

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

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|----------------------------------|---|----------------------|
| ANGELA RODMAN |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,021,922 |
| STATE OF KANSAS |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| STATE SELF-INSURANCE FUND |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals the May 26, 2005 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that claimant's alleged accidental injury arose out of and in the course of her employment, finding respondent had a duty to provide safe exits for employees, irrespective of its lease agreement. The ALJ went on to find that respondent's negligence was the proximate cause of claimant's injury, thereby negating the "going and coming" rule provisions of K.S.A. 2004 Supp. 44-508(f).

ISSUE

Did claimant's accidental injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds as follows:

Claimant, a long-term employee of respondent, was employed at respondent's Ramada Inn location when, on January 12, 2005, while leaving respondent's location, she slipped on ice, striking her head on a tree stump. Claimant's exit from the building was through a back door, which, once claimant departed the door, would lock behind her, allowing no reentry from that location. This was a common departure area for claimant and other respondent employees. However, this door was also available to other businesses in the area and could even be utilized by patrons of the Ramada Inn, which inhabited the

front part of the building. The respondent employees were strictly prohibited from parking in the front of the building and were required to park in the back parking lot.

Claimant's accident, which occurred on a Wednesday, was preceded by an ice storm which struck the city of Topeka two days before. Claimant worked for respondent on the Friday before the accident, that being January 7, 2005. On January 10, 2005 the State offices were closed due to the inclement weather. On January 11, 2005 (a Tuesday) the State employees apparently were allowed to arrive at 10:00 a.m. due to the difficulties associated with the icy conditions.

On the day of claimant's accident, e-mails were transferred between several of the respondent employees regarding the unsafe conditions outside of the Ramada Inn building and, in particular, the location where claimant departed the building. The first e-mail in question was issued from Linda Hubbard, Director of Building and Office Services, at 2:17 p.m. on the date of accident.¹ In that e-mail, Ms. Hubbard warned the KDOL (State of Kansas, Department of Labor) employees that due to the recent weather, the parking lots, sidewalks, driveways and alleys had icy spots and extra caution was required when traveling these areas. It was stated in the e-mail that due to the extremely cold temperatures, even sand, salt and ice melt were not melting the ice completely. This e-mail generated a response from Jennifer Wise, Inquiry Team Supervisor, with a copy to Nancy Liskey, claimant's supervisor. In that e-mail,² Ms. Wise advised Ms. Hubbard that the parking lot in the front of the Ramada Inn was cleaned and practically ice free, but the parking lot in back, where the KDOL employees parked, had not been maintained as well as in the front. Ms. Wise indicated she had previously slipped and slid while walking up to the hotel, but had not fallen. She then inquired as to whether anything could be done. A response from Ms. Liskey advised that she had spoken to an individual named Dustin and was assured that they were in the process of sanding and spreading dirt. This e-mail³ was at 3:17 p.m. on the date of accident.

Later that afternoon, when claimant exited the building, she slipped on the sidewalk, striking her head, suffering significant injuries.

The sidewalk outside of respondent's building was actually owned by Executive Manor, Inc., with respondent leasing a portion of the building from the landlord. The lease agreement⁴ makes it the responsibility of the landlord to maintain the exterior property,

¹ P.H. Trans., Cl. Ex. 1 at 2.

² P.H. Trans., Cl. Ex. 1 at 1-2.

³ P.H. Trans., Cl. Ex. 1 at 1.

⁴ P.H. Trans., Resp. Ex. A.

including the cleaning of the parking areas, entrances and sidewalks, and specifically mentioning snow removal.

As noted above, claimant on the date of accident exited the rear of the building and while traveling down the sidewalk, slipped on ice, striking her head and suffering significant injuries. Respondent contends that the location of claimant's fall was outside its premises and, therefore, not its responsibility to maintain. Claimant, on the other hand, argues that respondent was negligent in failing to insure that claimant had a safe path to the parking lot, irrespective of the terms of the lease agreement.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The "going and coming" rule contained in K.S.A. 2004 Supp. 44-508(f) provides in pertinent part:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.⁷

The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.⁸

⁵ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁶ K.S.A. 44-501(a).

⁷ K.S.A. 2004 Supp. 44-508(f).

⁸ *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

The Supreme Court, in *Thompson*, narrowly defined the term “premises” as,

. . . a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress.⁹

For the premises exception to the “going and coming” rule to apply, an area must be a part of the employer’s premises over which the employer exercises control. In this instance, the lease agreement makes it clear that the area where claimant slipped and fell was an area not under respondent’s control but was, instead, the specific responsibility of the landlord to maintain.

A second exception to the “going and coming” rule involves a determination as to whether or not the employee’s injury is proximately caused by the employer’s negligence.¹⁰

In this instance, the ALJ determined that respondent was negligent in its duties to claimant, thereby awarding benefits, citing *Jameson*.¹¹ In *Jameson*, the Appeals Board found that the respondent had an additional duty not to expose its employees to perils and dangers against which the employer could guard by the exercise of reasonable care. The employer, in *Jameson*, failed in that additional duty, thereby being negligent in failing to clear the pathways and parking lots outside its premises. However, in *Jameson*, the record was unclear as to whose responsibility it was to maintain the facility. In *Jameson*, the employer and the landlord shared responsibility, with the employer being responsible for the removal of trash and rubbish on the premises and the landlord being responsible for mowing grass and maintaining the landscaping. The responsibility for the removal of ice and snow from the paved sidewalks, roadways or parking lots was not specified in the lease agreement. *Jameson* is distinguishable from this case in that, here, the landlord is clearly responsible for the maintenance of the exterior property, with respondent having no such responsibility. However, if respondent was negligent in its actions, K.S.A. 2004 Supp. 44-508 would still allow the Act to apply in this instance.

The Board notes that respondent was aware of the condition of the sidewalks and had gone so far as to warn the employees of the slick conditions by e-mail on the very afternoon of the accident. The State employees had not been required to work on Monday, two days before the accident, and had come to work late the day before the accident due to the severe weather conditions. The e-mail from Jennifer Wise, Inquiry

⁹ *Id.* at 39, citing *Thompson v. Law Offices of Alan Joseph*, 19 Kan. App. 2d 367, 373-374, 869 P.2d 761, aff’d 256 Kan. 36, 883 P.2d 768 (1994).

¹⁰ K.S.A. 2004 Supp. 44-508(f).

¹¹ *Jameson v. Nationwide Learning Resource, Inc.*, No. 1,004,215, 2003 WL 359838 (Kan. WCAB Jan. 14, 2003).

Team Supervisor, placed respondent on notice that there was a problem with the back parking lot at the Ramada Inn. Respondent took the additional step of checking with the landlord in order to assure that treatment was ongoing at the locations in question. Respondent was assured that the parking lot had been treated the day before with sand and that the landlord was in the process of spreading dirt that day. Nevertheless, respondent still warned the employees that, due to the extremely cold temperatures, even the treatment of the surfaces sometimes was not sufficient, as slick spots remained.

The Board acknowledges that respondent had a duty to exercise reasonable care in the circumstances.¹² The Board in this instance cannot find that the employer breached that duty. Respondent had warned its employees of the slick conditions outside of the buildings. When specifically advised of the adverse conditions in the back of the Ramada Inn building, respondent contacted the landlord in order to assure that appropriate treatment steps were being taken.

In this instance, the Board cannot find that respondent was negligent in its activities, having taken several steps to both warn the employees and to insure that appropriate treatment measures were being taken to eliminate the slick conditions if at all possible. Respondent is not an absolute insurer of the safety of its employees. The Board finds that respondent was not negligent such as to negate the provisions of the "going and coming" rule contained in K.S.A. 2004 Supp. 44-508(f). The Board, therefore, finds that the Order of the ALJ granting claimant benefits should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated May 26, 2005, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of September, 2005.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Marcia L. Yates, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹² *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994).