BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BRANDI A. PHIFER
Claimant

v.

AP-00-0464-019
CS-00-0441-971

COCHRAN MORTUARY
Respondent

and

THE HARTFORD
Insurance Carrier

ORDER

Claimant requested review of the February 25, 2022, Award issued by Administrative Law Judge (ALJ) Ali Marchant. The Appeals Board heard oral argument on July 7, 2022.

APPEARANCES

Randall J. Price appeared for Claimant. Kevin J. Kruse appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the stipulations and considered the same record as the ALJ, consisting of the transcript of Regular Hearing, held March 9, 2021, including Exhibits B-D; the transcript of Evidentiary Deposition of Todd A Phifer, taken June 29, 2021, including Exhibits 1-3; the transcript of Evidentiary Deposition of P. Brent Koprivica, M.D., taken September 1, 2020, including Exhibits 1-4; the transcript of Remote Evidentiary Deposition of John P. Estivo, D.O., taken August 31, 2021, including Exhibits 1-6; the transcript of Evidentiary Deposition of Karen Terrill, taken April 12, 2021, including Exhibits 1-3 and A; the transcript of Remote Evidentiary Deposition of Terry L. Cordray, taken August 23, 2021, including Exhibits 1-3; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUE

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

FINDINGS OF FACT

Claimant worked for Respondent, a funeral home, from 2001-03 and from 2004 to May 2019. Claimant initially worked as a receptionist and administrative assistant. Claimant later worked as the office manager, where she managed staff, answered phones, received flowers for memorial services, prepared areas for funerals and dealt with accounts payable and receivable. Claimant later became an assistant funeral director, where she assisted in preparing funerals and memorial services. Ultimately, Claimant became the Assistant Manager, where she helped clients pre-arrange and fund funerals, and ran the day-to-day operations. Claimant also applied cosmetics, performed hair styling and dressed bodies for presentation. Claimant testified she was also involved in picking up bodies and transferring them to Respondent's hearse. Claimant occasionally drove a limousine or hearse during services. Claimant reported to the manager, who was her husband, and to the owners, who were her in-laws.

Although it appears Claimant's work was performed on Respondent's premises, Claimant testified she was required to drive as part of her work duties because she drove to work from her home. Respondent provided Claimant a company car. The car was a normal passenger car, and was not specially modified. Claimant testified she was expected to be available to work twenty-four hours per day, seven days per week. Claimant was provided a cell phone by Respondent, and Claimant was expected to answer business calls at any time. Respondent, however, also employed an answering service to take calls after hours and to screen calls for emergencies.

Claimant was paid a salary. Claimant did not clock in or out, and she did not have a set lunch schedule. Claimant indicated she ate at her desk when busy, but could take a lunch break on a slow day.

On July 20, 2017, Claimant drove to work in the company car and performed her usual work. Claimant performed administrative work in her office, helped in the preparation room and cleaned the building for the next service. Claimant and her husband decided to leave work and go on an hour-long lunch break because they were hungry. Claimant and her husband planned to go to a restaurant located five minutes from Respondent's premises. Claimant carried her company cell phone with her, and was expected to take any calls while away from the office. Claimant believed Respondent had authority over her during her lunch break, and she would be required to return to work early if needed. Claimant also testified she routinely did business over the phone during her lunch breaks.

Claimant and her husband left Respondent's location with the company car. Claimant and her husband were traveling on a public street, and were struck from behind by another car while waiting in the center lane to turn left. Claimant was riding in the car as a passenger when the accident occurred. Claimant was not using her cell phone or otherwise engaged in work for Respondent when the accident occurred. Claimant felt an immediate onset of cervical symptoms, including tightness and stiffness in her neck. After the accident, Claimant returned to work and attempted to continue working. After thirty to forty-five minutes, her neck stiffness was too much and Claimant was driven home. Claimant's symptoms worsened.

Ultimately, Claimant underwent a three-level anterior cervical discectomy fusion procedure by Dr. Dickerson. Claimant continued to experience residual neck and shoulder pain, as well as headaches, after she reached maximum medical improvement. Claimant received epidural steroid injections following her surgery due to her residual symptoms. Following her release to return to work, Claimant resumed her usual work. Claimant had higher earnings than during the twenty-six week period preceding the accident. Claimant testified she worked twenty to sixty hours per week.

At the time of the accident, Claimant and her husband were attempting to purchase the business from the owners. Sale negotiations reached an impasse regarding the sale price. As a negotiation tactic, Claimant and Mr. Phifer sent the owners a letter, dated March 8, 2019, stating they intended to resign effective July 12, 2019. Mr. Phifer testified he did not really intend to resign, and he did not believe his parents would allow him to resign and discontinue sale negotiations. In response, one of the owners instructed Mr. Phifer to terminate Claimant. Claimant's termination was effective May 2019. The exact date of Claimant's last day worked is unknown.

Following her termination, Claimant worked as an insurance agent, but was unsuccessful. Claimant is in the process of starting another business. Claimant currently has no income.

Dr. Estivo rated Claimant's functional impairment at 15% of the body as a whole under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth edition (*AMA Guides*), with 2% impairment preexisting, producing 13% functional impairment of the body as a whole for the July 20, 2017 injuries. Dr. Estivo thought Claimant sustained no task loss based on the task list prepared by Mr. Cordray, and sustained 17% task loss based on the task list prepared by Ms. Terrill.

Dr. Koprivica rated Claimant's functional impairment at 13% of the body as a whole under the *AMA Guides*, required permanent restrictions and required future medical treatment. Dr. Koprivica thought Claimant sustained 83% task loss based on the task list prepared by Ms. Terrill.

Mr. Cordray opined Claimant sustained no loss in wage-earning capacity under the opinions of Dr. Estivo, and was capable of earning $980.77, per week based on Dr. Koprivica's restrictions. Ms. Terrill thought Claimant was unable to work based on Dr. Koprivica's restrictions and was capable of earning $622.40, per week based on Dr. Estivo's opinions.

ALJ Marchant issued the Award on February 25, 2022. ALJ Marchant found Claimant's average weekly wage was $1,051.81, which did not include commissions Claimant received from insurance sales because those commissions were not paid by Respondent. ALJ Marchant found the accident was the prevailing factor causing Claimant's injuries and resulting impairment or disability based on the opinions of Drs. Estivo and Koprivica. ALJ Marchant concluded Claimant failed to prove the accident arose out of and in the course of employment because Claimant was not engaged in work-related travel or performing work when the accident occurred, and compensation was barred under the going and coming rule.

For completeness, ALJ Marchant found, if compensable, Claimant's functional impairment on account of the accidental injuries was 13% of the body as a whole. ALJ Marchant found Claimant was eligible to receive work disability compensation based on an average of the wage loss and task loss opinions, or 22.5% permanent partial general disability, from May 1 through July 12, 2019, but was not eligible to receive work disability benefits after July 12, 2019, because Claimant voluntarily resigned her employment effective July 12, 2019. ALJ Marchant also ordered Respondent to pay $500.00, for the medical expenses incurred with Dr. Tokala under the unauthorized medical allowance if the matter was compensable. Finally, ALJ Marchant concluded Claimant was entitled to an award of future medical treatment if this matter was compensable. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

The parties do not dispute ALJ Marchant's findings and conclusions regarding average weekly wage, prevailing factor, nature and extent, past and unauthorized medical, or future medical. The Appeals Board agrees with the extensive findings of fact and conclusions of law within the Award on those issues, and incorporates those findings and conclusions herein as if fully set forth. The sole issue on review is whether Claimant proved she sustained personal injury from an accident arising out of and in the course of her employment with Respondent.

Claimant argues compensability is not barred under the going and coming rule because travel was intrinsic to her employment. Claimant also argues the accident is compensable under the personal comfort doctrine. Respondent, however, argues travel was not intrinsic to Claimant's employment, and the accident did not occur while Claimant was engaged in a work-related trip or errand placing her at a greater risk of injury

compared to the general public. Respondent also argues the personal comfort doctrine does not apply to accidents occurring during off-premises lunch breaks.

A. THE PERSONAL COMFORT DOCTRINE IS INAPPLICABLE.

Under the personal comfort doctrine, employees who, within the time and space limits of their employment, engage in acts to minister to personal comfort do not thereby leave the course of employment unless the extent of the departure is so great an intent to abandon the job temporarily may be inferred, unless the method chosen is so unusual and unreasonable the conduct cannot be considered an incident of the employment.[1] Generally, the personal comfort doctrine does not apply when the employee leaves the place of employment for lunch. Instead, the going and coming rule applies when the accident occurs while leaving or returning to work from a lunch break.[2]

This case involves an accident occurring while Claimant was traveling from the place of employment to eat lunch. Claimant was on a public street when the accident occurred. The personal comfort doctrine does not apply. Instead, compensability should be determined under the going and coming rule.

B. CLAIMANT FAILED TO PROVE SHE SUSTAINED A COMPENSABLE INJURY BECAUSE COMPENSABILITY IS BARRED UNDER THE GOING AND COMING RULE.

An injury is compensable under the Kansas Workers Compensation Act only if it arises out of and in the course of employment.[3] An injury happens "in the course of employment" when it takes place within the period of employment, at a place where the employee reasonably may be, while fulfilling work duties or engaged in doing something incidental thereto.[4] An injury "arises out of employment" when it arises out of an increased risk of injury due to the nature, conditions, obligations and incidents of employment.[5] The words "arising out of and in the course of employment" shall not be construed to include

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[1] *See Thach v. Farmland Foods, Inc.*, No. 122,684, 2021 WL 5990059, at *5 (Kansas Court of Appeals unpublished opinion filed Dec. 17, 2021).

[2] *See Kanode v. Sprint Corp.*, No. 1,042,744, 2009 WL 978949, at *5 (Kan. WCAB Mar. 25 2009).

[3] *See* K.S.A. 44-508(f)(2).

[4] *See Atkins v. Webcon*, 308 Kan. 92, 98, 419 P.3d 1 (2018).

[5] *See id.*

an accident or injury arising out of a neutral risk with no particular employment or personal character.[6]

Under the going and coming rule, "arising out of and in the course of employment" shall not be construed to include injuries occurring while the employee is on the way to assume, or after leaving, the duties of employment.[7] The going and coming rule is a statutory exclusion to the "arising out of and in the course of employment" language in the Act.[8] The going and coming rule does not apply when the employee is on premises owned or under the exclusive control of the employer, or where the employee is on the only available route involving a special risk or hazard not faced by the general public except when dealing with the employer.[9] The going and coming rule is also inapplicable when travel is an intrinsic part of employment,[10] or when the employee is traveling as part of a special purpose trip or work-related errand.[11] The use of a company car, particularly a vehicle specially equipped for the particular work to be performed, may be a factor in determining whether travel in that vehicle is intrinsic to employment.[12]

Having reviewed the record, the Board concludes Claimant's injuries did not result from an accident arising out of and in the course of employment. The majority of Claimant's work was administrative and preparation work occurring at Respondent's location. Claimant occasionally drove a limousine or hearse, but was not driving either vehicle when she was injured. The company vehicle Claimant was riding in at the time of the accident was not specially modified to perform a work-related task. The Board finds travel was not inherent to Claimant's work for Respondent.

The record also establishes Claimant was not engaged in a special purpose trip or a work-related errand for Respondent when the accident occurred. Claimant was not engaged in a business trip or working for Respondent when the accident occurred. Instead, Claimant and her husband chose to take a break from working and to eat lunch together at an off-premises location.

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

[7] *See* K.S.A. 44-508(f)(3)(B).

[8] *See Atkins*, 308 Kan. at 99.

[9] *See* K.S.A. 44-508(f)(3)(B).

[10] *See Atkins*, 308 Kan. at 99-100.

[11] *See Halford v. Nowak Constr. Co.*, 39 Kan. App. 2d 935, 941, 186 P.3d 206 (2008), *rev. denied* 287 Kan. 765 (Nov. 4, 2008).

[12] *See id*. at 940.

The record as a whole establishes Claimant's injuries were not the product of an accident arising out of and in the course of her employment with Respondent. Claimant was riding as a passenger, and not engaged in work duties, when the accident occurred on a public street while Claimant and her husband were traveling to an off-premises restaurant to eat lunch. Travel was not intrinsic to Claimant's employment. Claimant was not traveling on a route with a special risk of injury not faced by the general public. Claimant was not traveling because of a work-related purpose. Instead, Claimant was traveling because she was hungry and wanted to take a break from working. In a similar case, the Kansas Supreme Court denied compensation under a prior version of the going and coming rule.[13] Because the going and coming rule applies, the accidental injuries Claimant sustained cannot be construed to arise out of and in the course of her employment with Respondent. The denial of compensability contained in the Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board the Award issued by ALJ Ali Marchant, dated February 25, 2022, is affirmed. Claimant's request for compensation under the Kansas Workers Compensation Act is denied.

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: (Via OSCAR)
Randall J. Price
Kevin J. Kruse
Hon. Ali Marchant

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[13] *See Walker v. Tobin Constr. Co.*, 193 Kan. 701, 705, 396 P.2d 301 (1964).