

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

STEPHANIE HARDESTY)
Claimant)
VS.)
SUBWAY)
Respondent)
AND)
HARTFORD INS. CO. OF THE MIDWEST)
Insurance Carrier)

Docket No. **1,050,579**

ORDER

Respondent and its insurance carrier request review of the June 15, 2010 Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

Stephanie Hardesty left her work, with her supervisor's permission, in order to step outside to look at an item her husband had purchased for their daughter's birthday. The item was in the back of a pickup truck parked on respondent's premises. Hardesty climbed into the back of the pickup truck to look at the item and as she was stepping down out of the truck her knee gave out and she fell. The respondent denied her claim and argued the accidental injury occurred while Hardesty was on a personal deviation from her work.

The Administrative Law Judge (ALJ) noted that Hardesty was on the respondent's premises, had only been outside a few minutes and was returning to work when the accident happened. The ALJ concluded there was not a sufficient deviation from work to deny Hardesty benefits. Consequently, the ALJ found Hardesty suffered accidental injury arising out of and in the course of her employment with respondent.

Respondent requests review of whether Hardesty's accidental injury arose out of and in the course of employment. Respondent argues Hardesty was on a personal errand unrelated to her employment when she suffered the accidental injury. Consequently, respondent requests the Board find Hardesty did not suffer accidental injury arising out of and in the course of her employment.

Hardesty argues that the general rule is that accidental injuries occurring during a break are compensable when the accident occurs on the employer's premises. Hardesty further argues she had her supervisor's permission to step outside, she was still on the clock, her supervisor could call her back to work at any time, she was on respondent's premises, she was only outside a few minutes and she was on her way back to work when she fell. Consequently, Hardesty requests the Board to affirm the ALJ's Preliminary Hearing Order.

The issue raised on appeal to the Board is whether claimant suffered accidental injury arising out of and in the course of her employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The facts are not disputed. Hardesty, a part-time employee, works from four to eight hours a day as a "sandwich artist" for respondent. It was further undisputed that she does not get 15-minute breaks nor a lunch break. She testified:

Q. On occasion are you allowed to take breaks?

A. Yes, sir.

Q. And how does that arise?

A. When we're not busy. Like, if we want to eat a sandwich or something of that nature, we can usually eat as long as we work while we eat. She prefers that we do it when we're slower so that we get our customers through and stuff like that.

Q. But you don't clock out for your breaks?

A. No, sir.¹

Sarah Duncan, respondent's assistant manager, agreed that employees typically eat while working, and that respondent's policy regarding breaks and lunches is that the employees can take a few minutes when business is slow but there are no scheduled breaks.

On April 10, 2010, Hardesty was at work when her husband called and discussed buying an item he had seen at a garage sale for their daughter's birthday. It was agreed he would bring the item by respondent's store for her to see. A little later her husband

¹ P.H. Trans. at 7-8.

came and parked in respondent's parking lot with the purchased gift in the back of a pickup truck. Hardesty told Ms. Duncan she was going outside and would be right back. Ms. Duncan replied "okay", as she knew Hardesty was stepping outside to look at something her husband had purchased.

Hardesty stepped outside and climbed up on the pickup truck which was parked on respondent's parking lot in front of the doors to the premises. After looking at the gift Hardesty then stepped down with one foot on the concrete and heard two loud pops. Her knee went one way and her back the other and she fell to the ground. An ambulance was summoned and claimant was taken to Abilene Memorial Hospital's emergency room. X-rays were taken and claimant was placed in a full knee brace. The doctor took claimant off work for 48 hours until she followed up with Dr. Gary Coleman on April 13, 2010. The doctor diagnosed a meniscus injury versus ligament tear so he recommended an MRI. An MRI was performed on April 14, 2010, which revealed a tear of her ACL and some joint effusion noted. Hardesty was then referred to an orthopedic specialist, Dr. Bradley Daily. Hardesty was examined and evaluated by Dr. Daily on April 28, 2010. It was determined that Hardesty was in need of an ACL reconstruction using hamstring autografting due to instability issues.

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.² Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³

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.⁴

² K.S.A. 2009 Supp. 44-501(a).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

⁴ *Id.* at 278.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵ Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.⁶ Breaks benefit both the employer and employee.⁷ And in circumstances such as in this case where the employee is taking a break with the approval of the employer and on the employer's premises, there is a degree of control sufficient to find the accident compensable.⁸ Furthermore, the evidence does not indicate that claimant's injury occurred as a result of any personal condition or risk, as in *Boeckman*⁹ or *Martin*¹⁰.

In this instance, Hardesty had stepped outside, with her supervisor's approval, to take a short break to see the gift her husband had purchased for their daughter's birthday. She never clocked out, was still on the respondent's premises, was outside just a few minutes and was returning to work when she was injured. Moreover, Ms. Duncan agreed that if she had needed help in the store she had control to tell Hardesty to come back in to work. Under this set of facts, especially considering the duration of Hardesty's activity, the respondent can be deemed to have retained authority over Hardesty sufficient to find the accident compensable.¹¹

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated June 15, 2010, is affirmed.

⁵ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

⁶ See Larson's Workers Compensation Law § 21.02 (2009).

⁷ *Id.*; *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998) and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

⁸ See Larson's Workers Compensation Law § 13.05(4) (2009).

⁹ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

¹⁰ *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

¹¹ See Larson's Workers' Compensation Law § 13.05(4) (2009).

¹² K.S.A. 44-534a.

¹³ K.S.A. 2009 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of September 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Brian Pistotnik, Attorney for Claimant
Patricia Wohlford, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge