

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SCOTT SWISHER)
Claimant)
V.)
) AP-00-0477-812
CORE MARK INTERNATIONAL, INC.) CS-00-0474-819
Respondent)
AND)
)
INDEMNITY INS CO OF N AMERICA (INA INS))
(CT GEN))
Insurance Carrier)

ORDER

Claimant requests review of the July 27, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample.

APPEARANCES

Roger Fincher appeared for Claimant. Frank Matande appeared for Respondent and its insurance carrier (Respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held July 26, 2023, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Did Claimant suffer a work-related injury by accident arising out of and in the course of his employment?
2. What is the proper date of accident?
3. Was timely notice provided to Respondent?
4. What is the prevailing factor causing Claimant's injury, resulting medical treatment, and need for further medical treatment?

FINDINGS OF FACT

Claimant worked as a truck driver for Respondent for at least two years, delivering groceries and goods to gas stations in Kansas. Claimant drove a semi-truck to make his deliveries on a route which included Ottawa, Topeka, Wichita, and other cities. Claimant passed the required physical examinations and had a valid commercial driver's license (CDL).

Claimant was diagnosed with diabetes over 10 years ago. Claimant testified his diabetes was under control while working for Respondent. Approximately 6 months prior to starting his employment with Respondent, the toes on Claimant's left foot were amputated. Claimant attributed the need for amputation to wearing steel-toed shoes, stating his toes rubbed against the shoes and became infected. He did not believe diabetes was a factor in the amputation of his toes.

In the summer of 2022, Claimant went to Texas and spent time walking. Claimant developed a blister on his left foot as a result. Claimant testified the blister healed following the trip, and he returned to work. Sandy Vanderviele, Claimant's partner, agreed Claimant developed a blister on his left foot at the time of the Texas trip. Ms. Vanderviele stated she cared for Claimant's foot during this period, understanding care was important with Claimant's diabetes. Ms. Vanderviele testified the blister bothered Claimant for a couple of weeks before getting better.

Claimant testified he sought treatment for the blister at least once with his primary care physician, but those records are not in evidence.

Claimant worked as usual after his return from Texas. In December 2022, Claimant and a coworker were in Valley Falls, Kansas, when, according to Claimant, he slipped in the freezer portion of his truck.¹ Claimant explained his left foot came out of his shoe when his shoe became caught on the frozen floor of the truck, resulting in a cut on his left foot. He described:

I've got a freezer in the front of the truck and it gets real cold and sometimes your feet will stick on the floor, and when it did, there's a – it's like a side entrance with, like, a ladder. And as I was stepping out, I peeled my shoe off and I fell out the front door and I got caught up in the ladder. The guy that was working with me caught me so I didn't hit the ground. And when I peeled my shoe off, I got cut on that part of the ladder at the top of that where it hinges up to the top of the truck.²

¹ Claimant did not know the exact date.

² P.H. Trans. at 12.

Claimant immediately applied a bandage to his foot and completed his work day. Claimant stated he informed his supervisor, Daryl Huss, of the incident the following day upon his arrival at work. According to Claimant, Mr. Huss told him to “keep an eye on it.”³ Claimant did not complete paperwork regarding the incident, and he did not request medical treatment.

Claimant indicated the cut on his foot was not healing in the two weeks following the incident, but it was not bothering him. Claimant made an appointment with his personal physician for December 19, 2022. However, by December 16, 2022, Claimant was feeling sick and left work early. Ms. Vanderviele made Claimant go to the emergency department at Community HealthCare System that same day.

In his Application for Benefits (E-1), Claimant alleged the accident occurred on December 16, 2022. During his preliminary hearing testimony, Claimant indicated the accident occurred approximately two weeks prior to December 16, 2022, as that was the date he visited the emergency room.

Hospital records indicate the following history was provided:

Most recent A1C was 8.3% in October of this year. Prior to that, A1C's had been in 7.4 to 7.7%. . . . Chief concern today, by he and his wife, is redness and swelling of left leg and foot. . . . They have been treating a diabetic ulcer on bottom of left foot since May of this year. Sore started after he did a lot of walking, which he states was around 14 miles. Ulcer was getting smaller until recently. Now has larger opening and an odor. Foot, ankle and lower leg red and warm. Blood sugars running over 300. Has felt nauseated and has even vomited a few times. Wife insisted he come to clinic to be seen today, however, he is angry she made him come in. States he had an appointment on schedule for Monday, December 19th, and thought that was soon enough.⁴

Claimant testified he was feeling poorly while at the hospital and could not recall exactly what history he provided regarding causation, but he did not tell hospital staff he had a sore on his foot for six months. Ms. Vanderviele, who was present with Claimant at the hospital, testified Claimant spoke with hospital staff clearly and coherently. Ms. Vanderviele denied telling hospital staff the sore was present for six months. She testified the cut was in the same general area as the blister from the previous summer. There is no mention in the hospital records of an accident at work. There is no mention in the hospital records of a cut on Claimant's left foot, only a diabetic ulcer.

³ *Id.* at 14.

⁴ *Id.*, Resp. Ex. 1 at 1.

Claimant was diagnosed with sepsis, MRSA, and gangrene at the hospital. Claimant was admitted immediately and underwent an initial amputation of his left foot and ankle, before ultimately enduring another amputation at a higher level, below the knee. Claimant was hospitalized until January 3, 2023. He was provided with a prosthetic.

Dr. Daniel Zimmerman examined Claimant at his counsel's request on May 12, 2023. Dr. Zimmerman reviewed Claimant's medical records, though he did not identify records from Community HealthCare System in his report. Dr. Zimmerman took a history from Claimant and performed a physical examination, finding the prevailing factor causing Claimant's "foot laceration culminating in the development of sepsis and gangrene in the left foot is the injury that occurred when he slipped in the freezer unit of a truck operated for his employer."⁵

Claimant, unable to return to work, was terminated by Respondent in March 2023. Claimant's medical insurance was also terminated, and he has not received treatment for his condition since April 2023. Claimant testified he is able to drive his personal vehicle and believes he could maintain a CDL.

The ALJ found Claimant failed to sustain his burden of proving an accident occurred on December 16, 2022, the accident arose out of and in the course of his employment, or the accident was the prevailing factor causing his injury and need for medical treatment. The ALJ explained:

These inconsistencies and lack of specificity between Claimant's version of the timeline, his medical history and the existence of an accident are very problematic. And while it is true that Dr. Zimmerman has opined that the cut on the foot is the "prevailing factor" for the foot laceration, his opinion is problematic for the simple reason that it does not appear that Dr. Zimmerman reviewed the emergency room records from Community Health Care System from December 16, 2022.⁶

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues he suffered a personal injury by accident arising out of and in the course of his employment, and the accident is the prevailing factor causing his injury, medical condition, and resulting disability and impairment.

Respondent did not file a brief.

⁵ P.H. Trans., Cl. Ex. 1 at 3.

⁶ ALJ Order at 6.

1. Did Claimant suffer a work-related injury by accident arising out of and in the course of his employment?

K.S.A. 44-501b©) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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

"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. 44-508(d) states:

"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.

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

(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.

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

"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.

In his E-1, Claimant alleged an injury by accident on December 16, 2022. Claimant testified the actual date may have been a week or two prior to the date alleged. Claimant was very specific in describing his foot was on a ladder, where it hinges to the top of the truck.

There is no mention of an accident, as Claimant described, in the emergency room notes. To the contrary, Claimant gave the emergency room staff a history of the sore starting after he did a lot of walking. Claimant had a preexisting diabetic condition requiring constant treatment. He had toes amputated six months to a year prior to working for Respondent. He had ulcerations in the exact spot he now alleges he cut his foot.

The ALJ found Claimant failed to establish an accident arising out of and in the course of his employment with Respondent or the accident was the prevailing factor causing his injury. The undersigned agrees. Given the inconsistencies in Claimant's recitation of the time and date of the alleged injury by accident, the inconsistencies in his description of the accident and the history contained in the emergency room record, and his preexisting diabetic condition, the undersigned finds Claimant failed to meet the burden of proving he suffered an injury by accident arising out of and in the course of his employment with Respondent.

The undersigned does not find the opinion of Dr. Zimmerman probative, as it is not apparent he reviewed the December 16, 2022, emergency room notes.

All other issues are moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Julie A.N. Sample, dated July 27, 2023, is affirmed.

IT IS SO ORDERED.

SCOTT SWISHER

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Dated this _____ day of September, 2023.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Roger Fincher, Attorney for Claimant
Frank Matande, Attorney for Respondent and its Insurance Carrier
Hon. Julie A.N. Sample, Administrative Law Judge