

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

DORIS IRENE FRATZEL)	
Claimant)	
V.)	
)	
PRICE CHOPPER)	Docket No. 1,066,540
Respondent)	
AND)	
)	
FOUR B CORPORATION)	
Insurance Carrier)	

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge William G. Belden’s December 16, 2013 preliminary hearing Order. Leah B. Burkhead of Mission, Kansas, appeared for claimant. Mark J. Hoffmeister of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the December 4, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

On August 7, 2013, claimant was checking out a customer when she felt an “urgent” need to use the restroom. After spending approximately five minutes checking out the customer, she was walking briskly to the restroom when she fell and fractured her left shoulder. The preliminary hearing Order found claimant’s accidental injury arose out of and in the course of her employment because “. . . Claimant’s fall was the product of walking briskly to the bathroom, which was created by Claimant’s working conditions.”¹

Respondent requests reversal, arguing claimant did not suffer personal injury by accident arising out of and in the course of her employment. Respondent asserts claimant’s accident was the result of a neutral or personal risk. Claimant argues but for her employment, she would not have been placed in the position of having to wait five minutes before addressing the urge to use the restroom. Claimant requests the Order be affirmed.

The sole issue for the Board’s review is: Did claimant’s accidental injury arise out of and in the course of her employment?

¹ ALJ Order at 4.

FINDINGS OF FACT

Claimant started working for respondent in 2006. Her current position is team leader/cashier. Her shift runs from 8:00 a.m. to 4:00 p.m. She does not have a lunch break, but gets two fifteen minute breaks at 10:30 a.m. and 1:30 p.m. Claimant's job requires her to stand on her feet for eight hours a day attending to customers, ringing up sales and collecting payment.

Claimant had a prior injury to her left shoulder in October 2009 when she lifted some milk and sustained a left shoulder strain. She was treated and released on November 16, 2009 with a note that she had left bicep tendonitis that had resolved. Claimant testified that any problems she had from the incident in October 2009 had completely resolved.

On August 7, 2013, claimant arrived at her register to begin work at 8:00 a.m. Prior to beginning work, she was not having any "stomach issues"² or discomfort, nor had she eaten anything unusual. She did not have a bowel movement that morning, which was unusual. At approximately 8:40 a.m., while waiting on a customer, she had a very sudden "urge" to have a bowel movement, "like if [she] didn't go right then [she] was going to have a problem."³ Claimant continued to attend to the customer, which felt like "forever."⁴ Claimant kept thinking "please hurry" because she had to relieve herself "badly."⁵

Claimant was not permitted to simply leave her cash register. Claimant testified as a general rule, cashiers are supposed to wait for their scheduled breaks to use the restroom. If a cashier needs to leave his or her register, the protocol is to call the manager's duty room to let the manager know and if the manager is not in the duty room, call for the manager over the loud speaker and wait for a return call.

After approximately five minutes, claimant finished with the customer and began walking "very briskly"⁶ toward the restroom. Claimant was in a hurry so she did not attempt to contact the manager and instead asked another cashier to let her supervisor know where she went. While briskly walking to the restroom, the customer she had just checked out was in her path. As she was passing this customer, she felt herself begin to fall. In an attempt to break her fall, she grabbed the bag rack at the end of the register, but was unsuccessful and fell, landing on her left arm and shoulder. The claimant testified she had a "little bit"⁷ of a bowel movement in conjunction with her fall.

² "Stomach issues" appears to be a euphemism for the need to have a bowel movement.

³ P.H. Trans. at 23.

⁴ *Id.* at 24.

⁵ *Id.*

⁶ *Id.* at 27; see also pp. 45-46.

⁷ *Id.* at 34.

The floor where claimant fell was not wet. Claimant denied tripping over anything. While claimant was not “exactly sure” what caused her to fall, she testified she thought her shoe got caught on a tile or she stubbed her toe.⁸ Claimant was wearing pants that were frayed on the bottom. While her pant legs were frayed, she denied tripping on her frayed pants. Claimant wore tennis shoes which she indicated were approved by the store manager. The only item she was carrying was a washcloth.

Steven Dumortier, the store director, arrived at the scene shortly after claimant’s fall. He testified the floor had not recently been waxed. He saw no liquid or object on the floor, nor any loose tiles or sticky substance. While claimant was lying on the floor, he did notice a stirrup configuration from claimant’s frayed hem around the heel of her shoe. He testified claimant told him she had “tripped over her own feet.”⁹

Mr. Dumortier testified cashiers are allowed to use the restroom at work, but it is preferred they use it during scheduled breaks if possible. If an employee must leave their register, the favored approach is to call a manager but it is permissible to ask a coworker to cover. Mr. Dumortier acknowledged it would be rude for a checker to just walk away while waiting on a customer to use the restroom, but it could be done if necessary.

Following the accident, claimant was transported by ambulance to Providence Medical Center. The history provided was she “[w]as stepping out from behind the register and her shoe caught on the floor, she fell forward trying to catch herself with her arms.”¹⁰ X-rays taken showed a deformity of the humeral head that was thought to be old, but further studies were recommended to rule out an acute fracture if symptoms persisted. Claimant’s left arm was immobilized until seen by an orthopedic specialist.

On August 8, 2013, claimant was referred by respondent to OHS Compcare. The history provided was “she was at her register and went to go to the restroom, and her shoe caught on the floor and she tripped fell forward trying to catch himself [sic] with her arms striking her left shoulder . . . on a bag holder.”¹¹ She was diagnosed with a left shoulder contusion and released to the care of her primary care physician on a nonwork related basis. Respondent denied compensability on August 8, 2013.

Claimant testified that had she had the sudden need to use the restroom at home, she would simply use the facilities immediately, with no need to wait for a customer or any need to ask someone else to cover her work duties.

⁸ *Id.* at 29-30, 48.

⁹ *Id.* at 58.

¹⁰ *Id.*, Cl. Ex. 3 at 1.

¹¹ *Id.*, Cl. Ex. 4 at 1.

Claimant was seen at her attorney's request by Prem Parmar, M.D., an orthopedic surgeon, on August 14, 2013. The history provided was "her foot got caught in a tile and she tripped" and tried to break her fall with her left arm.¹² Claimant had painful shoulder range of motion. Impingement tests were highly positive on the left. Dr. Parmar indicated the prevailing factor in claimant's "current issues" was her work-related injury.¹³ He recommended a shoulder MRI. Dr. Parmar initially restricted claimant to no work with her left arm, followed by light duty.

On August 22, 2013, claimant went on her own to Heartland Primary Care for treatment of her left shoulder. Nurse Practitioner Angela VanDonge indicated claimant should have a shoulder MRI and follow-up with Dr. Parmar. On September 5, 2013, Ms. VanDonge again recommended the MRI. On October 8, 2013, Ms. VanDonge told claimant she would not provide an off work slip until the MRI was performed. The MRI was performed on November 22, 2013. The MRI showed a nondisplaced, comminuted fracture of the greater tubercle of the proximal humerus. Thereafter, Karol L. Davis, M.D., excused claimant to be off work until December 4, 2013 and referred her to KCIC Ortho.

Claimant has not worked subsequent to the accident. She testified she was told by respondent that no accommodated work was available and she would have to have a full release to return to work. At the time of the preliminary hearing, she was receiving short-term disability benefits. Claimant still has problems with her left arm and shoulder and experiences shooting pains when raising her arm above waist high. She wears an immobilizer.

The preliminary hearing Order states, in part:

In this case, specific aspects of Claimant's employment created a causal connection between her work and the accident of August 7, 2013. First, Claimant's work requires her to attend to customers and to ring up sales. Second, Claimant's work required her to request coverage from either management or coworkers before she could leave her working area to go to the bathroom. On August 7, 2013, these two aspects of Claimant's employment required Claimant to remain at her work area, despite Claimant's sudden urge to use the restroom, and wait on a customer. Once Claimant finished attending to the customer, she had to walk briskly to the bathroom, which placed Claimant at a greater risk of falling than what she would have encountered if she walked at a normal pace. Claimant did not face this problem outside of her working life. The Court does not find Claimant's fall resulted from other personal factors, such as Claimant's clothing, or from neutral risk factors faced outside of work. The Court finds Claimant's fall was the product of walking briskly to the bathroom, which was created by Claimant's working conditions. The Court concludes Claimant's injury of August 7, 2013 arose out of and in the course of her employment with Respondent.

¹² *Id.*, Cl. Ex. 6 at 4.

¹³ *Id.*

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.¹⁴ It is claimant's burden to prove entitlement to benefits by a preponderance of the credible evidence.¹⁵

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁶ 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.¹⁷

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.

. . .

¹⁴ K.S.A. 2012 Supp. 44-501b(b).

¹⁵ K.S.A. 2012 Supp. 44-501b(c) and K.S.A. 2012 Supp. 44-508(h).

¹⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹⁷ *Id.* at 278.

(f)(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.

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.¹⁸ Work breaks benefit both the employer and employee.¹⁹

¹⁸ See Larson's Workers' Compensation Law § 13.05(4) (2013); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

¹⁹ *Id.*; *Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *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).

Larson's Workers' Compensation Law, Ch. 21, p. 1 (2013) states:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Seeking necessary relief from discomfort (seeking warmth, coolness, or toilet facilities) is "so obviously in the category of necessities that no question arises about their being basically in the course of employment. The only issue on which compensation is sometimes denied is that of seeking these facilities in an unreasonable manner."²⁰

McCready analyzes various risks: (1) risks 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.²¹ Under the post-May 15, 2011 law, neutral and unexplained risks are no longer compensable.

ANALYSIS

Claimant had an accident trying to avoid an accident. The evidence fairly infers that claimant fell while hurrying to use the restroom at work.

Going to the restroom is a personal comfort.²² As noted above, accidental injuries occurring while claimants attend to personal comforts are generally compensable. Kansas law requires a "causal connection between the conditions under which the work is required to be performed and the resulting accident."²³ The law, as changed on May 15, 2011, did not eliminate the personal comfort doctrine. For reasons explained below, claimant proved a causal connection between the conditions of her work and her accident.

²⁰ Larson's Workers' Compensation Law § 21.05, p. 18 (2013). The Board has been cautioned against using Larson's treatise to interpret statutes where a statute is plain and unambiguous. *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 561, 293 P.3d 723 (2013) ("[T]here was no need to resort to the Larson's factors when the statute contained all of the needed information to resolve the question presented."). Larson's has routinely been cited by the appellate courts. See *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011); *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 385, 130 P.3d 111 (2006).

²¹ *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 88, 200 P.3d 479 (2009).

²² *Laturner v. Quaker Hill Nursing, LLC*, No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 1, 2012).

²³ K.S.A. 2012 Supp. 44-508(f)(2)(B)(i).

Claimant's accidental injury arose out of employment. Using a restroom at work is incidental to work, so claimant's accident on the way to try to meet that goal arose out of her employment. Further, common sense dictates that a condition or obligation of her employment would be to remain at work and use bathroom facilities at work, rather than stop working and use an off-site bathroom facility.

Claimant's accidental injury was also in the course of her employment. Her accident occurred while she was at work and during work hours. There was a causal connection between the conditions under which the work is required to be performed and the resulting accident. Namely, had claimant not been at work and waiting on a customer, her need to go to the bathroom would not have escalated into what she viewed as a near-emergency, in turn causing her to hurry and fall when rushing to the restroom. This scenario, based on claimant's testimony, would not occur at home or in connection with claimant's activities of day-to-day living. If claimant needed to relieve herself away from work, she would not have her job duties and responsibilities delaying her and increasing her urgency.

Mr. Dumortier's suspicion that claimant tripped on her frayed pants is speculation. Even if claimant had tripped on her own feet, she still had an accident. Claimant was perhaps clumsy or moving too fast or with too much sense of urgency for her own good, but a claimant's klutziness and haste, as based on the particular facts of this case, are not defenses to compensability.

While claimant's injury was associated with her urgent need to use the restroom, it did not arise out of a personal risk. A personal risk is quite different from every persons' universal need. Claimant's accident occurred while she was rushing to the restroom. The risk in this case was claimant needing to hurry to the restroom because she had been attending to her work. This scenario presents an employment risk, not a neutral risk. Claimant's fall was also not unexplained. While she was not certain, she testified her foot caught on tile and the evidence establishes her accident was due to her being in a hurry to get to the toilet in an attempt to make up for time lost while waiting on a customer.

CONCLUSION

Claimant sustained personal injury by accident arising out of and in the course of her employment on August 7, 2013.

DECISION

WHEREFORE, the undersigned Board Member affirms the December 16, 2013 preliminary hearing Order.²⁴

²⁴ 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

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable William G. Belden