BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RICHARD BARNUM	)	
Claimant	)	
V.	)	
	)	AP-00-0475-415
PERDUE FARMS, INC	)	CS-00-0473-591
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the May 9, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven Roth.

APPEARANCES

Kala Spigarelli appeared for Claimant. Jeff S. Bloskey appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Preliminary Hearing, held April 14, 2023;
2. Continuation of Preliminary Hearing, deposition of Richard Barnum, taken April 14, 2023;
3. Preliminary Hearing Testimony of Nazario Garcia Hernandez, taken April 14, 2023.

ISSUE

Did Claimant sustain personal injury by accident arising out of and in the course of his employment with Respondent on February 3, 2023, including was Claimant's accident the prevailing factor causing his injury and medical condition?

FINDINGS OF FACT

Respondent is a commercial hog farming and breeding operation. Claimant worked as a farrowing tech, which is a physically demanding job. In general, Claimant cares for the hogs, which includes changing and cleaning their pens. On February 3, 2023, Claimant was lifting fencing panels to build a pen. He testified he felt pain in his left shoulder and neck. Claimant left work at approximately 9:30 a.m. for previously arranged time off to pick up a heater in Joplin. He did not tell Cesar Ramirez, the employee in charge, or Nazario Hernandez, his direct supervisor, he injured himself prior to leaving. Mr. Hernandez was not working on this day.

While traveling to Joplin, Claimant testified he was in excruciating pain causing him to lie down in the back seat. Upon arriving in Joplin, Claimant sought chiropractic care at Able Body Chiropractic. At 2:04 p.m., Claimant's wife posted on Facebook, "With my Son and Husband picking up a heater and Richard getting worked on he slept wrong."[1] Records from Able Body are not in the record.

Claimant's pain continued into the evening, causing him to seek medical treatment at Allen County Hospital ER. Claimant testified he told the front desk he hurt himself at work. Claimant had x-rays taken, was given muscle relaxers and released. Records from Allen County are not in the record.

Beginning at 11:45 p.m., on February 3, Claimant exchanged text messages with Mr. Hernandez. Claimant did not describe a work-related injury during the exchange. The texts discussed Claimant's pain, the need to acquire doctor notes verifying his absence from work and his hope to return to work February 6. Mr. Hernandez asked, "What happened? Are you ok?"[2] Claimant did not answer these questions. He did not tell Mr. Hernandez he was injured at work.

Claimant was scheduled to work on February 4, 2023, but did not due to his pain. Claimant sought treatment for his left shoulder at the Community Health Center of Southeast Kansas in Iola. The first page of the Community Health medical records are in the record. They note Claimant's shoulder pain started the day before, but also state he denied an injury and thought he slept on it wrong. Claimant was treated and released. He and Mr. Hernandez did not exchange text messages on February 4. Claimant testified he called Respondent's HR department and left a message, but did not receive a return call. Claimant was unable to produce verification of this call.

---

[1] Continuation P.H. Trans. (April 14, 2023), Resp. Ex. A at 8.

[2] *Id* at 10.

Claimant texted Mr. Hernandez on February 5, 2023, advising he would not be able to work on Monday. He was still in pain, could not move his upper body and had plans to be evaluated at Weilert Chiropractic, his normal chiropractor, the first thing Monday morning, February 6. Claimant did not tell Mr. Hernandez he was injured at work. Records from Weilert Chiropractic are not in the record.

On Monday, February 6, at 7:39 a.m., Claimant texted Mr. Hernandez advising his injury occurred at work on Friday, February 3. Mr. Hernandez asked Claimant what had occurred and expressed concern regarding whether the claim might be compromised since it was not reported on the day of the accident. The text exchange follows:

> By the way I hurt, myself at work on Friday you were not their probably need to fill out a incident report I'm still in severely pain
>
> Sorry but you only have 24 hr report it
> You should told me on Friday
> What happened?
> I mean I can report it but it might not qualify for work comp
>
> ...
>
> Hey so did you find out anything for me yet
>
> Why do you mean?
> What you mean?
>
> I will not be in today and I am still needing a the paperwork for workman's comp I text you and told you I was hurt I already been to the hospital and the doctor now I'm going back to the hospital today I need the paperwork for workman's comp ASAP
>
> This doesn't qualify for work comp, if you have questions please reach out HR.
> Sorry
>
> I am still in a lot of pain[3]

No text messages exchanged on February 6 and 7 provide an answer to Mr. Hernandez's question regarding what happened on February 3 and none describe Claimant's injury occurring as a result of lifting hog panels. Mr. Hernandez informed Claimant his claim did not qualify for work comp and if he had questions, he needed to contact HR. Claimant initially testified he notified Mr. Hernandez on February 3 he injured himself at work. Later, he acknowledged he did not advise Mr. Hernandez he was injured at work until February 6.

---

[3] Text Exchange, Resp. Ex. C at 2.

Claimant sought treatment at Neosho Memorial Regional Medical Center on February 7, 2023. The doctor's note states Claimant presented with a right shoulder injury; onset three days ago; symptoms were worsening; and, the injury occurred from lifting hog panels at work. Claimant was provided conservative care and was released with follow-up appointments recommended.

On March 10, 2023, Claimant was evaluated by Steven T. Ericksen, M.D., an orthopedic surgeon. Based on his examination and review of the February 23, 2023 MRI, he diagnosed multilevel degenerative changes with small disc bulges at C3-C4 and C5-C6 and a large left disc protrusion/herniation at C6-C7 with severe impingement on the left C7 nerve root. He referred Claimant for a cervical epidural injection, recommended he continue with physical therapy and return in four weeks.

Claimant continues to have pain in his neck, shoulder and numbness in his left fingers. He is receiving treatment for his neck and shoulder from Dr. Erickson and Brett Olson, PA. None of the medical care Claimant received or is currently receiving, was authorized by Respondent.

Claimant delivered work restrictions to Respondent's local place of business as instructed. His attempts to communicate with Respondent's out-of-state HR department were unsuccessful. Claimant testified HR finally called him approximately 2-3 weeks prior to the preliminary hearing to advise they were denying his claim. Mr. Hernandez advised Claimant work was not available to him on February 13, 2023. He has not returned to work for Respondent or anyone else since leaving work on February 3, 2023.

The ALJ denied Claimant's request for medical treatment and TTD because he failed to prove his injury arose out of and in the course of his employment. Specifically, Claimant did not prove his injury occurred while moving fencing panels at work. The ALJ stated:

> This is a difficult case. Claimant's testimony was received by the Court at the preliminary hearing. In later deposition, it was very clear how this injury came about while moving hog panels. Claimant also consistently relayed the same explanation to a number of his doctors, as reflected in their medical notes February 7 onward.
>
> Yet, therein lies the difficulty of this case. Up until that point, in prior actions, reported statements of the Claimant, and comments made by his wife during the four days between February 3 and 7, all either directly contradicted a work accident's causation, or cast doubt on the idea that the onset of his neck and shoulder pain came from lifting hog panels. Specifically, the problematic actions creating implied doubt that this is a work injury are as follows:

• Leaving work while allegedly injured, but without notifying anyone or even leaving a note or some other communication indicating he was leaving due to an accident.

• When notice of the injury was given to Mr. Hernandez by text message, it was hours later, and no mention was made that the injury was work related. Neither was there any request for Respondent to provide or pay for medical care, even though Claimant sought care within hours of that text.

• Claimant kept in contact with Hernandez by text over a span of 3 days, but still made no mention of a work related cause for his injuries.

• The above said, from time to time, injured workers will mistakenly fail to be as specific as they should when they first report work injuries. They may unwittingly believe or assume their words are sufficient to report a connection between work and their injuries when in fact, they are not, which leaves employers attempting to be mind readers. With that acknowledged, when Claimant finally mentioned the work accident on February 6, the text started with, "by the way I hurt myself at work on Friday ..." The use of the phrase "by the way" suggests an awareness on the part of Claimant that his prior messages had not put Respondent on notice that there was work connection to his current condition. If so, this suggests Claimant's prior omission was not made mistakenly or unwittingly.

In all candor, none of the above concerns considered individually would be of great concern. It is only collectively that they cast a shadow of doubt on whether Claimant's onset of pain occurred at work or was due to work, versus whether his shoulder and neck condition originated elsewhere. Could it be from some other cause other than work, and lifting hog panels only aggravated a prior injury?

The shadow of doubt grows much darker when you consider statements made by Claimant's wife on Facebook where she wrote that her husband's injured shoulder and neck are the result of Clamant having "slept wrong." It seems implausible that Claimant could have ridden in the back seat of a car all the way to Joplin, suffering from significant pain, and failed to clearly communicate to his wife about any incident with hog panels. Even so, it's not impossible that Claimant's wife was confused or just wrong about how her husband's injury came about. But then, why did Claimant answer at the Allen County Hospital just one day later, "denies injuries, thinks he slept on it wrong," when apparently asked, "What brings you to the ER?"

It seems very implausible that someone on the Allen County Hospital staff would not only misunderstand and incorrectly record what Claimant was saying, but would also make the exact same mistake as Claimant's wife did the day before. As a judge, it is never easy (and fortunately rare) to conclude that testimony received in a hearing contradicts the facts, defies human nature, or both. But with regrets to Claimant, the evidence as currently presented gives that appearance.

> With that said, emphasis should be placed on the phrase "evidence as currently presented." No one doubts that Claimant is injured. The doubts exist only as to how and when these injuries came about. It is entirely possible that records from Able Body Chiropractic or Allen County Hospital or from other credible sources might cast a new light dispelling the shadows of doubt that put to question the compensability of this claim. If so, such would be received by this Court and viewed objectively, with equality shown to all parties. Until then, this claim is denied.[4]

Claimant argues he met his burden of proving his injury arose out of and in the course of his employment; the prevailing factor for his injury and medical condition was lifting fencing panels on February 3, 2023; and the May 9, 2023 Order should be reversed and medical and TTD benefits should be authorized. Respondent maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[5] The provisions of the Act shall be applied impartially to all parties.[6] The burden of proof shall be on the employee to establish the right to an award of compensation, based on the entire record under a "more probably true than not" standard and to prove the various conditions on which the right to compensation depends.[7]

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.[8] The accident must be the prevailing factor in causing the injury, and the prevailing factor is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[9]

Claimant failed to prove his injuries arose out of and in the course of his employment and the prevailing factor causing his injuries and need

---

[4] ALJ Order (April 12, 2023) at 2.

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

[6] *See id*.

[7] *See* K.S.A. 44-501b(c) and K.S.A. 44-508(h).

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

[9] *See* K.S.A. 44-508(d),(g).

for medical treatment is the work accident occurring with Respondent on February 3, 2023.

The ALJ denied Claimant's request for medical treatment and TTD because of the discrepancies in the record regarding how Claimant injured himself.

> In all candor, none of the above concerns considered individually would be of great concern. It is only collectively that they cast a shadow of doubt on whether Claimant's onset of pain occurred at work or was due to work, versus whether his shoulder and neck condition originated elsewhere.[10]

This Board Member shares these concerns and agrees with the ALJ's analysis and conclusions.

Claimant initially testified he reported his injury to Mr. Hernandez on February 3. Later, he testified he did not tell Mr. Hernandez he hurt himself at work until February 6. In the interim, Claimant's wife posted on Facebook he was receiving chiropractic treatment because he slept wrong. Claimant reported to Community Health his shoulder pain started the day before (February 3), but denied a specific injury and he thought he slept on it wrong. Claimant did not provide an explanation regarding the reports he slept wrong posted by his wife and his reporting the same thing to Community Health.

Claimant exchanged text messages throughout the weekend with Mr. Hernandez, who inquired more than once, why Claimant was in such pain causing him to seek medical treatment and making him unavailable to work. Claimant did not respond to any of these inquiries. Claimant did not report he hurt himself at work until Monday morning and still did not provide the details regarding lifting hog fence panels. Claimant did not provide an explanation why he delayed reporting his work injury until Monday morning.

Having reviewed the record, this Board Member concludes Claimant failed to meet his burden of proving he suffered a work-related injury to his left shoulder and neck on February 3, 2023. Specifically, the work injury did not arise out and in the course of employment and is not the prevailing factor for his injuries and medical condition. The ALJ's denial of Claimant's request for workers compensation benefits for his injuries is affirmed. Claimant's request for workers compensation benefits for his injuries are denied.

DECISION

[10] ALJ Order (April 12, 2023) at 6.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member, the Order of Administrative Law Judge Steven Roth, dated May 9, 2023, is affirmed.

IT IS SO ORDERED.

Dated this day of July 2023.

_____
CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Kala Spigarelli, Attorney for Claimant
Jeff Bloskey, Attorney for Respondent and its Insurance Carrier
Hon. Steven Roth, Administrative Law Judge