

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

ELMER F. ROHR)
Claimant)
VS.)
BUTLER COMMUNITY COLLEGE)
Respondent)
AND)
ACCIDENT FUND NATIONAL INSURANCE)
Insurance Carrier)

Docket No. 1,056,422

ORDER

STATEMENT OF THE CASE

Claimant appealed the September 6, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 9, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

On April 19, 2011, claimant fell at work and struck his face, suffered a broken nose, a facial fracture below the right eye, and broke or lost seven teeth. Claimant has no recollection of how the accident occurred. A co-worker and a bystander observed the accident, but neither testified. Claimant asserts he had an "unexplained fall" which is compensable. Respondent contends claimant had a syncopal episode that caused claimant's fall. Therefore, claimant's injury did not arise out of and in the course of his employment with respondent. The ALJ determined claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent. The ALJ did not explain how she came to this determination.

Did claimant's accident and injuries arise out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant began working for respondent in 1987. On April 19, 2011, claimant received three work orders for jobs from his supervisor. The last thing prior to the accident he remembered was being in a truck discussing the jobs with a co-worker. The first thing after the accident claimant remembered was waking up in Via Christi Regional Medical Center, St. Francis, in Wichita (St. Francis Hospital). Claimant was initially taken by ambulance to Susan B. Allen Memorial Hospital in El Dorado (El Dorado Hospital) where he arrived at 10:40 a.m. Claimant was later transferred to St. Francis Hospital, where he was admitted at 1:46 p.m. It appears claimant was in St. Francis Hospital for three days.

April 19, 2011, records from El Dorado Hospital indicate that claimant was walking and tripped over a parking barrier falling flat on his face. Claimant then had a seizure-like episode lasting 30 seconds. He was sitting up at the scene when the ambulance arrived. Claimant was agitated, confused, combative and incontinent. The source of this information is listed as patient, family and EMS. A patient record from El Dorado Hospital dated April 21, 2011, indicated a bystander witnessed claimant tripping over a parking pylon, falling forward without trying to stop himself, falling on his face.

Claimant indicated he spoke to his co-worker Mike Jessup about the incident. Claimant testified as follows regarding his conversation with Mr. Jessup:

Q. (Mr. Seiwert) Okay.

A. (Claimant) But I had talked to the guy that I had worked with that day, Mike, and he said I just went over like a tree.

The Court: He said what?

A. I just fell over like a tree being cut down.

Q. So you suffered a fall at work?

A. Yes.

Q. And struck your face?

A. Uh-huh.¹

¹ P.H. Trans. at 9.

As a result of the fall claimant suffered a broken nose, a facial fracture below the right eye, and broke or lost seven teeth. Claimant also experienced a loss of consciousness. As indicated above, the first thing he remembered after the accident was waking up in St. Francis Hospital. While at El Dorado and St. Francis hospitals, claimant was treated by numerous physicians. None of the records from the hospitals indicate that a personal condition was the cause of claimant's fall.

Claimant saw his personal physician, Dr. H. Richard Kuhns, on April 29, 2011. Dr. Kuhns' impression was that claimant had a recent concussion with a fracture of the nose and underlying chronic obstructive pulmonary disease. His report stated claimant had a syncopal episode and hit his head. On May 6, 2011, Dr. Kuhns scheduled an EEG for claimant. Dr. Kuhns then referred claimant to neurologist Dr. Sarab Alseoudi at Advanced Neurology Consultants.

The EEG was performed on May 9, 2011. Dr. Alseoudi reviewed the EEG, which revealed no definite evidence of epileptiform activity or seizure activity. His impression was evidence of mild left temporal dysfunction, nonspecific in nature, and no evidence of seizure activity. On June 16, 2011, claimant went to El Dorado Hospital and was seen by Dr. Alseoudi. Claimant reported symptoms of dizziness, bad headaches, blurry vision and occasions when his vision went gray. Dr. Alseoudi's assessment was:

Patient presents with postconcussion syndrome with recurrent headache, vertiginous sensation with nystagmus. He had one seizure after head injury right away and this has not recurred and it was followed by postictal confusion and memory loss. His EEG showed mild left temporal dysfunction consistent with the head injury. He also has cervical spondylosis.²

Dr. Alseoudi recommended an MRI of the brain and cervical spine if claimant had more symptoms of dizziness and neck pain.

Claimant acknowledges that following an automobile accident in 1982 he had a seizure while in the hospital. Claimant thought the seizure resulted from the drugs he was given. At that time, claimant was transferred to another hospital, where he stayed for two weeks. He also was struck in the head with a shot put when he was in the eighth or ninth grade. Claimant does smoke and has COPD. A week before the accident, claimant was treated for bronchitis. While at El Dorado Hospital claimant underwent head CT scans, which revealed claimant had extensive to moderate sinusitis.

Claimant contends his fall was unexplained and, therefore, arose out of and in the course of claimant's employment with respondent. Respondent asserts that claimant's fall was caused by a syncopal episode. A syncopal episode is a loss of consciousness with

² *Id.*, Cl. Ex. 1.

no warning symptoms. Respondent points to claimant's 1982 seizure, COPD and the fact that claimant fell flat on his face. Respondent argues that if claimant had tripped over a parking pylon, he would have suffered abrasions consistent with attempting to break his fall.

The ALJ found there is no evidence, medical or otherwise, connecting claimant's fall to his employment. She concluded that claimant failed to meet his burden of proving personal injury by accident arising out of and in the course of his employment.

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

K.S.A. 2010 Supp. 44-501(a) in part states: "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. 2010 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."

In *Hensley*,⁵ the Kansas Supreme Court categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.⁶

³ K.S.A. 2010 Supp. 44-501(a).

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

⁵ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

⁶ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992); *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

ANALYSIS AND CONCLUSION

Claimant's fall is unexplained. Claimant has no knowledge of how or why he fell. A co-worker indicated claimant fell like a tree. A bystander apparently saw claimant trip over a parking pylon. Neither the co-worker nor the bystander testified. Claimant's injury falls into the neutral risk category as recognized by the Kansas Supreme Court in *Hensley*.

Respondent relies on *Roberts*⁹ and argues the facts of the current claim are on point with *Roberts*. There, Roberts had polio and fell at work and argued her fall was unexplained. The Board found polio to be the cause of Roberts' fall. Consequently, the Board concluded the cause of the fall was a personal risk and not compensable. In the present claim, the cause of claimant's fall is unknown.

There is minimal, if any, medical evidence to suggest that claimant's 1982 seizure, his COPD or any other personal condition caused or contributed to claimant's fall. Dr. Kuhns' statement that claimant had a syncopal episode followed by the fall is the only evidence that claimant's fall was caused by a personal risk. No other medical provider made a similar observation. However, Dr. Kuhns' diagnosis was made before claimant saw Dr. Alseoudi, a neurologist. Dr. Alseoudi's impression was evidence of mild left temporal dysfunction, nonspecific in nature, and no evidence of seizure activity.

This Board Member finds that the facts in the current claim closely mirror the facts in *Toumi*.¹⁰ Toumi was loading a fork lift with sump pumps. His next recollection was waking up on a gurney, headed for an ambulance. The Board Member stated:

The Appeals Board has consistently held that neutral risks or unexplainable falls occurring in the course of an employee's employment, even though they have no particular employment or personal character, are compensable. Driscoll v. Cedar Vale Hospital, Inc., Docket No. 214,179 (July 1997); Davis v. Montgomery

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2010 Supp. 44-555c(k).

⁹ *Roberts v. Salina Retailers Association*, No. 1,016,052, 2004 WL 3089877 (Kan. WCAB Nov. 19, 2004).

¹⁰ *Toumi v. Senne & Company, Inc.*, No. 237,798, 1999 WL 55385 (Kan. WCAB Jan. 26, 1999).

Ward, Docket No. 220,775 (September 1997). See also Larson's Workers' Compensation Law, § 10.31(a) (1998).¹¹

Since *Toumi*, the Board has continued to hold that neutral risks or unexplainable falls occurring in the course of a worker's employment, even though they have no particular employment or personal character, are compensable.¹²

Claimant's fall was unexplained and, therefore, is the result of a neutral risk. This Board Member finds that claimant suffered a personal injury that arose out of and in the course of his employment with respondent.

WHEREFORE, the undersigned Board Member reverses the September 6, 2011, preliminary hearing Order entered by ALJ Barnes and remands for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

¹¹ *Id.*

¹² *Rivera v. T & T Management Co., Inc. d/b/a McDonald's*, No. 1,055,078, 2011 WL 4942785 (Kan. WCAB Sept. 21, 2011); *Gottstine v. JR Custom Metal Products, Inc.*, No. 1,026,450, 2006 WL 1605928 (Kan. WCAB May 30, 2006); and *Llamas v. Dillard Department Stores, Inc.*, No. 258,657, 2001 WL 237271 (Kan. WCAB Feb. 13, 2001).