

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

HOLLY J. MALONEY)	
Claimant)	
)	
VS.)	
)	
GATES RUBBER)	
Respondent)	Docket No. 1,040,511
)	
AND)	
)	
INSURANCE CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 16, 2008, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Brian J. Fowler, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered injury from an accident that arose out of and in the course of her employment and ordered respondent to pay claimant temporary total disability benefits from May 17, 2008, until released. The ALJ appointed Dr. Ellefson as claimant's authorized treating physician. The ALJ further ordered that Dr. Ellefson is authorized to make a psychiatric referral if necessary.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 3, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant sustained a compensable injury. Respondent argues that the facts and evidence do not support a

claim that claimant was injured while in the course and scope of her employment. Respondent further challenges claimant's credibility.

Claimant requests that the Board affirm the Order of the ALJ. She asserts that she satisfied her burden of proof that her accidental injuries arose out of and in the course of her employment. Further, she contends the ALJ had the opportunity to view her and respondent's witnesses to ascertain credibility.

The issue for the Board's review is: Did claimant suffer an accidental injury that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a finisher. She loaded hose onto a table, tested the hose, and then transferred the hose from the testing reel to normal reels or baling to package. The hoses are heavy equipment hoses, not garden hoses.

Claimant had worked for respondent for about a month and a half before the alleged injury of May 11, 2008. She worked a 12-hour shift starting at 7 p.m. She testified that on May 11, about four hours into her shift, she was loading hose off of a large reel that was behind her.¹ A control panel was to her left and a large rotating table was to her right. The control panel had an arm that went up, over and down, holding the hose onto the table. She claims she was loading hose when the arm on the control panel went up and then came back down into the start position. When that happened, the hose wrapped around her left arm, and she was jerked forward, with her head going toward the machine. She claimed she thought she was going to be decapitated. She tried to brace herself on the table, and her hand slipped because of the rotating movement of the table. When she was jerked forward, the force of the hose wrapped around her left arm and caused her left leg to buckle. She fell head first, coming down on her left side.

Claimant felt immediate pain in her ankle, neck and left shoulder. She blacked out for a few seconds and when she came to, the table had stopped rotating. She got the hose from around her arm and braced herself with her right side to get up off the floor. She instantly got dizzy and had to wait to regain her equilibrium. She then felt the pain in her left ankle. She could not lean on her ankle, so she called for her supervisor.

Claimant said there are four tables in the area where she worked, and people were working at two of the tables on the date she was injured. She said those tables were approximately 60 feet from where she was working. Claimant testified there were no

¹ Claimant also testified that the accident happened at 2:30 a.m., which would have been the morning of May 12.

witnesses to her alleged accident. She said the supervisors were not at their station, and the other workers were facing the opposite direction from her station.

Claimant was taken into the clinic office and was given Tylenol and an ice pack. She sat in the office several hours, until the nurse came in. The nurse made an appointment with Dr. Syed Rizvi for later that day, May 12. Dr. Rizvi examined claimant's ankle, which had turned black and blue. He also examined her neck and shoulder. He told her she needed a brace on her ankle and sent her to Allen County Hospital for x-rays. His office notes indicate that claimant was placed on light duty for 10 days. Respondent received a note from Dr. Rizvi dated May 12 that stated: "[Claimant] can return to full duty with no reel-packing."²

Claimant testified that she asked respondent if she could slacken on the work or take a break if she started hurting or if the work got to be too much, but she was told that she had to meet quota and that was not within her restrictions. She was terminated by respondent and believes her termination was the result of her work-related injury.

Claimant testified that she was not allowed to follow up with additional treatment and was told that respondent did not want a large workers compensation case. Because claimant was denied medical treatment, she was evaluated by Dr. Edward Prostic. Dr. Prostic recommended that claimant be placed on antidepressant medications and undergo an exercise program. He also recommended she be evaluated by a psychotherapist. She claims she has nightmares and wakes up screaming and in a cold sweat. She also continues to complain of headaches and severe pain in her neck and back. She has pain through the center of her neck and in her left shoulder. She has tingling and numbness down her arm into her left hand, and her ankle is swollen and sore. She testified that three days after the accident she told Teri Porter, respondent's human resource manager, about emotional problems she was having because of the accident.

Ms. Porter testified that she is responsible for employee health, safety and environment. She spoke with claimant about the alleged accident the morning after the accident was reported. Ms. Porter stated that claimant gave her three versions about how her alleged accident happened. Claimant first said that she was nearly decapitated by the machine's arm, then she said she was thrown into the table, and later she said that she was thrown to the ground. Ms. Porter stated that maintenance checked the machine after the alleged incident and found nothing wrong with it.

Ms. Porter said that in order for the arm on the machine to go up, a button needs to be pushed. Another button needs to be pushed for the arm to go back down. If the arm goes up, it does not bring the hose up with it. The arm lays over the top of the hose, and

² P.H. Trans., Cl. Ex. 3.

the hose is not entangled in it. In order for the accident to happen as described by claimant, two buttons would have had to malfunction.

Ms. Porter testified that claimant was terminated because she told her supervisor that she had called the doctor's office and had been given additional restrictions. Ms. Porter called the doctor's office to confirm the additional restrictions and was told that the doctor's office had no documentation showing that claimant had called. Claimant had told her that she had spoken with Dr. Handshy, but Dr. Handshy was out of state at the time of the alleged call. Ms. Porter was told by the doctor's office that Dr. Handshy had not spoken to claimant, nor had any additional restrictions been placed on claimant by the other doctor in the office.

Ms. Porter denied telling claimant that she could not go back to see a doctor or that respondent did not want a workers compensation claim. She denied seeing claimant limp while she was still working for respondent and said the first time she saw claimant limp or wear a brace was at the preliminary hearing. She stated she never noticed claimant having problems with her neck or left arm, nor did claimant tell her about any emotional problems she was having.

Benjamin Forman was claimant's supervisor at respondent. He was told about claimant's alleged accident by his team leader, Brian Hunter. Maintenance was asked to check the machine. Mr. Forman was present when the maintenance person evaluated the machine, and the maintenance person found no malfunctions. There have been no problems with the machine since the alleged accident.

Mr. Forman said that this accident could not have happened the way it was described by claimant. He stated, as did Ms. Porter, that if the arm on the machine went up, the hose would stay on the table. In his opinion, the hose could not have pulled claimant into the machine.

Mr. Forman said there are eight tables in his section. There are several tables around the table where claimant was working, with the closest table being three feet away. Mr. Forman said that all of the tables had people working at them, and that no one witnessed the alleged accident. In his opinion, if this accident had happened as claimant alleged, it would have been witnessed by someone at one of the other tables.

Mr. Forman testified that he had never seen claimant limp until the preliminary hearing. He said she did complain about neck pain, and he was aware that she had some work restrictions. He also said that a safety investigation was conducted after the alleged accident and that claimant was questioned about her emotional state. However, he testified that claimant never reported having any emotional problems. He said claimant was terminated on May 29 for falsification of statements because she said she had spoken with Dr. Handshy and that he had told her she could not load the table, which was not one of her documented restrictions.

Mr. Forman had seen claimant on May 11 before the alleged accident, and she was walking okay, was physically fine, and was able to perform her job.

PRINCIPLES OF LAW

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

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. Some deference may be given to the ALJ's

³ K.S.A. 2007 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁵ *Id.* at 278.

findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

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. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Claimant alleges an accident occurred at work at about 11 p.m. on May 11, 2008. It was not witnessed by anyone. However, she immediately reported it to her supervisor. She was taken to the office to complete an accident report, given Tylenol and ice packs, and told to wait until the end of her shift to see the company nurse. After the "nurse" or health and safety representative examined claimant at about 9 a.m., she made an appointment with Dr. Rizvi for 10 a.m. that day.

According to claimant, when she was examined by Dr. Rizvi, the company nurse insisted on being present. Claimant described her left ankle being black and blue, and she was having trouble walking. She also voiced complaints about injuries to her neck and left shoulder. Dr. Rizvi sent claimant to Allen County Hospital for x-rays and a drug test. She returned to Dr. Rizvi on May 19. She was to return for follow-up, but claimant said respondent refused to allow her any additional treatment.

The medical records of Dr. Rizvi are consistent with claimant's testimony and claimant's description of her injuries, except that Dr. Rizvi's office note of May 12, 2008, notes a date of injury of May 10, 2008. Dr. Prostic's report likewise relates claimant's injuries to her work with respondent.

Respondent's witnesses do not contradict claimant's testimony about what happened immediately after the alleged accident or her description of her injuries. However, Ms. Porter, who spoke with claimant the morning after the accident, said claimant's descriptions of the accident differed. Specifically, she said claimant gave her three different versions. In one, she was nearly decapitated, in the second she was thrown into the table, and in the third she was thrown to the ground. However, these are not necessarily inconsistent, as claimant testified all three of these things happened in quick succession. Ms. Porter also disputed that the machine could malfunction the way claimant

⁶ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2007 Supp. 44-555c(k).

described. Furthermore, she also questioned claimant's credibility due to the alleged misrepresentations concerning claimant's work restrictions from the doctor and not having observed claimant limp before the preliminary hearing. Ms. Porter also said that the respondent does not have a company nurse, although claimant could be referring to Debra in Health and Safety. She acknowledged that someone from the company usually accompanies injured workers to their doctor's appointments, except not after they are no longer working for the company.

Respondent's only other witness was Mr. Forman, claimant's supervisor. He acknowledged claimant immediately reported her accident to the team leader, Brian Hunter. He was present when a maintenance person checked claimant's machine and could find no malfunctions. Mr. Forman's description of what claimant told him about her accident is consistent with claimant's testimony and the description given to Ms. Porter that she was jerked into the table and then on to the floor. However, Mr. Forman disputes that the machine could have malfunctioned in that way. He also disputes claimant's testimony that there were no other workers nearby when her accident occurred.

The nature and extent of claimant's injury is not at issue in this appeal. What is at issue is whether an accident occurred. Claimant testified it did. Respondent's two witnesses argue that the machine could not have malfunctioned and done what claimant described. The uncontroverted facts are that claimant immediately reported her accident and was given an ice pack and Tylenol at the work site and then medical treatment with the company physician. The physician's records are consistent with claimant's testimony concerning the mechanism of injury and what was injured. Claimant's description of her accident has been consistent, the testimony of Ms. Porter to the contrary notwithstanding. But given that two witnesses who are also familiar with the claimant's machine testified about how the machine operates and that the accident could not have happened as claimant described it, this case presents a close question.

Based on the record presented to date, this Board Member finds that claimant did suffer an accident at work on or about May 11, 2008.

CONCLUSION

Claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on the date alleged.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 16, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge