BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALEXIS DESOTO
Claimant

v.

AP-00-0463-762
SPIRIT AEROSYSTEMS, INC. CS-00-0457-569
Respondent

and

NEW HAMPSHIRE INS. CO.
Insurance Carrier

ORDER

Claimant requests review of the February 10, 2022, preliminary Order issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Joni J. Franklin appeared for Claimant. Vincent A. Burnett appeared for Respondent and 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 held October 13, 2021, with exhibits A1-A3 and B1-B2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

Did Claimant sustain personal injuries from an accident arising out of and in the course of her employment with Respondent?

FINDINGS OF FACT

Claimant works for Respondent as a underwing mechanic. In Summer 2020, Claimant was laid off by Respondent. The day after Claimant was laid off, Respondent

contacted her and offered her a job assembling ventilators at Respondent's Palm Springs, California plant for two months. Claimant accepted the new job assignment.

Claimant, along with twelve other coworkers, temporarily relocated to Palm Springs. Respondent provided air transportation to and from Palm Springs. Respondent provided Claimant a hotel room as a temporary residence, which Claimant estimated was a ten-minute drive to and from work. Respondent provided a rental van Claimant shared with four other coworkers. Claimant worked the second shift, which ran from 3:00 or 3:30 p.m. to 11:55 p.m., and Claimant testified overtime work was available. It does not appear Claimant was paid by Respondent when she was not working at the plant. Claimant's hotel room did not have a kitchen, and the hotel did not have a restaurant. Claimant drove off site for food. Claimant normally drove to and from work with her coworkers in the shared rental van. Apart from going to work and getting food, Claimant did not travel while she was in California. Claimant acknowledged travel was not part of her normal job.

On September 1, 2020, Claimant drove the rental van to a convenience store to get a sandwich for lunch. Claimant estimated the convenience store was a one-minute drive from the hotel. No coworkers were traveling with Claimant, and the trip occurred before Claimant's shift started. Respondent did not instruct Claimant to drive to the convenience store. Claimant testified she intended to drive back to the hotel to pick up her coworkers and drive to work. Between 1:00 and 1:30 p.m., Claimant was driving back to the hotel, attempted to cross traffic and was struck by another vehicle. Claimant backed the van into the convenience store parking lot, and the police made an accident report. Some of Claimant's coworkers transported her to Eisenhower Hospital for emergency treatment.

At the hospital, Claimant underwent CT scans and rested for three hours. Claimant was released from the hospital on September 1. Claimant did not receive further medical care in California. Claimant was off work for one day, and returned to work. At her request, Claimant returned to Wichita on September 11.

Upon her return to Wichita, Claimant received additional medical treatment from Respondent's medical department, and was referred to Dr. Estivo. Dr. Estivo provided conservative treatment for a cervical spine sprain, left shoulder strain, and left lateral ankle sprain. Dr. Estivo also noted Claimant had an unrelated lumbar disc pathology and was undergoing surgery by Dr. Ericksen. On March 8, 2021, Dr. Estivo declared Claimant at maximum medical improvement for the left ankle sprain, left shoulder strain, and cervical spine. Dr. Estivo recommended Claimant see an orthopedic specialist for a gluteal tear seen on an MRI, and if surgery was not recommended Claimant would be at maximum medical improvement.

Claimant was seen by Dr. Murati on June 1, 2021. Dr. Murati noted Claimant underwent a laminectomy at L3-4 and L4-5, by Dr. Erickson, with anatomical changes noted based on a comparison of MRIs of the lumbar spine performed on August 5, 2020,

and October 1, 2020. Dr. Murati also diagnosed tinnitus, bilateral carpal tunnel syndrome aggravated by the motor vehicle accident, right lateral epicondylitis, bilateral rotator cuff tears versus sprains, myofascial pain of the left shoulder girdle, cervical radiculopathy, left trochanteric bursitis with a near-complete tear of the left gluteus medius, left iliotibial band sprain, left patellofemoral syndrome, left talofibular ligament sprain, metatarsalgia of the left 1-5, metatarsal heads, and bilateral sacroiliac joint dysfunction. Dr. Murati thought all of those conditions were related to the motor vehicle accident of September 1, 2020, and additional treatment was recommended. Dr. Murati imposed light-duty restrictions.

On May 4, 2021, Dr. Adrian evaluated Claimant's left hip. Dr. Adrian diagnosed a tear of the gluteus minimus, and administered an injection into the hip. On August 22, 2021, Claimant told Dr. Adrian the injection did not help with her symptoms, and surgery was discussed. Dr. Adrian imposed work restrictions.

Claimant is performing her normal job for Respondent in Wichita. Claimant wants additional medical treatment, including surgery by Dr. Adrian. A preliminary hearing on Claimant's requests for additional medical treatment, past medical bills, temporary total disability compensation, and unauthorized medical was held on October 13, 2021, and Respondent confirmed it disputed the motor vehicle accident arose out of and in the course of Claimant's employment. On February 10, 2022, ALJ Klein issued the preliminary Order denying compensability because the going and coming rule applied. ALJ Klein found Claimant was performing a personal errand by traveling for lunch, had not started her drive to work, and as not performing work activities. Because ALJ Klein did not find the matter compensable, Claimant's requests for medical compensation and temporary total disability compensation were not addressed. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[1] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[2] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[3]

It is undisputed the motor vehicle accident of September 1, 2020, occurred and resulted in physical injuries to Claimant. At issue is whether the accident arose out of

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[1] *See* K.S.A. 44-501b(a).

[2] *See id*.

[3] *See* K.S.A. 44-501b(c).

and in the course of Claimant's employment with Respondent. Claimant argues her travel to California made all travel inherent to her employment, the going-and-coming rule did not apply, and requiring Claimant to travel for food created a special hazard rendering her travel compensable. Respondent argues Claimant was on a purely personal errand two hours before her shift began, or compensability was barred under the going and coming rule.

1. The motor vehicle accident is not compensable because it occurred during a personal, unpaid, errand outside working hours off Respondent's premises with no benefit to Respondent.

Generally, to be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.[4] The accidental injury "arises out of" employment only if there is a causal connection between work and the accident, and if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.[5] An accident is "in the course of" employment if the accident occurred within the period of employment, at a place where the employee may reasonably be, while fulfilling work duties, or engaged in performing something incidental to work duties.[6]

In *Atkins v. Webcon*, the injured worker was a laborer assigned an out-of-town roofing job. The worker was paid hourly and received a bonus if the work was completed on time. The employer provided transportation to and from job sites, provided a hotel room for the worker, and paid the worker a per diem. At the hotel, the employer did not supervise employees, and allowed employees to do as they wanted. Employees, however, were not allowed to take a company vehicle to a bar.[7]

On the evening preceding the accident, Atkins and a coworker walked across the street from the hotel to a bar, which was common practice. At approximately 2:20 a.m., Atkins was struck by a drunk driver as he was crossing the street to his hotel. Compensation was denied.[8] Atkins sought compensation, claiming travel was inherent in his employment and the accident arose out of and in the course of his employment. The Supreme Court noted intrinsic travel made an injury suffered while traveling for

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[4] *See* K.S.A. 44-508(d).

[5] *See* K.S.A. 44-508(f)(2)(B).

[6] *See Atkins v. Webcon*, 308 Kan. 92, 98, 419 P.3d 1 (2018).

[7] *See id. at* 93.

[8] *See id*. at 94.

work compensable because the employee had already assumed the duties of employment by traveling.[9] In the case at hand, however, Atkins was not fulfilling work duties at a bar, and was not on his way to work from the hotel at 2:20 a.m. Instead, Atkins was hurt while walking from a bar to his hotel, which was too far removed from work duties to be incidental to his work duties.[10] Compensation was denied.

This case is similar. Here, Claimant was not required to travel extensively on a daily basis to perform her work assembling ventilators in Respondent's factory. Instead, Respondent provided Claimant a temporary residence and access to a rental van for personal errands and to drive to and from work. Before Claimant's actual work shift began, she drove on public streets to a convenience store open to the general public to eat lunch. Claimant was not paid by Respondent for this endeavor. Approximately two hours before her shift would begin, Claimant was injured when she was driving on the public road for the one-minute drive back to her hotel. The undersigned agrees with the ALJ Claimant was not on her way to pick up her coworkers and drive to work. If Claimant were doing so, she and her coworkers would have reached the work place approximately two hours before their shift began. It is more reasonable to conclude Claimant's intended trip ended at the hotel. As in *Atkins*, Claimant's trip from the convenience store did not occur during working hours, at a place Claimant would reasonably be in furtherance of employment duties, and Claimant was not on her way to work. Claimant's trip was too far removed from her work duties to be incidental to work. Claimant did not prove the accident arose out of and in the course of her employment because it was a purely personal errand unconnected to her employment.

2. In the alternative, the motor vehicle accident is not compensable because it is barred under the going and coming rule.

Even if Claimant was traveling to work, via the hotel, when the accident occurred, compensation would be barred under the going and coming rule. The words "arising out of and in the course of employment" shall not be construed to include injuries occurring while the employee is on the way to assume the duties of employment, but this does not apply when the employee is on premises owned or under the exclusive control of the employer, or where the employee is on the only available route that involves a special risk or hazard not faced by the general public except when dealing with the employer.[11] Whether the going and coming rule applies is reviewed on a case-by-case

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[9] *See id*. at 99.

[10] *See id*. at 101-102.

[11] *See* K.S.A. 44-508(f)(3)(B).

basis.[12] Where travel is inherent to performing the job and becomes a condition of employment benefitting the employer, it is considered to arise out of and in the course of employment as a unitary whole.[13]

In *Butera v. Fluor Daniel Constr. Corp.*, the injured worker was an ironworker required by the employer to temporarily relocate to remote construction sites. Butera was initially paid mileage to travel to and from his home while setting up a temporary residence, and was paid a daily stipend after the temporary residence was established.[14] Butera was assigned to work at Wolf Creek for six months, and set up a temporary residence in Garnett, Kansas, which was a thirty-minute drive to and from work. While driving to work, Butera collided with a guard post at Wolf Creek.[15]

The Court of Appeals stated injuries incurred while going to or coming from work can be compensable where the travel is intrinsic to the profession or required to complete some special work-related errand or special-purpose trip.[16] To be compensable, the travel must create a risk in some way peculiar to the work in which the employee is engaged and not from a risk the employee would be equally exposed outside of work.[17] Examples cited by the Court as having intrinsic travel were traveling salesmen or oil drillers required to drive to assemble work crews.[18] On the other hand, while fixed-situs employees travel to and from the work site to do the employer's business, their travel is excised from the scope of compensability.[19]

In *Butera*, the Court found the worker was not paid mileage once his temporary residence was established. After the temporary residence was established, Butera was no longer required to drive extensively. Butera's off-hours activities were not managed and the worker was not expected to work off hours. The employer did not experience a

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[12] *See Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 167, 274 P.3d 650 (2013).

[13] *See Blair v. Shaw*, 171 Kan. 524, 589-29, 233 P.2d 731 (1951); *see also Williams v. Petromark Drilling, LLC*, 299 Kan. 792, 795, 326 P.3d 1057 (2014).

[14] *See Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278 (2001), *rev. denied* 271 Kan. 1035 (2001).

[15] *See id.* at 543.

[16] *See id.* at 546.

[17] *See id.*

[18] *See id.*

[19] *See id.*

special benefit from Butera having a temporary residence closer to work. The Court concluded Butera faced no greater risk in his drive to and from work than other commuters when the accident occurred, and compensation was barred under the going and coming rule.[20]

This matter is similar to *Butera*. Claimant was provided a temporary residence by Respondent, and was not required to travel extensively. Claimant was provided a company van to drive to and from work, and to perform personal errands, but travel was not a specific element of her work assembling ventilators. Claimant was not directed by Respondent to drive to the convenience store or to drive back to the hotel on her way to work. Rather, if Claimant was driving to work from the convenience store, via the hotel, it was her daily commute on a public road, where Claimant faced the same hazards of suffering an accidental injury from a motor vehicle accident as members of the general public. Travel was not inherent in Claimant's work, Claimant was not engaged in a special errand benefitting Respondent, and Claimant was not facing a special hazard or risk of injury on faced by the general public except when dealing with Respondent. The accident did not occur on Respondent's premises or in an area under Respondent's exclusive control. Compensability is barred under the going and coming rule.

DECISION

WHEREFORE it is the finding, decision and order of the undersigned Board Member the Order of ALJ Klein, dated February 10, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2022.

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WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR
Joni J. Franklin
Vincent A. Burnett
Hon. Thomas Klein

[20] *See id*. at 547.