

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

TERESA M. ARMITAGE)
Claimant)
VS.)
SPIRIT AEROSYSTEMS, INC.)
Respondent)
AND)
INS. CO. OF STATE OF PENNSYLVANIA)
Insurance Carrier)

Docket No. **1,057,373**

ORDER

Claimant requests review of the February 10, 2012 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleged she suffered slip and fall injuries on October 31, 2010 and April 15, 2011. After a preliminary hearing the Administrative Law Judge (ALJ) entered an Order dated November 2, 2011, which specifically found claimant was not a credible witness and that she failed to meet her burden of proof that she provided timely notice. On November 17, 2011, the deposition of claimant's supervisor, Ronald Beard, was taken. On January 17, 2012, another preliminary hearing was held. No additional testimony was taken but claimant argued that Mr. Beard's testimony supported a finding of just cause and that there was no dispute that claimant provided notice of the April 15, 2011, accident. Respondent argued that Mr. Beard's testimony supported the ALJ's previous Order. Respondent further argued that claimant failed to prove she suffered accidental injury arising out of and in the course of her employment and because the accident on April 15, 2011, was the result of claimant's weakened leg from her previous injury in October 2010, it did not arise out of and in the course of her employment.

The ALJ found that claimant failed to sustain her burden of proof that she gave timely notice of accident nor to establish just cause for enlargement of the notice period to 75 days.

Claimant requests review of whether she sustained a compensable injury on October 31, 2010, and April 15, 2011, and whether claimant gave timely notice of her injuries.

Respondent argues the ALJ's Order should be affirmed.

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:

Claimant was employed as a plastics bench mechanic. Claimant worked third shift which begins at midnight through 7 a.m. Claimant's job requires her to clean tools. On October 31, 2010, she apparently was working before her shift started and between 10:30 and 11 p.m., as she was cleaning a tool with a mop, she slipped and fell down against the tool. She injured her left knee first and then her right knee. Claimant testified that she told her supervisor, Ron Beard, about the accident that night. Mr. Beard denied claimant told him about the accident that night. Mr. Beard testified claimant told him about the incident some six or eight weeks later but she did not know whether she had hurt herself at work or home. And at that time she did not request medical nor want to fill out an accident report.

A co-worker, Steve Parkins, testified that he saw claimant fall on October 31, 2010. He admitted that his memory of the night had to be refreshed before he testified. Mr. Beard testified that after he was finally told of the October 31, 2010, fall he had questioned Mr. Parkins who told him that he had not seen claimant fall.

On November 2, 2010, claimant sought medical treatment with her personal physician. Dr. Mark VinZant's office notes indicate claimant had a slip and fall while mopping at home. The doctor diagnosed claimant as having a hamstring strain and that it would heal in a couple of months.

Claimant testified that she did not tell Dr. VinZant that she had hurt herself at work because she knew he wouldn't treat her for a workers compensation injury and she just wanted treatment as she was in a lot of pain. She further testified that she didn't want to file a claim because she didn't want to get laid off. But claimant had filed a dermatitis claim against respondent in 2007 and was not laid off because of it.

Claimant had another accident on April 15, 2011, while cleaning another tool. Her left leg gave out and she fell down steps onto the cement floor. Claimant testified that her left leg was weak from the October 31, 2010 incident and it gave out causing her to fall. She reported the injury to her supervisor, Ron Beard. Mr. Beard agreed claimant told him about the April 15, 2011 fall and that she stated the fall was caused by her weakened leg from the October 2010 injury.

Claimant further testified that the first time she notified respondent about the alleged October 31, 2010 accident was on July 8, 2011. Claimant testified:

Q. My records indicate the first time that you reported this incident to Spirit Medical would have been on July 8, 2011.

A. Correct.

Q. Is that correct?

A. Yes.

Q. And that was at the suggestion of Dr. Niederee.

A. Yes.

Q. Prior to going to Spirit Medical in July of 2011, had you delivered or transmitted to Spirit Medical any sort of written document indicating that you were making a claim for workers' compensation benefits as a result of the October, 2010 incident?

A. No.

Q. So the very first time, other than the verbal notice to your supervisor, the very first time you would have notified anybody else would have been when you went to Spirit Medical on July 8th.

A. Yes.¹

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

¹ Armitage Depo. at 25.

provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that she notified Ron Beard about the October 31, 2010 accident during a conversation on November 1, 2010. Mr. Beard denied that conversation took place. Claimant did not seek medical treatment from respondent and told her personal physician that she injured herself at home. Claimant's explanations regarding why she lied to her personal physician are suspect. After initially reviewing this evidence the ALJ determined claimant was not a credible witness. This Board Member agrees and finds claimant did not tell her supervisor about the alleged accident on November 1, 2010. And the evidence further establishes that claimant failed to provide timely notice of the October 31, 2010, alleged accidental injury.

Claimant also suffered a fall at work on April 15, 2011. There is no dispute that she provided timely notice of this accident to her supervisor, Mr. Beard. But respondent argues that claimant failed to prove that she suffered accidental injury arising out of her employment.

Claimant described her April 15, 2011 accident:

When I was at work, I was working on my tool, and it happened at 6 a.m. in the morning. I was coming off the tool down the step and my left leg gave out from pain, and I went down both steps onto the cement with my left knee.²

Mr. Beard acknowledged notice of the accident but, as previously noted, Mr. Beard testified claimant told him the fall was caused by her weakened leg from the October 2010 injury.

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

² P.H. Trans. (Nov. 1, 2011) at 15-16.

³ K.S.A. 2010 Supp. 44-501(a).

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

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, there is no dispute that claimant was in the course of her employment when the accident occurred as claimant was at work in the respondent's service. The dispositive issue is whether claimant's accidental injury arose "out of" her employment with respondent.

Under the Kansas Workers Compensation Act, at the time of claimant's April 15, 2011 accident, an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.⁶ An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.⁷ But an injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.⁸

In *Hensley*,⁹ the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. "Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable."¹⁰ In Kansas, unexplained falls are compensable.¹¹ But in this instance the fall was explained.

⁵ *Id.* at 278.

⁶ K.S.A. 44-508(e).

⁷ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006)

⁸ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

⁹ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

¹⁰ *Martin v. U.S.D.* 233, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

¹¹ *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

As previously noted, personal risks are not compensable. The reason for the fall was adequately explained by the claimant. She testified that as she stood her weakened left leg gave out causing the fall. And claimant told her supervisor that her weakened leg gave out and she fell. Simply stated, claimant had a previous history of problems with her left leg, which was a risk personal to claimant, and the facts establish that her leg gave out and caused the claimant's fall. Such personal risks are not compensable. Accordingly, this Board Member finds claimant did not suffer personal injury by accident arising out of his employment with respondent on April 15, 2011. The accident suffered by claimant on April 15, 2011 is attributable to a personal condition of the claimant and compensation is denied.

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. 2010 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 Nelsonna Potts Barnes dated February 10, 2012, is modified to reflect claimant failed to meet her burden of proof that she suffered accidental injury arising out of her employment on April 15, 2011, and affirmed regarding claimant's failure to provide timely notice of the alleged October 31, 2010 accident.

IT IS SO ORDERED.

Dated this 20th day of April, 2012.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

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¹² K.S.A. 44-534a.

¹³ K.S.A. 2011 Supp. 44-555c(k).