BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN FOSTER
Claimant

v.

AP-00-0462-824
CS-00-0458-875

HILAND DAIRY FOODS CO., LLC
Respondent

and

INDEMNITY INS. CO. OF NORTH AMERICA
Insurance Carrier

ORDER

Respondent requests review of the December 10, 2021, preliminary Order issued by Administrative Law Judge (ALJ) Julie A.N. Sample.

APPEARANCES

Anna M. Mark appeared for the Claimant. Christopher J. McCurdy appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Transcript of Preliminary Hearing taken via Videoconference, held December 7, 2021, including exhibits A1-A4 and B1-B3; the transcript of Continuation of Preliminary Hearing of John Foster by Videoconference; Deposition of James Thomas Conrow, taken December 9, 2021; and the pleadings and orders contained in the administrative file. The Appeals Board also reviewed the parties' briefs.

ISSUE

Did Claimant sustain personal injury from an accident arising out of and in the course of his employment with Respondent?

FINDINGS OF FACT

Claimant works for Respondent as a delivery driver. Respondent requires Claimant to wear protective footwear with a safety toe and slip-resistant soles. Respondent does not provide the footwear directly, but pays employees an allowance to purchase footwear. The employees select the footwear, which must meet Respondent's safety requirements. Claimant selected his protective footwear from a vendor approved by Respondent. Claimant testified his shoes became untied two to three times per day because the laces were slick. Claimant did not purchase different shoelaces to correct the problem. Claimant does not wear his protective footwear outside of work, and usually wears sneakers or slip-on shoes at home.

On March 1, 2021, Claimant was at Respondent's plant and entered the restroom. Claimant was wearing his protective footwear. The sink in the restroom sprayed water on the floor, and Claimant testified the floor was wet. The floor is made of non-textured concrete.

As Claimant was walking, he fell and landed face-forward. Claimant attempted to grab the sink to break his fall, but the sink was wet and Claimant was unable to hold onto it. Claimant testified he did not know why he fell. Claimant also testified he thought he tripped over his shoelaces and the wet floor contributed to his fall. A co-worker was entering the restroom during the event, and saw Claimant fall face-forward. The co-worker called management for assistance. The co-worker later prepared a written statement confirming the fall occurred, but did not state the cause of the fall.

Mr. Conrow, an on-site supervisor, came to the restroom and saw Claimant in a stall. According to Mr. Conrow, Claimant said he did not know the reason he fell, and Claimant thought he passed out. Claimant did not state he tripped over his shoelaces or slipped in water. Mr. Conrow did not notice the floor or Claimant's clothes were wet. Mr. Conrow transported Claimant to North Kansas City Hospital for medical treatment. After transporting Claimant, Mr. Conrow noticed the car seat where Claimant sat was not wet.

According to the emergency department record of North Kansas City Hospital, Claimant stated he tripped and fell forward. Claimant also stated he may have lost consciousness, but not before the fall. Claimant received stitches for a forehead laceration, and underwent studies to rule out a closed head injury. Claimant was referred to Meritas Health for further treatment.

Mr. Winder, Respondent's Fleet and Distribution Manager, picked up Claimant after he was discharged from the hospital. While driving with Claimant, Mr. Winder asked what happened. According to Mr. Winder, Claimant said he tripped over his shoelaces and fell forward. Mr. Winder confirmed the sink in the restroom sprayed water on the floor.

Claimant testified he noticed one of his shoes was untied when he was riding with Mr. Winder.

Both Mr. Winder and Mr. Conrow confirmed Respondent required employees in the plant to wear steel-toed and slip-resistant shoes. Mr. Conrow confirmed the employees received an allowance from Respondent to purchase protective shoes. Both Mr. Winder and Mr. Conrow denied Claimant reported a problem with his shoe becoming untied before the accident.

Claimant went to Meritas Health for treatment of the right elbow and shoulder on March 1, 2021. According to Meritas' records, Claimant stated he fell forward in the restroom after he tripped over his shoelaces. Claimant was referred to Dr. Divelbiss for treatment of his right elbow and shoulder.

Claimant initially saw Dr. Divelbiss on May 7, 2021. According to Dr. Divelbiss' records, Claimant stated he tripped over his shoelaces and fell flat onto the floor. Claimant reported ongoing right elbow and shoulder pain. Claimant was diagnosed with right shoulder impingement and right medial epicondylitis, which Dr. Divelbiss thought was caused by the March 1, 2021 fall. Dr. Divelbiss recommended surgery and imposed light-duty restrictions. Respondent denied further medical treatment.

Claimant's right elbow and shoulder remained symptomatic, and Claimant sought authorization of additional treatment by Dr. Divelbiss. Following a preliminary hearing, ALJ Sample issued the preliminary Order. ALJ Sample found Claimant's use of mandatory safety footwear provided by Respondent, coupled with the water hazard in Respondent's restroom, created an employment-related risk of injury. ALJ Sample concluded Claimant met his burden of proving compensability, and granted the request for authorization of medical treatment. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the preliminary Order should be reversed because Claimant was unable to explain the cause of the fall, making it a non-compensable unexplained fall stemming from a neutral risk with no particular employment character. In the alternative, Respondent argues Claimant's falling due to untied shoelaces constitutes a personal risk, rendering the injury noncompensable. Claimant argues he met his burden of proving the fall was caused by a work-related risk, and Respondent failed to prove the fall was caused by a personal or neutral risk. In the alternative, Claimant argues the claim arising out of employment under the personal comfort doctrine.

Generally, it is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the

provisions of the Act.[1] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[2] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[3]

To be compensable, an accident must be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift.[4] The accident must be the prevailing factor in causing the injury, and "prevailing factor" is defined as the primary factor compared to any other factor, based on consideration of all relevant evidence.[5]

Here, there is no dispute the fall of March 1, 2021, occurred. Claimant was at the place of employment in an area he was reasonably expected to be in furtherance of his employment when the fall occurred. It is undisputed Claimant sustained injuries to the right elbow and right shoulder. Dr. Divelbiss clearly stated the fall was the prevailing factor causing the injuries and need for additional medical treatment. The issue is whether the fall is excluded from the definition of "arising out of and in the course of employment" under K.S.A. 44-508(f)(3)(A).

An injury occurring as a result of day-to-day activities, a neutral risk with no particular employment or personal character, a risk personal to the worker or arising either directly or indirectly from idiopathic causes is not considered to arise out of and in the course of employment.[6] Once the employee has met the burden of proving a right to compensation, the employer has the burden of proving relief from liability based on any statutory defense or exception.[7]

Here, Claimant met his initial burden of proving a right to compensation from the accident of March 1, 2021. Under *Johnson*, the burden shifts to Respondent to prove the

---

[1] *See* K.S.A. 44-501b(a).

[2] *See id*.

[3] *See* K.S.A. 44-501b(c).

[4] *See* K.S.A. 44-508(d).

[5] *See* K.S.A. 44-508(d),(g).

[6] See K.S.A. 44-508(f)(3)(A).

[7] *See Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 53, 445 P.3d 1183 (2019), *rev. denied* 311 Kan. 1046 (2020).

accident falls under an exception to compensability under K.S.A. 44-508(f)(3)(A). Respondent's arguments will be addressed in turn.

First, Respondent failed to prove the fall did not arise out of and in the course of employment because it arose from a personal risk. Respondent's reliance on *Meyer v. Frontier AG, Inc.*,[8] is misplaced. In *Meyer*, the employee noticed one of his shoes was untied, and he placed his foot on a chair to tie the shoe. As the employee removed his foot from the chair, the heel was caught in a tear in the chair upholstery, causing the employee to fall and to sustain a right knee injury.[9] The single Board Member deciding the claim adopted the findings and conclusions of the administrative law judge, who concluded the risk of falling while tying a shoe would ordinarily be a personal risk. The risk, however, was compounded by the tear in the upholstery of the chair, which was a work-related risk. Therefore, the risk was work-related, and the injury arose out of and in the course of employment.[10] Here, Claimant did not fall because he was tying his shoe. Rather, Claimant fell because of an unexplained fall, because he tripped on a shoelace or because he slipped on a wet floor. The personal risk in *Meyer* is not present.

Second, Respondent failed to prove the fall was noncompensable because it was the product of a neutral risk with no particular employment or personal character. The 2011 amendments to the Kansas Workers Compensation Act did not modify the preexisting law of neutral risks.[11] Respondent must prove the fall was the product of a neutral risk, and the risk had no particular employment or personal character, to prevail. Unexplained falls are compensable because they are the product of a compensable neutral risk, absent evidence of no particular employment or personal character.[12] Here, even if the fall was unexplained, there is no evidence the fall had no particular employment or personal character. Thus, Respondent's argument, Claimant's fall is noncompensable because it is unexplained, must fail.

The greater weight of the evidence indicates Claimant's fall was caused by employment-related risks. Claimant was wearing shoes prone to becoming untied due to his working conditions. Claimant did not wear his safety shoes at home. In addition, the non-textured concrete floor was wet because of the sink spraying water, which was an

---

[8] *See Meyer v. Frontier AG, Inc.*, No. 1,052,768, 2011 WL 494982 (Kan. WCAB Jan. 28, 2011).

[9] *See id.* at *1.

[10] *See id*. at *3.

[11] *See Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 50, 445 P.3d 1183 (2019), *rev. denied* (Feb. 25, 2020).

[12] *See id*. at 51 (*citing McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009)).

employment-related hazard Claimant did not face outside his working life. Respondent provided no other evidence of the cause of Claimant's fall. The undersigned concludes Respondent failed to prove the exceptions of K.S.A. 44-508(f)(3)(A) apply.

Because Respondent failed to prove the exceptions of K.S.A. 44-508(f)(3)(A) apply, it is unnecessary to address Claimant's argument this matter arising out of employment under the personal comfort doctrine.

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 December 10, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

____
WILLIAM G. BELDEN
BOARD MEMBER

c: Via OSCAR

Anna M. Mark
Christopher J. McCurdy
Hon. Julie A.N. Sample