

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CARSON DRENNAN)	
Claimant)	
V.)	
)	CS-00-0448-670
ROCKY MOUNTAIN MOBILE)	AP-00-0450-880
TRUCK SERVICE LLC)	
Respondent)	
AND)	
)	
SERVICE AMERICAN INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent requests review of the April 28, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Terry Torline, of Wichita, Kansas, appeared for Claimant. Vince Burnett, of Wichita, Kansas, appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from February 25, 2020, with exhibits attached; the transcript of Preliminary Hearing from April 21, 2020, with exhibits attached, and the documents of record filed with the Division.

ISSUES

Respondent argues Claimant did not meet with personal injury arising out of and in the course of his employment and failed to prove otherwise.

Claimant argues the ALJ's Order should be affirmed.

The issue on appeal is whether Claimant sustained accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT

The ALJ ruled Claimant suffered an accidental injury arising out of and in the course of his employment. Respondent was ordered to pay outstanding medical bills, including bills for diagnostic tests, in accordance with the fee schedule. The ALJ ordered temporary total disability benefits paid from November 17, 2019, through December 2, 2019. Dr. Mattar was designated as the authorized treating physician. Authorized medical mileage shall be paid upon proper presentation to Respondent.

Claimant started work for Respondent in October 2019 as a technician.

According to Claimant, on November 7, 2019, he was injured moving a three foot jack weighing 50 to 60 pounds in bay 4. When he attempted to stand the jack upright, it fell backwards and hit his pelvis on the right side close to his groin. Claimant had immediate pain, but was able to continue working. Claimant is not confident of the actual time of the accident, but thought it occurred between 10:00 a.m. and 12 p.m. in bay 4. There were no witnesses to the accident.

On November 10, Claimant sent an email to his supervisor, David Buche, reporting he was hit by the jack in his pelvis on November 7, 2019, at about 11:00 a.m. in bay 4. On November 14, 2019, Claimant completed an employee accident report about the incident. He stated on the report the time of the injury was "around 10 to 11."

The employer has video surveillance of their premises, including bay 4. The video covers the entire area of the bay except for a 4 feet by 4 feet area near the bay door and just outside the bay door. The camera is mounted just inside the door of bay 4. According to Mr. Buche, the only thing you can really do in the area not covered by the camera is latch the door.

Mr. Buche reviewed all the November 7, 2019, video footage of bay 4. He did not see in the footage where Claimant was hit in the pelvis by the jack. He only saw Claimant moving the jack.

Respondent introduced into evidence a copy of the video footage of November 7, 2019, covering the time frame of 10:30 a.m. to 12:10 p.m. The employer believed this included the entire time frame for when Claimant's accident occurred. This video does not show Claimant being hit by the jack.

Mr. Buche acknowledged the camera did not cover all of bay 4, and it was possible for Claimant to have been outside or even in bay 4 in a part not covered by the camera. He also admitted to not having any footage of bay 4 before 10:30 a.m., and it is possible for Claimant to have injured himself with the jack prior to 10:30 a.m. The video of the entire day is no longer available as Mr. Busche only saved footage from the time frame reported by Claimant as to when the accident occurred.

Claimant went to the ER on November 10, 2019, due to increased pain in his pelvic/groin area. Claimant was diagnosed with soft tissue edema and a likely hematoma in the abdomen.

Respondent sent Claimant to Dr. Wilkinson, who opined that Claimant's injury was work-related. He referred Claimant to Dr. Aaron Nilhas, a surgeon, for treatment of the hematoma. His treatment included antibiotics and then ultrasound-guided drainage of the hematoma. There were concerns the hematoma could be due to medical issues other than an accidental injury and diagnostic testing was done. After evaluation and treatment, it was determined Claimant's condition and symptoms were due to the work accident.

Claimant continues to have pain randomly and for two and three days at a time.

Claimant was released to return to work on December 7, 2019. Claimant did not work for Respondent after November 17, 2019. He was released from employment with Respondent on December 2, 2019. Claimant went to work for Budde Enterprises as a mechanic on December 11, 2019.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2019 Supp. 44-508(h) states:

(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.

K.S.A. 2019 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. . .

. . .

(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.

. . .

(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.

K.S.A. 44-508(g) states:

(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.

The outcome of this case is dependent upon which version of the facts is more persuasive.

Claimant consistently described how he was injured, to his employer, the medical providers and in his testimony under oath. Claimant has been consistent about the time frame of the accident, being between the hours of 10:00 a.m. and 12:00 p.m. Claimant has not been consistent with whether the accident occurred closer to 10:00 a.m. or 11:00 a.m.

Respondent challenged Claimant's description of his accidental injury with a surveillance video of bay 4. The video does not show the entirety of bay 4 or the area outside the door of bay 4. The preserved video Respondent presented as evidence covers the time from 10:30 a.m. to 12:10 p.m. on November 7, 2019. Respondent acknowledges Claimant's accident could have occurred in the area outside of camera range in bay 4.

The Board Member finds Claimant's testimony persuasive that he had accidental injury while employed with Respondent and such accidental injury arose out of and in the course of Claimant's employment. Claimant's testimony was largely consistent, and could have occurred outside the surveillance footage on the video.

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.¹ Moreover, this

¹ K.S.A. 2018 Supp. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A).

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated April 28, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Terry Torline, Attorney for Claimant
Vince Burnett, Attorney for Respondent and its Insurance Carrier
Honorable Thomas Klein, Administrative Law Judge