**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **THAILAND TO** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **NATIONAL BEEF PACKING CO.** | ) | CS-00-0451-366 |
| Respondent | ) | AP-00-0456-190 |
| AND | ) | |
| | ) | |
| **ZURICH AMERICAN INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

# ORDER

The claimant, through Jonathan Voegeli, requests review of Administrative Law Judge (ALJ) Pamela Fuller's preliminary hearing Order dated January 27, 2021. Shirla McQueen appeared for the respondent and its insurance carrier (respondent).

## RECORD AND STIPULATIONS

The record consists of the September 2, 2020, and November 11, 2020, deposition transcripts of the claimant; the September 16, 2020, deposition transcripts of George Hall, Jeannie Hall and Fernando Carrera; the deposition transcript of Joe Davis, which was started on September 16, 2020, and concluded on November 11, 2020; all exhibits attached to the transcripts; the pleadings and the case file. Any stipulations are adopted.

## ISSUES

1. Did the claimant willfully fail to use fall protection voluntarily provided to him by the respondent and/or recklessly violate the respondent's safety policies?

2. May the Board address the claimant's argument K.S.A. 44-501(a) is contrary to the quid pro quo of workers receiving limited benefits regardless of fault in exchange for giving up their right to sue in tort before a jury?

## FINDINGS OF FACT

The claimant began working for the respondent on October 14, 2019, as an IE engineer. The claimant's shift started in the evening of one day and ended the next day in the morning. He repaired and fixed the IE, which is a mechanical robot which picks boxes out of shelves. The claimant indicated the respondent had him briefly attend safety training. The claimant acknowledged undergoing safety training during his orientation, which included completing 66 modules over three days and watching a fall protection video.

As part of his orientation, the claimant signed a document titled "Fall Protection Training." Such document states under "Safety Harness and Lanyard Procedures":

> All personnel are required to wear a safety harness and utilize a lanyard while working in an area that is four feet or more above floor or ground level, that is not guarded on all open sides by a standard railing and mid-rail, or the equivalent, except at the entrance to the stairway.[1]

The claimant denied attending any safety meetings or receiving instruction on fall risk after that time, other than Sunday meetings in which fall protection was discussed a few times. He understood the fall prevention policy was to wear a harness if he was standing four feet or more above ground level.

Fernando Carrera was the claimant's lead man. He testified the respondent's safety training is "quite overwhelming."[2] Mr. Carrera indicated the respondent does initial safety training for workers, annual training, and 15 minute training every day at the beginning of a shift to discuss various safety issues chosen by a supervisor, which includes fall protection. Further, Mr. Carrera testified the respondent has safety harnesses and lanyards available to workers.

Mr. Carrera testified he saw the claimant on the fourth level of the carousel at about 10:30 p.m. on April 13, 2020,[3] starting the process of trying to get 12 feet above the catwalk to fix a photo-eye, without the use of a safety harness. The claimant was not surrounded by a standard railing and a mid-rail, or the equivalent. The claimant was standing on the IE. Mr. Carrera radioed the claimant to come down and put on his harness. According to Mr. Carrera, he discussed the safety issue with the claimant, and the claimant apologized and said he would get a harness and put it on. As a result of their conversation, Mr. Carrera believed the claimant understood he needed to wear fall protection if not completely surrounded by standard railing and a mid-rail. Mr. Carrera testified he immediately told his supervisor about the claimant's "Level 1" safety violation.

The claimant testified Mr. Carrera said he committed a Level 1 safety violation. The claimant admitted he should have worn a safety harness during the April 13 incident which prompted the conversation with Mr. Carrera.

On April 14, during the same shift, the claimant went to the second level of the catwalk to repair the IE. He could not fit where he needed to go so he sat at the mouth of the IE, with his foot planted on a vertical guard or a post. Both the claimant and Mr.

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[1] Claimant Depo. (Sept. 2, 2020), Ex. E at 1.

[2] Carrera Depo. at 16.

[3] All dates refer to 2020, unless specified otherwise.

Carrera testified the area the claimant was in was an egress area off the main catwalk which was not surrounded on all four sides by a standard railing and a mid-rail, or the equivalent. The egress area was blocked off with a chain. Mr. Carrera testified the purpose of the chain is to warn workers to have machinery locked out and to wear fall protection when going past the chain. However, Mr. Carrera acknowledged there is no sign in the egress area warning a worker to put on fall protection if the worker were to go past the chain. Mr. Carrera testified a worker on the catwalk, yet not in the egress area, need not wear fall protection because the worker is surrounded by handrails on four sides.

In attempting to fix the IE, the claimant was not wearing a safety harness or tied off with a lanyard. While swinging a hammer to flatten sheet metal, the claimant's foot slipped and he fell approximately 14 feet to the ground. The claimant got up after the fall. He ran to Omar Carrillo and said he fell and did not want to report the accident because he was afraid of being fired for not wearing his safety harness. The claimant believed at the time he spoke to Mr. Carrillo he was in violation of the safety policy to wear a safety harness. The claimant later testified he did not believe he needed to wear a safety harness because he viewed the catwalk area – a solid platform – as ground level, so he was not working at least four feet above ground level. The claimant testified he had only worn a safety harness on the catwalk in the past while standing on the IE. He denied ever being talked to, reprimanded or written-up for working from the gap in the guardrail without a harness.

As a result of his fall, the claimant was hospitalized for three days. The record is not clear, but it appears the claimant sustained a closed head injury, blunt trauma to his neck, a left shoulder injury and six fractured ribs.

Mr. Carrera wrote three statements about the incidents occurring on April 13 and April 14.[4] He wrote all of the statements on April 14. The first statement, written at around 12:35 a.m., indicted Mr. Carrera saw the claimant walking toward the nursing station. Further, Mr. Carrera asked the claimant what happened, and the claimant responded he had fallen off the second level. The second statement, completed at approximately 3:33 a.m., indicated Mr. Carrera saw the claimant was trying to fix a photo-eye around 10:30 p.m. on April 13, which prompted Mr. Carrera to radio the claimant and instruct him to wear a safety harness. In the third statement, done at 7:20 p.m. on April 14, Mr. Carrera recounted the photo-eye incident, his subsequent conversation with the claimant about wearing fall protection, and the claimant being escorted to the respondent's nursing station around 12:30 a.m. that day.

The claimant wrote one statement on April 17, and a second statement on April 23. The initial statement said he could not get the metal flush with the IE. He was sitting on a grate. While swinging a hammer, his foot slipped and he fell down. The second statement stated, in part: "I didn't have my harness on. . . . I slipped and fell from second

[4] Carrera Depo., Ex. L.

level to level below me. I have been trained on fall protection and should have had my harness on. Failure to do so could result in write-up/discharge."[5] The claimant testified he felt intimidated to write down such information, lest he lose his job. The claimant said George Hall, the respondent's assistant personnel director, dictated and demanded he put specific words in his second statement. Also, the claimant testified when he wrote the second statement, he was in a daze and drugged up from medication prescribed by doctors to treat his work injuries.

Mr. Hall took the claimant's statement dated April 23. Mr. Hall contended he did not remember if the claimant provided an earlier statement to the respondent on April 17. Mr. Hall testified he asked the claimant specific questions and had the claimant write his answers. He denied dictating any responses to the claimant or bullying the claimant into giving certain responses. Mr. Hall testified he asked the claimant if he was wearing a safety harness and the claimant answered no. Mr. Hall testified the claimant told him he should have had his harness on. He gave the claimant's statement to Joe Davis, the safety director. According to Mr. Hall, the claimant committed a significant safety violation, resulting in his employment being suspended. The ALJ stated Mr. Hall was reluctant to answer even general questions at his deposition.

Jeannie Hall is respondent's assistant safety director. She conducts training as part of her duties and was responsible for training the claimant in fall protection. Ms. Hall testified the respondent's safety instruction does not specifically tell workers to wear a harness while on a catwalk. Ms. Hall testified employees are required to wear a safety harness on a catwalk if they are not surrounded by guard rails. Ms. Hall agreed the catwalk area did not have signs advising workers to wear fall protection, but there are horizontally-placed chains blocking access to certain areas. She believed the purpose of the chains was to warn workers to wear fall protection.

Joe Davis is respondent's safety director. His job consists of training, retraining, investigating accidents and injuries, auditing for OSHA regulations, and observing. Mr. Davis testified the claimant was aware of the respondent's policies regarding fall protection and the use of personal protective equipment. He testified the claimant had received platform training. According to Mr. Davis, the claimant should have been wearing a harness because once the claimant got past the barrier, he was no longer surrounded by guard rails.

On April 29, the respondent terminated the claimant's employment for a Level 1 safety violation. He currently works on a ranch building electric fences, cutting grass and feeding cows.

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[5] Claimant Depo. (Sept. 2, 2020) at 34 and Ex. H.

In lieu of a preliminary hearing, the parties filed a stipulation of evidence by depositions on January 4, 2021. On January 27, 2021, the ALJ issued the preliminary Order, stating:

> . . . It is clear the claimant was seated, reaching out over an open area with no railing or fall protection on when he fell. It is equally clear that the claimant knew he should be wearing fall protection and did not do it. During testimony, he stated the catwalk he was sitting on was considered ground level by him so he didn't think he needed fall protection although his prior statements indicate otherwise. The claimant had been provided training, understood the training and was provided the necessary safety equipment. The claimant knew that the safety violation was a Level 1 violation and could result in his discharge which ultimately he was discharged.
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> . . .
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> Kansas courts have . . . held that to act recklessly, the actions must be beyond ordinary negligence or carelessness and the person must have a conscious disregard for a known or obvious risk. It is found that the claimant did act recklessly. The opening which he was reaching over was a 14 feet drop and that was obvious. He had been reprimanded earlier in the shift concerning working at heights without fall protection and disregarded that reprimand and chose to do it a second time, just in a different location. It is also found that the claimant's failure to use fall protection was willful, using the above facts.
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> The claimant is not entitled to any of the benefits sought. He recklessly violated the respondent's safety policies and willfully refused to use the safety harness provided. Compensation is denied.[6]

This appeal followed. The claimant argues he did not violate the respondent's safety policies and he did not need to use a safety harness. Further, the claimant argues fault should not preclude a preliminary award of benefits because the purpose of the Kansas Workers Compensation Act (KWCA) is to provide benefits regardless of fault. The respondent maintains the Order should be affirmed.

## PRINCIPLES OF LAW

K.S.A. 44-501b(c) states the claimant carries the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends. Under K.S.A. 44-508(h), the trier of fact shall consider the whole record. The burden of proving an affirmative defense is on the employer.[7]

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[6] ALJ Order at 10-11.

[7] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

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

> "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. 44-501(a) states, in part:

> (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . .
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> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations; or
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> . . .
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> (2) Subparagraphs (B) and (C) of paragraph (1) of subsection (a) shall not apply when it was reasonable under the totality of the circumstances to not use such equipment, or if the employer approved the work engaged in at the time of an accident or injury to be performed without such equipment.

With regard to "willful," *Carter* states:

> [T]he meaning of the word "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)[8]

The violation alone of instructions from an employer is not enough to render the employee's actions "willful" as a matter of law under K.S.A. 44-501(d).[9] In *Thorn,*[10] the employee, while operating a crusher, used a short stick to pry ore between the rollers of the crusher. His hand was pulled into the machine and severely injured. This was contrary

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[8] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920)).

[9] *Hoover v. Ehrsam Co.*, 218 Kan. 662, 544 P.2d 1366 (1976). K.S.A. 44-501(d) is a predecessor statute to K.S.A. 2014 Supp. 44-501(a).

[10] *Thorn v. Edgar Zinc Co.*, 106 Kan. 73, 186 P. 972 (1920) *reh'g denied* Feb. 11, 1920.

to his employer's rule obligating him to use a long-handled maul to break ore. The worker admitted he used the stick "unthoughtedly" as he had seen other workers using the stick in the same manner. The actions by the worker were not "willful" under K.S.A. 44-501(d).

Regarding the definition of "reckless," *Anderson*[11] states:

> The applicable workers compensation statutes do not define recklessness. Accordingly, courts determining whether an employee recklessly violated an employer safety policy for the purposes of K.S.A. 2017 Supp. 44-501(a)(1)(D) look to other areas of law for guidance. This court has looked to the Restatement (Second) of Torts and statutory criminal law for definitions of recklessness for prior workers compensation cases. [Citation omitted].
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> The Restatement (Second) of Torts § 500(a) (1965) recognizes two kinds of reckless conduct. In the first, "the actor knows, or has reason to know ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." In the second, "the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so."
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> Under the Kansas Criminal Code, a person acts recklessly "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2017 Supp. 21-5202(j).

## ANALYSIS

### 1. Pursuant to K.S.A. 44-501(a), the claimant is disallowed compensation because he both willfully failed to use a reasonable and proper guard and protection voluntarily furnished to him by the respondent and he recklessly violated the respondent's workplace safety rule.

The claimant cites *Anderson*[12] for the proposition a worker cannot recklessly violate a safety rule if the worker believes he is doing the work in a safe manner. In *Anderson*, the employer required workers to wear rubber gloves within five feet of a power source. An electrical worker on a telephone pole believed he was at least five feet away from a power source. A supervisor watched the worker, knew he was not wearing rubber gloves, and allowed the work to proceed. The worker contacted a live wire and was badly shocked.

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[11] *Anderson v. PAR Elec. Contractors, Inc.*, No. 118,999, 2018 WL 6074279, at *7-8 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

[12] *Id.*

*Anderson*, in part, held the worker did not willfully violate a safety rule because his employer, through the supervisor, approved the method of working without rubber gloves.

This case is dissimilar to *Anderson*. Earlier in his shift, the claimant's lead man warned him he committed a safety violation due to not wearing a safety harness. They discussed the need to use a harness. The claimant apologized. Mr. Carrera believed the claimant understood the importance of using a safety harness.

Later, in the same shift, the claimant was sitting on a catwalk while attempting to repair an IE machine. The area he was sitting was not surrounded on all four sides with guard rails and mid-rails, or the equivalent. The claimant was sitting 14 feet above the ground. While the claimant equates the catwalk as being the "ground," for the purposes of the respondent's safety rule concerning use of a safety harness and a lanyard, the undersigned Board Member disagrees. The claimant was working more than four feet above the ground. He fell 14 feet because he was not using required safety equipment.

The claimant told Mr. Carrillo he was worried he would be fired for not wearing a safety harness. The claimant's subsequent testimony he believed he was not in violation of the respondent's safety rule conflicts with what he told Mr. Carrillo. The claimant's written statement dated April 23 showing he should have been wearing a safety harness is consistent with what he told Mr. Carrillo.

As indicated by the ALJ, the risk of falling from a height of 14 feet was apparent. The claimant willfully failed to use a reasonable and proper guard/protection voluntarily furnished by the respondent. He had been counseled about using fall protection earlier in his shift. The claimant's subsequent actions show he knew he violated the rule. Similarly, the claimant recklessly violated the respondent's workplace safety rule because his behavior was deliberate and indifferent to a high degree of risk of harm. K.S.A. 44-501(a) disallows compensation to the claimant.

**2. The Board may not address the claimant's argument the KWCA violates the quid pro quo because the Act accounts for fault.**

"All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."[13] Section 18 of the Kansas Constitution Bill of Rights guarantee to the right to a remedy is satisfied when the Legislature provides an adequate substitute remedy, or quid pro quo.[14] Section 18 is a fundamental constitutional right.[15]

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[13] Kansas Constitution Bill of Rights, §18.

[14] See *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 855, 942 P.2d 591 (1997).

[15] See *State v. Larraco*, 32 Kan. App. 2d 996, 999, 93 P.3d 725 (2004).

The claimant argues the insertion of fault into the KWCA violates the quid pro quo for workers to receive limited benefits regardless of fault in exchange for surrendering the right to sue in tort before a jury. The Board may not address the argument; it is a constitutional argument which may be raised to a court of competent jurisdiction.[16]

## CONCLUSIONS

The claimant willfully failed to use a reasonable and proper guard and protection voluntarily furnished to him by the respondent. Similarly, the claimant recklessly violated the respondent's workplace safety rule. K.S.A. 44-501(a) disallows compensation to the claimant. The Board may not address the claimant's constitutional quid pro quo argument.

**WHEREFORE**, the undersigned Board Member affirms the Order dated January 27, 2021.[17]

**IT IS SO ORDERED.**

Dated this _____ day of April, 2021.

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HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c (via OSCAR):
Jonathan Voegeli
Shirla McQueen
Hon. Pamela Fuller

[16] See *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

[17] The above preliminary hearing findings and conclusions are not final and may be modified on a full hearing. This review of a preliminary Order has been determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by the entire Board.