

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

CONNIE L. PATILLO)
 Claimant)
V.)
))
STATE OF KANSAS)
 Respondent)
AND)
))
STATE SELF-INSURANCE FUND)
 Insurance Fund)

Docket No. 1,065,742

ORDER

Respondent requests review of the July 18, 2013 preliminary hearing Order. Dennis Horner of Kansas City, Kansas, appeared for claimant. Kendra Oakes of Kansas City, Kansas, appeared for respondent and its insurance fund (respondent).

The preliminary hearing Order indicated claimant's accident arose out of and in the course of her employment, and not from a neutral risk.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the July 16, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's injury was due to a neutral risk and, therefore, did not arise out of and in the course of her employment. Respondent requests the preliminary hearing Order be reversed.

The issue for review is: Did claimant's accident arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

On May 29, 2013, claimant, a mental health tech, was standing against an office wall at 6:55 a.m. during shift report when she felt a sting on her upper right thigh and experienced immediate pain. Claimant believed an insect bit her. Respondent's "EMPLOYEE/VISITOR/STUDENT INJURY REPORT" noted four coworker witnesses were present when the incident occurred. According to claimant, one coworker saw the bug after claimant tried to hit it.

Claimant conferred with her supervisor, Rosemary Burke, who advised her to seek immediate medical attention. Claimant was initially seen at Miami County Medical Center and then referred to Olathe Medical Center. When her wound worsened, claimant underwent chemical debridement at KU Medical Center. Claimant still has occasional pain in her right thigh. No medical records were offered or admitted into evidence.

Following the incident, Ms. Burke completed a "Safety Review" form, noting there had been "a lot of bugs around doors etc. lately" and recommending that respondent spray the yard with pesticide and schedule an exterminator more in the spring and fall.¹

Claimant acknowledged that she had the same amount of risk of being bitten outside the building as she did inside the building, but also testified respondent had been having a problem with insect infestation inside the building. Claimant testified that respondent sprayed extensively the day after her accident.

The preliminary hearing Order states, "Claimant's risk was not a neutral risk, since her employer attempted to remediate the premises following her injury. Claimant testified the premises were known for the abundant insect population."²

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

¹ P.H. Trans., Cl. Ex. 1 at 3-4.

² ALJ Order (July 18, 2013).

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) 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; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

...

(h) "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 unless a higher burden of proof is specifically required by this act.

ANALYSIS

Claimant proved that she was injured by accident arising out of and in the course of her employment. The only evidence was her testimony and documentation from respondent concerning the incident. Such documentation does not dispute claimant's allegations and actually provides support.

While claimant acknowledged an equal risk of being bitten by a bug outside the building, it cannot be said that the risk of being bitten by a bug while at work was a neutral risk "with no particular employment character" when both claimant and Ms. Burke acknowledged respondent's bug problem.

CONCLUSIONS

Claimant proved a compensable personal injury by accident arising out of and in the course of her employment. Her accidental injury was not due to a neutral risk with no particular employment character.

WHEREFORE, the undersigned Board Member affirms the July 18, 2013 preliminary hearing Order.³

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

³ 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. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONNIE L. PATILLO

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Honorable Steven Howard