

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>PABLO RODRIGUEZ</b>	)	
Claimant	)	
	)	
V.	)	
	)	
<b>KBK INDUSTRIES, LLC</b>	)	
Respondent	)	Docket No. 1,076,540
	)	
AND	)	
	)	
<b>HARTFORD UNDERWRITERS INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the May 3, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Bradley E. Avery of Topeka, Kansas, appeared for claimant. Bruce L. Wendel of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to sustain his burden of proving a personal injury by accident arising out of and in the course of his employment with respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 3, 2016, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues the greater weight of the evidence proves he sustained a personal injury by accident arising out of and in the course of his employment. Further, claimant argues the uncontested medical evidence indicates the accident is the prevailing factor causing his injury, medical condition, and any resulting impairment.

Respondent maintains the ALJ's Order should be affirmed.

The issues for the Board's review are:

1. Did claimant suffer a personal injury by accident?
2. If so, did claimant's accidental injury arise out of and in the course of his employment?
3. Was claimant's accident the prevailing factor causing his injury, medical condition, and disability?

### FINDINGS OF FACT

Respondent produces oil and water tanks, ranging from 30 inches to 15.5 feet in diameter and weighing between 700 and 7,000 pounds. Claimant was employed by respondent as a gunner. Claimant operated a fiberglass chop gun, shooting the tops on the tanks. Claimant stood on a scaffold, measuring 3 to 3.5 feet from the ground, to perform his job duties.

Claimant testified that on January 11, 2016, he was standing on his scaffold when another tank came loose from its restraining blocks and rolled toward him, causing him to jump from his scaffold and injure his right ankle. He explained two co-workers were pushing a tank nearby when it "jumped the block."<sup>1</sup> Claimant testified:

Well, a tank rolled over, and I was shooting the back to this tank. It jumped on the block, the block that they use to put – and I jumped because I was about to be crushed by the tank. I jumped from the scaffold. And when I fell down, I fell down on one of my legs.<sup>2</sup>

Claimant testified the co-workers pushing the tank were approximately two feet away from where he was injured. He explained one co-worker drove a forklift while the other pushed the tank. Claimant could not recall their names.

Claimant stated he felt immediate pain in his right ankle after jumping from the scaffold. The incident occurred at approximately 7:00 a.m., and claimant continued working until the end of his shift at 4:00 p.m. Claimant indicated he worked on his feet, with pain, all day. Claimant did not tell his supervisor about the incident on January 11, 2016. Claimant explained he thought he had a minor injury at that time.

Claimant left work at 4:00 p.m. on January 11, 2016. His wife, Mirna Barrera, and daughter, Yesenia Rodriguez, both testified claimant usually arrives home within 45

---

<sup>1</sup> P.H. Trans. at 70.

<sup>2</sup> *Id.* at 12.

minutes of leaving work. On January 11, 2016, claimant did not arrive home until 6:00 p.m. Claimant stated he continued to stop his vehicle while driving because pressing the accelerator hurt his right ankle. He said he did not go anywhere other than home from work.

Ms. Rodriguez, claimant's daughter, testified claimant needed help moving from his vehicle to the house. Ms. Rodriguez noted claimant could not walk at that time and mentioned having fallen from a scaffold at work. Ms. Barrera, claimant's wife, testified claimant required assistance because he was unable to walk. She stated Ms. Rodriguez did not help claimant from his vehicle to the house, but rather claimant knocked on the door after arriving home. Claimant testified his pain worsened that night, and Ms. Barrera took him to the emergency room the following day. Claimant was treated with a splint and provided crutches. Ms. Barrera provided papers from the hospital to respondent on January 12, 2016.

Jay Muller, production control manager for respondent, disputed claimant's testimony regarding the rolling tank. Mr. Muller stated he would have been notified if a tank had rolled off its blocks. He testified:

Q. If a tank would have rolled off its blocks, would someone have reported it?

A. Yes.

Q. Did anyone report [a tank] rolling off its blocks that day?

A. No.

Q. How often do tanks roll off their blocks?

A. Not very often. One every two months, maybe.<sup>3</sup>

Mr. Muller explained the blocks are one foot from the ground. He indicated the tanks are fiberglass, and even a fall from one foot will damage a tank. Mr. Muller testified:

A. If [a tank] falls – the fiberglass, it will spiderweb the fiberglass, and we will have to do rework on it.

...

Q. Every time that a tank falls off a block, it damages it?

A. That is correct.<sup>4</sup>

---

<sup>3</sup> *Id.* at 57.

<sup>4</sup> *Id.* at 58-59.

Mr. Muller provided a production report which lists which tanks are worked per week.<sup>5</sup> Mr. Muller agreed the report did not indicate which tanks were worked on which day. He stated no tanks large enough to be on blocks were worked on January 11, 2016, according to both his report and speculation based on his experience of the production line. Mr. Muller testified:

Q. Your testimony regarding what tank [claimant] was working on, the circumstances of the production that day is based upon guess work; correct?

A. Yes.<sup>6</sup>

During his investigation of claimant's accident, Mr. Muller spoke to Chris Brooks, claimant's supervisor. Mr. Brooks had a conversation with claimant at the end of his shift, and claimant did not mention an injury. It is respondent's policy to immediately report any injury. Mr. Muller testified Mr. Brooks also told him he did not notice claimant walking with a limp. Mr. Muller testified he spoke with claimant's supervisors regarding the accident, but did not speak with claimant. Mr. Muller could not explain why he did not speak with claimant in the course of conducting his investigation.

Claimant began treatment with Dr. Cheema at Hays Medical Group on January 14, 2016. Dr. Cheema recommended claimant undergo an MRI of the right ankle. No MRI was completed, and claimant did not follow up with Dr. Cheema. Claimant was taken off work.

Dr. C. Reiff Brown examined claimant on March 2, 2016, at claimant's counsel's request. Dr. Brown reviewed claimant's history, medical records, and performed a physical examination. He noted the only records available to him were Dr. Cheema's records dated January 14, 2016, which did not refer to a specific diagnosis. Dr. Brown opined:

In my opinion, [claimant] has suffered a possible malleolar fracture and a possible fracture of the calcaneus of the right foot. Additional care is indicated and I have advised relatives to provide that. In my opinion, the injury that occurred January 11, 2016 was the prevailing factor causing his injury, his present condition and any impairment that may be present as residuals following his treatment. In my opinion, he would be unable to do any type of work activity other than that in a seated position utilizing his hands for light manipulative work activity. He should not attempt to walk even with the crutches any but short distances or about the room and he should not apply weight bearing forces to the right lower extremity. Over the counter pain medications should be sufficient. He should also elevate the foot

---

<sup>5</sup> See *id.*, Resp. Ex. A.

<sup>6</sup> P.H. Trans. at 66.

anytime that he sits down. For practical purposes, I believe him to be essentially temporarily totally disabled.<sup>7</sup>

Claimant stated he continues to have pain in his right leg.

#### PRINCIPLES OF LAW

K.S.A. 2015 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.

K.S.A. 2015 Supp. 44-508(h) states:

“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.

K.S.A. 2015 Supp. 44-508(f) states, in part:

(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)(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.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a

---

<sup>7</sup> *Id.*, Cl. Ex. 3 at 2.

<sup>8</sup> K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>9</sup>

### ANALYSIS

Claimant did not report his injury to anyone and worked the remainder of his shift without complaint. At the end of his shift, claimant did not tell Mr. Brooks he had been injured because he did not think he had a serious injury. Mr. Brooks told Mr. Muller claimant was not limping when he left the work place.<sup>10</sup> Mr. Brooks' observations of claimant when he left work are inconsistent with claimant's testimony that his pain was so severe he had trouble driving his vehicle home from work.

Mr. Muller testified a tank rolls off its blocks approximately every two months. Each time a tank rolls off its blocks, the event is reported to him. The reason it is always reported is because the fiberglass tank will always sustain damage when it rolls off the blocks, which is approximately one foot off the ground. Mr. Muller testified there was no report on the accident date that a tank had rolled off the blocks.

Based upon claimant's testimony, there were at least two witnesses to his accident. He testified the two co-employees pushing the tank that fell toward him were two feet away. Claimant stated he did not know the names of the two witnesses.<sup>11</sup> Testimony by the co-workers that a tank rolled off its blocks on the date claimant alleges injury, or that they witnessed claimant jump, would go a long way in helping claimant meet the burden of proving an injury by accident.

The undersigned agrees with the ALJ's conclusions. The weight of the evidence supports a finding claimant failed to sustain the burden of proving he suffered an injury by accident arising out of and in the course of his employment with respondent.

### CONCLUSION

Claimant failed to sustain the burden of proving he suffered an injury by accident arising out of and in the course of his employment with respondent.

---

<sup>9</sup> K.S.A. 2015 Supp. 44-555c(j).

<sup>10</sup> See P.H. Trans. at 41.

<sup>11</sup> See *id.* at 70.

ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 3, 2016, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2016.

---

HONORABLE SETH G. VALERIUS  
BOARD MEMBER

c: Bradley E. Avery, Attorney for Claimant  
brad@kslegaleagles.com  
monica@kslegaleagles.com

Bruce L. Wendel, Attorney for Respondent and its Insurance Carrier  
bruce.wendel@thehartford.com

Hon. Bruce E. Moore, Administrative Law Judge