

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the dates alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant alleges accidental injury to his low back through a series of accidents ending December 7, 2000. Claimant testified that the job he performed for respondent required lifting and carrying in excess of 100 pounds on a regular basis. He also, after assembling large metal frames, pushed those frames a good distance on a rack. The frames weighed anywhere from 300 to 1,200 pounds when they were completed. Claimant alleges that he suffered ongoing problems to his low back over the several-year period leading up to his alleged date of accident.

Respondent contends claimant suffered accidental injury while helping his son unload trash out of the back of a pickup on November 18, 2000, arguing claimant has failed to prove he suffered an accidental injury arising out of and in the course of his employment with respondent.

Numerous medical and personnel records were placed into the record during this litigation. Robert D. Carey, the human resources manager for respondent, completed a United Medical Resources, Inc., Initial Statement Of Claim after receiving a telephone call from claimant. The information on that form indicates claimant suffered an injury lifting concrete blocks on November 18, after which he went to the emergency room. It also indicates he reinjured himself on December 8, moving wood. This form was completed by Mr. Carey on December 15, 2000. Claimant denies advising Mr. Carey of any such injuries.

Mr. Carey also completed an Employer's Report Of Accident on January 19, 2001, again indicating claimant injured himself while loading concrete blocks and moving a wood pile. Claimant further denies the accuracy of this report.

Claimant underwent surgery in the form of an L5-S1 discectomy on January 12, 2001, performed by orthopedic surgeon William L. Dillon, M.D., in Parsons, Kansas. The initial report provided to Dr. Dillon, which was completed by Dr. Dillon's physician's assistant and dated January 5, 2001, indicated that claimant suffered an injury while unloading a pickup with his son. There was no mention on that form of any work-related

injury. Additionally, Dr. Dillon identified a patient information form from the Southeast Kansas Orthopedic Clinic. This form, dated January 4, 2001, was filled out by claimant, indicating a date of accident of November 18, 2000. On the form, the question is asked "where/how did it happen." Claimant answered that question "at home." Again, there is no mention of any work-related injury.

Claimant testified regarding a long history of back problems associated with his work with respondent. However, both Kevin Schenker, claimant's foreman, and Mr. Carey testified that they were unaware of claimant having any prior back problems before the November 18, 2000 incident.

Mr. Schenker also testified that after the November 18 incident, claimant brought a form from the Labette County Medical Center indicating claimant was on pain medication and could only perform light duty. Claimant was placed on light duty as of November 21, working in the small parts department. Mr. Schenker stated that the maximum lifting required in the small parts department would be 15 pounds.

Mr. Schenker acknowledged claimant complained of back pain between November 18 and December 7, 2000, but was never told by claimant that the work, in any way, worsened his condition.

Mr. Carey testified that the letter from claimant's attorney, which was received on or about January 19, 2001, was the first indication that claimant's back injury was work related. Up to that point, he was under the impression claimant had suffered an injury while helping his son.

Mr. Carey testified that the forms were filled out in his own hand because claimant called him and advised that he (claimant) was unable to drive to work. So, in order to get claimant's short-term disability payments started, Mr. Carey filled out the forms and submitted them on claimant's behalf. Mr. Carey testified that claimant called him on the Monday or Tuesday following the November 18 accident, and advised him that he had suffered the injury, but the injury occurred over the weekend while claimant was helping his son at home and was not work related.

When asked why he did not report the accident immediately, claimant advised that he was afraid of being terminated from his employment. When cross-examined as to whether he had ever been aware of anyone being terminated for filing a workers' compensation claim, claimant advised he had not.

Claimant also testified in his deposition prior to the regular hearing that he told his foreman approximately once per week of ongoing back complaints and the relationship of those back complaints to the heavy lifting required of his job. This testimony seems to

contradict claimant's statement that he was afraid to tell respondent of a work-related injury for fear of being terminated.

At the regular hearing, claimant was asked several questions regarding emergency room notes from Mt. Carmel Medical Center around Thanksgiving 2000. The medical notes indicated claimant injured his back helping unload a pickup. However, for whatever reason, those notes were not placed into evidence, although claimant was questioned at length about the information contained on those notes.

The Administrative Law Judge in the Award denied claimant benefits, finding claimant had failed to prove accidental injury arising out of and in the course of his employment. While not specifically addressing the issue, the Administrative Law Judge apparently found claimant's testimony to be less than credible. The Administrative Law Judge found the evidence "overwhelming" that claimant injured his back while helping his son unload a pickup.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

In this instance, claimant's testimony is contradicted by medical records, by personnel records and by the testimony of Mr. Schenker, who also testified that claimant advised him that he injured himself at home, helping his son unload a pickup.

The Appeals Board finds the weight of the evidence supports respondent's position that claimant suffered accidental injury while helping his son unload a pickup and not while employed with respondent. The Appeals Board, therefore, finds that the Award of the Administrative Law Judge denying claimant benefits for having failed to prove that he suffered accidental injury arising out of and in the course of his employment should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated November 26, 2001, should be, and is hereby, affirmed, and claimant is denied an award against respondent for the injuries alleged through a series of accidents through December 7, 2000.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director