

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

RONALD GRAHAM)	
Claimant)	
VS.)	
)	Docket No. 216,284
RUSK, INC.)	
Respondent)	
AND)	
)	
KANSAS TRUCKERS RISK MGMT. GROUP)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award dated February 26, 1999, amended by Nunc Pro Tunc of March 8, 1999. The Appeals Board heard oral argument September 1, 1999.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant seeks benefits for hearing impairment, post-concussion syndrome, lumbosacral strain as well as neck, right shoulder, and right upper extremity difficulties including carpal tunnel syndrome and ulnar cubital syndrome. Claimant worked as a truck driver for respondent and asserts that these injuries occurred when he was attacked by an unknown assailant at a rest stop. The Administrative Law Judge found the hearing impairment, post-concussion syndrome, and lumbosacral strain to be compensable but denied benefits for the claimed upper extremity problems.

On appeal, respondent contends claimant's injuries did not occur as claimant says they did and did not arise out of claimant's employment. Respondent also contends the alleged low back injury was not a permanent injury.

Claimant contends the Award should include benefits for the upper extremity injuries.

Each party also raises an evidentiary issue. Respondent contends the ALJ erred by denying respondent the opportunity to examine claimant regarding an arrest for battery against a family member in March 1997. Claimant contends the telephone deposition of Marcus Dees should not be considered as part of the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be reversed. The Board agrees with the ruling by the ALJ on the evidentiary questions but, for the reasons stated below, the Board concludes claimant has not proven that he suffered accidental injury arising out of and in the course of his employment.

Before addressing compensability, the Board finds the ALJ did not err either by refusing to permit respondent to pursue questions about an arrest of claimant for battery in March 1997 or in considering the deposition testimony of Marcus Dees. Respondent asserts the testimony about claimant's arrest in 1997 might be relevant to suggest an explanation for the battery on claimant in 1996. The connection seems too tenuous and the Board agrees with the ALJ's decision to sustain an objection to this testimony.

The Board also agrees with the decision to consider the testimony of Officer Marcus Dees. Claimant objects to the testimony of Officer Dees, arguing there is no foundation for his testimony because he testified by phone and no one had met Officer Dees. The court reporter was with counsel in Wichita and respondent's counsel acknowledged he had not met Officer Dees. But the witness testified he was Marcus Dees from the Love County Sheriff's department in Marietta, Oklahoma. He also testified he interviewed Ronald Graham and his girlfriend on July 16, 1996, about an attack at the rest stop. An in-person deposition produces little, if any, further identification of a witness. Counsel has the option to otherwise investigate and produce any contradictory evidence they might have. None was presented here. The Board also recognizes that in Chapter 60 proceedings a deposition may be taken by telephone only if the parties stipulate or the court orders it. K.S.A. 60-230(b)(7). But Chapter 60 does not generally apply to workers compensation proceedings and rules of evidence are more relaxed in workers compensation proceedings. *Crow v. City of Wichita*, 222 Kan. 322, 566 P.2d 1 (1977); *Dean v. Hodges Bros.*, 170 Kan. 333, 224 P.2d 1028 (1950). The Board concludes the deposition of Officer Marcus Dees may be considered.

The Board notes that Officer Dees gave his opinion that the claimant's statement was not credible. Although the Board has reached a similar conclusion, the Officer's testimony on this point was considered to be speculative and given little weight. The Board did consider to be significant, however, Officer Dees' testimony about what claimant told Officer Dees happened on the night claimant was injured. This was considered significant because, as explained below, it differed from other versions claimant gave of the events.

Claimant testified that about 2 a.m. on July 16, 1996, he stopped at a truck stop near the Oklahoma-Texas border. Claimant and his girlfriend had earlier picked up a load in Cleburne, Texas, for delivery in Hutchinson, Kansas. According to claimant, he got a soft drink and a cinnamon roll and then spent about 20 minutes in his truck completing some of his paperwork. Claimant states he then decided to get another soft drink. According to most of the versions of his testimony, he left the truck and the next thing he remembers is waking up in the sleeper compartment covered in blood.

After reviewing the evidence, the Board concludes claimant's version of the events is not credible. The Board reaches this conclusion for three reasons. First, the evidence shows claimant is willing, at least on occasion, to give false or exaggerated information. Second, claimant's version of the events is implausible. Finally, claimant has not given his version of the events with the consistency one would expect if it were true.

First, the record contains examples of claimant making false or exaggerated statements. The evidence shows claimant was convicted of a felony involving checks three or four years before the events of this case. Claimant denied any felony conviction on his application for employment. The record also contains testimony by claimant about two prior injuries where claimant exaggerated the injury. Claimant testified he had a gunshot wound in Granada and that he was once stabbed in the heart. Both injuries turned out to be minor compared to the implication from claimant's initial testimony. These factors would not, alone, completely discredit claimant's testimony. They do raise questions about claimant's credibility.

The Board finds some aspects of claimant's version of the events to be implausible. Claimant's version of the events would have him leaving his truck on the second occasion, the occasion when he was injured, at approximately 2:30 a.m. His girlfriend testified she was in the sleeper when claimant left, apparently referring to the first time he left. It woke her up when he came back. She knew he was eating something, sitting on the edge of the bed. The next thing she remembers is waking up and finding him covered in blood in the sleeper. But the record shows she called for emergency assistance at about 11 a.m. Claimant testified he does not recall events between leaving the truck and being awakened by his girlfriend. He also testified he does not recall most of the events that occurred during the eight hours he was at the hospital.

Claimant's version of the events appears improbable for several reasons. First, claimant's version gives no motive for the attack on claimant. Claimant testified, at least

on one occasion, that he had \$600 in cash on him at the time. Nothing was stolen. No other reason for the attack is suggested by the evidence. Second, claimant's version of the events leaves a substantial period of time, from approximately 2:30 a.m. to approximately 11:00 a.m., unaccounted for by either claimant or his girlfriend, claimant's girlfriend because she was asleep and claimant because of a blow to the head. Other specifics seem improbable. Claimant testified he always locks his truck when he leaves. If he did so on this occasion, he would have returned in a state too injured to remember what happened but able to unlock the truck and climb into the sleeper. Claimant's girlfriend awoke when claimant sat on the edge of the bed on the first return but did not when he returned injured and got into the bed. Claimant's inability to recall the events at the hospital is challenged by the emergency room records that reflect claimant was alert and oriented.

Finally, claimant has not provided an adequately consistent history. He testified at his deposition of November 21, 1996, that he had only change in his pocket at the time he was injured. In later hearings he testified that he had \$600 in his pocket. Claimant testified on several occasions that he did not remember what happened after he left the truck. At the regular hearing he testified: "I was going to get me a Pepsi, and as soon as I got out the second time, that's when I was hit." He had not mentioned earlier that he remembered getting hit.

Claimant gave a substantially different version of the events to the investigating officer and to Dr. Rizwan U. Hassan. The investigating officer, Officer Dees, testified that claimant told him he got out of the truck to relieve himself. He went to the back of the truck and was hit in the back of the head. He passed out and woke up lying on the ground. Officer Dees also testified that claimant's girlfriend gave a similar story. She told Officer Dees that claimant stepped out to relieve himself and when he came back into the cabin he was complaining of a headache. Claimant went into the sleeper and when she awoke she noticed the blood.

Dr. Hassan's records reflect that claimant and his girlfriend told him the following, still different, story:

According to him, on July 16, 1996, he was driving a truck on the highway and stopped at a rest area. Someone robbed him, hit him on back of his head. Later, approximately 4 ½ to 5 hours, his girlfriend, who was sleeping in the truck, came out and discovered him.

Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a). The Board finds claimant's version of the events is not credible and concludes the record does not establish how or why claimant was injured. Not all of the possibilities would make the injury compensable. The Board, therefore, concludes the evidence in this case does not meet claimant's burden.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 26, 1999, as amended by the Nunc Pro Tunc of March 8, 1999, should be, and the same is hereby, reversed. The Board concludes claimant has failed to prove accidental injury arising out of and in the course of employment and benefits are denied.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Wichita, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director