

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

DIANA L. SABATINO)
 Claimant)
V.)
 STATE OF KANSAS)
 Respondent)
AND)
 STATE SELF INSURANCE FUND)
 Insurance Carrier)

Docket No. 1,068,555

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Brad E. Avery's April 3, 2014 preliminary hearing Order. Keith L. Mark of Mission appeared for claimant. Nathan D. Burghart of Lawrence appeared for respondent.

The record on appeal is the same as that considered by the judge and consists of the April 3, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant slipped and fell at McDonald's on January 22, 2014. The judge ordered respondent to pay temporary total disability benefits as a result of claimant's January 22, 2014 accidental injury. Respondent contends claimant's accidental injury did not arise out of and in the course of her employment. Claimant maintains the Order should be affirmed.

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

FINDINGS OF FACT

Claimant has been a fire inspector with the Kansas State Fire Marshall's Office for nearly 14 years. She lives in Delia. Her job duties include traveling in a state vehicle, inspecting public buildings for fire code violations and completing paperwork using a state computer that submits reports directly to respondent. Claimant's "territory" covers eight counties in Northeast Kansas. Shawnee County is not in claimant's territory. Claimant testified she is required to go to respondent's office at 7th Street and Jackson in downtown Topeka (hereinafter "office"), 28 miles from Delia, on a weekly basis to complete office paperwork, including time sheets, itineraries and vehicle logs.

Claimant performs between one and five inspections a day depending on the building. She indicated respondent's office provides her with a list of inspections that she must do within a certain period of time. When claimant is not performing an inspection or completing paperwork, her job entails driving to and from inspections as well as to respondent's office.

On December 24, 2013, claimant was in respondent's office completing paperwork. She and her supervisor, Randy DeShon, respondent's Fire Prevention Field Supervisor, had a discussion about her doing paperwork in the office. Claimant testified:

- A. I was in there to do my weekly paperwork, time sheets, et cetera, and he come up and questioned me why I was in there the week before two times, because people had questioned him why I was in there and for so long, why was I there, and I explained to him I just done a Federal inspection that was put in immediate jeopardy. It took six hours to type the report on one day, and then I went back on the other day that week to do my normal office work.

And I said, "Randy, if you don't want me to type here, where am I supposed to type? Where do you want me to work?"

- Q. And what did he say to that?

- A. He said, "Go to McDonald's."¹

Claimant acknowledged being previously told to do paperwork at the office and not at her home. She testified Mr. DeShon told her to do her paperwork at McDonald's so he would not get complaints that she was in the office. According to claimant's typed time sheet documenting her work from January 13 to January 17, 2014, she drove 26 miles from Delia to Wamego and back on January 13 and "typed at McDonald's."² She testified she would not have indicated she typed at McDonald's if she believed she was violating respondent's policies and would have gotten in trouble.

On January 22, 2014, claimant drove a state vehicle from her home in Delia to the McDonald's located at 17th Street and Wanamaker in Topeka. She testified she specifically went to McDonalds with the intent to type inspection reports. Claimant testified she was "on the clock" from the time she left her house that morning. She arrived between 9:00 a.m. and 9:30 a.m. She "hooked up"³ or turned on her computer to type a report for an inspection she had performed the day before. She anticipated it would take two to three

¹ P.H. Trans. at 13-14; see also pp. 16, 19, 47-49 and 75-76.

² *Id.*, Ex. 1.

³ *Id.* at 21.

hours to complete the report. She testified that around 9:45 or 10 a.m., she headed to the counter to make a purchase because she did not think she could “just sit there and take up their space.”⁴ There were wet floor signs, but claimant walked through them. On the way to the counter, she slipped and fell on a wet floor, landing flat on her back. After her accident, claimant went directly back to her table without ordering food. She wanted to sit down and assess how she was feeling. She testified she did not notify anyone at McDonald’s that she fell, nor fill out an incident report. She did order breakfast. After being at McDonald’s for about three hours, she left and performed two inspections on the west side of Topeka.

Later that day, claimant sent an email to Mr. DeShon advising him: “Just to let you know, while typing at McDonalds today I fell on their wet floor.”⁵ Mr. DeShon responded, “Were you injured?”⁶ In turn, claimant replied, “Nothing broke. Sore neck, knee and hip.”⁷ Claimant did not make any complaints about her shoulders and arms in the email, but testified she did send another email later in the day about her back.

Brenda Schuette, respondent’s Human Resource Director, sent claimant an email in which she asked claimant to provide her with specifics regarding the accident by noon on January 24. Claimant’s January 24 email to Ms. Schuette states:

Date & time: Jan 22 ‘14, time 9:30-9:45 am

Place: McDonald’s restaurant, 17th & Wanamaker, Topeka, KS

What happened: I slipped and fell on wet floor.

How it happened: Came into the restaurant, looked around for a plug in for computer, was pointed to the only one outlet in the restaurant, sat my computer and papers down at the table and headed for the counter to purchase something to be able to stay in the restaurant while typing my work. The floor in my walking path had been mopped, the wet floor signs were out, I headed to the counter and down I went to the floor.

Contacts: nobody came to ask if I was ok, though there were 5-6 customers in line, even the employee cleaning the dining area did nothing

McDonald’s contact: after falling I directly went back to my table before ordering to compile what just happened and how I was feeling. I am not sure if any staff at the counter saw the fall.

McDonald’s report: I made no report at McDonald’s. I asked my supervisor if I needed to go back to the restaurant once I left to make a report, I was told I did not need to.⁸

⁴ *Id.*

⁵ *Id.*, Ex. A at 3.

⁶ *Id.*, Ex. A at 2.

⁷ *Id.* at 30; see also *Id.*, Ex. A at 2.

⁸ *Id.*, Ex. A at 1.

On February 3, 2014, claimant was seen at her attorney's request by Michael Poppa, D.O. The doctor's physical examination of claimant revealed restricted cervical, thoracic and lumbar range of motion with associated pain and muscle spasm, in addition to bilateral shoulder myofascitis. Dr. Poppa opined claimant's fall was the prevailing factor in causing her injury, medical treatment and disability. Dr. Poppa recommended x-rays, an MRI and physical therapy. He opined claimant was currently unable to work.

At the preliminary hearing, claimant testified she was experiencing headaches, pain and lack of motion in her neck, achiness in her shoulders and an aching pain in her low back. Subsequent to her accident, claimant has not returned to work.

Mr. DeShon testified when claimant is out of town for an inspection, she is supposed to prepare the report at the facility following the inspection. If she is unable to complete paperwork at the inspected facility, she can work at her motel room or "stop at lunchtime somewhere"⁹ and try and get her paperwork done there. Mr. DeShon acknowledged having a conversation with claimant on December 24, 2013, in which he told her she had spent a "lot of time for paperwork"¹⁰ at the office, including that Brenda McNorton, respondent's Prevention Division Chief, told him claimant had been in the office six hours a day for two days in a row. He specifically denied telling her to go to McDonald's to do paperwork.¹¹ Instead, he testified he told her to "do our paperwork on site or at . . . motels when . . . away from the office."¹² However, he testified that when working in the Topeka area or her home area that is closest to the Topeka office, claimant is to do her paperwork in the Topeka office.

Mr. DeShon testified he was unaware of the January 13, 2014 time card showing claimant was typing at McDonald's, at least until he noticed such information at the preliminary hearing. He acknowledged he only reviews about every other time sheet. He testified that if he had noticed the entry at the time it was submitted, he would have "sent her an e-mail asking her why she went to Wamego when it's the same distance to Wamego as it is to Topeka."¹³

Mr. DeShon agreed with claimant's counsel that he had no evidence or information to dispute claimant's assertion that she was performing her job at McDonald's on January 22, 2014.

⁹ *Id.* at 59.

¹⁰ *Id.* at 57.

¹¹ *Id.* at 58-59.

¹² *Id.* at 57.

¹³ *Id.* at 62.

Respondent provided documentation regarding where to complete paperwork:

- May 17, 2011 - emails from Ms. McNorton to claimant stating, in pertinent part: "Can you please let me know why you were not in the office as I instructed you to be if you were logging office time?" and "You are correct per our meeting if you [are] doing any sort of paperwork it's to be done here in the office period."¹⁴
- June 29, 2011 - email from Ms. McNorton to claimant stating, in pertinent part: "Starting July 1st, 2011 you will be reporting to the Topeka office **anytime** you have office/paperwork to complete until further notice."¹⁵
- December 22, 2011 and December 5, 2012 performance reviews covering December 27, 2011 to December 27, 2012, and April 11, 2011 to December 27, 2011, which list the following job objectives:

All required inspection reports will be processed and submitted within current agency guidelines. When not completing inspections at a facility, employee will report to the Topeka office to complete this paperwork.

All correspondence, weekly activity reports, vehicle logs, etc. will be processed and submitted within current agency guidelines. Employee will report to the Topeka office to complete this paperwork.¹⁶

- September 3, 2013 - email from Mr. DeShon to claimant stating, in pertinent part: "Last but not least, aren't you supposed to do paperwork from the Topeka office?"¹⁷
- November 15, 2013 - written reprimand from Ms. McNorton to claimant stating, in pertinent part: "Furthermore, as you have been instructed, if you are typing reports you are supposed to be doing so at your assigned office, which is the Topeka office, not your home base."¹⁸ Claimant apparently was supposed to have been inspecting a school district in Wamego, but instead had typed reports at home, without first getting respondent's approval, while a plumber fixed her well pump.

¹⁴ *Id.*, Ex. C at 1-2.

¹⁵ *Id.*, Ex. B.

¹⁶ *Id.*, Ex. E at 1 and F at 1.

¹⁷ *Id.*, Ex. D.

¹⁸ *Id.*, Ex. G.

Claimant acknowledged receiving all of the aforementioned documents or correspondence. She testified that because of the November 15, 2013 written reprimand, she typed reports in the office a couple days prior to and on December 24, 2013.

Claimant's December 30, 2013 performance review, covering the period December 27, 2012 to December 27, 2013, indicated inspections were to be completed within the week the facility was inspected, but did not contain the specific language in prior performance reviews stating paperwork not done at an inspection site should be done at the Topeka office.

The December 30, 2013 performance review stated respondent received complaints from other employees that claimant "is very gruff and acts as though she has a chip on her shoulder at times. Her performance would improve if she would concentrate on building relationships and seeing the value of having an open mind."¹⁹ The December 5, 2012 performance review noted claimant responded sarcastically to a supervisor and "customers" who had asked that she not come back due to what they apparently perceived as a gruff attitude. The December 22, 2011 performance review indicated claimant "constantly challenges the authority of her supervisors."²⁰

Following presentation of all evidence, the judge stated:

I informed everybody how I'm going to rule anyway. Again, at least in my opinion, this is governed by Hoover versus Ehram, 218 Kan. 662. The respondent alleged that the work was done in a forbidden manner, but the work itself was not forbidden. She was in the course and scope of employment.

I'm going to order temporary total paid for the date requested. Also, I'm going to send her out for an IME with an orthopedic or probably a neurosurgeon to determine what, if any, additional treatment is needed, and I will get that order to you shortly.²¹

In his preliminary hearing Order, the judge cited *Hoover*²² as establishing claimant's case as compensable. Thereafter, the preliminary hearing Order states:

The Court finds it is unclear from the record exactly what the respondent's policy was on the date of accident regarding where claimant was supposed to perform her work. In addition to the counseling session for writing reports in the office, her current performance evaluation for 2013 contained no expectation for writing reports in the office, whereas previous evaluations had such language included.

¹⁹ Id., Ex. 3 at 5.

²⁰ Id., Ex. F at 6.

²¹ Id. at 87.

²² *Hoover v. The Ehram Co.*, 218 Kan. 662, 544 P.2d 1366 (1976).

Arguendo, going to McDonalds as a location for writing reports while in Topeka was forbidden, there is no dispute claimant was at the restaurant to write the inspection report and that writing said reports was part of her job. The Court therefore finds claimant's accidental injury arose out of and occurred in the course of her employment with the respondent.²³

Respondent filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.²⁴ It is claimant's burden to prove his or her right to an award based on the whole record under a "more probably true than not true" standard.²⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.²⁶ Both the arising "out of" and "in the course of" employment conditions must be proven to allow compensation. Such phrases have separate and distinct meanings:

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.²⁷

K.S.A. 2013 Supp. 44-508 states, in part:

(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.

²³ ALJ Order (Apr. 3, 2014) at 2.

²⁴ K.S.A. 2013 Supp. 44-501b.

²⁵ *Id.* and K.S.A. 2013 Supp. 44-508(g).

²⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

²⁷ *Id.*

K.S.A. 2013 Supp. 44-508(f) states, in pertinent part:

(2)(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.

ANALYSIS

The judge relied on *Hoover* to find the case compensable. *Hoover* is binding case law, but it does not necessarily reflect recent legislative changes regarding compensability. The decision reached in *Hoover* was largely rooted in a treatise, Larson's Workmen's Compensation Law.²⁸ The Kansas Supreme Court recently cautioned against resorting to Larson's "to supplant or alter the actual text of a statute."²⁹ Unlike *Hoover*, our statutes do not explicitly discuss the compensability of an injury incurred when performing work in a prohibited manner versus performing prohibited work. Therefore, this Board Member's analysis is based on K.S.A. 2013 Supp. 44-508(f)(2)(B)(i), which requires a causal connection between the work required to be performed and the resulting injury.

Respondent previously told claimant, repeatedly, not to prepare reports at home. Claimant was even disciplined for typing reports at home in November 2013. When she then spent more time at the office in December 2013, respondent questioned whether her presence was necessary. Claimant testified she was at McDonald's because Mr. DeShon gave her the impression she was spending too much time preparing reports at the office

²⁸ See *Hoover*, 218 Kan. at 666-69.

²⁹ *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 561, 293 P.3d 723 (2013).

and should go to McDonald's instead. While Mr. DeShon denied telling claimant to perform paperwork at McDonald's, there is no dispute that he asked claimant why she was spending too much time at the office, which implies she should avoid the office. When adding in claimant's performance reviews, which document other employees complaining about claimant's perceived gruff attitude, commentary that claimant was sarcastic or challenged supervisors and Mr. DeShon's indication that Ms. McNorton was asking why claimant was spending too much time in the office, this Board Member concludes claimant was basically told to do her work elsewhere.

Is there evidence of a causal connection between the conditions under which claimant's work was required to be performed and her resulting accident? Yes. Claimant testified without contradiction that she was at McDonald's to perform work. Mr. DeShon agreed he had no evidence to dispute that claimant was doing her job at McDonald's on January 22, 2014. The judge apparently believed claimant's story, which is plausible given claimant's indication on her time sheet that she did paperwork at a McDonald's just eight days before her injury.

We also need to look at whether claimant's injury perhaps did not arise out of and in the course of her employment based on K.S.A. 2013 Supp. 44-508(f)(3)(A)(i-iv). Claimant's injury was not a result of the natural aging process or the normal activities of day-to-day living. If claimant was told to go to McDonald's to complete her paperwork her injury did not arise out of a neutral risk with no particular employment or personal character, or a personal risk or as the result of an idiopathic cause.

This case is difficult to assess because this Board Member was not present to assess witness credibility. This Board Member often affords some deference to a judge's first-hand opportunity to assess witness credibility. While the judge made no explicit credibility ruling, claimant and Mr. DeShon presented varying testimony regarding whether claimant was told to work at McDonald's. Given that such testimony was largely at odds, it appears the judge believed claimant's assertion she was told by her supervisor to type reports at McDonald's and he did not believe Mr. DeShon's contrary testimony.

The decision is affirmed.

CONCLUSIONS

Based on the current record, the preliminary hearing Order is affirmed because claimant's accidental injury arose out of and in the course of her employment.

WHEREFORE, the undersigned Board Member affirms the April 3, 2014 Order.³⁰

³⁰ 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. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Brad E. Avery