

The issue is: did claimant sustain personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant was employed by respondent as an over-the-road truck driver. He alleged that on January 4, 2016, at around 9:00 p.m., he sustained personal injury by accident in the parking lot of the Paradise Saloon “gentlemen’s club” in Lawrence, Kansas, when he slipped on ice exiting his truck.

Claimant left his residence in Holton, Kansas, at about 1:45 a.m. on January 4, 2016, and drove his personal vehicle to Salina, Kansas, to pick up his truck and the freight he was instructed to take to Marshall, Minnesota.

According to claimant, respondent provided him with route information via the truck’s Qualcomm¹ several days before the trip, but he was not located near the truck to receive that information. Claimant testified he was not required by respondent to take a particular route when performing his duties. On January 4, 2016, the Qualcomm in claimant’s truck was inoperable, so claimant was unaware of the route information provided by respondent.

Claimant testified he normally followed the route he received from respondent, and if the Qualcomm in the truck was working, he would have taken the recommended route. At some point after he left Salina, claimant called Qualcomm Technical Support seeking assistance in returning the device to operation.

Claimant did not have a map in the truck, so he took the best route to Minnesota he knew, by taking I-70 east towards Kansas City to intersect with I-35, and then proceeding north. Claimant asserted he did not have money to pay for turnpike tolls, so he planned to exit I-70 and take U.S. Highway 24 east to I-35 north. Claimant did not know the route he chose added 140 extra miles to his trip. Claimant was paid by the mile, based on the shortest route from his point of departure to his destination. Claimant testified he left Salina at around 6:30 p.m.

DOT regulations required claimant to take a thirty-minute break within three hours after he started driving. He drove about two and a half hours when he took his break in Lawrence, Kansas, at about 9:00 p.m.² Claimant stopped in the parking lot of the Paradise

¹ A Qualcomm is a computer-like device located in the cab of claimant’s truck that had a variety of functions: global positioning (GPS); e-mail-like communications between respondent and claimant, including route and load information, and suggested stops to refuel; and a navigation system allowing respondent to track the truck’s location and whether the truck was in operation.

² If claimant had no money for turnpike tolls, he presumably exited I-70 at Topeka to Highway 24 east to Lawrence.

Saloon, a “gentleman’s club.” He chose that parking lot because it was large enough to accommodate his semi-truck and trailer and would allow him enough room to turn his rig around. Claimant did not go into the Paradise Saloon. He was not a member of that establishment, nor did he know any members. Claimant had never been inside the club and he did not know if the club was open when he was parked in the lot. He stayed with the truck during his entire break.

After claimant stopped for his break, his Qualcomm began working, and it suggested he return from Lawrence to Topeka, then proceed north on Highway 75. Claimant intended to take the recommended route following his break.

Claimant testified that near the end of his break, he stepped out of the cab to use a restroom facility located behind the vehicle. As he did so, he grasped a handle and his right foot slipped on the icy lot, causing him to swing around and strike his back on the tractor. Claimant alleged he felt a pop in his right shoulder, but he did not fall to the ground. He experienced pain in his upper right shoulder towards his shoulder blade and down into his right elbow.

Claimant testified he reported his accident by calling respondent’s after-hours number. He did not recall with whom he spoke, but claimant alleged he was told to go to his primary care doctor the next day, or go to the emergency room.

Claimant decided to drive to his residence in Holton, which he did using only his left arm. Claimant admitted he considered it dangerous to operate the truck one-handed, but he testified he probably would have been fired if he left the truck in an unsecured location.

On January 5, 2016, claimant was taken to Stormont-Vail Hospital in Topeka. X-rays revealed no fractures and claimant was provided a sling and medication. It was recommended he have an MRI scan, and consult an orthopedic specialist.

Claimant returned to the ER on February 9, 2016, with complaints of right shoulder pain. A physician assistant recorded a history of right shoulder pain after an injury several weeks before. His right shoulder had decreased range of motion, tenderness and crepitus, and he was referred to John H. Gilbert, M.D.

On March 14, 2016, claimant saw Dr. Gilbert, who also recommended an MRI and a surgical consultation.

Claimant testified he sustained a previous injury to his right shoulder on June 24, 2015, for which he received treatment, including an arthroscopy performed by Dr. Shah. The 2015 injury did not involve his right rotator cuff, and he was released without restriction

on October 8, 2015. On December 7, 2015, claimant passed respondent's pre-employment physical examination "with no restrictions or impairment."³

Claimant testified he cannot lift his right arm above his head without pain, which he described as constant. Claimant asserted his pain interferes with his life activities, including sleep.

Lucas B. Wollin, respondent's driver business leader, testified he managed some of respondent's operations. He testified the trip routes respondent provides to its drivers represent the most efficient routes in terms of saving time and minimizing fuel expenses. Drivers are paid based on the mileage of the most direct route. The routes respondent provides show fuel stops, freight related stops, deliveries and any additional stops a dispatcher adds to the route. When the trip is dispatched, the trip route is provided to the driver.

Respondent's "driver messages"⁴ document the trip dispatches and messages between the driver and respondent. Mr. Wollin testified the driver messages show that on December 26, 2015, route information was provided by respondent for claimant's trip from Salina to Marshall, Minnesota via the truck's Qualcomm. Mr. Wollin testified respondent did not have a policy mandating drivers look at the route information before the day the trip commences.

When respondent's drivers call in to the after-hours number, a notation is placed in a logbook. Mr. Wollin testified the logbook for January 4, 2016, showed no after-hours calls reporting an injury.

According to Mr. Wollin, the truck's GPS tracking data for January 4, 2015, showed claimant was in Salina, Kansas, between 6:00 and 7:00 p.m., in New Cambria, Kansas, at 6:57 p.m. and in Alma, Kansas, at 7:57 p.m. Mr. Wollin testified the Qualcomm has to be operating for the tracking feature to work. Mr. Wollin testified there were times the Qualcomm was down. The tracking data showed claimant left Salina on January 4 at 6:45 p.m., arriving in Lawrence at 9:43 p.m. The truck's ignition was off from 9:43 p.m. until 10:11 p.m., when claimant left Lawrence, arriving in Holton at 11:17 p.m., at which time the truck's ignition was again turned off.

Mr. Wollin testified the suggested route from Salina to Marshall, Minnesota would have been north from Salina to Omaha, then through Sioux City, and on to Marshall. For the alternate route claimant intended to take, Mr. Wollin estimated 140 miles would be added to the trip.

³ P.H. Trans., Cl. Ex. 2.

⁴ P.H. Trans., Resp. Ex. B.

Mr. Wollin confirmed drivers are required to take a 30 minute break, typically after three hours of driving, and the driver may choose where and when to take the break. The driver is responsible for the truck when taking their breaks and for the entire trip.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2014 Supp. 44-501b(c), the burden of proof is on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2014 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.

...

(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.

(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.

"[M]edical evidence is not necessary to prove causation generally."⁵ "A claimant's testimony alone is sufficient evidence of his own physical condition."⁶ To prove the prevailing factor requirement, a "[c]laimant need not produce medical evidence."⁷

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."⁸

⁵ *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 844, 316 P. 3d 796 (2013), *rev. denied* 301 Kan. ___ (Jan. 15, 2015); see also *Webber v. Automotive Controls Corp.*, 272 Kan. 700, 705, 35 P. 3d 788 (2001).

⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P. 3d 1184, *rev. denied* 270 Kan. 898 (2001).

⁷ *Rose v. Sears*, No. 1,075,426, 2016 WL 453044 (Kan. WCAB Jan. 26, 2016); see also *Strale v. General Motors, LLC*, No. 1,074,211, 2015 WL 8006369 (Kan. WCAB Nov. 30, 2015).

⁸ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P. 2d 146 (1976).

Appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder.⁹ The Board often opts to give some deference – although not statutorily mandated – to a judge's credibility findings regarding a witness where the judge has the first-hand opportunity to do so.¹⁰

The evidence is undisputed claimant sustained personal injury by accident, as those terms are defined in the Act, when and in the manner claimant described. The medical evidence corroborates claimant's testimony, and there is no evidence claimant's injury resulted from any other cause.

There is no evidence contradicting claimant's testimony concerning whether his accidental injury arose out of and in the course of his employment. When injured, claimant was at work, delivering freight on respondent's behalf, at respondent's specific request. He was taking a break required by DOT regulations applicable to him as an over-the-road trucker, the job respondent hired and paid him to perform. He was not engaged in any personal activity and no evidence suggests he was dishonest or misleading. The ALJ observed both claimant and Mr. Wollin testify. This claim involved nothing in the nature of a "deviation," "frolic" or "detour."¹¹ The record reflects the truck's Qualcomm was inoperable until after claimant took his mandatory break in Lawrence. He was accordingly unaware of respondent's recommended route prior to that time. Moreover, claimant was not required by respondent to take the route it suggested.

Respondent contends no medical opinion established claimant's accident was the prevailing factor causing his injury, medical condition and disability. The fallacy of that argument is medical evidence is not necessary to prove the prevailing factor requirement--the fact finder must consider all the evidence submitted by the parties, which both the ALJ and the Board have done.

Respondent offers no authority to establish this claim, by virtue of claimant taking a route different than the route respondent recommended, somehow makes his claim noncompensable. The Board has carefully reviewed the evidence in the record, and has considered the arguments of both parties, and concludes the ALJ correctly found claimant sustained personal injury by accident arising out of and in the course of his employment.

⁹ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹⁰ *King v. Sealy Corp.*, No. 1,059,645, 2016 WL 858309 (Kan. WCAB Feb. 23, 2016).

¹¹ See, generally, *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Foos v. Terminix*, 277 Kan. 687, 89 P. 3d 546 (2004).

The Board notes the preliminary hearing Order discusses the “going and coming rule,” embodied in K.S.A. 44-508(f)(3)(B). However, since claimant was neither on the way to assume the duties of his employment, nor after leaving such duties, the “going and coming rule” is inapplicable.

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.¹² 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(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant sustained personal injury by accident arising out of and in the course of his employment.

DECISION

WHEREFORE, the undersigned Board Member finds the Order of Administrative Law Judge Steven M. Roth dated April 27, 2016, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 2016.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
judypopelaw@yahoo.com

Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
kak@kc-lawyers.com

Honorable Steven M. Roth, Administrative Law Judge

¹² K.S.A. 44-534a.