

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KYLE PEARSON)
Claimant)
V.)
JB TURNER & SONS ROOFING)
AND SHEET METAL) AP-00-0457-784
Respondent) CS-00-0456-284
AND)
NATIONAL FIRE INSURANCE)
COMPANY OF HARTFORD)
Insurance Carrier)

ORDER

The claimant, through Michael Patton, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary Order dated May 5, 2021. James Hess appeared for the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record consists of the preliminary hearing transcript dated March 31, 2021, and all exhibits, including the claimant's deposition transcript dated March 23, 2021; the deposition transcript of John Turner dated April 12, 2021; the deposition transcripts of the claimant, as well as Lance Foster and Allen Foster, dated April 13, 2021; the deposition transcript of Jeremiah Ross dated April 16, 2021; and the pleadings and the case file.

ISSUE

Did the claimant sustain personal injury by accident arising out of and in the course of his employment on May 26, 2020?

FINDINGS OF FACT

The claimant worked for the respondent as a sheet metal specialist. As part of the hiring process, he completed a "Health Questionnaire" on August 4, 2019. The claimant indicated he previously had a back or spinal injury, and listed "syadic nerve lumbar,"¹ i.e., sciatic nerve lumbar.

¹ P.H. Trans., Resp. Ex. B3.

At his first deposition, the claimant testified:

- he never had any prior low back injuries or associated medical treatment;
- he camped one night over the 2020 Memorial Day weekend and floated in a pond;
- he only camped one night, instead of two nights, because he was physically worn out from working for the respondent the prior week;
- he did not drive or lift any ATV or four-wheeled vehicles over the Memorial Day weekend;
- he was not involved in any kind of accident over the Memorial Day weekend;
- he was physically fine the following morning of Tuesday, May 26, 2020, and was able to lift his 50-60 pound tool bag into the company truck;
- he traveled from Topeka to Ft. Scott with coworkers named Lance Foster, Antonio and Zach Blake;
- upon arriving at a job site two hours later, he slipped on gravel getting out of the truck, felt a slight pinch in his low back and tried to walk it off;
- he did not think the coworkers saw him slip, but assumed they knew he was hurt because he was trying to walk off his pain for a few minutes;
- he was pretty sure he told all of his coworkers something pinched in his right buttocks;
- his superintendent, Allen Foster (Allen), arrived at the job site later in the day;
- he told Allen he slipped getting out of the truck and further injured his back when helping with lifting a 20-foot panel;
- Allen joked the claimant must have partied too hard over the holiday weekend, which the claimant denied;
- his leg was completely numb and he was unable to work, so he laid down under an awning the rest of the work day (for four to five hours);
- he told coworkers he needed to go to the emergency room;
- his coworker, Lance, drove 90 miles per hour to get him back to Topeka;

- he contacted his wife to pick him up;
- he was hardly able to walk, so his coworker, Zach, helped him to his wife's vehicle and also loaded his tools into his wife's vehicle;
- his wife took him to the Stormont Vail emergency room;
- he spoke to John Turner, the respondent's owner, on June 9, 2020, and informed him he hurt himself slipping on gravel and while lifting a 20-foot panel;
- Mr. Turner did not respond, apart from requiring a return to work release; and
- he again told Mr. Turner about his accident or injury on June 15, at which time, the claimant was laid off work.

At the preliminary hearing, the claimant's testimony was generally consistent with his prior deposition testimony. The claimant stated his coworkers knew he slipped when getting out of the truck because it took him a few minutes to walk it off. He also testified his coworkers immediately knew he was hurt after lifting a panel and assigned him different work. The claimant testified Allen knew he was hurt and asked what was wrong, even asking if the claimant got too drunk over the holiday weekend. The claimant denied being intoxicated, and told Allen he had gone camping one night.

The claimant testified when he filled out the questionnaire, he understood the term "sciatic nerve" meant neck or mid-back pain from working heavy construction. The claimant testified he did not know about the term "lumbar." He stated rest and ibuprofen or Tylenol relieved his symptoms. At the preliminary hearing, the claimant also indicated his injury resulted in urinary and bowel incontinence.

Jannette Pearson is the claimant's wife. She testified they camped over the Memorial Day weekend. She denied the claimant suffered any injuries or operated a four-wheeler. On May 26, 2020, she picked up the claimant upon his return to the shop. She testified the claimant was struggling to walk and Mr. Blake helped him into the vehicle and loaded his tool bag. She then drove the claimant to the emergency room.

The claimant was seen by Sarah Sartain, M.D., at the Stormont Vail emergency room for low back pain on May 26, 2020. Dr. Sartain diagnosed a back strain and prescribed medications. The doctor referred the claimant to pain management and released him to return to work effective May 29, 2020. No Stormont Vail medical records reference an accidental work injury.

On June 1, 2020, the claimant saw his primary care physician, Michael Cox, M.D., for right-sided sciatica and low back pain radiating down leg. An MRI report dated the same day showed the claimant had mild disc bulging at L5-S1, with no spinal canal stenosis or neural foraminal narrowing. Dr. Cox took the claimant off work from May 27, 2020, until June 10, 2020. Dr. Cox's records and the MRI report do not mention a work-related accidental injury.

The claimant testified Mr. Turner laid him off and told him to file for unemployment on June 15, 2020, because work was not available. The claimant has not worked since.

The claimant was evaluated by Florin Nicolae, M.D., on September 8, 2020. The limited records in evidence from Dr. Nicolae do not mention a work injury or accident.

The claimant returned to Dr. Cox on January 26, 2021, complaining of ongoing debilitating back pain. The doctor noted the claimant had three epidural steroid injections without relief. Dr. Cox prescribed gabapentin and recommended a consultation with a neurosurgeon. To date, the claimant has not seen a neurosurgeon. This January 26, 2021, report did not mention a work-related accident or injury.

Stormont Vail sent the claimant a letter dated January 25, 2021, indicating Blue Cross denied his claim as possibly due to a work-related accident. Thereafter, the claimant testified he contacted Blue Cross and was told to file for workers compensation.

John Turner was the respondent's president and owner until December 31, 2020. In the event of a work-related injury, Mr. Turner testified the company procedure was for the employee to report it to the immediate supervisor and the supervisor should call it in. The supervisor would take the injured employee to a designated medical provider or call an ambulance. The respondent would notify Kansas Drug Testing to obtain a drug test. Based on his testimony, Mr. Turner's policy was to accommodate both work-related and non-work-related restrictions, if possible.

Mr. Turner testified the claimant called him after work on May 26, 2020, stating his back was bothering him and "it wasn't anything that he had done at work, that he had a prior incident at another employer. And he wanted to go and get it checked out and he wanted to let me know."² Mr. Turner testified the claimant was not hurt working for the respondent and said nothing about slipping on gravel or lifting panels. After Mr. Turner testified, the claimant agreed they spoke the evening of May 26, 2020. The claimant testified he called Mr. Turner because the respondent's employees were told to contact him if medical treatment was needed. The claimant stated Mr. Turner told him to get treatment through health insurance.

² Turner Depo. at 10.

Mr. Turner testified the claimant never said he was injured at work or aggravated an old back injury at work. The claimant never asked to fill out an accident report or requested medical treatment. Mr. Turner was first notified the claimant was reporting a work accident when he received the claimant's Application for Benefits in January 2021. Mr. Turner testified he did not bring the claimant back to work or offer accommodated work because of safety concerns.

The claimant and Mr. Turner exchanged text messages on June 1, 2020, and every day starting June 9 through June 15, with the exception of June 13, 2020. None of these text messages mention a work-related accident or injury. The claimant acknowledged this fact, but believed he had direct conversations with Mr. Turner about his work injury.

Lance Foster (Lance) worked for the respondent as a foreman. He drove the crew to the job site on May 26, 2020. Lance testified he and the claimant discussed what they did over the weekend, which is something they always did. Lance indicated the claimant said he camped and rode four-wheelers over the weekend. Lance stated the claimant told him on the trip to Fort Scott his back was hurting and he wrecked a four-wheeler over Memorial Day weekend.

To the best of his recollection, Lance testified he did not see the claimant slip on gravel getting out of the truck, nor did the claimant or anyone else mention the claimant hurt his back slipping on gravel or lifting panels. Lance testified the claimant worked all day without real difficulty. He denied driving fast to get back to Topeka because the claimant had back pain. Lance testified he was not aware the claimant's wife picked him up, whether any coworker helped the claimant with his tool bag, or the claimant went to the emergency room that evening.

William "Allen" Foster, Lance's father, has worked for the respondent for approximately 16 years. As a field superintendent, part of his duties involve dealing with workers compensation injuries. He is responsible for reporting a work injury to his supervisor and sending the injured worker for a drug test.

Allen testified the claimant told him on May 26, 2020, he and his cousin were "playing on four-wheelers or quads . . . over the weekend" and he hurt his back while "picking" up a four-wheeler over Memorial Day weekend.³ Allen also agreed there was a "rollover" involving the four-wheeler.⁴ Allen denied the claimant said he hurt his back slipping on gravel or lifting panels on May 26, 2020. He testified he likely teased the claimant about drinking too much over the weekend, but this was after learning about the

³ Allen Foster Depo. at 8.

⁴ *Id.* at 10, 19.

incident with a four-wheeler. Allen testified he told Mr. Turner the claimant said he hurt his back in a four-wheeler incident. According to Allen, Mr. Turner never said anything or told him he could not report it as a work accident. Allen testified he showed up at the job site around mid-morning on May 26, 2020, and left around 1:00 or 2:00 p.m. When he returned to the shop around 4:00 or 5:00 p.m., Allen told Mr. Turner the claimant hurt his back over the weekend. He joked the claimant had drank too much after the claimant mentioned he hurt his back lifting the four-wheeler.

Allen testified he spoke with the claimant a few times after he was no longer employed with the respondent. The conversations centered around side jobs the claimant was doing. One conversation occurred at Home Depot when Allen saw the claimant buying materials for a carpentry job. The claimant denied working since being laid off by the respondent, other than attempting some work which he could not do because of pain.

Zakaree Blake was working with the claimant on May 26, 2020. He testified the claimant was definitely hurt on the job that day. Mr. Blake testified he saw the claimant slip as he was getting out of the vehicle. Mr. Blake testified:

He told both Antonio and Alan [sic], and every - - everybody on the job site knew, after it happened, when his back first messed with him in the beginning of the morning, and then when he actually hurt it really bad by lifting panels, it was known right away that his back was hurting to the point where, later on in the day, he was sitting underneath the canopy in pain.⁵

Mr. Blake testified he may have slept in the company truck while traveling to the Ft. Scott job site. He did not recall anyone discussing events occurring over the Memorial Day weekend. Mr. Blake no longer works for the respondent. Mr. Blake attempted to give the respondent two weeks' notice of resignation before moving on to new employment, but Allen tersely told him his services were no longer needed.

Jeremiah Ross is the claimant's cousin. Mr. Ross spent time on his family's property over the Memorial Day weekend and testified the claimant was there one day. Mr. Ross acknowledged there were four-wheelers on the property, but denied the claimant was involved in a four-wheeler accident or suffered a back injury.

The ALJ denied benefits after finding the claimant's alleged injury did not arise out of and in the course of his employment. The claimant argues he proved his injury arose out of and in the course of his employment. The respondent maintains the Order should be affirmed.

⁵ P.H. Trans. at 72.

PRINCIPLES OF LAW AND ANALYSIS

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

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.

⁶ K.S.A. 44-501b(b).

⁷ K.S.A. 44-501b(c).

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

There is contradictory testimony. The claimant contends he was hurt at work on May 26, 2020, and denied being injured over the preceding Memorial Day weekend from riding, wrecking or lifting a four-wheeler. Mrs. Pearson testified the claimant was not injured over the holiday weekend, which was echoed by Mr. Ross. Mr. Blake testified everyone on the job site knew the claimant got hurt at work on May 26, 2020. Although it is unknown how information about a potential workers compensation injury was obtained, Blue Cross indicated in January 2021, the claimant's need for medical treatment was possibly due to a work-related injury. Arguably, Mrs. Pearson and Mr. Ross are biased because they are related to the claimant. Further, Mr. Blake left the respondent's employment on bad terms.

Mr. Turner testified the claimant denied any work-related injury while working for the respondent. Lance Foster testified the claimant told him his back hurt and he wrecked a four-wheeler over the Memorial Day weekend. Allen Foster testified the claimant told him he hurt his back over the holiday weekend from picking up or rolling a four-wheeler. Arguably, the Fosters' stories about the claimant being hurt over the prior weekend due to some event with a four-wheeler are too similar. The Fosters continue to work for the respondent.

The claimant had some sort of low back problem predating his employment with the respondent, based on his writing on a form about sciatic nerve pain and mention of "lumbar." While this diagnosis is similar to Dr. Cox's June 1, 2020, diagnosis of right-sided sciatica, there is no medical proof of an ongoing or persistent preexisting condition. The claimant clearly has disc bulging and right leg symptoms at present. The claimant's attempt to explain his prior condition as affecting his neck or mid-back is lacking.

What is absent from the evidentiary record tips the scales in favor of the respondent. There are no medical records in evidence supporting a work-related accidental injury. Medical records typically mention a history or cause of a patient's symptoms, even if it is no known cause. The text messages between the claimant and Mr. Turner do not mention a work-related accidental injury. Between the medical records and the text messages, the undersigned Board Member would ordinarily expect some communication verifying or even alleging a work-related accidental injury, if such vocational incident or incidents occurred. The absence of this communication indicates no work-related injury occurred.

The claimant bears the burden of proof. The claimant did not prove he sustained an accidental injury arising out of and in the course of his employment while working for the respondent on May 26, 2020.

WHEREFORE, the undersigned Board Member affirms the preliminary Order dated May 5, 2021.

IT IS SO ORDERED.

Dated this _____ day of July, 2021.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Michael Patton
James Hess
ALJ David Bogdan