

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

FRANKLIN E. BALDWIN, JR.)	
Claimant)	
V.)	
)	
PROFESSIONAL LAWN CARE SERVICES)	Docket No. 1,024,450
Respondent)	
AND)	
)	
HARTFORD UNDERWRITERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of Special Administrative Law Judge (SALJ) Gregory A. Lee's October 22, 2012 Award. The Board heard oral argument on March 6, 2013. Steven R. Jarrett of Overland Park, Kansas, appeared for claimant. Kevin J. Kruse, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

SALJ Lee found that claimant willfully failed to use safety equipment provided by respondent. He denied claimant's request for an award of compensation based on his determination that claimant willfully failed to use safety equipment provided by respondent, as based on K.S.A. 2005 Supp. 44-501(d)(1).

The Board has considered the record and adopted the Award's stipulations.

ISSUES

On July 1, 2005, claimant fell from a 40-foot ladder while trimming a tree for respondent. Among other maladies, claimant had a severe brain injury. Other than safety glasses, claimant was not using safety equipment provided by respondent when he fell.

Claimant asserts his claim should be compensable because: (1) he did not willfully fail to use proper guards and protections provided to him by respondent; (2) he lacked the necessary training to understand how to use the safety devices; and (3) respondent did not rigidly enforce safety rules, such that it cannot avail itself of the protection of K.S.A. 44-501(d)(1).

Respondent argues claimant's willful failure to use a safety guard that was furnished to him by respondent precludes recovery pursuant to K.S.A. 44-501(d)(1). Respondent maintains that SALJ Lee's Award should be affirmed.

The issues for the Board's review are:

- (1) Did claimant sustain personal injury by accident arising out of and in the course of his employment?
- (2) Should compensation be disallowed pursuant to K.S.A. 44-501(d)(1)?
- (3) What is the nature and extent of claimant's disability?
- (4) What was claimant's average weekly wage?
- (5) Should respondent be ordered to pay additional temporary total disability (TTD) benefits?
- (6) Should respondent be ordered to pay claimed medical expenses as authorized medical or ordered to pay future medical?
- (7) What is the status of claimant's prior attorney's lien?

FINDINGS OF FACT

Claimant began working for respondent on June 7, 2005. He was hired by respondent's owner, Paul Braton. His supervisor was Tracy Copen.¹ Claimant last worked for respondent on July 1, 2005, the date of his accident. That day, claimant was on a 40-foot ladder when a tree limb he cut fell, bounced, and hit the bottom of the ladder, causing him to fall approximately 35 feet. Claimant was not using a safety harness or a lanyard when he fell. Claimant had traumatic injuries and was hospitalized for nearly two months.

Claimant had worked for the respondent for about three and one-half weeks at the time of his accident. The first one-half of claimant's work for respondent was ground crew work, i.e., dragging brush, picking up debris and running branches through a wood chipper. The last one-half of his work for respondent was pruning, trimming and removing trees.

Claimant had never previously worked as a tree trimmer. Mr. Copen provided claimant with on-the-job training. Respondent loaned claimant a copy of *The Tree Climber's Companion*,² a training manual for professional tree climbers. Claimant testified he had read about one-third to one-half the book before his accident.

¹ Mr. Copen is married to Mr. Braton's stepdaughter. (Copen Depo. at 20).

² JEFF JEPSON, *THE TREE CLIMBER'S COMPANION: A REFERENCE AND TRAINING MANUAL FOR PROFESSIONAL TREE CLIMBERS* (2d ed. 2000) (Illustrated by Bryan Kotwica).

Claimant testified that Mr. Braton always discussed with him the importance of using safety gear when climbing a tree.³ Claimant testified, and Mr. Braton agreed, that Mr. Braton provided no instruction on tree climbing or tree trimming.⁴

Mr. Braton confirmed that he and claimant had several discussions regarding company safety policy. Mr. Braton testified that respondent's unwritten safety policy required all workers to wear work boots, safety glasses, gloves and a hard hat at all times, even if only working on the ground. Respondent provided all safety equipment to its employees, except boots. The hard hat had a turn buckle on the back which would be used to tighten the hat to secure it to claimant's head. A safety harness, when used with a lanyard, holds a person in a tree so the person can use both hands, for instance, to operate a chain saw. Putting on the harness takes about 20 to 30 seconds.

If working in a tree, respondent's workers were required to wear a safety harness and "tie off" or "tie into" a tree using a lanyard. Tying off is the process of having one end of a lanyard hooked to the safety harness and looping the other hooked end of the lanyard around the tree or branch and back onto the safety harness. The person wearing the safety harness is essentially attached to the tree by the lanyard. Tying off takes about 10 seconds. Climbing ropes, which were a secondary safety device to back up the use of a safety harness and lanyard, were optional and used on an as-needed basis.

Claimant acknowledged respondent talked with him about the importance of safety gear. Claimant testified that when he could use a harness, he did, but use of such gear was not always practical. Claimant testified that he had a hard time keeping the safety harness around his large waist. Mr. Copen confirmed that claimant had problems keeping the harness around his waist due to his large midsection and "no butt."⁵ Claimant did not have a problem keeping the harness in place once he was suspended in a tree. Mr. Copen never told Mr. Braton that claimant had problems wearing the safety harness because of his size.

Claimant took directions from Mr. Copen concerning rigging and how to take down a tree. Mr. Copen knew about knots and how to rig the ropes on tree branches to lower them. Claimant looked to Mr. Copen for guidance and asked him questions on the proper way to climb trees, the use of a harness and the use of a safety hat. Claimant testified that Mr. Copen did any work that required expertise. Mr. Copen testified that he was in the tree for 75% of the jobs he and claimant performed, with claimant being on the ground. Claimant testified he and Mr. Copen split time in the trees evenly, about 50% each.

³ P.H. Trans. (Sep. 9, 2005) at 17.

⁴ R.H. Trans. at 43; Braton Depo. (Sep. 28, 2005) at 56.

⁵ Copen Depo. at 48.

Mr. Copen testified that trimming trees is “absolutely a hazardous job”⁶ and employees must know what they are doing. He showed claimant how to trim trees safely and properly and told claimant about safety requirements and issues. Mr. Copen did not teach claimant how to use climbing ropes, as he is not certified to teach. Claimant was not competent in using climbing ropes. Mr. Copen showed claimant how to use the safety harness and lanyard, and always advised claimant to wear all safety equipment for every job, but testified that claimant believed safety equipment was a burden:

Q. Did you always advise Frank to wear all the safety equipment?

A. Absolutely.

Q. And that would have been every single job that you supervised him on?

A. Absolutely.

Q. Did he always follow your advice?

A. Sometimes roughly, but absolutely forced into it.

Q. Tell me what you mean by that.

A. He was stubborn and Frank felt that he did not have to do it and he was his own kind of man. Frank felt that it was more of a burden and that he wasn't going to fall.

Q. Were there issues prior to 7/1 of '05 where Frank would actually start to perform the work without using the equipment and you would basically force him to use it?

A. There were times where I would say, Frank get the saddle,⁷ or, [y]ou can't do that, and he would, [o]h, it will be fine, but I never let it slide.

Q. So basically on all the jobs that you worked when you were supervising Frank before 7/1/ of '05, you always made sure he used the safety equipment even though he sometimes wouldn't want to?

A. Absolutely⁸

. . .

⁶ *Id.* at 16.

⁷ “Saddle” is another name for a safety harness or safety belt. (Braton Depo. at 15).

⁸ *Id.* at 22-23.

Q. Did you ever catch him up in the tree without his hard hat on occasion?

A. Yes.

Q. What would you say to him?

A. Get your - - down before I kick you off the ladder. Put your stuff on. What's the matter with you? Do I have to have this talk with you again? He would come down. He was an older guy, you know. Frank, he was proficient, he could climb a tree. I didn't like him doing it, and when Frank first came on the job he got the attitude that - - I don't know if it was because he was older or what, but he was going to take charge of it. It's hard to keep an eye - - a lot of yards are big like, and I'd be working up front, Frank would go around the back and I'd come around the back sometimes and see him up in the tree, you know. Frank, get down. You leave this high stuff to me, the stuff you're scared of. Put it on.⁹

Mr. Braton confirmed that Mr. Copen had to force claimant to use the equipment:

Q. Did Tracy ever tell you that Frank had problems using the safety belt, slash, harness?

...

A. Yes, he did.

Q. What kind of problems was he having?

A. That he felt that he was safe, that he just didn't want to use the equipment. And Tracy brought it to my attention a couple different occasions that him and Frank basically had some small words as far as him just basically not putting it on. And Tracy made him get down out of a tree and put the safety equipment on and get back up in the tree before he completed his work.¹⁰

Mr. Braton testified Mr. Copen enforced respondent's safety policy a couple times and tried to teach claimant to never be in a tree without a safety harness and lanyard by forcing claimant to get out of a tree and put safety equipment on before being allowed to get back up in the tree. Claimant acknowledged that Mr. Copen reprimanded him two or three times for not wearing his safety harness while in a tree.¹¹

⁹ *Id.* at 45. Mr. Copen testified that there were times when claimant would not wear safety equipment even though Mr. Copen had told him to wear it. (Copen Depo. at 44).

¹⁰ Braton Depo. (Sep. 28, 2005) at 43.

¹¹ Cont. of R.H. Trans. at 18.

Claimant testified that whenever Mr. Copen found him in a tree without a harness and rope, Mr. Copen would tell him to use his safety equipment. Claimant said Mr. Copen always used safety equipment. Claimant stated that Mr. Copen's policy was that employees in a tree were supposed to have a harness, hard hat and ropes, but Mr. Braton was more concerned about getting work done.

Claimant testified that there was a time or two where he climbed a tree without being tied in, in Mr. Copen's presence, out of necessity to retrieve a climbing rope.¹²

Mr. Braton testified that both he and Mr. Copen enforced company policy of not having employees in trees without using safety equipment. Mr. Braton was inconsistent about having observed claimant in trees prior to the accident. He testified in 2012 that he had observed claimant in trees several times each week for extended periods prior to the accident and that he always was wearing a safety harness. In 2005, Mr. Braton testified he was not on the job sites and that he had no idea how much time claimant was in trees.¹³

On June 30, 2005, the day before the accident, claimant looked at the tree he was to remove. Claimant testified that the tree was dead. Mr. Braton met with claimant at the job site the evening before the accident. He and claimant went over how to prune the tree so the branches would not fall on the roof of a house underneath the tree. They did not discuss how claimant could tie off to the tree or discuss using safety equipment. According to Mr. Braton, claimant told him that he had all of the safety equipment in the truck. Based on such discussion, Mr. Braton assumed claimant would use such safety equipment.¹⁴ Claimant testified that he and Mr. Braton agreed claimant would put a ladder up and cut the ends of the limbs starting from the outside and work in toward the center of the tree.

Mr. Copen testified that the day before the accident, he had been thinking all day about quitting his employment with respondent. That evening, claimant and Mr. Braton talked about removing the tree. Mr. Copen heard Mr. Braton say that all claimant would have to do was put a ladder up and fold the limbs down. Mr. Copen did not tell Mr. Braton or claimant not to do the job that way, but said, "It will be one week before one of you guys are [sic] hurt or dead."¹⁵ He then told Mr. Braton he was quitting and left.

Mr. Braton testified that he went over the job with claimant the evening before the accident and the morning of the accident, and claimant seemed extremely enthusiastic about doing the job. He indicated claimant felt comfortable completing the job on his own.

¹² R.H. Trans. at 47-48.

¹³ Braton Depo. (May 31, 2012) at 8, 32; Braton Depo. (Sep. 28, 2005) at 53-54.

¹⁴ Braton Depo. (Sep. 28, 2005) at 63.

¹⁵ Copen Depo. at 42.

Claimant testified that on the morning of July 1, 2005, he and Mr. Braton discussed that the tree would not hold a climbing rope because it was rotten. Mr. Braton denied that such conversation occurred. Mr. Braton brought a 40-foot extension ladder for claimant to ascend the tree. Mr. Braton testified that even though claimant was going to use the ladder, he still had to use a safety harness and lanyard. Mr. Braton testified that claimant never told him he was not going to use his safety harness or not going to tie-into the tree.

Mr. Copen returned to the job site the morning of July 1, 2005 at 7 or 8 a.m., to drop off some of respondent's equipment. Claimant had already started work when Mr. Copen arrived. The type and extent of such work was not clearly noted in the record. According to Mr. Copen, claimant was not wearing safety equipment. Mr. Copen no longer worked for respondent and he did not tell anyone how to perform work that morning. Mr. Copen and claimant discussed whether Mr. Copen could resolve his differences with Mr. Braton.¹⁶ Claimant asked Mr. Copen about what equipment he needed for rigging. Mr. Copen asked claimant why he needed such information, as claimant had "no clue about doing" rigging and would never use such equipment anyway.¹⁷ Mr. Copen told claimant to "be careful[.]" but did not tell him to use his safety equipment.¹⁸

July 1, 2005, was the first day claimant trimmed trees without Mr. Copen's supervision. Claimant fell from the ladder and suffered multiple injuries, including an intracranial sheer injury, in which the force of high velocity trauma sheers or stretches grey matter in the brain, along with damage to the frontal lobes.¹⁹ Claimant was transported by ambulance to Overland Park Regional Medical Center. His Glasgow Coma Scale was a seven on a 0-15 scale, which meant his head injury was severe.

Claimant initially testified that he thought he had his harness on part of the time on July 1, 2005, because he was using it to carry the chain saw up the ladder. However, he ultimately testified at the September 9, 2005 preliminary hearing that he was unsure whether he had been wearing the harness and may have left it in the truck.²⁰ However, claimant asserted at the March 6, 2012 regular hearing that he was initially wearing the harness, but he thought the harness would trip him up and be a safety hazard because the harness kept slipping down over his hips when he ascended the ladder, so he removed it and put it in his truck. Claimant was not wearing his hard hat at the time of the fall.

¹⁶ Claimant testified Mr. Copen and Mr. Braton had a "big blowup" and a "big argument about money, I think, and Tracy had stopped working." (P.H. Trans. (Sep. 9, 2005) at 23, 67).

¹⁷ Copen Depo. at 35-36.

¹⁸ *Id.* at 36, 39.

¹⁹ Navato-Dehning Depo. at 8-9.

²⁰ *Id.* at 64.

Claimant testified that he understood he should have been wearing a harness and a hard hat, but he did not believe it was practical on the July 1, 2005 job. Claimant believed the tree overhanging a house was old and dead.²¹ Claimant had never trimmed an old, dead tree. Claimant testified the tree was not climbable and too diseased to have any branches to tie into. Claimant testified that because the tree was dead and rotted, had he been using a safety harness and lanyard, the branch would have broken and come down on top of him. He admitted that he did not wear a hard hat because it would just fall off.

Claimant testified that the accident was beyond his experience level, but he believed he was performing the job in a safe manner:

Q. Let me ask you this. In doing the job that you were doing at the time that you got hurt, were you doing it as safely as you knew how based on your three weeks of tree trimming experience?

A. Yeah.

Q. Is that a yes?

A. Yes, sir. I'm sorry. You know, in defense of myself, I honestly thought that that was what was expected of me. I didn't know of another way of doing it more safely or I would have done that.²²

Juan Acezedo worked for respondent. When he arrived at the job site at 8 a.m., he saw Mr. Braton talking with claimant, about what, Mr. Acezedo did not know. Mr. Braton left before claimant climbed the tree. Mr. Acezedo helped claimant with the ladder. He said claimant was about 36 feet off the ground working with a chain saw. According to Mr. Acezedo, claimant was not at any time wearing a safety harness or a hard hat.²³ Mr. Acezedo testified that claimant was reaching out cutting a branch when the branch fell, hit the ladder, and claimant fell to the ground. Claimant initially testified in 2005 to his belief that he fell because the branch he was leaning against broke, but testified at the 2012 regular hearing that the last limb to fall bounced and struck the ladder, dislodging him.

Mr. Acezedo normally only mowed lawns and landscaped. He had worked with claimant only one other time. At that time, Mr. Copen did the tree trimming and was wearing a safety harness and hard hat and was tied off. Mr. Acezedo did not wear a safety harness and lanyard, explaining that he did not need them because he worked on the ground. Mr. Acezedo said he never wore a hard hat or safety goggles.

²¹ Part of the tree was dead, but part of the tree was alive. (Copen Depo. at 40; Braton Depo. (Sep. 28, 2005) at 32, Ex. 4).

²² R.H. Trans. (March 6, 2012) at 54.

²³ Acezedo Depo. at 8-9.

A third member of the crew, "Alan" or "Allen," called Mr. Braton after claimant's accident. Mr. Braton arrived at the accident scene 22 minutes later. The ladder was still in the tree. A branch that had been cut off the tree was on the ground. Mr. Braton testified that he asked claimant's coworkers if claimant had been wearing safety equipment and was told that claimant had not and instead left all of his safety gear in his truck. Mr. Braton found a hard hat sitting in the front seat of claimant's truck and a climbing rope, the lanyard and the safety harness in a bag in the back of claimant's truck. Mr. Braton concluded that a branch hit the ladder and caused claimant to lose his balance and fall. Mr. Braton opined that if claimant had been tied in, even if the branch fell, hit and knocked the ladder over, claimant would have remained in the tree and would not have fallen to the ground.

OSHA investigated the accident. According to Mr. Braton, respondent was not cited as a result of the accident. Further, Mr. Braton testified that OSHA did not require that claimant have formal training to be a tree trimmer.

Mr. Braton stated there would never be a time when it would be impractical to wear a safety harness and lanyard when pruning a tree. Mr. Braton testified that there was no reason for claimant not to have used safety equipment. Mr. Braton testified that it would have been extremely easy for claimant to have been tied into the tree. He disagreed with claimant that use of a safety harness and lanyard was impractical. Mr. Braton testified that claimant was required to wear his safety harness and "tie-in" with a lanyard when pruning trees and that such measures should be taken every time both feet are off the ground.

Mr. Braton provided the ladder to claimant, but stated that utilizing a safety harness and lanyard is still necessary when ascending a tree using a ladder. He noted that page 36 of the *Tree Climber's Companion* states that climbers must be tied in with either a climbing rope or a lanyard when working from a ladder. Mr. Braton never quizzed claimant on the contents of *The Tree Climber's Companion* or asked him what chapters he had completed.

Mr. Braton trimmed the tree on July 5, 2005, using the ladder. Mr. Braton acknowledged that part of the tree was dead. The dead branch, which was six to seven inches in diameter, was solid all the way through and supported his weight and the ladder. Mr. Braton estimated that he outweighed claimant at the time of the accident. He testified there is no way to look at and estimate the strength of any branch. He nonetheless stated that the dead portion of the tree would have supported a 300-pound or even a 400-pound man. He was able to support himself from the branch using a lanyard. Mr. Braton testified that if claimant had tied off onto a dead branch, it would not have been possible for the limb to break and cause claimant to fall. Mr. Braton identified six different options claimant could have used to tie off safely.

Mr. Copen was not at the site at the time of the accident, but testified claimant obviously had not been wearing his safety equipment or he would not have fallen.

Claimant was in a coma for approximately three to four weeks after the accident. He had a neck injury. He was at Overland Park Regional Medical Center until July 29, 2005, when he was transferred to Mid-America Rehabilitation Hospital and placed under the care of Cielo Navato-Dehning, M.D., who is board-certified in physical medicine and rehabilitation and spinal cord injury medicine. Claimant was discharged from Mid-America Rehabilitation Hospital on August 26, 2005. He was ambulating satisfactorily at the time.

On October 17, 2005, following a preliminary hearing, Administrative Law Judge Robert Foerschler ruled the claim was compensable and ordered payment of temporary total disability benefits and medical treatment. A Board Member affirmed Judge Foerschler's preliminary hearing decision on December 27, 2005.

On December 16, 2005, claimant was evaluated by Patrick Caffrey, Ph.D., at respondent's request. Dr. Caffrey performed a neuropsychological evaluation which showed claimant had mild to moderate cognitive impairment. Dr. Caffrey felt claimant had demonstrated a remarkable recovery in the initial six months following his accident.

Claimant received extensive medical treatment through various physicians, primarily Dr. Navato-Dehning. Claimant received transitional living, cognitive, physical, occupational and speech therapy several times per week into 2006. Claimant testified that he developed left knee complaints as a result of physical therapy in January 2006.

On February 22, 2006, claimant was seen by Chris D. Fevurly, M.D., at respondent's request. Dr. Fevurly is board certified in internal and preventative medicine and as an independent medical examiner. Dr. Fevurly diagnosed claimant with a closed head injury with traumatic brain injury, several chronic musculoskeletal conditions, preexisting chronic alcohol abuse, chronic cigarette abuse producing moderate COPD, history of DVT (deep vein thrombosis), and multiple coexisting chronic medical problems. Claimant complained of bilateral knee symptoms. Dr. Fevurly opined claimant was at maximum medical improvement (MMI) for his closed head injury and musculoskeletal injuries. Dr. Fevurly rated claimant as having an 18% whole person impairment based upon the *AMA Guides*²⁴ (hereinafter *Guides*), consisting of 14% for a brain injury/cognitive impairment and 5% for cervicothoracic pain. Dr. Fevurly restricted claimant from working at heights, due to brain injury-related balance issues, and obtaining a commercial driver's license. Dr. Fevurly testified claimant likely could not perform management or supervisory duties. Dr. Fevurly testified that claimant is employable based on his demonstrated post-injury ability to cut and haul firewood in a wheelbarrow, but he could not say how many hours per day or days per week that claimant would be able to perform manual labor. Dr. Fevurly characterized claimant as "amazingly vigorous."²⁵

²⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

²⁵ Fevurly Depo. at 19.

On June 6, 2006, Dr. Navato-Dehning noted claimant reported left knee pain from going up and down stairs.

About one year post-accident, respondent offered claimant a job in which he would work on the ground. Claimant declined the offer. Dr. Fevurly testified that claimant had the ability to pick up brush and put it in a chipper for respondent.

Dr. Fevurly testified that claimant's balance issues caused him to fall during hospital treatment and fracture his left wrist. He found that claimant's left wrist and left knee had fully recovered. Dr. Fevurly noted claimant made no left knee complaints until eight months post-accident and there were no treatment records linking claimant's left knee to the accident. Dr. Fevurly indicated claimant's left knee complaints were not causally related to the accident, and were likely either degenerative in nature or related to cutting and hauling firewood. Claimant had no emotional outbursts at Dr. Fevurly's evaluation.

Claimant returned to Dr. Caffrey on November 13, 2006, for an updated neuropsychological evaluation. Dr. Caffrey noted that claimant did not use maximum effort for fear of developing a significant headache. Based upon the test results, Dr. Caffrey believed claimant made a rather remarkable recovery from the head trauma and would be a good candidate for competitive employment. Dr. Caffrey recommended claimant try to get a driver's license and get job placement assistance.

Dr. Caffrey's interpretation of his testing showed that claimant scored normal for memory and scored well for attention and concentration. Claimant had mild depression, which Dr. Caffrey did not think was a new problem. Dr. Caffrey did not think claimant had any loss of intellectual functioning due to his injury. Dr. Caffrey noted claimant displayed good effort on the testing and tolerated frustration well, but the MMPI-2 testing showed claimant was "faking bad."²⁶ It was Dr. Caffrey's opinion that claimant was capable of performing work consistent with his history, including as a general contractor, but believed he should not return to work as a tree trimmer. Dr. Caffrey did not view claimant's memory or concentration issues as impacting his employability.

On January 16, 2007, claimant was seen by James S. Zarr, M.D., at respondent's request. Dr. Zarr is board certified in physical medicine and rehabilitation. Dr. Zarr diagnosed claimant with a traumatic brain injury, multiple facial fractures, left wrist fracture, persistent left knee pain, visual floater, right lower extremity DVT and mild persistent dysphagia. Dr. Zarr opined that claimant had not reached MMI and should be reevaluated. Dr. Zarr provided restrictions of sedentary work only and recommended claimant be evaluated by an orthopedic surgeon to determine causation of his left knee complaints.

Dr. Navato-Dehning noted in an April 3, 2007 letter to claimant's attorney that claimant's left knee injury was due to his fall.

²⁶ Caffrey Depo. at 40.

Claimant returned to Dr. Zarr on January 11, 2008. Dr. Zarr opined claimant had reached MMI. Claimant had mild word finding and memory problems. It was Dr. Zarr's opinion that claimant did not have any significant impairment regarding his left wrist and the left knee injury was not a work-related condition. Dr. Zarr rated claimant as having a 5% mental impairment, a 5% emotional impairment, a 5% urinary impairment, a 3% balance impairment, a 3% bowel impairment and a 3% sexual dysfunction impairment. These combined ratings result in a total impairment of 22% to the body as a whole based upon the *Guides*. Dr. Zarr believed claimant was capable of returning to substantial and gainful employment, but would require medications for the remainder of his life. Dr. Zarr did not provide any permanent work restrictions at the time of his evaluation, but testified claimant should avoid working at heights or engage in activities requiring good balance. He agreed that he would have been in a better position to provide restrictions if he evaluated claimant over a longer period of time.

Dr. Navato-Dehning is the director of Mid-America Rehabilitation Hospital and the director at Truman Medical Center Lakewood. She treated claimant for years, beginning on July 29, 2005 and placed him at MMI on November 25, 2008. She last evaluated claimant on February 13, 2012, about two weeks before her deposition. She noted claimant's brain injury caused him to have emotional lability, cognitive dysfunction, memory and attention issues, balance problems requiring use of a cane, and the loss of normal control of his bowels and bladder. The brain injury caused the left side of claimant's body to be weaker than the right side, but he fully recovered from his left-sided weakness, except for his left wrist and left knee. She testified that claimant's left wrist injury was related to the fall and his left knee injury was either related to the fall or due to an altered gait secondary to his brain injury. However, she did not know that claimant attributed his left knee symptoms to participating in physical therapy and noted her opinion on causation would change if claimant's left knee problems did not result from the accident.²⁷ She also opined that claimant's preexisting depression would likely have been aggravated by his brain injury.

Dr. Navato-Dehning prescribed claimant medication for mood/emotional stabilization and memory/cognitive function, including a medicine typically prescribed to treat dementia. Claimant will require medication management for the remainder of his life. Dr. Navato-Dehning did not think claimant was able to live independently due to his brain injury. If claimant were not married, Dr. Navato-Dehning indicated claimant would need to be in an Alzheimer's unit or a locked ward due to his brain injury.

Dr. Navato-Dehning provided various work restrictions in Exhibit 6 of her deposition. Claimant cannot consistently work more than eight hours in a day. She gave claimant restrictions involving sitting, standing, reaching and grasping, which were primarily due to his generalized arthritis. Dr. Navato-Dehning testified claimant is realistically unemployable due to his emotional lability, issues with attention and his bowel and bladder dysfunction.

²⁷ Navato-Dehning Depo. at 33.

Dr. Navato-Dehning indicated workers compensation insurance stopped paying for claimant's treatment with her in June 2011. She was never informed that she was not authorized to continue treating claimant.

On September 8, 2011, claimant was evaluated by Daniel D. Zimmerman, M.D., at claimant's attorney's request. Dr. Zimmerman is board certified in internal medicine, as well as an independent medical examiner. Dr. Zimmerman opined that claimant's left knee and left wrist injuries were consequences of the July 1, 2005 accident. He found claimant sustained a 22% whole body impairment due to the central nervous system or cognitive residuals, a 15% left wrist impairment, and a 20% left lower extremity impairment, which combine to be a 35% whole body impairment based on the *Guides*. Dr. Zimmerman provided light duty and postural restrictions and indicated claimant cannot work at heights or operate or be around dangerous machinery. Dr. Zimmerman opined that claimant is unemployable and had a 75% task loss exclusive of his cognitive deficits.

Michael Dreiling, a vocational expert, interviewed claimant on October 31, 2011, at claimant's attorney's request, and compiled a list of tasks claimant performed in the 15 years before his July 1, 2005 accident. Mr. Dreiling noted claimant completed a taxidermy course, but had not made any money in such activity. Mr. Dreiling opined claimant was essentially and realistically unemployable based upon Dr. Dehning's restrictions.

On February 14, 2012, claimant was evaluated by E. Jerome Hanson, M.D., at respondent's attorney's request. Dr. Hanson is board certified in neurological surgery. Dr. Hanson noted claimant fractured his left wrist when falling in the hospital. Dr. Hanson did not observe claimant having any emotional outbursts. Claimant's gait was slightly unsteady, but relatively satisfactory. Dr. Hanson believed claimant used a staff as a "security blanket." Dr. Hanson attributed claimant's unsteadiness to age, past alcohol and drug use and medications, not due to the head injury. Dr. Hanson rated claimant as having a 10% whole body impairment for loss of cerebral function based upon the *Guides*, of which 50% was due to prior alcohol and drug abuse. Dr. Hanson could not point to pre-injury medical records showing cognitive impairment. Dr. Hanson restricted claimant to lifting 20-50 pounds on a regular basis, no ladders, scaffolds or elevated work platforms and to avoid circumstances in which claimant could fall. Dr. Hanson noted that claimant's mild cognitive deficits did not significantly interfere with his activities of daily living. Dr. Hanson agreed that he would have a better picture of claimant's abilities if he evaluated him on multiple occasions instead of just once. He did not think claimant was permanently and totally disabled. Dr. Hanson opined that claimant could work 40 hours per week.

Terry Cordray, a vocational expert, interviewed claimant on March 27, 2012, at respondent's attorney's request. He compiled a list of tasks claimant performed in the 15-year period before his July 1, 2005 accident. Mr. Cordray opined that claimant was capable of working based upon restrictions from Drs. Zarr, Fevurly and Caffrey, but unemployable based upon Dr. Navato-Dehning's restrictions. Mr. Cordray's opinions were based on his assumption claimant did not have significant cognitive impairment.

At the March 6, 2012 regular hearing, claimant complained of ongoing problems with balance for which he uses an assistive device. He wears braces on both his left wrist and left knee. Claimant indicated he can only work for a couple of hours before needing to rest. He complained about flashes of anger, memory and concentration deficits. Claimant asserted that his brain injury makes him unable to determine when he needs to go to the bathroom, resulting in bowel and bladder incontinence. He alleged no sex drive or ability to achieve an erection, subsequent to the accident. He admitted that his neck is fine.²⁸

Claimant was never substantially and gainfully employed after the accident. Claimant cleared a grove of ash trees with a chain saw and used a splitter to split the wood. He could perform such task for a couple hours at a time before needing to rest. He was paid \$500 from this activity, but made no profit. Claimant acknowledged that he uses a wheelbarrow to transfer firewood at his house, perhaps two to three times per week. The firewood weighs 10-20 pounds per piece. He used the wheelbarrow to move eight to ten pieces of firewood at a time. Claimant testified he does not think he is able to work full-time due to his memory issues and inability to do much of anything.

Claimant can mow his yard and water, weed and maintain his garden, including pick fruit. He passed a driver's test and can drive. He hunts geese with a 12-gauge pump shotgun and fishes. He makes turkey calls. He took a taxidermy course and performs some taxidermy, but such activity does not appear to have generated much income.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²⁹

K.S.A. 2005 Supp. 44-501(d)(1) states:

If the injury to the employee results . . . from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

K.A.R. 51-20-1 states:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

²⁸ R.H. Trans. (Mar. 6, 2012) at 23.

²⁹ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means 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 . . . Guides . . . , if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

To deny benefits for failing to use a proper guard or protection voluntarily provided by the employer for the employee's use, such failure must be "willful." *Carter* states:

[T]he meaning of the word "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)³⁰

³⁰ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, rev. denied 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920)).

ANALYSIS**1. Claimant Sustained Personal Injury by Accident Arising Out of and in the Course of his Employment.**

Claimant suffered personal injury arising out of and in the course of his employment on July 1, 2005. While K.S.A. 2005 Supp. 44-501(d)(1) precludes payment of compensation where a worker willfully fails to use employer-provided safety equipment, it does not impact whether an injury arises out of and in the course of employment.

2. K.S.A. 2005 Supp. 44-501(d)(1) Precludes an Award of Compensation.

This case presents an extremely close question. Claimant decided not to use safety equipment furnished by respondent and he fell from the ladder.

The Kansas Supreme Court has defined willful as demonstrating a headstrong or stubborn disposition. The burden placed upon an employer with respect to this defense is substantial. The Board is unaware of any Kansas Supreme Court or Kansas Court of Appeals decisions in which a respondent successfully asserted the defense. The majority of Board decisions follow *Carter* and typically conclude that an employee's failure to use a proper guard or protection does not meet the level of willfulness as defined by the Kansas Supreme Court, such that the statute does not bar compensation.³¹ There have been exceedingly rare situations where an employee repeatedly and blatantly disregarded a rigidly enforced requirement to use employer-provided safety equipment and benefits have been denied, but these cases represent the exception and not the rule.³²

³¹ See *Butner v. Glazers Wholesale Drug Co.*, No. 1,048,515, 2011 WL 2693253 (Kan. WCAB June 16, 2011); *White v. Pratt Industries*, No. 1,041,568, 2010 WL 2671473 (Kan. WCAB June 15, 2010); and *Freeman v. Paul Transportation*, No. 1,044,270, 2009 WL 1588643 (Kan. WCAB May 15, 2009).

³² See *Sutton v. Allied Waste North America*, No. 1,052,434, 2011 WL 2693262 (Kan. WCAB June 15, 2011) ("Claimant's failure to use the seat belt was in violation of respondent's policy. Claimant knew of that policy, he had been trained concerning that policy, and his past violations resulted in his being reminded of the policy and coached to follow that required safety procedure. The policy was enforced by respondent. Claimant did not say he forgot to fasten his seat belt. Instead, claimant testified that he intended to wait to fasten his seat belt until he was on the public road. There was no such exception to respondent's policy. Under these circumstances, claimant's failure to use the seat belt was willful.") and *Buck v. Custom Roofing*, No. 199,552, 1995 WL 598234 (Kan. WCAB Sep. 21, 1995) (Compensation denied under K.S.A. 44-501(d)(1) after claimant fell from roof. He had been reprimanded to use a safety belt while working on a roof, but would only put on the safety belt when he saw his boss coming to the job site.).

Price v. Robert Todd Baker d/b/a Sunshine Lawn & Tree Service, No. 1,058,418, 2012 WL 758317 (Kan. WCAB Feb. 21, 2012), cited by respondent, was decided based on post-May 15, 2011 law, which also allows denial of compensation due to an employee's "reckless violation" of the employer's safety rules. The law applying to this case only concerns the more stringent requirement that the respondent prove a "willful failure" to use a proper guard and protection voluntarily furnished the employee by the employer.

The violation alone of instructions from an employer is not enough to render the employee's actions "willful" as a matter of law under K.S.A. 44-501(d).³³ In *Thorn*,³⁴ the employee, while operating a crusher, used a short stick to pry ore between the rollers of the crusher. His hand was pulled into the machine and severely injured. This was contrary to respondent's rule obligating the employee to use a long-handled maul to break up pieces of ore. Claimant admitted he used the stick "unthoughtedly" as he had seen other workers using the stick in the same manner. The actions by Mr. Thorn were not found to be "willful" under K.S.A. 44-501(d).

After a thorough review of all of the facts, the Board concludes that claimant's case is not compensable. Respondent provided claimant with a safety harness and lanyard for his protection. Claimant was taught how to use the safety equipment, he knew how to use such safety equipment, and knew he was supposed to use the safety equipment. At both the 2005 preliminary hearing and the 2012 regular hearing, claimant testified that he knew he was to use safety equipment, but decided not to do so. Claimant disregarded respondent's requests that he use safety equipment. In lieu of following respondent's admonishments, claimant chose not to use safety equipment. Claimant had no right to disregard his employer's directives and substitute his own rationale for eschewing safety equipment. If claimant had used the safety harness and lanyard, he likely would not have fallen to the ground and been injured.³⁵

Claimant hypothesizes that any branch or trunk that he may have tied into could have broken due to the tree being dead. The branches turned out to be solid. According to Mr. Braton, even if the branches had been weak and hollow, they would have been strong enough to support claimant's weight. More importantly, there is nothing in K.S.A. 2005 Supp. 44-501(d)(1) that says an employee may disregard the use of a proper guard or protection based on the worker's subjective judgment or excuse. The statute has no exception for situations where the worker thinks not using safety devices is a more reasonable choice than following safety protocols. Using the safety harness and lanyard, as the claimant had been instructed by Mr. Copen, would have posed no additional danger. Using the harness and lanyard would have reduced the risk even if the tree was weak.

The Board concludes claimant's decision to not use the safety devices provided to him by respondent for his safety was "willful" based on Mr. Copen's testimony that claimant was "stubborn" and had to be "absolutely forced" to use safety equipment.

³³ *Hoover v. Ehsam Co.*, 218 Kan. 662, 544 P.2d 1366 (1976).

³⁴ *Thorn v. Zinc Co.*, 106 Kan. 73, 186 P. 972 (1920) *reh'g denied* Feb. 11, 1920.

³⁵ The Board does not view claimant having not used a climbing rope or hard hat as particularly relevant. Use of a rope was not mandatory, only optional. Claimant's hard hat, had he been using it, likely would have fallen off before he hit the ground. Additionally, the Board is not confident that claimant's use of a hard hat would have helped to prevent his brain injury as a result of a fall from over three stories.

The dissenting Board Members assert claimant was not ignoring safety rules because Mr. Braton only told claimant to ascend the ladder and cut branches. There is zero evidence Mr. Braton told claimant to ignore safety rules. While the Board accepts as credible Mr. Acezedo's testimony that claimant was at no time wearing his safety harness or lanyard on July 1, 2005, claimant testified he knew he was supposed to use safety gear. At the 2005 preliminary hearing, claimant testified that tying into a dead branch was not feasible because the branch might break. At the 2012 regular hearing, claimant testified that he had ascended the ladder while wearing his safety harness, but took the harness off because it slipped down and he was worried he would trip. Claimant never testified that Mr. Braton told him to ignore safety rules and just ascend the ladder to cut the tree. Rather, claimant acknowledged that Mr. Braton would "always" talk to him about using safety gear in trees. Mr. Copen always told claimant to use safety gear.

The dissenting Board Members also assume Mr. Copen quit due to respondent ignoring safety rules, but this conclusion is only based on an inference. Mr. Copen did not testify that he resigned due to respondent ignoring safety rules. The Board does not know specifically why Mr. Copen stopped working for respondent. Claimant testified that Mr. Copen quit over a money dispute. Claimant never testified to any belief that Mr. Copen quit due to respondent ignoring safety protocols. Even assuming Mr. Copen was concerned about safety when he advised claimant and Mr. Braton on June 30, 2005, that one of them would be dead in a week, such a statement would seem to enforce to claimant the idea that being safe when working from heights was vitally important.

It could be argued claimant did not have the proper training and experience to use safety equipment. However, K.S.A. 2005 Supp. 44-501(d)(1) says nothing about proper training and experience. The statute has no exception for workers with limited training or experience. If it did, no new employees would be subject to the law. The statute applies to all workers who ignore the employer's safety requirements.

While Mr. Acezedo did not use safety equipment, his failure to do so is not determinative of respondent's safety rules concerning employees working at heights in trees. Respondent rigidly enforced its requirement that workers in trees must use safety harnesses and lanyards. Comparing Mr. Acezedo's work on the ground crew with the work Mr. Copen, Mr. Braton and claimant performed in trees is comparing apples and oranges.

As an aside, the Kansas Supreme Court's longstanding holding that "willful" means something other than intentional is uncertain based on recent directives from the Court to apply the law as written.³⁶ K.S.A. 2005 Supp. 44-501(d)(1) literally precludes compensation where an employee willfully fails to use a proper guard or protection supplied by the employer. The statute does not define "willful," let alone equate willful with

³⁶ See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

headstrong, stubborn, unyielding or obstinate contradiction. The definition of "willful" was recently discussed by Justice Rosen in his concurring and dissenting opinion in *Unruh*,³⁷ where he observed that "willful" conduct is on par with intentional, deliberate, purposeful, non-accidental, designed and/or voluntary conduct. Whether the appellate courts would adhere to the definition of "willful" as noted in *Bersch* and *Carter* is uncertain.³⁸

CONCLUSION

Claimant willfully failed to use a reasonable and proper guard and protection voluntarily furnished to him by the employer. K.S.A. 2005 Supp. 44-501(d)(1) disallows any compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Special Administrative Law Judge Gregory A. Lee's Award dated October 22, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

³⁷ *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1205, 221 P.3d 1130 (2009).

³⁸ See also *DeBerry v. Kansas State Bd. of Accountancy*, 34 Kan. App. 2d, 813, 818, 124 P.3d 1067 (2005), *rev. denied* 281 Kan. 1377 (2006) (willful violation found where CPA intended to commit a forbidden act or abstain from doing something he was required to do); and *Dickens v. Snodgrass, Dunlap & Co.*, 255 Kan. 164, 181, 872 P.2d 252 (1994) ("Willful" is synonymous with voluntary, deliberate and "intentional.)).

DISSENTING OPINION

Claimant proved a compensable case. At worst, claimant's failure to use safety equipment was a negligent act, not a willful, headstrong or stubborn decision to disregard respondent's safety rules.

Mr. Braton instructed claimant to go up the ladder and trim the tree. The issue of safety did not arise when Mr. Braton and claimant discussed how to trim the tree. Rather, they discussed how to not damage the roof of the house below the tree branches. According to Mr. Copen, Mr. Braton said, "All we have to do is put a ladder up there and fold the limbs down on the tree."³⁹ At that time, Mr. Copen responded, "It will be one week before one of you guys are hurt or dead."⁴⁰ He then immediately quit. Mr. Copen's testimony pointedly implies that safety was not Mr. Braton's concern. It is not difficult to connect the dots: Mr. Copen quit due to respondent's culture of noncompliance with safety protocols.

Claimant testified he believed he was performing the work as directed by Mr. Braton. If claimant was simply told to climb up the ladder and cut the limbs, without any discussion of safety, it is reasonable to conclude his testimony is credible that he thought he was doing the work as directed. If claimant genuinely believed he was doing what he was told to do by Mr. Braton, i.e., simply climb the ladder and cut the branches, he cannot be said to be willfully ignoring his employer's request to use safety devices, especially in the context of Mr. Braton and claimant not discussing safety in relation to this particular job.

Additionally, the safety equipment must be "reasonable and proper" for K.S.A. 2005 Supp. 44-501(d)(1) to bar compensation.⁴¹ While the statute does not specifically mention whether an employee should be properly trained how to use safety equipment, whether the guard or protection is reasonable and proper would seem to hinge on proper training and supervision. It cannot be said that the general directive to use safety equipment is reasonable and proper where claimant had *de minimis* training and experience in the use of such equipment and claimant was simply told to ascend the ladder and cut the branches. Claimant's training was limited to partial review of a book about trimming trees and approximately ten days of on-the-job training concerning tree-trimming. The very first job he performed without Mr. Copen's supervision was the job in which he was injured. The undersigned Board Members conclude the safety equipment was not reasonable and proper.

³⁹ Copen Depo. at 41-42.

⁴⁰ *Id.* at 42.

⁴¹ See *Binger v. Read*, 101 Kan. 303, 165 P. 821 (1917).

Respondent basically asked for this unfortunate result. If it is believed that claimant willfully disregarded safety rules, such that he repetitively had to be forced to use safety equipment, it would have been foolish for respondent to send claimant to trim the tree on July 1, 2005, without any supervision. Sending claimant, a worker with extremely limited experience and training, to do a job Mr. Copen characterized as absolutely hazardous is simply courting disaster.

Moreover, under K.A.R. 51-20-1, an employee that violates a safety rule is still entitled to compensation where the employer generally disregards and does not rigidly enforce safety rules. Mr. Acezedo testified that he did not use a hard hat or safety glasses. Mr. Braton testified all employees, whether on the ground or in trees, had to wear hard hats and safety glasses. While Mr. Acezedo worked on the ground crew, and would thus have no reason to wear a safety harness or lanyard, the fact that he did not use any safety equipment demonstrates that respondent generally disregarded rules regarding safety. This is another reason claimant is entitled to benefits.

In *Grissom*,⁴² the Board held:

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*⁴³ and the Court of Appeals in a much more recent decision in *Carter*⁴⁴ have defined "willful" to necessarily include:

. . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.⁴⁵

Although claimant may have violated Mr. Braton's instructions, that alone is not enough to render claimant's action as a matter of law "willful." There is insufficient evidence to establish claimant's failure to use the safety equipment was without yielding to reason, obstinate or perverse.

⁴² *Grissom v. Mid Continent Cabinetry, Inc.*, No. 1,046,678, 2010 WL 769957 (Kan. WCAB Feb. 26, 2010).

⁴³ *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

⁴⁴ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

⁴⁵ *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

If the case were compensable, the undersigned Board Members would conclude that claimant is permanently and totally disabled based on the testimony of the authorized treating physician, Dr. Navato-Dehning.

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Honorable William Belden, Administrative Law Judge

Honorable Gregory A. Lee, Special Administrative Law Judge