

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Respondent is a community service organization that provides housing, transportation and employment assistance to those who are homeless and unemployed. Claimant was provided with a place to live and assigned to work at Pioneer Balloon. On July 18, 2007, while returning from a break, claimant was struck in the forehead by a co-worker wielding a stool. The two struggled for a moment and then the fight was broken up by a supervisor. Claimant was taken to a local hospital and treated for a cut in his head. Shortly thereafter, both claimant and the co-worker were fired and turned away from the residential facility.

Since the assault, claimant testified that he has headaches and pain behind his eye. He has been taken off work and referred to a neurologist for an evaluation but to date, that examination has yet to occur.

The claimant's version of the events leading up to the assault is dramatically different from that presented by respondent's witnesses. Claimant testified that he did not know his assailant, Mark Page, other than to light a cigarette for him on one occasion. He denies that the two had any contact or dispute in the residential facility or in the workplace. He likewise denies saying anything about Mr. Page's girlfriend. According to claimant, Mr. Page was an unusual individual who kept to himself. This event with Mr. Page using a stool to attack claimant was, from claimant's perspective, unexpected and unprovoked.

Respondent contends that Mr. Page and claimant were involved in a personal dispute and that the claimant was provoking Mr. Page throughout the day of the assault. In fact, Sam Haley, the owner of respondent's residential facility, had received a number of similar complaints about claimant before the incident. Mr. Haley recounted an instance just the day before the assault where he mediated a dispute between claimant and Mr. Page and that the two indicated they were fine and that things were "cool."¹ Nonetheless, Mr. Haley denied having any difficulties with Mr. Page before this event. According to Mr. Haley, he learned of the incident between the claimant and Mr. Page when the assistant plant manager phoned him in El Dorado that same day. Following the event, Mr. Haley talked to several people trying to find out what occurred. He also spoke to Mr. Page and to the claimant. Mr. Haley testified that Mr. Page told him that claimant was trying "to get under his skin"² and then said something entirely inappropriate about Mr. Page's girlfriend. And so Mr. Page explained that he had no choice but to strike out at claimant.

¹ P.H. Trans. at 38-39.

² *Id.* at 37.

Following the preliminary hearing, at which both claimant and Mr. Haley testified, the ALJ issued an order granting medical treatment and temporary total disability, implicitly concluding that claimant's injuries were as a result of a compensable accident. However, the Order does not set forth the legal theory upon which the ALJ relied.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

In this instance, the claimant's injury certainly arose in the course of claimant's employment. The remaining question is whether his injury arose "out of" his employment.

Fights between co-workers usually do not arise out of employment and generally will not be compensable.⁶ However, if an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.⁷ For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated

³ K.S.A. 2006 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁵ *Id.* at 278.

⁶ *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

⁷ See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

by an employment hazard,⁸ or the employer had reason to anticipate that injury would result if the co-workers continued to work together.⁹

In this instance, claimant denies that he had any interaction, negative or otherwise, with Mr. Page (other than to provide a light for a cigarette) up to the moment of the assault. Moreover, it appears that Mr. Page's motivation for starting this fight stemmed not from work, but from statements he says claimant made, all unrelated to the workplace. There is no basis for concluding that the assault had any relationship to the workplace. For that reason, this member of the Board finds that the *Springston*¹⁰ rationale does not apply and cannot form the basis for liability.

Claimant's counsel alternatively suggests that respondent should have anticipated this fight and that knowledge gives rise to liability under *Jordan*.¹¹ Setting aside, for the moment, that this contention is in direct contradiction with claimant's assertion that he and Mr. Page had nearly no contact with one another before the assault, this Board Member does not find sufficient facts to support claimant's argument. While there may have been some sort of problem between claimant and Mr. Page (something that claimant denies altogether) Mr. Haley testified that the problem was resolved and both men were no longer at odds with each other. They had not fought nor caused any sort of disruption. They merely had some sort of verbal disagreement.¹² Thus, there was nothing for respondent to anticipate, at least on this record.

The last basis for liability is that set forth in *Baggett*.¹³ *Baggett* involved a claimant that was injured when a co-worker pushed him during a fight about a purely personal matter. After being pushed, Mr. Baggett backed up, falling into a 12 foot deep hole and was injured. The *Baggett* Court stated that "[w]here an employee falls victim to an assault stemming from a purely personal matter while on the job and his or her injuries are exacerbated by an employment hazard, it is held that the injury arose out of the employment and is compensable."¹⁴

⁸ *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

⁹ *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

¹⁰ *Springston*, supra n. 7.

¹¹ *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 101 P.3d 239 (2004).

¹² Again, claimant denies any of this happened.

¹³ *Baggett*, supra n. 8.

¹⁴ *Id.*, Syl. ¶ 3.

Claimant contends the fact that a stool from the workplace was used in the assault transforms this unexpected assault into a compensable event, as in *Baggett*, because the stool exacerbated the hazard to claimant. Conversely, “[h]ad Page attacked with his fists or a personally owned weapon, the workplace would not have increased the risk to claimant. Since he used a stool from the workplace as a weapon, there was a concurrent employment risk along with the personal risk associated with the argument.”¹⁵

After considering both parties’ arguments, this member of the Board finds that the rationale of *Baggett* cannot be extended as far as claimant suggests. *Baggett* involved an unanticipated fall in a large hole during the course of a fight. It does not stand for the proposition that any object taken from the workplace constitutes a hazard and transforms an unexpected assault into a compensable event. This is particularly the case when as here, this member of the Board finds that claimant was not an innocent victim of Mr. Page’s anger. In short, the undersigned finds claimant’s injuries were not exacerbated by an employment hazard. For this reason, the ALJ’s Order is reversed and benefits are denied.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 11, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of December 2007.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

¹⁵ Claimant’s Brief at 7-8 (filed Nov. 26, 2007).

¹⁶ K.S.A. 44-534a.