BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RICHARD GROUNDS	)	
Claimant	)	
V.	)	
	)	AP-00-0462-953
EXCEL INC.	)	CS-00-0459-488
Respondent	)	
AND	)	
	)	
AIU INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 22, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Joseph Seiwert appeared for Claimant. Clifford K. Stubbs appeared for 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 December 20, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Did Claimant's injury result from voluntary participation in horseplay?

2. Did the ALJ exceed his authority and/or jurisdiction by awarding payment of medical bills when no medical bills were submitted as evidence at the preliminary hearing?

FINDINGS OF FACT

Claimant began working for respondent as a forklift operator on June 9, 2021. Claimant also performed table work, sorting product into bins, when he was not operating

a forklift. Claimant stated he was punched in the back of his right knee by a coworker, Elijah Burnett, without provocation on July 20, 2021. Claimant explained he was working at one of the tables when Mr. Burnett sat at the table behind him, reached across and punched his knee. Claimant testified he had no warning and reacted:

> I was standing there at the table, and after he hit me in the knee and I shouted and yelled in the whole room, I'm like, why did you do that? And he's like, it's funny, man. I want to see you go down.[1]

Mr. Burnett testified Claimant, prior to July 20, 2021, made homophobic and racist jokes and would "shoulder bump" him in a playful manner. Mr. Burnett explained:

> Q. Did you ever hit or touch [Claimant] before that day on July 20?
>
> A. No.
>
> Q. Did he ever hit or touch you?
>
> A. I mean, he rubbed up against me. He would shoulder bump me, like, boy, you ain't ready, but it would all just be playing around. Like I said, when I first started over there, I didn't even know him. He just came out of nowhere and started talking, telling jokes, racial jokes, but that's him, you know.[2]

Mr. Burnett disputed Claimant's testimony regarding the events of July 20, 2021. Mr. Burnett testified he was sitting alone at one of the tables, eating a popsicle, when Claimant approached him and made a comment about the popsicle. Mr. Burnett indicated Claimant was in his face, and he struck Claimant with an open hand to the knee. Mr. Burnett stated he was not trying to hurt Claimant, just make him back off. Mr. Burnett testified Claimant did not scream or yell or indicate he was hurt afterward, but instead they laughed it off, and Claimant returned to the forklift.

Claimant stated he felt immediate pain and throbbing in his right knee, though he returned to work. Two days later, Claimant could not hold the forklift's brake down due to his knee pain. He reported the incident to his supervisor. Mr. Burnett completed a Complaint/Witness statement this same day. Mr. Burnett indicated in the statement he and Claimant played all the time. He wrote:

> Tuesday (July 20, 2021) [Claimant] told a coworker that I was sucking his d*** because I was talking to cooporate [*sic*] so with a open fist I touch the back of his

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[1] P.H. Trans., Resp. Ex. 3 at 33.

[2] P.H. Trans., Resp. Ex. 1 at 21-22.

leg and we laughed it off and talked about went back to work and both finished our job and been talking every since. He always play and joke around he even sized me up everyday but we both laugh it off.

What he said after I touched his leg was don't touch his leg no more because he has had surgery. I said okay and I apologized about it. Then everyday since I known him he would say something gay I wouldn't like it laugh it off and keep working . . .[3]

Mr. Burnett further described the event:

Q. And about, I don't know, how many steps would he have had to take to go around the table to get over to you?

A. He wasn't even supposed to be at the table. He stepped off his forklift and went over to the third table and started talking to the people over there, and he walked around the table. I was on the fourth table by myself. He walked around the table, and that's when he said something about the popsicle. He was already in my face. I tried to back up, but when I backed up, he stepped forward, and we were face to face now.

Q. And when you were – you said you struck him with an open hand to his leg; is that right? Or –

A. Yes. That's right.

Q. Were you trying to get him to back up? Were you trying to hurt him? Tell me, what was your intent?

A. I was just getting him out of my face. If that was the case, you know, it would have been a lot worse, but I like the job I work at, so I didn't do too much. But we laughed it off. I thought everything was okay from there. He jumped right back on the forklift, and then he came back later on with more jokes. And then I guess a couple days later, after he talked to one of the other guys, that's when they were like, that's a lawsuit, and that's when he went to the office, and that's when it got serious, you know.

Q. When this incident happened and you, you know, struck his leg with your open hand to push him back, did he scream out in pain or yell, anything of that nature?

A. No. No, he didn't.[4]

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[3] P.H. Trans., Resp. Ex. 2 at 1-2.

[4] P.H. Trans., Resp. Ex. 1 at 10-12.

After claimant reported the incident, respondent sent Claimant to MedExpress for an evaluation of his knee. Claimant reported pain and throbbing in his right knee. He was diagnosed with pain in the right knee, uncomplicated, and assigned work restrictions. It was noted Claimant could continue operating heavy machinery and should be seen by an orthopedic surgeon.

Claimant returned to respondent on light duty driving a forklift. Respondent required employees to wear masks at work. Claimant testified he could not wear a mask due to hyperhidrosis, or excessive sweating. Claimant told his supervisors of his condition, but it was not accommodated, so he walked off the job. Claimant returned with a doctor's note excusing him from wearing a mask, and was provided a position driving a forklift in another area. Claimant worried about the safety of driving a forklift in an area with hydraulic fluid on the ground and requested another job. He was placed on a job working outside. Claimant complained about the outside heat to his manager and eventually walked off the job again in late August 2021. Claimant has not worked since leaving respondent.

In 2010, Claimant worked for Auto Zone as a manager before voluntarily leaving this job due to decreased hours. He settled a workers compensation claim with Auto Zone for $13,000. Claimant then worked for El Dorado Corrections, but was terminated for not reporting a crime with which he was charged. After serving a two-year probation as a result of the criminal conviction, Claimant worked for Epic Sports before quitting without notice.

Claimant then worked for Orr Nissan. On July 14, 2018, he sustained a right knee injury after falling into an inspection pit. Claimant underwent a PCL reconstruction with graft, a lateral meniscectomy, and a chondroplasty of the patella by Dr. Justin Strickland. After his release from Dr. Strickland, Claimant settled his claim, which included injuries to his shoulders and right knee, on July 27, 2021, for a lump sum of $80,000. Claimant did not return to Orr Nissan following his right knee surgery.

On October 5, 2021, Dr. George Fluter examined Claimant at his counsel's request. Dr. Fluter reviewed Claimant's available medical records, history, and performed a physical examination, assessing Claimant with right knee pain and possible right knee internal derangement. Dr. Fluter determined the work injury was the prevailing factor in causing Claimant's condition:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [Claimant's] current condition and the reported work-related injury occurring on 07/20/21.
>
> Although [Claimant] has a history of a prior injury to the right knee in 2018 that required surgery, a specific event occurred on 07/20/21 resulting in the need for

> medical evaluation/treatment. This represents a new injury, not an aggravation/acceleration of a preexisting condition.[5]

The ALJ found Claimant did not voluntarily participate in horseplay and ordered respondent to provide treatment for Claimant's right knee injury. The ALJ denied temporary total disability benefits because Claimant voluntarily resigned his employment with respondent. Further, the ALJ ordered respondent to pay Claimant's authorized and unauthorized medical expenses.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the evidence, taken from the whole record, confirms Claimant initiated and voluntarily participated in the horseplay resulting in his alleged right knee injury. Respondent notes the ALJ did not address the credibility of any in his Order. Respondent argues it is not liable for payment of Claimant's medical expenses because Claimant's injury is not compensable and no medical bills were introduced into the record. Respondent maintains the issue of temporary total disability should be affirmed.

Claimant contends he is entitled to medical treatment, as he was not a participant in the horseplay. Claimant argues the ALJ's Order should be affirmed.

1. Did Claimant's injury result from voluntary participation in horseplay?

K.S.A. 44-501 states, in part:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
>
> . . .
>
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

In *Fishman v. U.S.D. 229,*[6] the Court of Appeals wrote:

> K.S.A. 2017 Supp. 44-501(a)(1)(E) disallows compensation for an injury if it results from "the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise." Somewhat surprisingly,

[5] P.H. Trans., Cl. Ex. 1 at 3.

[6] *Fishman v. U.S.D. 229*, No. 118,327, 2018 WL 3485612 (Kansas Court of Appeals unpublished opinion filed July 20, 2018).

> there is no statutory definition of horseplay in Kansas, either under the workers compensation law or elsewhere. Likewise, we have been unable to locate any Kansas case law which specifically embraces a particular definition. Notably, our Supreme Court recently held that, in the context of a civil battery lawsuit, the idea of horseplay is a "nebulous concept" which has "no legal meaning." *McElhaney v. Thomas*, 307 Kan. 45, Syl. ¶ 4, 56, 405 P.3d 1214 (2017). Turning to colloquial sources, the dictionary defines horseplay as "rough, boisterous play." Webster's New World College Dictionary 703 (5th ed. 2016).[7]

Fishman provides several examples of horseplay from case law, including a worker kicking or placing his foot on a spinning tire balancing machine to disrupt a coworker's readings, a worker being injured after "bear-hugging" another employee, dumping a coworker out of her chair, trying to lift large rolls of waxed paper overhead, trying to shock a coworker with an electrically charged wire fastened to a metal door, and throwing mortar at a coworker. The Court of Appeals noted the cited cases involved potentially hazardous activities and showed the claimants stepped away from their job duties and interfered with their coworkers' abilities to do their job duties. The Court of Appeals, in *Fishman*, found the claimant did not engage in potentially hazardous activity or abandon her job activities and denied the horseplay defense.

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.

The burden of proving affirmative defenses is on the respondent.[8] Here, the accounts of the events of July 20, 2021, differ. According to Claimant, Mr. Burnett hit him in the knee without provocation or warning. According to Mr. Burnett, Claimant made racial jokes and got in his face. Mr. Burnett alleges he struck or patted Claimant on the leg with an open hand to get him to back off. The ALJ did not make a finding of credibility. Giving equal weight to the witnesses, the record does not support, by a preponderance of the evidence, a finding of horseplay.

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[7] *Id.* at *5.

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

2. Did the ALJ exceed his authority and/or jurisdiction by awarding payment of medical bills when no medical bills were submitted in evidence at the preliminary hearing?

K.S.A. 44-534a(a)(2) states, in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(l)(2)(A) states, in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing where one of the parties alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to specific jurisdictional issues: accidental injury, injury arising out of and in the course of employment, timely notice, and certain other defenses. The Court of Appeals, in *Carpenter v. National Filter Service,* stated "[b]ecause in 44-534a jurisdiction means coverage by the Act, 'certain defenses' are subject to review

only if they dispute the compensability of the injury under the Act."[9] Where no jurisdiction is present, it is appropriate to dismiss the appeal.

Whether the ALJ could order the payment of medical bills without proper foundation is not an appealable issue under K.S.A. 44-534a(a)(2). Respondent's request for review of this particular issue is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Gary K. Jones dated December 22, 2021, is affirmed in part. Respondent's request for review is dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Joseph Seiwert, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge

[9] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).