

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

FRANK PFLUMM, JR.)
Claimant)
v.)
) Docket No. 1,064,858
HOME DEPOT USA, INC.)
Respondent)
and)
)
LIBERTY MUTUAL INSURANCE COMPANY)
Insurance Carrier)

ORDER

Claimant requests review of the January 25, 2015, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on June 9, 2016.

APPEARANCES

Brett J. Coppage, of Kansas City, Missouri, appeared for claimant. Clifford K. Stubbs, of Kansas City, Kansas, appeared for respondent and insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

This claim resulted from a left hand injury claimant sustained on Saturday, March 30, 2013, while he was engaged in work on a volunteer project.¹ The ALJ denied compensation. The ALJ found claimant’s accidental injury did not arise out of and in the course of his employment because: 1) respondent did not require claimant to engage in the volunteer work he was performing when injured; 2) respondent did not pay claimant to perform such work; and 3) claimant was not injured while engaged in a compensable recreational or social event pursuant to K.S.A. 2012 Supp. 44-508(f)(3)(C).

¹ References in this Order to “the volunteer project” and “the project” mean the project where claimant worked on the date of accident.

Claimant argues his injury arose out of and in the course of his employment because: 1) respondent allowed him to work on the volunteer project and agreed to pay him regular wages while so engaged; 2) on the date of the accident, respondent required claimant to either perform his regular duties in respondent's store or work on the volunteer project; 3) claimant's injury arose from tasks directly related to his regular work; and 4) respondent encouraged its employees to engage in volunteer work and other charitable activities and that such participation benefitted respondent.

Respondent contends it did not sponsor the volunteer project and did not agree to pay claimant for his work on the project. Respondent argues it did not require claimant to participate in the project and it did not benefit from such work. Respondent maintains claimant was clocked out when he was injured and the injury did not result from the performance of his regular job.

The issue is: Did claimant's personal injury by accident arise out of and in the course of his employment?

FINDINGS OF FACT²

Claimant's testimony

Claimant, a certified master plumber, began working in respondent's Merriam, Kansas, retail facility on October 22, 2007, as a master trade specialist. Relying on his technical knowledge and experience, he assisted customers in the planning of their projects and recommended the materials necessary to complete such undertakings. Claimant also performed duties such as repairing the store's plumbing and watering systems. Although his job consisted primarily of customer service, he was required to stock merchandise and keep his department in proper order. Claimant was a full-time employee, working from 8:00 a.m. to 5:00 p.m., with Thursdays and Sundays off. Respondent paid him by the hour.

Claimant described Hope Builders as an organization comprised of successful businessmen who desired to "give back" to the community. The organization performed charitable functions, such as building handicap accessible ramps for the elderly and disabled. Richard LaBelle was the founder and director of that nonprofit organization. Claimant became acquainted with Mr. LaBelle several years before the accident when Hope Builders, via Mr. LaBelle, became a regular customer. Claimant testified he often assisted Mr. LaBelle with plumbing matters and recommended the materials he required, which Hope Builders purchased from respondent. At some point, claimant arranged for Hope Builders to receive a 10 percent discount on products purchased from respondent.

² Although the entire record was reviewed, the Board's factual summary contains only the evidence material to its decision.

In 2011, claimant helped Hope Builders by providing instructions about installing water heaters. Mr. LaBelle thereafter wrote a letter to respondent's CEO commending claimant for his assistance. The CEO responded that he was pleased with the customer service claimant provided, and indicated claimant would receive a merit patch, referred to as a Homer Award, that was awarded to employees who provided customer service beyond that normally expected. For every three Homer Awards an employee received, respondent added an extra \$50 to their paycheck. The Homer Awards were intended to encourage employees to engage with the customers to create a more friendly shopping experience.

Respondent had a program called Team Depot, under which employees performed charitable work away from the store. The store manager determined which projects respondent approved for inclusion the program. Team Depot projects included such matters as cleaning up, replacing bathroom floors, constructing handicap walkways, and replacing water heaters. Projects occurred approximately once per quarter and were posted on a bulletin board that described the project. Employees were provided a sign-up sheet for the approved projects. Most projects were unrelated to plumbing, and claimant did not participate in the Team Depot program.³

On Tuesday, March 26, 2013, Mr. LaBelle contacted claimant at the store and requested his assistance with plumbing issues on a project involving the conversion of a building into a homeless shelter. Claimant offered to help on his Thursdays off for four weeks, to which Mr. LaBelle responded the plumbing repairs would not wait a month. Claimant replied he could help immediately only if Mr. LaBelle arranged with the store manager, Jordan Olsen, for claimant to get time off work to assist with the project.

Mr. LaBelle and Mr. Olsen met to discuss the matter. Although claimant was not a party to their conversation, he testified:

A. I just happened to be in the proximity as they came out of the door and I put my hands on my hips and I said, Well, what happened? And everybody smiled and said, It's a go. I said, It's a go? Yeah, it's a go. [Mr. Olsen] says, I'm going to lend you to do the plumbing work for the Hope Builders.

Q. Were there specific days that he was allowing you to take off to do the plumbing work?

A. Yeah. That was Friday and Saturday.

³ The record contains much additional evidence regarding the nature of the Team Depot and Homer Award programs, but there is no dispute the project on which claimant was working when injured was neither a Team Depot nor a Homer Award program.

Q. Was there any conversation about whether you would be paid from the Home Depot for those days?

A. Yes, he did. He said, and I'm going to pay Frank for Friday and Saturday.

Q. Who did he tell that to?

A. Me and Rich. There was three of us there, himself and the two of us.⁴

Claimant began work on the project on Friday, March 29, 2013, at about noon and worked that day until 5:00 p.m. He worked his regular job in the morning.

Although claimant worked with Mr. LaBelle on the project, it was not a Hope Builders project. Claimant was unaware what organization undertook the project, but Mr. LaBelle was apparently working with a church that owned the property.

Claimant admitted he was not required by respondent to work on the project and that his regular duties were performed inside the store. Claimant used his own tools at the project and, although store employees working on Team Depot projects wore orange "Team Depot" shirts, claimant admitted he was not wearing such a shirt while working on the project.

Mr. Olsen's testimony

Jordan E. Olsen testified he is a district operations manager for respondent, although he was the manager of respondent's Merriam, Kansas store when claimant was injured.

Mr. Olsen did not know Mr. LaBelle, but remembered talking with someone who asked if claimant could have a day off to help him with plumbing matters. Mr. Olsen testified that before the project commenced, he told claimant his work on the project was a volunteer matter and he was on his own time. He denied agreeing to pay claimant for his time working on the project.

Mr. LaBelle's testimony

Richard C. LaBelle testified he is on the board of directors of Hope Builders, a charitable organization that purchases material for its projects from respondent. Mr. LaBelle testified he worked with claimant on three or four projects.

Mr. LaBelle testified he was a party to a conversation, in respondent's store, with claimant and Mr. Olson, in which Mr. Olson agreed to give claimant time off so he could

⁴ R.H. Trans. at 26-27.

volunteer on the project. The conversation was approximately a week before claimant's accident, and Mr. LaBelle recalled Mr. Olsen agreeing for claimant to be gone on a Saturday and perhaps scheduling him on some other days. Mr. LaBelle testified:

Q. At that time, do you recall Jordan telling Mr. Pflumm that he would get paid his regular Home Depot wages for the work he did on this project in Kansas City, Kansas?

A. No.⁵

...

Q. ... Do you recall at any point in time any conversation, be it from Jordan, Frank, or you, where it was discussed whether or not Frank would be paid for his work doing the charity work ... ?

A. No, I really don't.

Q. To be clear, I want to make sure I'm clear on this. Are you saying the conversation never happened, or are you saying that you just can't recall one way or the other if it happened?

A. I do not remember it ever happening.⁶

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2012 Supp. 44-501b(c), the burden of proof is on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(f)(2)(B)(i) provides in relevant part:

An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident;

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.

⁵ LaBelle Depo. at 10.

⁶ *Id.* at 23-24.

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.⁷

Claimant’s accidental injury did not arise out of and in the course of his employment. The ALJ correctly denied compensation.

There is no dispute claimant was an employee of respondent when his accidental injury occurred. The issue is whether claimant’s accident arose out and in the course of that employment. Claimant was not at work in the service of respondent when his accident took place. He was instead voluntarily working in the service of another entity at the request of Mr. LaBelle. Respondent did not require, nor did it request, claimant to volunteer to work on the project. Respondent did not agree to pay claimant for his volunteer work, nor did respondent approve the project as it would have in the Team Depot program. Respondent told claimant before he commenced work on the project that he was on his own time.

Respondent allowed claimant to take off work on Friday, March 29, 2013, and Saturday, March 30, 2013, days claimant would ordinarily have worked for respondent, to participate in the project. But, in doing so, respondent neither approved of the project itself, nor did it agree to sponsor that activity.

Claimant’s job for respondent required him to work in respondent’s store and to engage in primarily customer service, using his knowledge and expertise in the plumbing profession. Claimant’s work did not require him to perform his duties outside the store. Claimant was paid by the hour and was required to use a time clock. There is no dispute claimant was “clocked out” and was not working inside the store on the day he was injured. Claimant was not paid for his time working on the project, nor did respondent agree to pay claimant. Claimant’s testimony regarding getting paid for his work on the project was contradicted by the testimony of both Mr. Olsen and Mr. LaBelle. The Board finds Mr. LaBelle’s testimony on this issue particularly persuasive, given his status as a witness disinterested in the outcome of this proceeding.

There was no causal connection between the conditions under which claimant’s work for respondent was required to be performed and his resulting accident. There is no

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

evidence respondent had any control over the conditions under which claimant's participation in the project was required to be performed.

Claimant argues respondent required him to either be at the store performing his regular duties or working on the project on March 29 and 30, 2013. In support of this, claimant emphasizes he clocked in, worked at the store, and was paid by respondent for his work on the morning of March 29, 2013.⁸ Claimant also insists his injury arose from tasks directly related to his regular work. These assertions do not advance his position that his accident arose out of and in the course of his employment.

Claimant was not injured while engaged in a recreational or social event and K.S.A. 2012 Supp. 44-508(f)(3)(C) accordingly is inapplicable.

CONCLUSION

Claimant's personal injury by accident did not arise out of and in the course of his employment.

AWARD

WHEREFORE, the Board finds that the Award of Administrative Law Judge Kenneth J. Hursh dated January 25, 2015, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁸ Although claimant was allowed to take leave for this entire day, he worked at the store in the morning due to a delay occurring on the project.

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Honorable Kenneth J. Hursh, Administrative Law Judge