

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NICOLE DEISER)	
Claimant)	
V.)	
)	AP-00-0465-990
MOSAIC)	CS-00-0459-383
Respondent)	
AND)	
)	
SENTRY INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the April 14, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Michael L. Snider appeared for Claimant. Joseph C. McMillan 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 April 13, 2022, with exhibits attached, and the documents of record filed with the Division.

ISSUES

The issues for the Board's review are:

1. Did Claimant suffer a compensable injury on June 24, 2021?
2. If so, what is the prevailing factor causing Claimant's right shoulder and arm injuries?
3. Did the ALJ err in finding Respondent not liable for medical treatment for Claimant's right shoulder and arm?

FINDINGS OF FACT

Respondent provides services to people with mental health needs and disabilities. On June 24, 2021, a resident entered the office of Jennifer Young, Claimant's supervisor. Claimant followed the resident into Ms. Young's office, where Ms. Young was speaking with a coworker. The resident took a box of candy he found in the office, and an altercation ensued when the employees retrieved the candy. Claimant testified she and Ms. Young were pushed to the floor by the resident during the incident. Claimant stated she sustained a cut to her finger and struck her right elbow when she fell. Ms. Young agreed Claimant cut her finger during the altercation, but denied either of them fell to the floor. Ms. Young explained the resident returned the candy after the struggle and walked out of her office. Ms. Young followed the resident to the doorway. Ms. Young continued:

Q. Okay, where was [Claimant] during this incident?

A. Behind [the resident].

Q. Okay. In the doorway?

A. Yes.

Q. Okay. She's testified that during that incident both you and she fell to the ground; is that what happened?

A. No, I never fell to the ground, and I did not see her fall to the ground.

Q. Okay. Did you at any time see [Claimant] fall to the ground?

A. No.

Q. Is it possible that she could have fallen to the ground in your office, and you not see her?

A. No.¹

Respondent requires a General Events Report to be completed by the involved employee after any incident. This report must include all behaviors of the involved resident(s), including any aggressive behavior. Ms. Young testified if a resident pushed an employee down, it would be included in the report as physical aggression. Claimant completed a General Events Report on June 24, 2021, but did not report any physical aggression by the resident.

¹ P.H. Trans. at 38-39.

Claimant called off work the following day, June 25, 2021, unrelated to the incident. Later that afternoon, Claimant contacted Ms. Young and requested to complete an incident report. Although she was informed the incident report must be completed within 24 hours, Claimant did not complete the paperwork until June 28, 2021. Claimant reported pain in her right shoulder and neck after she was knocked down by a resident and caught herself on the floor with her arm.

Claimant was evaluated at Ellsworth Rural Health Clinic on July 6, 2021, for pain affecting her neck, right shoulder, and right leg. She attributed her pain to a work injury occurring June 24, 2021. Claimant underwent conservative treatment, including physical therapy, and was provided temporary work restrictions.

Respondent conducted an investigation into the incident and discovered a text from Claimant to Ms. Young dated June 16, 2021, stating:

Hey I was in a 4 wheeler accident last night and my phone was destroyed I just got a new one I'm Sry [*sic*] I couldn't get anyone called I'm ok I'm Just really sore and bummed up.²

At the preliminary hearing, Claimant testified the text was partly inaccurate because she had used a talk-to-text feature which did not correctly transcribe her statement. Claimant explained her son was involved in the accident. She described:

Q. Okay. So were you on the back of the four wheeler?

A. No. He was doing tricks and I was videoing it while he's in a wreck. Then he destroyed my phone while he drove over the top of it because he lost control of it. I had to pull the four wheeler off of him.³

Following its investigation, Respondent denied Claimant's claim.

Claimant's counsel referred her to Dr. George Fluter on October 26, 2021, to determine treatment recommendations. Claimant complained of pain affecting the right side of the neck/upper back, right shoulder, and right upper arm with numbness in the middle, ring, and little fingers of the right hand. She provided a history of falling onto her right forearm during an altercation with a resident at work. Dr. Fluter reviewed Claimant's available records and performed a physical examination, finding:

1. Status post work-related injury; 06/24/21.
2. Right shoulder/upper extremity pain/dysesthesia.

² *Id.*, Resp. Ex. H.

³ P.H. Trans. at 29-30.

3. Right shoulder impingement/tendonitis/bursitis.
4. Possible right shoulder internal derangement.
5. Neck/upper back pain.
6. Cervicothoracic strain/sprain.
7. Probable right upper extremity nerve dysfunction (cervical radiculopathy, ulnar neuropathy).⁴

Dr. Flutter opined the work-related incident of June 24, 2021, is the prevailing factor causing her current condition and need for medical treatment. Dr. Flutter imposed temporary restrictions and recommended additional conservative treatment, with the possibility of surgical intervention depending on diagnostic testing results and Claimant's response to treatment.

Claimant left Respondent's employment in September 2021. She stated she currently works elsewhere, which aggravates her right arm, and experiences dull pain in her right shoulder.

The ALJ denied Claimant's preliminary hearing requests, determining the evidentiary record does not support a finding Claimant fell or suffered injuries to her right shoulder or elbow as a result of the June 24, 2021, accident.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ erred in determining the June 24, 2021, accident was not the prevailing factor causing Claimant's shoulder and arm injuries. Claimant contends Ms. Young was distracted at the time of the incident and so did not witness her fall. Further, Claimant argues the medical evidence supports she sustained an injury to her shoulder by accident on June 24, 2021.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the ALJ clearly and properly found Claimant not credible based on the evidence and testimony submitted. Respondent further notes Claimant offered no evidence or arguable basis to overrule the ALJ's Order.

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.⁵ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁶ The burden of proof shall be on the employee to establish the right to an

⁴ *Id.*, Cl. Ex. 1 at 5.

⁵ See K.S.A. 44-501b(a).

⁶ See *id.*

award of compensation, and to prove the various conditions on which the right to compensation depends.⁷

K.S.A. 2020 Supp. 44-501b(c) 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. 2020 Supp. 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 decision of whether Claimant suffered a compensable injury comes down to credibility of the witnesses. Claimant testified she and Ms. Young were pushed to the floor by a resident. Ms. Young denied either of them fell to the floor. Dr. Fluter noted a history of an incident where Claimant fell onto her right forearm during an altercation with a resident at work and based his causation opinion on the occurrence of this incident. As the result, Claimant suffered a variety of right upper extremity, right shoulder, and cervical maladies. There was no mention of the ATV incident in Dr. Fluter's report.

The ALJ questioned Claimant's credibility and denied compensation, writing:

While Claimant exhibits objective signs of an injury to her shoulder, on June 17, 2021, her son was involved in an ATV accident. Claimant testified that she alone had to remove the ATV from atop her son after the accident. That activity, considered in conjunction with the absence of credible evidence of a fall on June 24, undermines Claimant's credibility as to the cause of her complaints.⁸

The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.⁹ Appellate

⁷ See K.S.A. 44-501b(c).

⁸ ALJ Order (Apr. 14, 2022) at 1.

⁹ See *Garner v. Kitselman Construction, LLC*, No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

tribunals are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor.¹⁰

The preliminary hearing was held via a video conferencing system called "Case Call."¹¹ The ALJ had the opportunity to observe both Claimant and Ms. Young testify. The testimony, coupled with the ATV incident, led to his determination Claimant's testimony was less credible than Ms. Young's. The undersigned agrees and finds Claimant failed to meet the burden of proving she suffered compensable injuries to her right shoulder or elbow arising out of and in the course of her employment with respondent as a result of the June 24, 2021, accident.

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 Bruce E. More dated April 14, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2022.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Michael L. Snider, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge

¹⁰ See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹¹ P.H. Trans. at 1.