BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JASON SHAFFER	)	
Claimant	)	
V.	)	
	)	
MASONITE CORPORATION	)	CS-00-0018-868
Respondent	)	AP-00-0455-696
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

The claimant, through William Phalen, requested review of Administrative Law Judge (ALJ) Steven Roth's Award dated December 29, 2020. Michael Bandre appeared for the respondent and its insurance carrier (respondent). The Board heard oral argument on April 15, 2021.

RECORD AND STIPULATIONS

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

ISSUES

1. Did the claimant provide timely notice of a work-related injury;

2. If timely notice is found, did the claimant's injury arise out of and in the course of his employment and if so, what is the nature and extent of the claimant's disability?

FINDINGS OF FACT

The claimant, currently 48 years old, completed the 11th grade. He has a learning disability and did not obtain his GED. He attended a vocational school for carpentry and woodworking for a year, but did not complete the vocational training.

The respondent manufactures residential doors and windows. The claimant worked for the respondent on two occasions, with his most recent employment lasting four years. The claimant assembled windows, which required repetitive and strenuous physical labor.

The claimant testified he was involved in a bicycle accident about a year or year and one-half prior to working for the respondent the second time. He lost control of his bike after hitting loose gravel and went head-first into a dirt pile with his arms extended. According to the claimant, his arms hurt for about a week, he received no medical treatment, made a complete recovery and passed a physical examination after the bicycle accident, but before he started his second stint of employment with the respondent.

The procedural history of this claim is not straightforward. Initially, the claimant completed an application for hearing alleging a series of injuries each and every working day ending on or about July 31, 2017. However, at a preliminary hearing on June 17, 2019, the ALJ stated the claim concerned a traumatic accident occurring on July 31, 2017, not a series of injuries. The claimant's attorney clarified at the preliminary hearing his client had a series of injuries beginning June 30, 2016, with a specific incident occurring in July 2017. An amended application for hearing was filed, noting a series of work injuries beginning June 30, 2016, and continuing each and every work day.

The claimant described his work for the respondent as continuously and repetitiously using his arms to grab, flip, and pick up windows. Further, he testified:

> What I did all day was take the panels of glass, put them on a rail system that goes inside the windows; and the heaviest part about the glass was there was - - the storm proof was about half or a quarter of an inch thick, which was the heaviest part of the window; and we'd be building those, putting them on the stack that we were building; and then we'd push them down the line. That was the most repetitious part of it. Sometimes we would have some come in in a crate. We'd have to take out of the crate and put on line, cut them open and redo them.[1]

According to the claimant's preliminary hearing testimony, on June 30, 2016, he and a coworker were lifting a window weighing about 100 pounds out of a crate. When the window was about a foot off the ground, the coworker dropped his end causing the claimant's end to jerk down real hard. The claimant immediately felt a pain in his right shoulder radiating from his elbow. He testified he had no physical problems performing his work until this incident. The claimant testified this incident occurred about one hour and 20 minutes after his shift started.

Austin Jones, a coworker, prepared a written statement noting he witnessed the accident, including seeing the claimant "picking up a [piece] of glass out of a bunk" and "[dropped] the glass and grabbed his right shoulder out of pain from . . . lifting the glass."[2] This prompted Jones to walk to the claimant's work station to check on his condition. The claimant agreed the written statement described what occurred.

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[1] P.H. Trans. at 12-13.

[2] *Id*., Ex. A-4.

Hadyn Kyser, Masonite's Human Resources Generalist, prepared an affidavit noting Mr. Jones was not Masonite's employee on June 30, 2016. According to her, Mr. Jones was hired on July 18, 2016, so he would not have been in the plant as the respondent's employee. Ms. Kyser denied Mr. Jones worked at Masonite as a temporary employee from a temporary employment agency before he was hired on July 18, 2016.

The claimant testified he reported the accident to the lead person, Brian Terrill, who filled out an accident report. Thereafter, he was sent home and told to get a doctor's note before returning to work.

According to the claimant, Mr. Terrill filled out an "accident report" by hand using a pen and the report was not typed. The claimant told Mr. Terrill he: (1) injured his shoulder in a bicycle accident about one and one-half years earlier, but recovered fully; and (2) hurt himself at work on June 30, 2016. The typed report (Exhibit B-2) placed into evidence stated: "Jason injured his right arm 1.5 years ago when he had a bicycle accident. He said it is hurting him this morning and is going to the doctor. Jason said this is not work related."[3] The claimant denied telling Mr. Terrill his condition was not work related.

The claimant indicated the typed accident report in evidence was not the handwritten report completed by Mr. Terrill. Further, the claimant testified he did sign the accident report, but listed the date as March 30, 2016, which was not the correct date. When referring to Exhibit B-2, the claimant testified as follows:

> Q. When you signed this document, do you remember seeing basic cause bicycle accident on it?
>
> A. No.
>
> Q. Was that typed on there when you signed the document?
>
> A. No.
>
> Q. At the top of the accident report it says not work related. . . . Did you ever see that before?
>
> A. No.
>
> Q. Did you ever see this incident where he said your arm was hurting from - - hurting your bike [sic] a year and a half ago when you fell off a bike?
>
> A. No.[4]

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[3] *Id.*, Exhibit B-2; see also Wydick Depo., Exhibit 1.

[4] P.H. Trans. at 23.

The claimant contended the report he signed said nothing about a bicycle accident or his injury being unrelated to his work. The claimant agreed his signature was on Exhibit B-2, but denied signing it: "That is not the paperwork I signed."[5] He also testified he was "forced" to sign Exhibit B-2 out of duress out of fear his job would be in jeopardy.[6] The claimant testified he saw other workers removed from the plant for not signing documents, and contended an unnamed supervisor and an unnamed line lead told him he would be fired if he did not sign a document saying his condition was not work related.

The claimant's only explanation of how Exhibit B-2 was created was the respondent had it typed. The claimant denied the respondent forged Exhibit B-2, but probably listed his bicycle accident to "cover their asses."[7]

Jim Wydick is a Masonite supervisor. He was the first-aid attendant on June 30, 2016. He testified the claimant said he needed to go to the doctor because his shoulder hurt from a bicycle injury. Mr. Wydick indicated he met with the claimant and nobody else was at the encounter. Further, Mr. Wydick testified he, not Mr. Terrill, completed Exhibit B-2, which is a Masonite "Health & Safety/Supervisor First Report Form." Mr. Wydick wrote "Not Work Related" at the top of the report. Mr. Wydick denied the claimant ever reported injuring himself at work, and he was not aware of an incident where the claimant was injured while lifting a window. Had a work injury been reported by the claimant, Mr. Wydick testified he would have conducted an investigation and completed an accident report.

Danny Dunbar is a Masonite supervisor. He testified the same report is filled out whether a worker has a work-related injury or not. Mr. Dunbar stated the claimant must have told Mr. Wydick his injury was not due to his work because the report said "not work related." Mr. Dunbar testified the bicycle language was on the report when the claimant signed it because Masonite would never alter a report an employee had already signed.

On July 1, 2016, the claimant sought treatment on his own expense at the SEK Clinic. The claimant testified he told clinic personnel he had a repetitious job and he previously was injured in a bicycle accident, but fully recovered. Thereafter, the claimant was off work for two days. The SEK Clinic records, as well as records from a non-testifying physician, Dr. Charapata, were introduced at the preliminary hearing, but those records are not part of the final evidentiary record.[8]

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[5] *Id*. at 43; see also p. 44 ("I'm saying that's not the document that I signed originally.").

[6] *Id*. at 40; see also pp. 41-43.

[7] *Id*. at 44.

[8] At the Regular Hearing, the ALJ indicated only non-medical exhibits from the preliminary hearing transcript were part of the evidentiary record, excluding medical exhibits from the preliminary hearing. See also ALJ's Award, p. 6.

According to the claimant, upon returning to work, he was still in pain and his condition worsened from repetitive work. He testified he was placed on a harder job called the "intercept line," and his shoulder worsened. He told Mr. Terrill his shoulder was getting worse from the heavier work. The claimant testified the respondent sent him home a couple days later because he could not "pull the load."[9] The claimant indicated Mr. Terrill did not seem to care about his condition, but sent him to the company nurse. The company nurse, based on the claimant's testimony, tried to manipulate his arm, told him to use ibuprofen and get an arm wrap. The claimant testified he got and wore an arm wrap at work and told Mr. Terrill the wrap was prescribed by the company nurse. At this, the claimant contended Mr. Terrill "rolled his eyes" and walked away.[10] Further, the claimant indicated he remained on the intercept line, but in a job not requiring "heavy heavy lifting."[11]

The claimant was next assigned to door work on a router table, which he described as the toughest job in the plant. The claimant testified he told Mr. Wydick his condition was worsening while at work. The claimant indicated he returned to the company nurse who advised he take ibuprofen.

The claimant testified he dropped a door on his left hand in July 2017, which caused his right shoulder and elbow to be pulled down really hard and felt significantly worse. He told the plant manager about the work-related incident and was sent to the company nurse a couple days later. According to the claimant, the company nurse did nothing other than keep him off work for one or two days, before he was returned to his router table job involving doors.

The claimant testified he began missing work on account of his injuries. On July 31, 2017, the respondent terminated his employment for absenteeism.

Following the preliminary hearing, the ALJ denied benefits in an Order dated July 15, 2019. The ALJ questioned why the claimant signed the accident report because he was in fear of losing his job. The ALJ noted the claimant might be apprehensive to sign a document stating a non-work-related incident caused his injury, while omitting mention of a work-related injury. Further, the ALJ observed it made little sense for the claimant to tell his superiors about a bicycle accident from 18 months earlier, given the claimant's contention his shoulder recovered from such injury, if the actual purpose of completing the report was to commemorate a work injury. The ALJ doubted the information the claimant gave Masonite about a bicycle accident was misinterpreted by his supervisors.

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[9] P.H. Trans. at 30.

[10] *Id*. at 29.

[11] *Id*. at 30.

In the ALJ's preliminary ruling, the claimant did not prove a traumatic injury by accident. There was no mention of an accident in the accident report. Also, the employee who claimed to have been a witness, Mr. Jones, was not working on the alleged date of loss. The Order states, "Claimant has the burden of proof. As to the issues of suffering a traumatic accident on June 30, 2016, and giving notice of the traumatic accident, the evidence presents more questions than answers."[12] In two instances, the ALJ noted the allegation of a traumatic accident on June 30, 2016, was not credible.

The ALJ found Masonite reasonably believed the claimant had a bike injury and either did not know his condition worsened with work activities or the company attributed his problems to the bike wreck. The ALJ's preliminary Order was affirmed by a single Board Member.

At his attorney's request, the claimant saw Pedro Murati, M.D., on December 12, 2019. The claimant complained of right shoulder pain; loss of strength and range of motion in the right upper extremity; difficulty raising, lifting, rotating and straightening the right arm; and an achy neck with a catching sensation. The claimant told Dr. Murati his bicycle incident resulted in an injured left arm, primarily his elbow, which resolved. Dr. Murati diagnosed the claimant with right shoulder rotator cuff tear, right tricep tendonitis, and myofascial pain syndrome of the right shoulder extending into the cervical paraspinals. The doctor stated the claimant's neck worsened with continued work. The doctor opined the claimant sustained a work-related accident causing right upper extremity and neck pain, with the neck pain resulting from the right arm hanging from the upper back and neck, causing the cervical spine to "take up the slack and that is how the myofascial injury occurs, as an overuse injury."[13] Dr. Murati stated the prevailing factor in the development of the claimant's conditions, under reasonable medical certainty and probability, was the work accident. The doctor imposed permanent restrictions and recommended additional medical treatment.

Using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*Guides*, 6th ed.), Dr. Murati assigned the claimant a 7% whole person impairment, consisting of an 8% whole person rating for right shoulder and triceps tendinitis, combined with a 2% whole person impairment for pain affecting his cervical paraspinals. The doctor assigned the claimant a combined 13% whole person impairment under the AMA *Guides to the Evaluation of Permanent Impairment,* 4th ed. (*Guides*, 4th ed.), consisting of an 8% whole person rating for right shoulder and triceps tendinitis, and a 5% whole person impairment for pain affecting his cervical paraspinals.

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[12] ALJ Order (July 15, 2019) at 7.

[13] Murati Depo. Exhibit 2 at 5-6.

At his attorney's request, Karen Terrill, a rehabilitation consultant, interviewed the claimant on March 10, 2020. She prepared a list of 15 non-duplicative tasks the claimant performed in the five years preceding his accident. Ms. Terrill opined the claimant is capable of earning $390 per week for a 45% wage loss. Of the 15 tasks on Ms. Terrill's task list, Dr. Murati opined the claimant was unable to perform 14 tasks, for a 93.3% task loss.

At the respondent's request, the claimant saw Chris Fevurly, M.D., on January 31, 2020. The claimant complained of right shoulder pain which increases with abduction or forward reach, and right upper arm and right elbow pain. The claimant told Dr. Fevurly the bicycle accident resulted in a left arm injury. On physical examination, the claimant had nearly normal cervical spine range of motion and some mild tenderness of his cervicothoracic musculature and right trapezius, without spasm. The claimant had decreased right shoulder range of motion, reported severe pain and giveaway weakness. Dr. Fevurly assessed chronic generalized right arm pain and weakness, nonphysiologic findings of the right upper extremity, and possible rotator cuff tendinopathy. He stated the mechanism of injury described would not produce impingement, rotator cuff or labral tear, and there was no evidence of a cervical spine injury as the source of his complaints. Dr. Fevurly concluded the claimant had no impairment and was not in need of any restrictions or future medical treatment.

At the respondent's request, Steve Benjamin, a vocational rehabilitation consultant, interviewed the claimant on May 18, 2020. He prepared a list of 17 non-duplicative tasks the claimant performed in the five years preceding his accident. Mr. Benjamin opined the claimant is capable of earning up to $480 per week if utilizing Dr. Murati's restrictions.

The claimant testified a second time on August 19, 2020. The claimant testified the coworker who dropped his end of the window was Lowell Bates, a line lead and his supervisor. According to the claimant, Mr. Bates knew he was hurt from hearing him cry out in pain and from him telling Mr. Bates his shoulder was hurt from the work-related incident. The claimant indicated Mr. Bates referred him to Mr. Terrill. The claimant testified his arm swelled twice its size, resulting in the respondent sending him home and telling him he needed a return to work slip. The claimant acknowledged telling the SEK Clinic about his bicycle accident. Upon returning to work, the claimant indicated he was provided light duty for about two days.

The claimant testified the faster work on the intercept line, which involved lifting 60-70 pounds of glass all day, worsened his condition and pain began radiating down into his arm and up into his neck.

The claimant testified he reported the work-related injury to Mr. Terrill and Mr. Dunbar and was given light duty work for about two days before being transferred to the door plant, where he performed repetitive work involving doors weighing anywhere from 25 to 40 pounds. The claimant testified this work was the toughest job in the plant. The

claimant indicated the door plant job was much harder work. The claimant testified he reported increased symptoms to Brian, the acting GM at the door plant (a different Brian than Mr. Terrill). The next day, he was referred to the company nurse. The claimant indicated he reiterated the specifics of a work accident to the company nurse. He was placed on light duty. He continued to report the injury every two days to Brian and Jim Wydick, a supervisor. He testified Mr. Wydick, Mr. Terrill, Brian (the acting GM), and Mr. Dunbar all sent him at least one time to the nurse's office to ice his shoulder, and he told all of them he was injured at work. He also indicated he told another supervisor about a work injury; perhaps the person was "Sherry." Icing his shoulder for 15 minutes was a daily occurrence at work, based on the claimant's testimony.

On cross-examination, the claimant testified he had seen Dr. Charapata and reported a date of injury of July 31, 2017. The claimant could not recall if he was working that day, but returned to Dr. Charapata and reported an injury occurring June 30, 2016. The claimant testified he believed Austin Jones was hired by the respondent though a temporary agency, Express Personnel, and not directly by the respondent.

The claimant testified he continues to have pain from his neck to his shoulder, radiating down to his elbow. He takes ibuprofen daily. He experiences loss of strength, decreased range of motion and difficulty with raising, lifting, straightening and rotating the right arm, in addition to neck pain.

Several former employees testified about the respondent supposedly having a practice of denying compensability of accidental work injuries by not completing accident reports, not sending employees to a doctor or only sending injured workers to the company nurse.

Robert Spragg worked for the respondent for approximately nine months and testified he sustained two work-related injuries and reported one accident to an unnamed supervisor and one accident to the plant manager named "Steve," but accident reports were not completed. Mr. Spragg testified although he requested medical treatment with a doctor at least once a week, he was sent to the company nurse. When asked how he was treated after each accident, Mr. Spragg testified he was basically "ignor[ed]" after the first accident, but it was not that bad of a situation, and he was "told to quit"[14] by the plant manager after the second accident. Mr. Spragg testified he was terminated by the respondent in late 2014 or early 2015, but was not told why. He testified he eventually went to court and received treatment for his injuries. Mr. Spragg testified he knew three other workers who the respondent treated poorly after they were injured at work, but he did not know their names.

[14] Spragg Depo. at 11.

Charles Watson worked for the respondent for 23 years. He testified he reported a work-related accident to a single supervisor not associated with the present claim, but no accident report was completed nor was medical treatment offered. After several weeks of complaining, an accident report was finally completed and he was sent to the company nurse who diagnosed him with arthritis. He was ultimately terminated by the respondent for insubordination. Prior to being terminated, he had never been sent to a doctor for his work injuries. He testified he had surgery on both shoulders after going to court to get medical treatment. Mr. Watson testified he probably was aware of 10 workers for the respondent who lost their employment after work injuries, but he did not know the names of the workers, instead relying on his impression the respondent has a reputation for treating employees badly. However, Mr. Watson testified he was terminated for what he said to his boss and he did not testify his employment ended due to his work injuries.

Terry Dobyns worked for the respondent for four and one-half years and has a pending workers compensation claim. Mr. Dobyns testified he reported an accident to a foreman and a supervisor not associated with the present claim, but no accident report was completed. Although he requested a doctor, he testified the respondent did not provide one, so he sought treatment on his own. Mr. Dobyns testified everyone knows the respondent fires workers who get injured, but he did not name any injured workers who were fired by the respondent after work injuries. Mr. Dobyns testified his work with the respondent ended because he was physically unable to do the work, but he was not sure about his employment status with the respondent.

James Waltrip worked for the respondent for nine years and testified he sustained three work accidents. He received medical treatment for the first two accidents, apparently without issue, and returned to work on light duty. Following his third accident, the respondent kept him off work for a week and told him he would have to have a physical to return to work. Later that day, the respondent told him told his services were no longer needed. The respondent let him go near a time other workers were being laid off due to a downturn in business. Mr. Waltrip indicated he had to go to court to get medical treatment for the third injury. Mr. Waltrip stated the respondent seems to find a way to terminate the employment of injured workers and is slow to provide medical treatment to injured workers. He testified to his belief the respondent fired him because of his years of experience and his last workers compensation claim.

Miguel Fernandez worked for the respondent for approximately 10 years. While working for the respondent, he sustained a work-related injury in 2005 or 2006. He testified he asked to see a doctor and was referred to the company nurse. His condition continued to worsen over the next year while he worked, yet the respondent would only send him back to the company nurse, despite requests to see a physician. He testified he eventually had to go to court to get medical treatment. Mr. Fernandez remained employed by the respondent for two or three years after his accident.

The ALJ denied benefits after finding the claimant failed to prove he sustained a traumatic injury by accident on the date claimed or subsequent repetitive trauma, and failed to provide timely notice of either an injury by accident or injury by repetitive trauma.

The claimant argues he proved a work-related personal injury and provided proper notice. The respondent maintains the Award should be affirmed.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment.[15] The burden of proof is on the claimant.[16] The respondent must prove any affirmative defense.[17]

K.S.A. 44-508 provides, in pertinent part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

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[15] K.S.A. 44-501b(b).

[16] See K.S.A. 44-501b(c).

[17] *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> . . .
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury . . . .
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Board review of an order is de novo on the record.[18] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[19] On de novo review, the Board makes its own factual findings.[20] While the Board conducts de novo review, we often opt to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[21] The Board should explain why it disagrees with a judge's firsthand assessment of witness credibility.[22]

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[18] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[19] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[20] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[21] *Foy v. Kansas Coachworks, LTD*, No. 1,051,265, 2014 WL 1758032 (Kan. WCAB Apr. 21, 2014).

[22] *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, Syl. ¶ 3, 316 P.3d 796 (2013), *rev. denied* 301 Kan.1046 (2015).

ANALYSIS

The claimant's preliminary hearing testimony was personally observed by the ALJ. The ALJ's preliminary hearing Order voiced concerns with the claimant's testimony. Similarly, the ALJ's Award reiterates the claimant's credibility problems. The ALJ's rationale for denying benefits is explained in depth.

There are significant discrepancies in the claimant's testimony. His preliminary testimony was Mr. Jones witnessed a traumatic accident, but contains no mention of Mr. Bates having been the coworker and supervisor who purportedly witnessed, and dropped the other end of the glass carried by him and the claimant. The claimant's preliminary testimony that Mr. Jones witnessed the accident is undermined by Ms. Kyser's testimony showing Mr. Jones was only hired *after* the alleged accident of June 30, 2016.

Exhibit B-2 contains the claimant's signature. It indicates the claimant's injury was not due to his work, but rather due to a bicycle accident occurring one and one-half years earlier. The claimant alternately indicated he did or did not sign this typed document. He indicated the assertions in the document, including the lack of a work-related cause for his condition or the bicycle accident being the cause of his condition, were not on the form when he signed it. The claimant stopped short of accusing the respondent of fabricating Exhibit B-2, but testified the respondent was engaged in a cover-up. The claimant also testified he was forced to sign Exhibit B-2 out of duress, lest he lose his employment.

To believe the claimant, the Board would have to conclude one of two things. Either the respondent: (1) prepared two forms – one handwritten and one typed – concerning the claimant's injured shoulder, but suppressed a handwritten form; (2) the respondent subsequently prepared a typed report attributing the claimant's injury to an 18-month-old bicycle accident; (3) the respondent placed the claimant's signature on the typed form without his consent; and (4) several of the respondent's witnesses were engaged in this conspiracy. Alternatively, the typed form contained a misleading characterization of how the claimant was injured, yet he signed it anyway, out of fear for losing his job.

Both scenarios seem highly unlikely. The claimant testified he had a bicycle accident. The respondent would not have such information apart from the claimant. The claimant testified he told the SEK Clinic about his bicycle accident. Additionally, while the claimant was consistent his bicycle injury was short-lived, he initially testified the bicycle accident caused injury to both arms. The claimant subsequently told both Drs. Murati and Fevurly he only hurt his left arm (not both arms) in the cycling incident. It is doubtful the respondent manufactured a false report, especially a false report the claimant contends he only signed after reporting a work injury. Thereafter, at every opportunity, the claimant testified he informed many people in the respondent's management, either daily or every other day, that he had been injured at work and was getting worse. It makes little sense to sign a false report denying a work injury out of duress, only to keep reporting a work injury every 24-48 hours.

The claimant's preliminary testimony is he provided notice of his accident to Mr. Terrill. Notice to Mr. Bates, a worker in a supervisory capacity, was not mentioned in the preliminary testimony. Only claimant's subsequent deposition testimony points to Mr. Bates having firsthand or actual knowledge and being witness to the asserted dropping of a window on June 30, 2016. The change in testimony only occurred after compensability was denied following the preliminary hearing due to the claimant's inability to prove notice was provided to the respondent. The respondent disputed notice of an injury by accident at the preliminary hearing. At that time, the claimant simply did not testify Mr. Bates knew about the asserted accident. This was quite an important fact to omit. The Board does not find this evolving story to be credible.

Another glaring discrepancy between the claimant's preliminary hearing testimony and his subsequent testimony is the extent of his asserted injuries. At the preliminary hearing, the claimant only mentioned shoulder pain. At his subsequent deposition, the claimant testified he also had neck pain while working for the respondent. If the claimant had neck pain while working for the respondent, it would have been consistent for him to voice such complaint at both the preliminary hearing and his deposition. His testimony was not consistent. While records from Dr. Charapata would support the claimant's neck complaints, Dr. Charapata did not testify and the ALJ plainly indicated medical exhibits from the preliminary hearing were not part of the final evidentiary record. Therefore, the Board is not considering reports and opinions from Dr. Charapata.

Like the ALJ, the Board concludes the claimant has significant credibility issues. His inconsistent testimony, standing alone, is not credible evidence. Like the ALJ, the Board concludes the claimant did not give statutory notice to the respondent for either work-related injury by accident or a series of injuries due to repetitive trauma. Like the ALJ, the Board concludes the claimant did not sustain either a traumatic injury on June 30, 2016, or a series of repetitive work injuries through his last day worked for the respondent.

CONCLUSIONS

The claimant did not prove personal injury by accident on June 30, 2016, and did not prove he gave timely notice of any such work accident. Further, the claimant did not prove he sustained a series of repetitive injuries through his last day worked with the respondent, and he did not prove he provided the respondent with timely notice of an injury by repetitive trauma.

AWARD

WHEREFORE, the Board affirms the December 29, 2020, Award.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

Electronic copies via OSCAR to:
William Phalen
Mark Hoffmeister
Michael Bandre
Hon. Steven Roth