

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MATTHEW REIN)
Claimant)
V.)
SONIC)
Respondent) Docket No. 1,066,704
AND)
TWIN CITY FIRE INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent and its insurance carrier (respondent) appealed the January 21, 2015, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on June 19, 2015, in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Brandon A. Lawson of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

ALJ Jones stated:

The Court finds that it is more probably true than not that the Claimant was exposed to a chemical at work that caused his burn injury. The Court finds that the Claimant met with personal injury by accident on July 12, 2013, that the injury arose out of and in the course of his employment with the Respondent, and that the work

accident was the prevailing factor for the injury, medical condition, need for treatment, and the resulting impairment.¹

The ALJ awarded claimant disability benefits for a 5% whole body functional impairment and future medical benefits upon proper application and approval.

Respondent contends claimant failed to prove a compensable injury. Respondent asserts no evidence was submitted which links claimant's alleged injuries to anything connected with his work at respondent.

Claimant did not file a submission letter to the ALJ. Claimant filed his brief to the Board on June 18, 2015, well beyond the April 6, 2015, deadline.² Because claimant filed his brief the afternoon prior to oral argument, respondent and the Board had inadequate time to review the arguments and authorities contained in claimant's brief. Therefore, under the facts of this case, the Board will not consider claimant's brief.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?
2. Is claimant entitled to apply for future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant worked for respondent as a cook. Claimant testified that on July 12, 2013, he walked to work approximately one and one-half miles and was wearing a tank top and work pants. He would leave his work shirt and apron at respondent. When claimant arrived at work, he put on his work shirt that he had left at work by lockers in the back of the store. Claimant described the work shirt as having a collar, three buttons and having thick fabric so if grease or something splashed on the shirt, it would not go through the shirt. About 30 to 45 minutes after putting on the shirt, claimant noticed right shoulder pain or tingling and asked another cook to look at his shoulder. About one and one-half to two hours later, he told his manager that since coming to work, his shoulder had started hurting and he had a burning sensation. At claimant's request, the manager looked at claimant's right shoulder and noticed slight reddening.

¹ ALJ Award at 5.

² K.A.R. 51-18-2, *et seq.*, sets forth the appeals process, including the briefing schedule.

Later, the manager asked which one of the cooks wanted to go home first and claimant volunteered. By that time, the red area on claimant's right shoulder had raised and become a reddish-brown color. Claimant told his manager he was going to stop at the hospital on his way home and did so. At the hospital emergency room, claimant was given a prescription for anti-inflammatory medication and was told to use a damp cool cloth to keep the affected area cool.

That night, claimant did not sleep because of pain, so he returned to the hospital, where he was admitted. Claimant testified he underwent a skin graft by Dr. Bingaman with skin harvested from claimant's right thigh. He now has a scar on his thigh a little larger than the size of a cigarette pack. According to claimant, Dr. Bingaman told him he sustained an alkaline-based chemical burn and could not work until September 30, 2013.

Claimant testified anything that contacts the affected area on his right shoulder causes pain. Claimant indicated his burn spread partly down his back and down his shoulder blade. Sometimes he feels the pain in his lower back and other times it radiates into his neck and he has headaches. Claimant testified he has never been treated by a dermatologist for his condition. He also testified that prior to July 12, 2013, he never had any issues with his skin or burns.

According to claimant, one of his first job duties each shift is to fill a 55-gallon bucket with water, add a packet of degreasing solution and dump it on the floor. He admitted he could not recall if he cleaned the floor on July 12.

Claimant testified that after being released from the hospital, he attempted to retrieve the work shirt from respondent, but was not allowed to be at work. He does not have the tank top he wore to work on July 12.

At the request of his counsel, claimant was evaluated on September 30, 2013, by Dr. Pedro A. Murati. Dr. Murati physically examined claimant and reviewed his medical records from the Susan B. Allen Memorial Hospital in El Dorado. Claimant reported a burning sensation on his right shoulder within 20 minutes after putting on a shirt at work. Dr. Murati's impressions were status post right thigh skin graft and chemical burns to the shoulder, neck and chest.

Dr. Murati opined claimant's burns were a direct result of his work activities at respondent. Utilizing the *Guides*,³ Dr. Murati assessed claimant with a 2% right lower extremity functional impairment for loss of sensation in his thigh, which converts to a 1% whole body functional impairment, and a 5% whole body functional impairment for

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

allodynia⁴ of the chest, neck, shoulder and upper back, which combine for a 6% whole body functional impairment. Dr. Murati provided claimant restrictions and recommended yearly follow-up appointments and a compound topical medication to decrease pain.

Dr. Murati acknowledged he relied on claimant's statements with regard to the incident at respondent and that it was almost impossible to tell what chemical caused claimant's burn. The doctor testified, "Well, it could have been bleach, it could have been any cleaning fluid that they have there. You know, it's -- it would be interesting to see what kind of chemicals they have there, you know, and check the MSDS sheets and see what's going on."⁵

By order of the ALJ, claimant was evaluated by Dr. Peter V. Bieri on May 20, 2014. Claimant reported experiencing sharp burning pain on his right neck region 20 to 30 minutes after putting on his work shirt. Claimant reported he went to the hospital and was told he had an alkali burn. Dr. Bieri reviewed Dr. Murati's records and records from Susan B. Allen Memorial Hospital and Via Christi Hospital in Wichita. Dr. Bieri physically examined claimant and observed scars on claimant's right supraclavicular region and right thigh. He opined, "The claimant reported injury during the course of active employment reported on or about July 12, 2013. History and documentation are consistent with some type of chemical burn, resulting in a diagnosis of necrotizing fasciitis."⁶

Dr. Bieri indicated claimant met the criteria for class 1 impairment in Table 2, page 280 of the *Guides*, which provides for a 0% to 9% whole body impairment. The doctor opined claimant had a 5% whole body functional impairment. Dr. Bieri noted claimant was not under any active care, with the exception of topical agents for symptomatic relief, and no other future medical treatment was anticipated.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "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

⁴ Dr. Murati testified allodynia is when a person feels pain if the skin is touched with a nonpainful stimuli.

⁵ Murati Depo. at 12.

⁶ Bieri IME Report at 4.

⁷ K.S.A. 2013 Supp. 44-501b(c).

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.”⁸

This case turns on the credibility of claimant. His testimony that he developed a chemical burn after putting on a work shirt at work is uncontroverted. Drs. Bieri and Murati took claimant at his word, and both diagnosed him with a work-related chemical burn. At oral argument, respondent acknowledged it did not dispute claimant’s credibility. The ALJ apparently found claimant credible, ruling that it was more probably true than not that claimant was exposed to a chemical at work, causing his burn injury. The Board finds claimant was credible and that he sustained personal injury by accident arising out of and in the course of his employment with respondent. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.⁹

Respondent asserts claimant failed to prove the type of chemical that caused his burn injury and, therefore, there is no evidence of when or how the exposure occurred. Requiring claimant to prove the type of chemical causing his burn requires a higher burden of proof than “more probably true than not true” set forth in K.S.A. 2013 Supp. 44-508(h). The evidence in the record is that claimant began having a burning sensation within approximately 30 minutes after putting on his work shirt and respondent presented little, if any, contrary evidence. The shirt had been in respondent’s possession and control. Moreover, claimant’s uncontroverted testimony was that he attempted to retrieve the shirt, but was prevented from doing so by respondent.

The Board finds claimant proved, more probably than not, that he is entitled to apply for future medical benefits. Drs. Bieri and Murati indicated claimant would need topical agents for symptomatic relief. Neither doctor specified whether the topical agents were prescription or over-the-counter medications. However, Dr. Murati also recommended yearly follow-up appointments. Claimant underwent a skin graft and has two affected body sites. Yearly appointments to have a medical provider examine the burn and graft sites are prudent.

CONCLUSION

1. Claimant proved by a preponderance of the evidence that he sustained personal injury by accident arising out of and in the course of his employment with respondent.
2. Claimant is entitled to apply for future medical benefits.

⁸ K.S.A. 2013 Supp. 44-508(h).

⁹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 21, 2015, Award entered by ALJ Jones.

IT IS SO ORDERED.

Dated this ____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
mrice@mannlawoffices.com; SLink@mannlawoffices.com

Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier
blawson@evans-dixon.com

Honorable Gary K. Jones, Administrative Law Judge

¹⁰ K.S.A. 2013 Supp. 44-555c(j).