

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TRAVIS REVES)	
Claimant)	
V.)	
)	
IMAGE ENVIRONMENTAL INC)	CS-00-0441-943
Respondent)	AP-00-0454-854
AND)	
)	
TRAVELERS PROPERTY CASUALTY)	
CO. OF AMERICA)	
Insurance Carrier)	

ORDER

The claimant, through Brad Avery, requested review of Administrative Law Judge (ALJ) Kenneth Hursh's preliminary hearing Order dated December 10, 2020. Ronald Prichard appeared for the respondent and its insurance carrier (respondent).

RECORD

The record on appeal is the same as that considered by the judge.

ISSUE

The claimant contends he sustained a work-related head injury on January 24, 2019. The ALJ concluded the claimant did not sustain a head injury. The claimant phrases the issue as whether the “ALJ exceeded his authority by his failure to award the medical treatment recommended by Dr. Henry.”¹ However, the claimant generally argues he sustained a head injury and the ALJ incorrectly reached the opposite conclusion. The respondent denies the claimant sustained a work-related head injury.

The Board does not view the issue as whether the ALJ should have ordered medical treatment, which is not appealable from a preliminary hearing order.² Rather, the issue is did the claimant sustain a head injury from an accident arising out of and in the course of his employment on January 24, 2019?

¹ Claimant's Brief at 6.

² See *Beard v. Wolf Creek Nuclear Operating Corp.*, No. CS-00-0017-874, 2019 WL 4253361, at *12 (Kan. WCAB Aug. 27, 2019).

FINDINGS OF FACT

The claimant began working for the respondent in March 2018, as a welder fabricator. The respondent performed maintenance work for Unilever (now Upfield Foods). On January 24, 2019, the claimant was walking behind a coworker in a parking lot around 6:50 a.m. It was dark and some parking lot lights were not working. The claimant slipped on black ice. He testified he fell backwards on his buttocks and elbows, tore his shoulder labrum and struck the back of his head. The claimant testified a coworker named Justin Percy “kind of witnessed the fall”³ about 50 feet away from the claimant, but kept walking to the building.

At the time of his accident, the claimant was on the phone with his supervisor, Kenny Sloan. The claimant testified his phone went flying during his slip and fall, and he remained on the ground for two or three minutes before finding his phone. According to the claimant, Mr. Sloan was still connected to the call. The claimant testified:

A. Yeah. [Mr. Sloan] may have heard me cry out. He may have heard the phone hit the ground. When I found it, he’s like, What happened, you know, so I said, Man, I just fell on the ice, just hit hard. Very dizzy and disoriented at that time and like I say, temporary blindness. It took two to three minutes before I could even see to kind of crawl around on my hands and knees to look for my phone.

Q. But he didn’t hang up during that time period?

A. No. I almost requested an ambulance, but kind of just stayed on the ground for a little while trying to recover.⁴

Mr. Sloan testified he was talking to the claimant while driving to work at the time of the accident. He was not aware the claimant had fallen until the claimant mentioned it. When Mr. Sloan asked if the claimant was hurt, the claimant said he thought he was okay. Mr. Sloan denied hearing the claimant’s phone drop and did not recall a delay during their conversation, particularly a three-to-five minute delay. According to Mr. Sloan, the conversation ended shortly after the claimant fell. Thereafter, the claimant would have walked 300-400 yards to the respondent’s building. Mr. Sloan recalled the claimant saying he fell on his side or his arm, but the claimant never told him he hit his head in the accident.

³ Claimant’s Depo. (Nov. 7, 2019) at 29.

⁴ *Id.* at 27-28.

Jenny Sloan, Mr. Sloan's wife, is the respondent's office manager. Ms. Sloan was in the vehicle while her husband was talking to the claimant. She testified the conversation was being played over the vehicle's Bluetooth speaker and she heard both sides of the conversation. She denied there was any delay in the conversation between her husband and the claimant. She also did not recall a three-to-five minute gap in the conversation. Ms. Sloan denied the claimant said he dropped his phone. Ms. Sloan denied hearing anything indicating the claimant fell, apart from the claimant saying he fell. She testified her husband asked the claimant if he was okay and the claimant responded he thought he was okay. Ms. Sloan testified the claimant did not say he hit his head in the conversation. Further, she denied the claimant ever told her he hit his head when he fell.

The claimant testified he hung up the phone and remained on the ground for about five minutes after the fall before getting up and getting to the work site, where he encountered coworkers, including Mr. Percy, who stated the claimant took a "pretty good spill" and inquired if the claimant was all right or needed help. This offer was declined by the claimant, who testified he "was in a lot of initial pain and blind."⁵ The claimant testified he did not think he told Mr. Percy he was blind. No additional discussions of significance occurred thereafter until after a couple of hours of sitting in a meeting with Upfield Food's plant manager. The claimant testified he was "disoriented, confused, [and] in a lot of pain[,]"⁶ and he phoned Mr. Sloan to take him to a hospital. Mr. Sloan took the claimant to Olathe Medical Center. Mr. Sloan denied talking to any physicians at Olathe Medical Center.

The claimant testified he told hospital personnel what happened:

Q. I'm trying to go chronologically. So the day that you went to the ER the day of your accident, January 24th, you discussed with them what had happened. You told them what had happened?

A. Yes.⁷

The Olathe Medical Center records state: "Slip and fall on ice this a.m. Fell backwards onto tailbone, and then onto both elbows. Pain in tailbone, bilat elbows and R shoulder. Denies both head injury and LOC."⁸ Further, "Patient denies any head injury, no loss of consciousness."⁹ Review of neurologic symptoms stated, "No headache . . ."¹⁰

⁵ *Id.* at 29.

⁶ *Id.* at 30.

⁷ *Id.* at 32.

⁸ P.H. Trans. (July 8, 2020), Olathe Medical Center Records at 7.

⁹ *Id.*

¹⁰ *Id.*

The Olathe Medical Center neurological examination stated: "Alert and oriented to person, place, time, and situation. No focal neurological deficit observed, CN II-XII intact, normal sensory observed, normal motor observed, normal speech observed, normal coordination observed."¹¹ The claimant's Glasgow Coma Score was 15. The claimant rated his pain as a nine on a 0-10 scale, with 10 being the worst pain. Left elbow and right shoulder x-rays were read as normal. Cervical spine x-rays were interpreted as showing no acute abnormality, mild spondylosis and straightening of normal cervical lordosis, possibly related to spasm or strain. The claimant was diagnosed with a right shoulder contusion, right shoulder pain, left elbow contusion and cervical spine sprain. He was prescribed pain medication and muscle relaxer and referred for an orthopedic evaluation. The claimant was released in stable condition.

The claimant testified he told medical personnel he hit his head and someone thought he had a serious concussion. The claimant initially testified as follows:

Q. . . . So did you tell them you did not hit your head?

A. No.

. . .

Q. . . . Patient denies any head injury, no loss of consciousness?

A. No. How did they screw this up so bad?

. . .

Q. I'm more [focused] on it indicates that you told them you did not hit your head?

. . .

A. Pretty sure I did tell them.

. . .

Q. . . . Did you tell them that you hit your head when you fell, or did you tell them that you did not hit your head?

A. I believe I did, and I told them about the temporary blindness that incurred after falling.¹²

¹¹ *Id.*, Olathe Medical Center Records at 9.

¹² Claimant's Depo. (Nov. 7, 2019) at 62-64.

The claimant returned to work a few days later. He testified he experienced frequent headaches and dizzy spells, and about a week after the fall, ringing in his left ear.

On February 2, 2019, the claimant began treating with James Filberth, D.C. The history listed by Dr. Filberth is the claimant suddenly fell; he tried to brace his fall with his outstretched right arm, which hit the ground first; he landed on his buttocks and back; and his left elbow struck the ground. Dr. Filberth's initial record does not state the claimant struck his head. However, the claimant complained of occasional throbbing bilateral headache, which he rated at two on the 0-10 pain scale. Dr. Filberth diagnosed the claimant with lumbago with sciatica, cervicalgia; thoracic pain; left rotator cuff sprain; elbow contusion; and concussion without loss of consciousness.

Dr. Filberth treated the claimant eight more times in February, as well as March 1, 2019. These records do not mention headaches or a concussion. On March 5, Dr. Filberth noted the claimant had occasional headache pain, rated at a 10. The claimant had the same complaint on March 8. Dr. Filberth indicated a CT scan of the head should be done as soon as possible. Dr. Filberth again diagnosed concussion without loss of consciousness, a diagnosis listed in the chiropractic records for five more visits in March.

The claimant testified he had a dizzy spell at work on March 15, 2019, and a coworker held him up before he could fall to the ground.¹³ In subsequent testimony, the claimant indicated he fell to his knees.¹⁴ The claimant assumed this event was due to having sustained a concussion in the accident. A coworker took him to the Olathe Medical Center emergency room. The claimant provided the following history:

Pt presents to ER with near syncopal episode. He reportedly was seen here after fall six weeks ago. He has had posterior headaches and neck pains since the fall. He has a CT head and MRI shoulder scheduled for next week for further evaluation of his injury after this initial fall. Today he was at work. He felt very light headed, dizzy, and states his "knees gave out". Pt did not fall today. He was assisted to ground. Pt was disoriented and confused per coworker. On arrival he did not know where he was. Now on my assessment-pt A&Ox4. He has no concerns. He is having posterior head/neck pain, tingling in R hand which has been there since his fall in January.¹⁵

¹³ See *id.* at 34-35.

¹⁴ Claimant's Depo. (July 13, 2020) at 12, 15.

¹⁵ P.H. Trans. (July 8, 2020), Olathe Medical Center Records at 25.

Due to the claimant's complaints of a fall, trauma, headaches, dizziness, neck pain and confusion, a CT scan of his head and neck was performed. The CT scan was interpreted by Donald J. Stallard, M.D., as showing no intracranial mass, hemorrhage or abnormal fluid. The doctor concluded the CT scan showed no acute abnormality in the brain and degenerative cervical spine changes without acute abnormality. However, Shawn Stanley, M.D., indicated the CT scan showed a small internal carotid aneurysm, which was the likely cause of the claimant's ongoing headaches and periodic dizziness. Dr. Stanley recorded the claimant having fallen in January, sustaining a mild head injury and "very well could have some ongoing post concussive syndrome."¹⁶ Dr. Stanley diagnosed the claimant as having headaches, near syncope, post-concussive syndrome and a small brain aneurysm. The doctor stated, "You likely have concussion from your recent fall."¹⁷ The claimant was prescribed anti-nausea medicine, told to rest, and referred for a neurology evaluation.

The claimant testified Dr. Stanley told him the aneurysm was not very concerning, the claimant may have had the aneurysm his entire life and the doctor did not know if the aneurysm was related to the fall.

Later on the day of March 15, 2019, the claimant saw Dr. Filberth. There is no mention in the record of the claimant's fall earlier that day, but the claimant testified he told Dr. Filberth about such fall. The claimant never returned to work after March 15, 2019.

From March 19, 2019, forward, Dr. Filberth's records state the claimant reported his headaches were a two on the pain scale. On April 9, the claimant told Dr. Filberth he nearly passed out while walking and he scraped his right leg. The claimant reported his headaches were accompanied with dizziness, both rated as a six on the severity scale.

For eight chiropractic visits from April 17 through May 9, 2019, the claimant reported dizziness with headaches to Dr. Filberth. The dizziness was rated at a zero on the severity scale. Headaches were rated between one and eight on the scale. On May 9, 2019, Dr. Filberth noted the claimant had daily recurring suboccipital headaches which were not helped with medication. Among his diagnoses, Dr. Filberth recorded concussion without loss of consciousness and postconcussional syndrome.

In a letter dated May 28, 2019, Dr. Filberth stated:

¹⁶ *Id.*, Olathe Medical Center Records at 23.

¹⁷ *Id.* at 24, 35.

At present, he continues to suffer with disabling right shoulder pain and weakness as well as retractable headaches, which are directly related to the injuries he suffered on this January 24, 2019 work related injury. It is my opinion that he is likely to retain some degree of a partial permanent physical impairment as a result, and will require ongoing palliative care for several months. If he fails to improve adequately, I will again recommend orthopedic surgical consultation. Also, I have recommended Neurology consultation regarding his ongoing headaches for the head/brain injury.¹⁸

On July 9, 2019, the claimant saw C. Lan Fotopoulos, M.D., for a court-ordered independent medical examination (IME). The claimant reported slipping and falling on ice in January 2019, landing mainly on his right side, and remaining on the ground for three to five minutes. The claimant reported feeling foggy and dizzy due to the fall. Among other things, the claimant complained to Dr. Fotopoulos of having difficulty with concentration, poor balance, headaches, disturbances in coordination, numbness, falling down, tingling, brief paralysis, visual disturbances, weakness, a sensation of the room spinning, tremors, fainting and memory loss. Dr. Fotopoulos recommended the claimant undergo a head CT and stated, "I believe Travis has a post-concussive syndrome which requires neuropsychologic evaluation treatment."¹⁹

At the respondent's request, the claimant saw Patrick Caffrey, Ph.D., on August 26 and 27, 2019, for an independent neuropsychological evaluation. The claimant reported frequent headaches, occasional dizziness, occasional blurry vision, loss of balance with some falls, tinnitus, sleep problems, memory loss, poor ability to sustain attention and concentration, difficulty reading, word finding problems and emotional symptoms.

The claimant told Dr. Caffrey he fell on the date of the accident and remained on the ground for about five minutes. The claimant reported total loss of vision, which Dr. Caffrey noted was an unusual symptom. Dr. Caffrey stated the claimant could not confirm with certainty that he struck his head, but the claimant was rather sure he told the doctor he did hit his head.

Dr. Caffrey administered 21 neuropsychological tests. Dr. Caffrey believed the claimant was in the average level of premorbid functioning and the testing showed the claimant above average for verbal and visual memory, and average for attention/working memory, processing speed, verbal reasoning, visual reasoning and executive function. Dr. Caffrey diagnosed the claimant with adjustment disorder with anxiety; mild neurocognitive disorder due to traumatic brain injury (TBI), resolved; chronic pain; frequent headaches and right shoulder injury. On review of the initial Olathe Medical Center report from the date

¹⁸ *Id.*, Cl. Ex. 7.

¹⁹ *Id.*, Cl. Ex. 4 at 4.

of injury, Dr. Caffrey stated, “the severity of the injury suggests a mild traumatic brain injury, if any.”²⁰ Further, Dr. Caffrey noted imaging studies of the claimant’s brain showed no acute intracranial process or hemorrhage and the claimant had a normal Glasgow Coma Score of 15. According to Dr. Caffrey, his testing confirmed the claimant had normal neurocognitive function and he needed no cognitive rehabilitation.

Dr. Caffrey placed the claimant at maximum medical improvement (MMI) and opined the claimant could return to work without restrictions, at least from a neuropsychological standpoint. Dr. Caffrey also stated, “To the extent that [claimant] may have residual physical limitations due to complaints of frequent headaches, occasional dizziness, occasional blurry vision, occasional loss of balance and chronic right shoulder pain, this examiner would defer to a medical provider.”²¹

On September 9, 2019, the claimant began treating with Lowry Jones, M.D., for his right shoulder. The claimant told Dr. Jones he fell in January 2019, and landed on his right shoulder, right elbow and neck. The claimant reported a concussion. An October 15, 2019 record indicated the claimant was concerned and angry regarding his concussion symptoms, which included daily headaches and dizziness.

Dr. Jones operated on the claimant’s shoulder on January 3, 2020. The claimant’s shoulder thereafter improved until he fell at home on May 23, 2020, following a syncopal episode. As of June 15, 2020, the claimant was doing better, but not as good as he was prior to his fall at home. Dr. Jones recommended the claimant see a neurologist to evaluate his syncopal episodes, which caused significant limitations and precluded the claimant from driving.

A preliminary hearing was held on July 8, 2020. The ALJ left the record open for the parties to obtain evidence.

At a July 13, 2020 deposition, the claimant denied recalling speaking to a doctor or being asked by a doctor at Olathe Medical Center what happened to him on January 24, 2019. The claimant testified Mr. Sloan provided a report of what happened to Olathe Medical Center. On July 13 and 17, 2020, the claimant testified Mr. Sloan, on the date of accident, indicated he would take care of the claimant’s medical bills and prescriptions under private pay and there was no need for the claimant to bring a workers compensation claim. Further, the claimant indicated Mr. Sloan was worried a claim would affect the respondent’s insurance rating. A bill from Olathe Medical Center dated January 24, 2019, listed the insurance plan name as “Unilever/Best Foods/Work Comp.”²²

²⁰ *Id.*, Cl. Ex. 1 at 18.

²¹ *Id.*

²² Hill Depo., Ex. 15 at 4.

At his July 17, 2020 deposition, the claimant reiterated Mr. Sloan spoke to intake personnel at Olathe Medical Center for a few minutes, but the claimant could not hear what Mr. Sloan said. The claimant denied providing any information about his accident to Olathe Medical Center personnel. On cross-examination, the claimant testified he told the personnel how he fell, but never said what body parts hurt. The claimant testified Mr. Sloan told the Olathe Medical Center front desk to look at his left elbow. The claimant testified his left elbow never hurt. He testified he told Olathe Medical Center doctors his right shoulder and right elbow hurt, and he hit the back of his head. The claimant testified he was semi-conscious, confused, incoherent and not clearheaded, but believed he told Olathe Medical Center he was blind for three to five minutes and unable to find his phone.

In a preliminary Order dated July 23, 2020, the ALJ stated:

The court did not think the evidence supported a head/brain injury related to the January 24, 2019 slip and fall. The claimant's testimony about suffering blindness/unconsciousness immediately after the accident was contradicted by Sloan's testimony, the ER records from that date, and the fact the claimant was able to attend work following the accident. The claimant was evaluated by CT scan and by a neuropsychologist with no significant findings of injury. The head injury symptoms did not appear in medical records until some seven weeks after the accident.

...

The claimant's request for additional medical treatment for the alleged head/brain injury is denied.²³

At his attorney's request, the claimant saw Eva Henry, M.D., on October 7, 2020, for an IME. The claimant told Dr. Henry he remained on the ground for some time, unable to move, disoriented, confused and experiencing vision trouble. He was uncertain if he lost consciousness. The claimant told Dr. Henry Mr. Sloan must have come to check on him because he dropped his phone during their call. Further, the claimant indicated Mr. Sloan did not call an ambulance, but opted to take him to the emergency room perhaps an hour later. The claimant denied speaking to the emergency room doctor because Mr. Sloan provided details of the accident to the doctor.

Among other things, the claimant complained of headaches, loss of consciousness, disturbed nighttime sleep, gait difficulty (including lack of confidence walking and missing steps), weakness, dizziness, numbness, confusion, altered awareness, seizures, memory loss, skin itching, ringing in the ears, difficulty swallowing, blurred vision, loss of bowel control, high blood pressure, low blood pressure, depression, anxiety, problems in his neck, shoulder, arm, back, hand, and feet. Dr. Henry noted the claimant seemed confused

²³ ALJ Order (July 23, 2020) at 3.

and was not a good historian. Dr. Henry diagnosed the claimant with the following conditions, all directly related to the work accident:

1. Status Post Head trauma with Traumatic Brain Injury (TBI), with persistent neurological symptoms: Post-Concussive Syndrome
2. Chronic posttraumatic headaches – cervicogenic. Persistent Headache attributed to trauma or injury to the head and/or neck
3. Pseudobulbar Affective Disorder (PBA) and/or Psychological Disorder
4. Visual Disturbances
5. Adjustment Disorder with Anxiety
6. s/p repair of right shoulder SLAP tear with residual pain[.]²⁴

Dr. Henry stated, “The work injury he sustained on January 24, 2019 [was] the primary prevailing factor in causing his current conditions and disabilities.”²⁵ The doctor stated, “Mr. Reves’ medical records revealed documentation of classic post-TBI symptoms and neurological deficits since the day of his accident. Dr. Jones, Dr. Filbert [sic] and Dr. Fotopoulos (court appointed IME) had all diagnosed him with concussion and concussion related symptoms.”²⁶ Dr. Henry stated the initial records from Olathe Medical Center were incorrect because the respondent provided an incorrect history of the work accident.

Dr. Henry opined the claimant’s head injury was quite symptomatic and he should treat with a neurologist. She noted the small aneurysm was unrelated to the work accident.

Based on Dr. Henry’s report, the claimant requested medical treatment at a preliminary hearing on December 9, 2020. The ALJ, in an Order dated December 10, 2020, found the claimant did not suffer a work-related head/brain injury:

At the present hearing, the only new evidence was an October 7, 2020 report from a neurologist, Eva Henry, M.D. She diagnosed the claimant with various traumatic brain conditions. Her diagnosis was based on a history of symptoms as stated by the claimant and medical records that revealed classic traumatic brain injury symptoms from the date of the accident.

The same evidence that contradicted the claimant’s account of a head injury at the last preliminary hearing contradicts it as this hearing. Furthermore, Dr. Henry’s

²⁴ P.H. Trans. (Dec. 9, 2020), Dr. Henry reports at 7.

²⁵ *Id.*, Dr. Henry reports at 26.

²⁶ *Id.*, Dr. Henry reports at 9.

statement about the medical records is not true. According to the emergency room records on the date of the accident, the claimant denied having a head injury. The medical records did not mention any complaints that could possibly be related to a head injury until Dr. Filberth noted the claimant having headaches on February 5, 2019.

The new evidence fails to change the court's previous decision. The evidence does not support the claimant suffering a head/brain injury from the January 24, 2019 work accident. The claimant's request is denied.²⁷

This appeal followed.

PRINCIPLES OF LAW

Under K.S.A. 44-501b and K.S.A. 44-508: (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 claimant has the burden of proof; and (3) the trier of fact shall consider the whole record.

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

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(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.

²⁷ ALJ Order (Dec. 10, 2020) at 3.

Board review of an order is de novo based on the record.²⁸ De novo review, in the context of an administrative hearing, is a review of an existing decision and agency record, with independent findings of fact and conclusions of law.²⁹

ANALYSIS

There is evidence supporting and detracting from the claimant's position he sustained a work-related head injury on January 24, 2019.

In the claimant's favor, Dr. Filberth, on February 2, 2019, initially diagnosed him with a concussion without loss of consciousness and recorded occasional headaches. This diagnosis and mention of headaches were absent in the chiropractic records for the remainder of February, but Dr. Filberth made them again in March 2019.

Dr. Stanley, on March 15, 2019, diagnosed the claimant as likely having sustained a mild head injury, with a likely concussion, in January 2019.

On July 9, 2019, the court-ordered IME, Dr. Fotopoulos, believed the claimant had post-concussive syndrome which required neuropsychologic evaluation treatment.

Dr. Henry's opinion is in the claimant's favor. However, the ALJ dismissed Dr. Henry's conclusions, largely based on the initial Olathe Medical Center records. Of note, Dr. Henry stated Dr. Jones diagnosed the claimant as having a concussion. Records from Dr. Jones reflect the claimant's self-reported complaints about having a head injury. Dr. Jones did not personally diagnose the claimant as having a concussion. The records of Dr. Jones simply reiterated the diagnosis made on July 9, 2019, by Dr. Fotopoulos – postconcussion syndrome. The undersigned Board Member also finds Dr. Henry's conclusion the respondent provided an inaccurate history (or any history) of the claimant's accident to Olathe Medical Center is erroneous.

Indeed, the strongest evidence undermining the claimant's assertion of sustaining a closed head injury consists of the Olathe Medical Center records from on January 24, 2019. The records state the claimant denied a head injury and denied loss of consciousness. Neurological examination was normal. The initial Olathe Medical Center records refute the claimant's testimony he was confused, incoherent and not fully conscious.

The initial Olathe Medical Center records say nothing about the claimant being rendered temporarily blind by his accident. Being blind, if only for a short time, is a remarkable symptom one would expect to be recorded in the early medical evidence. Yet,

²⁸ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

²⁹ *Frick v. City of Salina*, 289 Kan. 1, 20-21, 23-24, 208 P.3d 739 (2009).

the Olathe Medical Center records from January 24 and March 15, 2019, do not reference temporary blindness, nor do Dr. Filberth's records, or the records from Dr. Fotopoulos and Dr. Jones. The first reference to temporary blindness is in Dr. Caffrey's report following his August 2019 evaluation of the claimant.

The claimant contended he was still blind when he encountered coworkers in the building in which they worked. It would be expected for the claimant to relay such a concern to coworkers. The claimant being able to walk from the site of the accident some 300 or 400 yards to where he was to report for work, while blind, seems implausible.

In his initial testimony on November 7, 2019, the claimant testified he provided a history about his accidental injury and symptoms to Olathe Medical Center on January 24, 2019. In July 2020, the claimant testified he did not provide Olathe Medical Center an account of what occurred, instead stating Mr. Sloan provided a history. The claimant later testified he did provide Olathe Medical Center with a history of his accident, but did not tell hospital personnel what body parts were hurt. He later testified he specified complaints regarding his right shoulder, right elbow hurt, head and blindness. This testimony is inconsistent.

The claimant testified he could not hear what Mr. Sloan said to intake personnel at Olathe Medical Center. The claimant later testified Mr. Sloan told the Olathe Medical Center front desk to look at the claimant's left elbow. This testimony is also inconsistent.

If Mr. Sloan provided a history to Olathe Medical Center, this information would almost assuredly be contained in the Olathe Medical Center records. Mr. Sloan denied speaking to any Olathe Medical Center doctors and testified he remained in the waiting room while the claimant was being evaluated.

The claimant's initial testimony on November 7, 2019, contained no mention of Mr. Sloan attempting to avoid responsibility for a workers compensation claim and concern over workers compensation insurance rates. Similarly, the claimant's initial testimony did not reflect Mr. Sloan discouraged him from filing a workers compensation claim. The claimant later made these allegations in subsequent testimony.

Mr. and Ms. Sloan either testified there was no time gap, or no time gap was remembered, during the phone call the claimant had with Mr. Sloan when the accident occurred. A minutes-long gap in a phone call, as described by the claimant, would seem memorable.

While the claimant told Dr. Henry Mr. Sloan must have sought him out and found him just after the accident, this report is not supported by the evidence. The claimant never testified this occurred. The evidence shows Mr. Sloan asked the claimant, by phone, if he was okay, and the claimant said he thought he was okay. Mr. Sloan denied the claimant ever personally told him he sustained a head injury.

Dr. Caffrey opined neuropsychological testing showed the claimant sustained a “mild traumatic brain injury, if any.” Such statement expresses doubt as to whether a head injury even occurred.

The evidence as a whole supports the ALJ’s ruling. The claimant’s testimony is contradictory. The medical evidence based on the claimant’s history is also flawed. The greater weight of the evidence establishes the claimant did not sustain a head injury arising out of and in the course of his employment on January 24, 2019.

CONCLUSION

WHEREFORE, the Board affirms ALJ Hursh’s December 10, 2020, Order.³⁰

IT IS SO ORDERED.

Dated this _____ day of February, 2021.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Brad Avery
Ronald Prichard
Hon. Kenneth Hursh

³⁰ The above preliminary hearing findings and conclusions are not final nor binding and may be modified upon a full hearing. This review of a preliminary hearing Order was determined by only one Board Member, unlike appeals of final orders, which are considered by the entire Board.