

The only issue before the Board is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds:

The City of Chanute employed claimant as a cemetery grounds keeper. In that position claimant assisted cleaning up the downtown area following an annual arts and crafts festival, Artist Alley. Shortly before 5:00 p.m. on September 29, 2007, claimant reported to the Chanute City Complex where he helped others on the cleanup crew to load the trucks with equipment and other items that would be used that day to do the festival cleanup.

Before leaving the city complex, claimant allegedly told two co-workers, Thad Busse and Jody Mauk, to meet him at Katy Park where they would begin cleanup. Rather than driving a city truck, claimant began the short trip downtown on his motorcycle, which he promptly wrecked after losing control on some loose gravel while navigating a curve in the street. The accident occurred not far from the complex where he had departed. Claimant acknowledges he took his motorcycle to go to the cleanup site as he intended to go to a poker tournament in another town after he had finished his cleanup chores and he did not want to go back to the complex after completing his work. At the time of the accident, claimant was "on-the-clock."

The accident injured claimant's left leg. He also alleges he began experiencing some neck problems shortly after the accident. Immediately after the accident claimant was taken to a local emergency room and then was transferred to the Labette County Medical Center.

Claimant maintains he was unaware he was prohibited from riding his motorcycle when his accident happened. He testified he has never been shown a written policy statement that prohibits employees from using personal vehicles while on city business. He also testified he rode his motorcycle on other occasions to city safety meetings and that he has never been reprimanded for driving his own vehicle.

Katy Park is located at the east end of the area where the exhibitors were located. Claimant believes his accident occurred on the most direct route to the park.

Daniel McMillan, who is the city's Park and Cemetery supervisor and claimant's supervisor, testified that Katy Park was not considered part of the festival. According to Mr. McMillan, who did not assist in the cleanup efforts, no festival activities are held in Katy Park and there is no cleanup needed in that area. He also testified he would not allow his

employees to drive their own vehicles on city business but he was not aware of any written policy statement to that effect. It is not entirely clear from the record, but it is questionable whether Mr. McMillan ever told his employees about his policy against using personal vehicles.¹

Michael Bockover, who is a foreman in the city's Parks Department and whom Mr. McMillan placed in charge of the festival cleanup, testified the festival had been set up on Main Street and that Katy Park was not part of the cleanup. He also testified that he did not allow individuals in the Parks Department to drive their own vehicles to Artist Alley. Mr. Bockover was unable to say whether all the city vehicles that left the city facility for the festival cleanup took the same route to downtown. What is more, Mr. Bockover is unable to state whether the route he personally took on September 29, 2007, was the most direct to the downtown area, although he believed it was the easiest route to travel as it was without curves. Mr. Bockover did not tell the cleanup crew they had to take any certain route to the downtown cleanup area.

Respondent also presented the testimony of Thad Busse, who worked with claimant in the cemetery department. Mr. Busse contradicts claimant's testimony regarding where they were to meet as Mr. Busse remembers claimant indicating they would meet downtown at the bleachers, not at Katy Park.

Only those accidents that arise out of and in the course of employment are compensable under the Workers Compensation Act.² Before an accident arises out of employment, there must be a causal connection between the accident and the nature, conditions, obligations, or incidents of the employment.³

This court has had occasion many times to consider the phrase "out of" the employment, and has stated that it points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . .

This general rule has been elaborated to the effect that 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.

¹ McMillan Depo. at 15.

² See K.S.A. 2007 Supp. 44-501.

³ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment. . . . [T]he foregoing tests exclude an injury not fairly traceable to the employment and not coming from a hazard to which the workman would have been equally exposed apart from the employment.⁴

Arising “out of” and “in the course of” the employment, as used in our Workmen’s Compensation Act (K.S.A. 44-501 *et seq.*), have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. 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 workman was at work in his employer’s service. The phrase “out of” the 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 if it arises out of the nature, conditions, obligations and incidents of the employment. *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).⁵

The undersigned finds claimant’s accident arose out of and in the course of his employment with respondent. At this juncture, the evidence establishes that when his accident occurred claimant was being paid and was on his way to the downtown area to assist in the festival cleanup. Accordingly, claimant’s accident arose out of and in the course of his employment with respondent as it occurred after claimant had commenced his work activities on that day and the incident occurred during an activity (travel to the cleanup site) that was necessary and in furtherance of, and incidental to, his assigned work.

In addition, the undersigned finds the evidence, at this stage, fails to establish that claimant’s accident occurred while he was performing a prohibited activity or that he had abandoned his employment.

In conclusion, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁴ *Siebert v. Hoch*, 199 Kan. 299, 303-304, 428 P.2d 825 (1967) (citations omitted).

⁵ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-198, 689 P.2d 837 (1984).

⁶ K.S.A. 44-534a.

WHEREFORE, the undersigned affirms the February 27, 2009, preliminary hearing Order entered by Judge Klein.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Samantha Benjamin-House, Attorney for Respondent and its Insurance Trust
Thomas Klein, Administrative Law Judge