my wrist, I have.

Q. But as far as the case we are here today about, your left arm, you never reported a work injury until after you left Josten's and after you consulted an attorney, correct?

A. Yeah.¹

The last day claimant worked for the respondent was July 6, 2000, and she has not had any further medical treatment on her left arm since July 3, 2000.

Claimant denied she told Roberta Mansfield, the nurse practitioner, that she hurt her elbow by working out on Nautilus equipment. She testified that the notes of Nurse Mansfield indicating that the claimant's symptoms began three days after starting a fitness program that uses Nautilus equipment were inaccurate.

The ALJ asked the following question:

Q. So is it your testimony that the fitness program that you apparently began prior to seeing the doctor had nothing to do with your symptoms that you were experiencing?

A. It might have made it flare up worse, you know, and make it hurt worse than what it normally was, but it was hurting me off and on before that, but I didn't -- like I said, I didn't ever go to the doctor because I knew they always put you on light duty when you went and -- because from when I had my wrist. When . . . so -- (pause)²

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.³ "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."⁴

¹Preliminary Hearing Transcript, p. 23.

²Preliminary Hearing Transcript, pp. 29-31.

³K.S.A. 44-510(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

⁴K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

Although claimant contends that she had symptoms of arm pain beginning in September 1999, she never advised respondent of the problem nor did she seek medical treatment. Most significantly, the medical evidence introduced at preliminary hearing consists of a record which indicates the claimant's arm pain was caused by working out on Nautilus equipment rather than at work. When advised that a letter confirming her arm problems were work-related would not be prepared, the claimant voiced her understanding rather than taking issue with what she now contends was an inaccurate history of her complaints. It was not until after she was terminated from employment that claimant alleged a work-related accident and the need for medical treatment.

Based upon the record compiled to date, the Board finds claimant's arm complaints were not caused by her work. The claimant has failed to meet her burden of proof that she sustained accidental injury arising out of and in the course of her employment. The Administrative Law Judge's decision to award preliminary benefits should be and is hereby reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁷

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated April 24, 2001, is reversed.

IT IS SO ORDERED.

Dated this _____ day of July 2001.

BOARD MEMBER

⁵*Brobst v. Brighton Place North*, 24 Kan. App.2d 766,771, 955 P.2d 1315 (1997).

⁶*Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁷K.S.A. 44-534a(a)(2).

c: James L. Wisler, Attorney, Topeka, Kansas
Bret C. Owen, Attorney, Topeka, Kansas
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director