

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KIMBERLY MCGONIGLE)
Claimant)
)
V.)
)
CLARA M. MITCHELL,)
d/b/a CLIC'S BAR) CS-00-0226-597
Uninsured Respondent) AP-00-0449-573
)
AND)
)
KANSAS WORKERS)
COMPENSATION FUND)

ORDER

The Kansas Workers Compensation Fund (the Fund), through Timothy Emerson, appeals Administrative Law Judge Thomas Klein's Award dated February 10, 2020. The Board heard oral argument on June 11, 2020. Mitchell Rice appeared for the claimant, Kimberly McGonigle (McGonigle). Clara Mitchell (Mitchell), the owner of the respondent, Clic's Bar (Clic's), was mailed notice of the hearing, but did not appear for oral argument.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award. Although not referenced under "Appearances" in the Award, Mitchell appeared pro se for Clic's at the regular hearing.

ISSUES

McGonigle injured her low back after agreeing to help Mitchell's son move a pool table slate in preparation for a pool tournament at Clic's, a bar in Hutchinson. The judge found McGonigle sustained injury by accident arising out of and in the course of her employment and awarded her permanent partial disability benefits based on a 25.5% body as a whole impairment and future medical treatment.

The Fund argues McGonigle's injury did not arise out of and in the course of her employment, but instead: (1) occurred during a recreational or social event which she was under no duty to attend; (2) her injury did not result from her regular job duties, but as a favor to Mitchell on her own time; and (3) she was not specifically instructed by her employer to help move a pool table slate because Mitchell's son was not an employer or supervisor who could direct her job duties. McGonigle did not file a brief with the Board.

The issues are:

1. Did McGonigle's injury arise out of and in the course of her employment?
2. What is the nature and extent of McGonigle's disability?
3. Is McGonigle entitled to future medical treatment?

FINDINGS OF FACT

McGonigle was employed by Clic's and bartended, waited tables, cooked and managed Karaoke. She always went to Clic's early to prepare for pool tournaments by performing housekeeping, such as vacuuming and cleaning bathrooms.

On November 4, 2016, Clic's was preparing for a big pool tournament. McGonigle was running late and received a text from Mitchell's son, Sheldon, asking if she was showing up. McGonigle surmised Sheldon wanted to be sure people would help Clic's get ready. Sheldon and Vic, Mitchell's husband, had keys and unlocked Clic's that day. When McGonigle arrived, Sheldon and Vic were re-felting a pool table. Mitchell was ill and not present. McGonigle stated Sheldon and Vic were not employed by Clic's, but were helping. She did not know if they were getting paid. McGonigle said everyone was laughing and joking. The record contains no proof anyone was drinking alcohol or merely socializing.

McGonigle was scheduled to work at 5:30 or 6:00 p.m., but not that afternoon. Around 2:30 p.m., McGonigle was cleaning pool balls and tables when Sheldon asked her to help lift the slate top of a pool table. According to McGonigle, Vic was present and said nothing when Sheldon asked for her help. McGonigle helped lift the slate. While lifting the slate, she felt as if her back "exploded."¹ Clic's had no workers compensation insurance.

McGonigle realized her back pain was not going away and called a friend, Jamie, to help clean Clic's. Jamie is not an employee of Clic's, but Jamie had helped clean at Clic's on an occasional basis as a favor to Mitchell. McGonigle also called her mother, who took her to the emergency room. After being discharged, McGonigle tried to work that night, but her injury rendered her ineffective. Mitchell told her to go home and rest.

McGonigle was paid by the hour and recorded her time on a card. Her card for November 4 was blank because preparing for a tournament was a "favor . . . on [her] own time."² McGonigle made clear she was not being paid to ready the bar for the tournament.

¹ P.H. Trans. at 19; see also pp. 21-23.

² *Id.* at 10, 24.

Mitchell and McGonigle had been friends for years. Mitchell acknowledged individuals, including McGonigle, sometimes came into Clic's on their own time to prepare for tournaments – without expecting pay – a practice Mitchell never discouraged. Mitchell specified McGonigle was not paid to prepare the bar for the tournament and was not acting as an employee of Clic's. However, Mitchell testified had McGonigle came to work early to clean, she would be paid for her time if she recorded her hours on a time card. Mitchell indicated Sheldon and Vic are not employees of Clic's, and Sheldon was not a supervisor, but Vic could provide supervision and tell employees what to do.

On July 14, 2017, after a preliminary hearing, the judge found McGonigle's injury arose out of and in the course of her employment and awarded benefits. Clic's was unable to pay for benefits and the Fund was held liable. The Fund appealed. On October 16, 2017, a single Board Member affirmed the Order after weighing competing evidence.

At her attorney's request, McGonigle saw Pedro Murati, M.D., who diagnosed McGonigle with an L1 burst fracture which required a T12-L2 fusion, ongoing low back pain with radiculopathy, right SI joint dysfunction and a thoracic spine sprain, all due to the accident. Dr. Murati stated McGonigle would require future medical treatment, including possible further surgery. He issued permanent restrictions best characterized as light duty with postural limitations. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Ed., Dr. Murati gave McGonigle a 30% whole body impairment. Under the *Guides*, 4th Ed., Dr. Murati assigned McGonigle a 32% whole body impairment.

At the Fund's request, McGonigle saw David Hufford, M.D. McGonigle complained of continued low back and right leg radicular pain. Dr. Hufford diagnosed McGonigle with an occupational lifting injury with L1 burst fracture requiring a lumbar fusion. Dr. Hufford recommended additional treatment, including use of analgesics and periodic injections to the right sacroiliac joint, and noted a spinal cord stimulator may lessen her symptoms and improve her function. He did not recommend permanent restrictions, stating McGonigle wanted to work within her own tolerances without formal restrictions. Dr. Hufford assigned McGonigle a 21% whole body impairment using the *Guides*, 6th Ed., and a 25% whole body impairment under the *Guides*, 4th Ed.

On pages 3-4 of the Award, the judge stated:

This matter turns on the last phrase of [K.S.A. 44-508(f)(3)(C)]. The specific question is whether or not Sheldon's request that the claimant assist him with moving the slate constitutes a specific instruction from the employer within the meaning of the statute. Prior to the request by Sheldon, the court finds that the claimant was engaged in a customary recreational or social event off the clock. The court finds that Sheldon's request does constitute an instruction and finds that the accident arose out of and in the course of claimant's employment.

The factors that the court finds persuasive are that Sheldon, the owner's son, is the one who called the claimant and asked if she was coming in. Vic, the [owner's] husband[,] clearly had the authority to instruct the claimant and he was present when claimant was asked to help move the slate. Both Vic and Sheldon had keys to the bar. The owner was not present due to an illness. Finally, claimant as an employee of the bar is the one who was asked to help with the slate, not one of the people present who did not work there.

...

The court finds that the claimant[']s accident arose out of and in the course of her employment.

The judge awarded McGonigle benefits as described on the first page of this decision. Based on Clic's and Mitchell's inability to pay and lack of insurance, the Fund was held liable. From this decision, the Fund appealed.

PRINCIPLES OF LAW AND ANALYSIS

Under K.S.A. 44-501b: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the trier of fact considers the whole record; and (3) the burden of proof is on the worker. An employer must prove any affirmative defenses.³ Under, K.S.A. 44-566a(e)(2) and K.S.A. 44-532a(a), the Fund is liable for payment of workers compensation benefits to an employee who is unable to receive such benefits from the employer because the employer does not have workers compensation insurance or is financially unable to pay for benefits. The Fund "steps into the shoes" of the employer.

The Board's review is de novo – consideration of an existing decision and agency record, but with independent findings of fact and conclusions of law.⁴

1. McGonigle's injury by accident arose out of and in the course of her work.

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

(f)(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

³ See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), rev. denied ___ Kan. ___, ___ P.3d ___ (Feb. 25, 2020).

⁴ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

(ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

...

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.⁵ Information outside the statute's plain wording should not be added.⁶ The Workers Compensation Act (the Act) is complete and exclusive within itself in covering every phase of the right to compensation.⁷ Before May 15, 2011, the Act did not define "arising out of and in the course of employment."⁸

Despite these instructions and the change in the law, appellate courts occasionally resort to case law interpretation of "arising out of" and "in the course of" employment.⁹ Kansas law also looks at the context of what a worker was doing when he or she was injured. *Bryant*,¹⁰ a pre-May 15, 2011 case, states an injury arises out of employment when the activity resulting in injury is connected to, inherent in, or in the overall context of performing work. Reaching for a tool belt and bending to weld, while working, was work and not just normal activities of day-to-day living. Post-May 15, 2011 cases follow the same reasoning.¹¹

⁵ See *Hoesli v. Triplett*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

⁶ See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 293 P.3d 723 (2013).

⁷ See *Kelly v. Phillips Petroleum Co.*, 222 Kan. 347, 566 P.2d 10 (1977).

⁸ *Munoz v. Southwest Medical Center*, No. 121,024, 2020 WL 1313794, at *5 (Kansas Court of Appeals unpublished opinion filed Mar. 20, 2020).

⁹ *Fishman v. U.S.D. 229*, No. 118,327, 2018 WL 3485612, at *4 (Kansas Court of Appeals unpublished opinion filed July 20, 2018); see also *Tran v. Figueroa*, No. 119,799, 2020 WL 1973953, at *4 (Kansas Court of Appeals unpublished opinion filed Apr. 24, 2020).

¹⁰ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011).

¹¹ *Munoz*, supra; *Netherland v. Midwest Homestead of Olathe Operations LLC*, No. 119,873, 2019 WL 4383374 (Kansas Court of Appeals unpublished opinion filed Sept. 13, 2019); *Johnson*, 57 Kan. App. 2d at 44; *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 140, 343 P.3d 114 (2015).

The plain language of K.S.A. 44-508(f)(2)(B)(i) states an injury by accident arises out of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident. Moving the pool table slate was required in getting that particular pool table ready to be used for that evening's "big" pool tournament. Assisting in lifting the pool table slate was the causal connection between the necessary work and McGonigle's resulting accident. Again, even though she termed what she did a "favor," she was working when she seriously injured her low back.

That McGonigle did not record her hours, was not getting paid and viewed her actions as a favor to Mitchell are coloring facts, but not determinative to deny compensability. Even if she was not being paid, McGonigle was still performing work. She would not have been at her place of employment and performing work absent her employer needing workers to prepare for the pool tournament. McGonigle's "favor" was actual work.

It would be better for McGonigle's case if she was officially on company time when injured. However, the fact a worker is not "on the clock" and being paid is not fatal to compensability. The Act does not state a worker must be getting paid to have a compensable claim. In *Rinke*,¹² a worker was entitled to workers compensation benefits when injured leaving her employer's premises when she was no longer "on the clock."

It is also noteworthy Mitchell was aware McGonigle routinely showed up to work early to prepare for pool tournaments. Mitchell gladly accepted the benefit of free labor. An employer should not receive the benefit of free work with no risk an employee may be injured doing so. Mitchell's allowing this practice made it an incident of employment. For example, a worker was injured while riding a dolly or a hand truck during her lunch hour. Evidence showed the employer acquiesced in this practice. Our Supreme Court stated:

Inasmuch as . . . the play in which the plaintiff was injured had become a settled custom, with the knowledge and indeed the express approval of the foreman. . . , and without objection [by] any one, . . . her injury may be regarded, not only as having occurred in the course of her employment, but as having arisen out of it.¹³

The Fund argues Clic's is not liable because Sheldon, a non-employee and non-supervisor, asked McGonigle to help him move the pool table slate. The Fund would have us only consider work injuries to be compensable if Mitchell or another supervisory employee demanded McGonigle lift the pool table slate and she was injured in so doing.

¹² See *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

¹³ *Thomas v. Proctor & Gamble Mfg. Co.*, 104 Kan. 432, 179 P. 372 (1919), abrogated by *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006). However, *Coleman* does not stand for the proposition an employer permits a known activity to become incidental to employment by allowing the activity to continue.

Vic and Sheldon opened the bar because Mitchell was ill and not available. In essence, Vic and Sheldon stood in Mitchell's shoes as her agents. Because of Mitchell's absence, Vic and Sheldon had apparent authority to prepare the bar for the pool tournament. Sheldon contacted McGonigle to make sure she was coming in to help the business get ready for the pool tournament. Sheldon's lack of capacity as a supervisor matters not. Sheldon had a key to the business and assumed the role of preparing for the pool tournament. Mitchell cannot evade Clic's workers compensation liability by being sick at home and having her husband and son assume her responsibility of getting the bar ready for the tournament. Simply put, McGonigle was injured performing work, regardless of Sheldon's role or her characterization she was performing an unpaid favor for Mitchell.

Moreover, K.S.A. 44-508(f)(3)(C) only excludes injuries incurred by employees: (1) engaged in recreational or social events, (2) where the employee was under no duty to attend and (3) where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer. The Board is hard-pressed to say moving a pool table slate is either recreational or social. Moving a pool table slate at a bar in preparation for a pool tournament by a person who works at the bar is a work activity. The overall context of lifting a pool table slate shows McGonigle was injured performing work, not engaging in recreation or socializing. Vacuuming the floors, cleaning tables and bathrooms, housekeeping and cleaning pool balls are not recreational or social events, but job tasks.

Lacking a recreational or social event, the statute does not apply. However, the Board does not consider Sheldon to be McGonigle's employer or conclude he gave her specific instructions. Sheldon's lack of a supervisory role and McGonigle having the option to decline his request matter little because the evidence establishes McGonigle was injured performing work furthering Clic's business when preparing for a pool tournament. Lifting a pool table slate is not recreational or social.

2. As a result of her injury by accident, McGonigle sustained a 25.5% impairment of function to the body as a whole.

The Board affirms the judge awarding McGonigle an average of the two impairment ratings under the *Guides*, 6th Ed.

3. McGonigle may pursue future medical treatment upon proper application.

K.S.A. 44-510h(e) presumes an employer's obligation to provide medical benefits terminates when the employee reaches maximum medical improvement. However, the presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. Two medical opinions suggest McGonigle will

need future medical treatment. The judge’s ruling on this issue is affirmed. She may pursue such benefits as permitted under the Act.

CONCLUSIONS

McGonigle sustained a compensable injury by accident arising out of and in the course of her employment. As a result, McGonigle sustained a 25.5% impairment of function to the body as a whole. McGonigle may pursue future medical treatment.

AWARD

WHEREFORE, the Board affirms the Award dated February 10, 2020, although for different reasons than determined by the judge regarding the arising out of and in the course of employment issue.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Electronic copies via OSCAR to:
Mitchell Rice
Timothy Emerson
Honorable Thomas Klein

with a copy via USPS to:
Clara Mitchell
4205 N. Lakeview Road
Hutchinson, KS 67502