

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CATHERINE I. KLINGSPORN,)
Claimant)
V.)
FIRST STUDENT MANAGEMENT, LLC)
Respondent) Docket No. 1,071,769
AND)
NEW HAMPSHIRE INSURANCE CO.)
Insurance Carrier)

ORDER

Respondent and its insurance carrier (respondent), through Kristina D. Schlake, of Kansas City, request review of Administrative Law Judge Thomas Klein’s January 6, 2015 preliminary hearing Order. Gary K. Albin, of Wichita, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the January 6, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant was involved in a school bus accident on September 16, 2014. She provided different accounts as to why the accident occurred: she testified an animal darted in front of her bus prior to the accident, but previously stated she fell asleep while driving. The judge concluded claimant dozed off and he stated, “for drivers who wake up early in the morning for work with little sleep, dozing off and having an accident is a risk inherent in their work.”¹ The judge did not state claimant sustained personal injury. No benefits were awarded. Instead, the judge ordered an independent medical evaluation for the purposes of assessing if the accident was the prevailing factor in claimant’s need for treatment and whether a personal injury, i.e., a structural change, occurred.

Respondent requests the Order be reversed. Respondent notes claimant had a preexisting condition and argues her accident was not the prevailing factor in her low back injury. Respondent further argues claimant was involved in an accident because she fell asleep – for unknown reasons – while driving. Thus, respondent asserts claimant’s accident arose indirectly from an idiopathic cause and is not compensable pursuant to K.S.A. 2013 Supp. 44-508(f)(3)(A)(iv). Respondent also contends the judge should have excluded a medical report from evidence because it was not attached to claimant’s application for preliminary hearing.

¹ ALJ Order at 2.

Claimant maintains the Order be affirmed. Claimant argues the judge “correctly concluded that [she proved] . . . a compensable claim.”² However, claimant also stated the judge *did not* conclude she “definitely sustained a compensable claim” and his ruling was within “his powers and authority . . . to order further neutral evaluation.”³

The issues are:

1. Does the Board have jurisdiction to address prevailing factor?
2. Does the Board have jurisdiction to address admission of a medical report?
3. Did claimant’s accident or injury arise from an idiopathic cause?

FINDINGS OF FACT

Claimant worked for respondent as a school bus driver. She drove a 21 or 27 passenger minibus or short bus. While this case concerns a September 16, 2014 accident and an asserted back injury, claimant had a preexisting back condition.

On February 26, 2014, claimant saw Mark Camden Whitaker, M.D. Claimant had landed on her tailbone two years earlier in a fight and her pain increased when lifting a laundry basket in March 2013. Dr. Whitaker assessed claimant as having a two-year history of mid back pain and progressive leg weakness with a compression fracture at L1 with severe stenosis. He suggested “corpectomy of L1 and the cage placement with a posterior instrumented laminectomy and fusion from T10-L3.”⁴

Dr. Whitaker’s May 19, 2014 pre-surgical history and physical indicated claimant had a two-year history of mid back and low back pain, in addition to leg weakness. On May 22, 2014, Dr. Whitaker performed the aforementioned surgery, which claimant indicated involved placing two rods and eight or ten screws in her back.

On July 30, 2014, claimant reported low back pain with increased activity. Claimant was released to return to work with no restrictions, but she was to continue wearing her back brace. Claimant returned to work on August 14, after summer break ended.

On September 10, 2014, claimant returned to Dr. Whitaker complaining of increasing low back pain after her return to work, including walking long distances. Dr. Whitaker took x-rays, ordered physical therapy, and according to claimant, prescribed Percocet. Claimant had yet to start physical therapy before her accident.

² Claimant’s Brief at 1.

³ *Id.* at 2.

⁴ P.H. Trans., Resp. Ex. 2 at 17.

Claimant characterized her prior back pain involved her upper and middle back, almost to her waist. She admitted prior low back pain before her accident, but denied prior “lower lower”⁵ back pain below her waist. She acknowledged some difficulty walking to and from her bus when she returned to work, but improved to where she did not need to take a shuttle to get to her bus. Claimant testified she was “able to do everything [she] was supposed to.”⁶

Claimant testified she awoke around 4:00 a.m. on September 16, 2014, and “felt pretty good.”⁷ She began her first bus route at 5:40 a.m. She was accustomed to this schedule or routine. The previous evening, claimant took a Percocet 10 mg. around 6:00 p.m. and went to bed around 8:30 p.m. Claimant indicated she did not take Percocet the morning of her accident because it had to be out of her system to drive a school bus.

Claimant testified she had an accident while driving the bus. She testified:

I was going [north] down Seneca [in the right hand lane by the curb], like I said, the kids were real quiet. There were three children on the bus and two of them were asleep. And my attendant was all the way in the back of the bus, and I thought I saw an animal. And when I looked I just went on - - I wasn't paying attention and I just kind of faded over to the side. And the next thing I know I was hitting [the right] curb and trash can and another curb and I stopped the bus. I pulled over and radioed in to dispatch and [James, the safety manager] came out. And I [told him I thought I saw an animal crossing the bus and] filled out [an incident report]. I asked, when I stopped the bus I asked if everybody was okay and they said yeah. And two of them said, we didn't realize you even hit anything.⁸

Claimant testified she thought the animal, which she believed to be a cat, ran from the right curb under her bus, but the animal was “kind of in front, but kind of in the back.”⁹ She did not have time to apply the brakes and she did not swerve, but she looked to her left to see if the animal came out from under the bus, but she saw nothing because she already hit the right curb. Claimant testified she was driving 41 miles per hour at the time of the accident. She testified “[i]t was a hard impact, like hitting a brick wall almost.”¹⁰ Claimant testified the bus had front-end damage. James told claimant to take the children to school and report back to respondent. Claimant finished her route.

⁵ *Id.* at 35.

⁶ *Id.* at 13.

⁷ *Id.* at 15.

⁸ *Id.* at 17.

⁹ *Id.* at 18.

¹⁰ *Id.* at 20.

Claimant testified her accident caused her injury to her “lower back like around my cheeks and my butt and stuff.”¹¹ Daniel Lygrisse, M.D., ordered a lumbar x-ray that was conducted on September 16, 2014. The x-ray was interpreted as showing: (1) extensive surgery and good alignment of the rods and the corpectomy; (2) significant disc pathology at L4-5 that was the likely cause of claimant’s chronic low back pain; and (3) mild loss of height at L4 that could represent a fracture.

Following the accident, claimant testified she experienced sharp pain radiating down both legs and had difficulty walking. She could hardly walk by the end of the week.

A day or two after the accident, claimant discussed the accident with Kristy Sternum, the company manager. Claimant testified Ms. Sternum told her she did not believe her story about an animal and that she should tell the insurance company that she dozed off. Claimant also testified that Ms. Sternum told her there was no video evidence of any animal, at least based on video cameras that were on the bus. Claimant testified that she told Ms. Sternum she did not doze off. According to claimant, their discussion continued:

She wanted to argue with me. And I didn’t want to argue. I didn’t feel too good because of the accident, so I just said, whatever. And then the next thing you know Jennifer [Adams, respondent’s safety manager], came in and Kristy said, well, she, we are going to go that she nodded off.¹²

Claimant testified she was concerned respondent would terminate her employment for allegedly sleeping on the job, but she was not fired.

Claimant provided an in-person recorded statement at respondent’s premises on September 19, 2014. Ms. Adams was in a room with her and the person conducting the interview, someone named Sean. Claimant stated the accident occurred at 6:30 a.m. and:

A: I, at first I didn’t realize what was going-, what was going on. I must have dozed off and I hit the-, a curb, a trash can, another curb and I stopped the bus and, and then I asked everybody if they was okay and they said they were.

...

Q. Think you fell asleep maybe?

A. Yeah.

...

¹¹ *Id.* at 10.

¹² *Id.* at 24-25.

Q. . . . [W]hat do you think made you fall asleep?

A. I'm not for sure.

. . .

Q. . . . What, what were you doing? You were just driving along and?

A. Yeah.

Q. Everything seemed normal?

A. Seemed normal and next thing I know I was up on the curb and hit the trash can.

Q. So you were asleep you think?

A. I think I dozed off.

Q. What woke you up? The bump?

A. Yeah.

. . .

A. . . . I'm in a lot more pain at a different area than I did-, where it was before. So, yeah, I'm.

Q. What other area?

A. It's more, I mean, it's lower down now that hurts.

. . .

Q. What do you think made you fall asleep that day?

A. I'm not for sure.

. . .

Q. . . . Did it tear up the bus when you hit it?

A. It put . . . a dent in it and broke the, um, the grille.¹³

¹³ *Id.*, Resp. Ex. 1 at 6-7, 15-16, 28, 33, 35.

Claimant testified she said in her recorded statement she dozed off because Ms. Sternum told her to do so.¹⁴ Claimant testified her story about the animal in the road was the truth and she lied in her initial statement because she had been told to say she nodded off and Ms. Adams was present during the statement:

- Q. And you, have you had a chance to review the recorded statements?
- A. Yes. Yes, I have. And it was not a telephone recording. And it was [Ms. Adams] was in there. And she intimidates people.
- Q. So are you saying [Ms. Adams] intimidated you in to lying?
- A. [Ms. Sternum] told me to say that I nodded off. And I did not nod off. And [Ms. Adams] was in there to make sure that I am saying what they want me to say. Because I have done, I have been in, where the insurance people have been there with another driver because I am a union steward, there was never a safety manager that was in there, it was only me, the person that had the accident and the insurance company.
- ...
- Q. And you didn't say anything in your recorded statement about seeing an animal or a cat; is that correct?
- A. Correct. But I was told to say that I dozed off by [Ms. Sternum].
- Q. So you are saying that you lied in your initial statement?
- A. Yes.
- Q. But we are supposed to believe you now; is that correct?
- A. Yes.¹⁵

Claimant testified that a Via Christi doctor told her she fractured her L4-5 vertebrae in the accident. On September 22, 2014, claimant saw Dr. Whitaker. His report noted claimant began having low back pain and right leg symptoms after "driving a bus and a curb."¹⁶ Dr. Whitaker took x-rays and suggested a CT and myelogram. Dr. Whitaker took claimant off work. She has not worked subsequently.

¹⁴ *Id.* at 27-28.

¹⁵ *Id.* at 36-38.

¹⁶ *Id.*, Cl. Ex. 1 at 10.

Claimant had a CT scan on October 7, 2014, which was interpreted as showing surgical changes, including rods and screws, without evidence of hardware loosening or failure, acute compression fractures of L4 and L5, and mild narrowing of L1 likely related to an old fracture.

On October 15, 2014, Dr. Whitaker diagnosed claimant with pain in her right pelvic region and thigh, previous T10–L3 posterior spinal fusion with possibly some acute compression fractures at L4 and L5 with low back and right hip pain. He suggested a bone scan and possible referral to a hip specialist. Dr. Whitaker took claimant off work.

Claimant saw Pedro Murati, M.D., at her attorney's request on December 8, 2014. Dr. Murati's report states, "[S]he was driving a school bus of children to school and the next thing she knew she hit a curb, trash can and then another curb. She states she is not sure what happened."¹⁷ Dr. Murati opined claimant's accident was the prevailing factor in claimant's conditions, including bilateral sacroiliac joint dysfunction, L4-5 compression fractures and low back pain with signs of new level radiculopathy. He stated claimant was essentially and realistically unemployable, she should apply for social security disability, and he also recommended extensive treatment modalities.

At the preliminary hearing, respondent denied claimant sustained an accident arising out of and in the course of her employment and alleged claimant's accident was due to a personal risk and that it arose either directly or indirectly from an idiopathic cause. Respondent also denied claimant's accident was the prevailing factor in her medical condition or need for treatment.

In the January 6, 2015 Order, the judge stated in part:

Claimant drove a school bus on behalf of the Respondent. While Claimant was driving, she hit a curb which resulted in potential fractures in her back. Claimant has a significant medical history including surgery to her back in May of 2014.

The Respondent denies the claim on the basis that Claimant fell asleep at the wheel due to an idiopathic cause or the accident was not the prevailing factor in the Claimant's need for treatment.

...

Claimant contends that an animal darted in front of her bus prior to the accident, but in a phone interview she stated that she must have dozed off prior to her accident. The Court does not place a great deal of credibility in phantoms, either cats, cars or otherwise. For purposes of workers compensation, either possibility is compensable as a work accident that arose out of and in the course of

¹⁷ *Id.* Claimant's Ex. 2 at 1.

claimant's employment. The Court believes that the Claimant's current version of the accident is one that she originally conceived of for the purpose of protecting her employment, and now is committed to it. The Court specifically finds preliminarily that the Claimant dozed off, and that for drivers who wake up early in the morning for work with little sleep, dozing off and having an accident is a risk inherent in their work.

The Court requests an IME from Dr. Matthew Henry for the purpose of learning his opinion on treatment recommendations if any as a result of Claimant's car accident and the prevailing factor in the Claimant's need for treatment, including whether or not there has been a structural change in Claimant's body as a result of her accident. If related to the accident, the Court's intention is to order total temporary disability from September 22, 2014 and continuing.

Thereafter, respondent filed a timely appeal, arguing claimant's accident or injury was due to either a personal risk, a neutral risk or arose either directly or indirectly from idiopathic causes.

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.¹⁸ The burden of proof is on the claimant to establish an award of compensation. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.¹⁹

K.S.A. 2013 Supp. 44-508 provides, in pertinent 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.

¹⁸ K.S.A. 2013 Supp. 44-501b(b).

¹⁹ K.S.A. 2013 Supp. 44-501b(c).

(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.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(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.

The Board's review of preliminary hearing orders is limited to allegations that a judge exceeded his or her jurisdiction, including review of jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a(a)(2): (1) did the worker sustain accidental injury or injury by repetitive trauma; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.²⁰

K.S.A. 2013 Supp. 44-555c(a) states, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

As noted above, the judge concluded claimant falling asleep and wrecking her bus was a compensable accident that arose out of and in the course of her employment.²¹ The judge further stated claimant's risk of falling asleep while driving was an employment risk if she had to wake up early with little sleep.

Respondent's brief lists two arguments. The first argument is that claimant's accident was not the prevailing factor in causing her low back condition. Within such argument, respondent challenges the admissibility of Dr. Murati's report, including his prevailing factor opinion, as contrary to the procedural requirements contained in K.S.A. 2013 Supp. 44-534a(a)(1).

The judge did not rule regarding prevailing factor. As such, this issue is not subject to Board review. Similarly, K.S.A. 2013 Supp. 44-534a does not allow Board review concerning admission of Dr. Murati's report. These issues are dismissed.

Respondent's second argument in its brief is that claimant's accident is not compensable because it arose either directly or indirectly from an idiopathic cause.²²

²⁰ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

²¹ Despite the statement in the Order that claimant's accident was "compensable," the judge has not yet determined if the claim is compensable. The judge ordered an IME to help determine if claimant sustained personal injury and if the prevailing factor requirement was met. Proof on such matters is necessary for compensability.

²² Although respondent's petition for review asserts claimant's accident or injury was occasioned by neutral or personal risks, such arguments were not in respondent's brief. A point incidentally raised, but not adequately argued, is abandoned. *Herrell v. Nat'l Beef Packing Co., LLC*, 292 Kan. 730, 736, 259 P.3d 663 (2011).

K.S.A. 2013 Supp. 44-508(f)(3)(A)(iv) precludes from the definition of “arising out of and in the course of employment” any accident “which arose either directly or indirectly from idiopathic causes.” Respondent’s argument that claimant’s accident was due to an idiopathic cause goes directly to whether an accident arose out of and in the course of claimant’s employment. The judge’s finding that claimant’s accident was due to an employment risk suggests claimant’s accident or injury do not fit into the categories listed in K.S.A. 2013 Supp. 44-508(f)(3)(A)(i-iv) and instead suggests claimant’s injury by accident fits the criteria of K.S.A. 2013 Supp. 44-508(f)(2)(B)(i). Respondent’s argument is an appealable issue from a preliminary hearing.

Respondent argues what caused claimant to fall asleep at the wheel is unknown and therefore, her accident was due to an idiopathic cause and not compensable. Respondent notes claimant got 7.5 hours of sleep before her accident and was feeling “pretty good” the morning of the accident. Respondent also questions if claimant was possibly drowsy from taking pain medication.

Claimant’s accident did not arise directly or indirectly from an idiopathic cause, such that it is not compensable. “Doctors use the term idiopathic to refer to something for which the cause is unknown.”²³ If claimant’s accident was due to her falling asleep, we have a known cause and not an idiopathic cause. Explaining why claimant fell asleep adds a requirement not found in our statutes, i.e., the need to explain why a known cause occurred. K.S.A. 2013 Supp. 44-508(f)(3)(A)(iv) does not bar compensability.

Within respondent’s argument concerning idiopathic causes is discussion that the facts of this are distinguishable from *Stoker*²⁴ and *Roush*,²⁵ preliminary hearing orders concerning claimants who fell asleep while driving and had motor vehicle accidents.

In *Roush*, Board Member Valerius stated:

This Board member finds that claimant's losing concentration or falling asleep while driving does not constitute a personal risk or an idiopathic cause within the meaning of K.S.A. 2012 Supp. 44-508(d). Losing concentration while driving or driving without the benefit of enough sleep is a risk common to and distinctly associated with all employments that require employees to drive vehicles.²⁶

In *Stoker*, Board Member Valerius stated:

²³ *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

²⁴ *Stoker v. Dustrol, Inc.*, No. 1,065,785, 2013 WL 6920092 (Kan. WCAB Dec. 5, 2013).

²⁵ *Roush v. Rent-A-Center, Inc.*, No. 1,062,983, 2013 WL 1876358 (Kan. WCAB Apr. 15, 2013).

²⁶ *Roush* at *3.

. . . Dr. Hufford opined claimant's work schedule resulted in fatigue that eventually led to her falling asleep at the wheel.

Dr. Hufford's conclusion is supported by claimant's uncontradicted testimony. Claimant worked 73 hours the week ending the Friday before the accident. On the day of the accident, claimant left her home at 3:40 a.m. and arrived at the employer's facility at 4:40 a.m. She then left the employer's facility at approximately 5:30 a.m. and drove approximately 45 miles to the work site, arriving around 6:30 a.m. Claimant then worked approximately seven and one-half hours with only a five minute break. She was on the clock for approximately nine hours prior to the accident.

. . . Claimant was required to wake up early and work long days with few breaks. This Board Member agrees with Dr. Hufford that this type of work schedule would lead to fatigue. Falling asleep at the wheel in this environment is not idiopathic, it is a hazard distinctly associated with claimant's employment with respondent.²⁷

Respondent argues such cases are distinguishable because there is no evidence in this case that claimant was sleep deprived or that her work environment created a hazard that she fall asleep on the job. While the preliminary hearing Order indicated claimant's accident arose out of and in the course of her employment because she faced a risk of dozing off while driving from having to wake up early in the morning for work with "little sleep," the record is devoid of evidence claimant's work or work schedule deprived her of sleep. She had to wake up early, but she went to bed early, was used to her routine and felt good the morning of her accident.

Although respondent is correct that there is no evidence showing claimant's job led to fatigue or caused her to have insufficient sleep, no argument is advanced that the judge exceeded his jurisdiction by issuing a ruling based on facts not in evidence. Even if such argument was made:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.²⁸

The order for the IME with Dr. Henry is unaffected and remains in full force and effect.

²⁷ *Stoker* at *4-5.

²⁸ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

CONCLUSIONS

WHEREFORE, after having carefully considered the entire record and limiting review to the specific issues raised, the undersigned Board Member concludes:

- respondent's arguments regarding prevailing factor and the admission of Dr. Murati's report into evidence are dismissed for lack of jurisdiction;
- respondent's appeal brought on the basis that claimant's accident or injury arose directly or indirectly by idiopathic causes is denied; and
- the order for the IME remains in full effect.²⁹

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

HONORABLE JOHN F. CARPINELLI
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²⁹ 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.