

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROBERT MCCANN)	
Claimant)	
V.)	
)	
DIECK'S, INC.)	AP-00-0477-501
Respondent)	CS-00-0468-307
AND)	
)	
AUTO OWNERS INSURANCE CO.)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier (respondent), through Kevin Johnson, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary hearing Order, dated July 10, 2023. George Pearson, III, appeared for the claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) preliminary hearing transcript, held September 21, 2022; (2) preliminary hearing transcript, held July 5, 2023; (3) all exhibits uploaded and admitted under HE-00-0070-454 and HE-00-0084-273; (4) pleadings filed with the Division; and (5) parties' briefs.

ISSUE

Did the claimant's injury arise out of and in the course of his employment?

FINDINGS OF FACT

The claimant worked as a meat cutter for the respondent. The claimant initially testified he slipped and fell on blood on December 27, 2020, landing on his tailbone. The claimant was alerted December 27, 2020, was on a Sunday, and the respondent would have been closed. In response, the claimant testified his accident date was December 28, 2020, because it happened on a Monday right after Christmas.

The claimant's initial Application for Benefits, filed on June 17, 2022, alleged he fell at work, and injured his tailbone and low back, on December 27, 2021. Just over one month later, the claimant filed an amended Application for Benefits, asserting his accident occurred on December 27, 2020.

Jason Loeffler, a butcher for the respondent, testified he witnessed the claimant slip and fall on December 27, 2020. The claimant reported the accident the same day to Brad Dieckmann, the respondent's owner and his direct supervisor. According to the claimant, Mr. Dieckmann told him to work through it. Both Mr. Loeffler and Royce Woodworth, another butcher, overheard the claimant tell Mr. Dieckmann about his back hurting on December 27, 2020. Both coworkers testified the claimant frequently complained about his low back thereafter. Both coworkers noted the claimant was visibly in pain after the accident.

The claimant continued working his regular duties. He denied any subsequent injuries.

On February 27, 2021, the claimant sought treatment on his own with Scott Iversen, D.C. The claimant reported mild to moderate mid and low back pain for three to four weeks. The report stated the claimant worked on concrete all day, and did a lot of lifting and heavy manual labor, which caused some back problems.

An MRI of the claimant's lumbar spine, conducted March 31, 2021, showed a fairly large central, perhaps slightly right paracentral, disc extrusion at L4-5 with mild mass effect upon the nerve roots in the right foramen transversarium; asymmetric broad-based disc bulge at L3-4, increased on the left; and mild posterior facet arthropathy at multiple levels without significant central spinal canal stenosis.

An April 7, 2021 report from Dr. Iversen stated the claimant had a "significant incident last week with his lower back" due to a physical altercation with his drunken brother, which irritated the claimant's low back, causing him to see his primary care physician. An MRI was conducted, and the claimant was told he had a significant disc bulge and a herniation at L5. The claimant testified there was no fight. Rather, he had to separate his brother and sister by "stepping between" them during an argument.¹ He agreed he irritated his low back, which was already injured. The claimant denied getting the MRI on account of the incident. The claimant testified his brother weighs about 140 pounds. Medical records indicate the claimant weighs over 300 pounds.

On May 6, 2021, the claimant saw his primary care physician, Kent Erickson, M.D. Dr. Erickson noted the claimant had undergone one epidural steroid injection and reported

¹ P.H. Trans. (July 5, 2023) at 16; see also *id.* at 23.

improvement with acute back pain, but had numbness and weakness in both legs. The doctor took the claimant off work. The claimant never returned to work for the respondent.

Dr. Iversen provided chiropractic treatment until July 16, 2021. At that time, the claimant reported also having injections and physical therapy. The claimant reported being 75-80% improved.

Dr. Iversen's records do not document a specific work injury occurring in December 2020. The claimant testified he told Dr. Iversen about slipping and falling at work, and having pain since December. According to the claimant, Dr. Iversen had him on an affordable, discounted "program" which precluded Dr. Iversen's office from listing the claimant's injury as being related to workers compensation.² The claimant contended he learned this information after receiving Dr. Iversen's records and calling Dr. Iversen to discuss why the records did not reflect a work injury in December 2020.

At his attorney's request, the claimant saw Daniel Zimmerman, M.D., on July 11, 2022, for an independent medical examination (IME). The claimant complained of pain and discomfort affecting the lumbosacral spine and radicular pain affecting the right lower extremity. The claimant reported falling while performing job duties for the respondent on December 27, 2020. He did not tell Dr. Zimmerman about an alleged physical altercation with his brother.

Dr. Zimmerman diagnosed the claimant with a right lumbar disc protrusion at L4-5 and stated, "The prevailing factor for the right lumbar disc protrusion at L4-L5 is the accident that occurred on December 27, 2020."³ The doctor recommended additional treatment, including anti-inflammatory medication, pain management interventions and physical therapy.

In lieu of a preliminary hearing scheduled on December 21, 2022, the parties agreed to a court-ordered IME with David Hufford, M.D., to address diagnosis, prevailing factor and need for treatment. The claimant saw Dr. Hufford on February 21, 2023, and complained of low back pain radiating into the right leg and intermittent paresthesias in his right foot. The claimant complained of a work-related low back injury occurring on December 27, 2020. He did not tell Dr. Hufford about an alleged physical altercation with his brother. Dr. Hufford diagnosed the claimant with an axial loading injury with L4-5 right-eccentric disc herniation and recommended additional medical treatment, including referral to a qualified spine surgeon.

² *Id.* at 24.

³ P.H. Trans. (Sept. 21, 2022), Zimmerman Report (dated July 11, 2022) at 5.

Dr. Hufford stated:

The prevailing factor for his current low back pain and right radicular pain including evidence of radiculopathy based on asymmetry of reflexes at the appropriate level is the occupational injury that occurred in the manner as stated. He slipped and fell landing on his buttocks creating an axial loading force in the low back. This appears to have caused a right-eccentric disc herniation that is consistent with his clinical findings. Despite the presence of pre-existing degenerative changes the acute tissue trauma is responsible for his need for treatment due to the occupational injury that occurred in the manner as stated.⁴

The claimant currently works for a different employer. He experiences daily back pain, numbness from the outside of his hip down to his foot, difficulty with walking upright, and back discomfort after being on his feet.

The ALJ ruled:

Claimant's preliminary hearing requests are considered and Claimant has sustained his burden of proof of personal injury by accident arising out of and in the course of his employment with Respondent. Claimant is entitled to medical care for his work injury, and it is ordered that Claimant be seen by Dr. James McAtee in Manhattan, Kansas for examination as recommended by Dr. Hufford.⁵

PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the claimant's injury did not arise out of and in the course of his employment. The respondent contends the claimant's testimony contradicts medical documentation from his self-selected physician, and he was unable to accurately identify his date of accident for months. The claimant maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment.⁶ The burden of proof is on the claimant.⁷ The respondent must prove any affirmative defense.⁸

⁴ P.H. Trans. (July 5, 2023), Ex. 1 at 2-3.

⁵ ALJ Order (July 10, 2023) at 2.

⁶ See K.S.A. 44-501b(b).

⁷ See K.S.A. 44-501b(c).

⁸ See *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

K.S.A. 44-508 provides, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(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.

Board review of an order is de novo on the record.⁹ A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹⁰ On de novo review, the Board makes its own factual findings.¹¹ While the Board conducts de novo review, we often opt to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where

⁹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹⁰ See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹¹ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

the judge was able to observe the testimony in person.¹² The Board should explain why it disagrees with a judge's firsthand assessment of witness credibility.¹³

The claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on December 28, 2020.

The undersigned Board member concludes the claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on December 28, 2020. The claimant's coworker, Mr. Loeffler, testified he witnessed the claimant's accident occurring on December 27, 2020. Another coworker, Mr. Woodworth, testified he heard the claimant talking to the respondent's owner, Mr. Dieckmann, about his work injury the day it occurred. Mr. Loeffler echoed this testimony. There is no evidence from Mr. Dieckmann refuting the claimant's assertion of a work-related injury in late December 2020. The claimant was mistaken in alleging a December 27, 2020, accident date. The undersigned finds the date of accident was December 28, 2020.

It is concerning Dr. Iversen's records do not reflect a work injury whatsoever, and Dr. Iversen's records suggest the claimant had low back pain beginning perhaps three weeks or a month before February 27, 2021. The claimant contends he told Dr. Iversen an accurate history. It is also concerning Dr. Iversen's records document an altercation with his brother which irritated the claimant's back and resulted in him obtaining an MRI. The claimant explained he was not in a fight or a physical altercation with his brother.

The ALJ had two opportunities to view the claimant's testimony and impliedly found him to be a credible witness. One coworker witnessed the claimant's accident. Two coworkers overheard the claimant telling the respondent's owner about the accidental injury on the day it occurred. The coworkers' testimony bolsters the claimant's credibility. The respondent presented no witnesses refuting the claimant's allegation he was hurt at work in late December 2020. While there are discrepancies in the evidentiary record, this Board member defers to the ALJ's determination the claimant sustained a compensable accidental injury arising out of and in the course of his employment.

WHEREFORE, the undersigned Board member affirms the preliminary hearing Order, dated July 10, 2023.

IT IS SO ORDERED.

¹² *Foy v. Kansas Coachworks, LTD*, No. 1,051,265, 2014 WL 1758032 (Kan. WCAB Apr. 21, 2014).

¹³ *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, Syl. ¶ 3, 316 P.3d 796 (2013), *rev. denied* 301 Kan.1046 (2015).

ROBERT MCCANN

7

AP-00-0477-501
CS-00-0468-307

Dated this _____ day of August, 2023.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
George Pearson, III
Kevin Johnson
Hon. David Bogdan