BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BEVERLY BASS-JOHNSON	)	
Claimant	)	
V.	)	
	)	AP-00-0469-169
FIRST STUDENT MANAGEMENT LLC	)	CS-00-0467-276
Respondent	)	
AND	)	
	)	
AIU INSURANCE CO. (NATIONAL	)	
UNION FIRE OF PITTS PA)	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 20, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

Phillip Slape appeared for Claimant. Christopher McCurdy appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from July 7, 2022, with exhibits attached, and the documents of record filed with the Division.

ISSUE

Did Claimant's accidental injury arise out of and in the course of her employment?

FINDINGS OF FACT

Claimant worked for Respondent as a school bus monitor for seven years. Claimant's job duties were ensuring the students on the bus are buckled into their seats and they remain in their seats. Claimant works a morning and afternoon shift. The morning shift starts at 5:36 a.m. and ends at to 9:35 a.m. The routes are the same every day.

On April 19, 2022, at about 8:45 a.m., the bus Claimant was on stopped at a QuikTrip so she and the bus driver could use the bathroom. Claimant exited the bus and about 5 to 6 steps away from the bus, Claimant stepped forward with her left leg and fell. When Claimant fell, she was stepping from grass onto concrete, striking her left knee on the concrete. As Claimant tried to get up, her left knee popped and Claimant was unable to get up. Claimant was not sure what caused her to fall. There was no water, oil or defects on the concrete.

It was a daily routine for Claimant and the bus driver to stop at the QuikTrip to use the bathroom each morning before they picked up to the last set of students. Respondent told her and the bus driver they could stop at any QuikTrip or convenience store to use the bathroom as long as the store did not object. It was too far for them to go back to the First Student premises to use the bathroom.

Claimant was transported by ambulance to the hospital where she was treated for injuries to her left knee and thumb. Claimant was diagnosed with a left extensive comminuted patella fracture and left thumb ulnar collateral ligament injury.

The ALJ granted Claimant's request for compensation, finding her short break and activities during it, which included the trips to the QuikTrip to use the bathroom, fell within the personal comfort doctrine and were incidents of her employment. Claimant met her burden proving the injury arising out of and in the course of employment. Dr. Chad Corrigan was designated as the authorized treating physician. Respondent was ordered to pay temporary total disability benefits and medical bills related to the work injury.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the weight of the credible evidence fails to support finding of an injury arising out of and in the course of employment. Respondent contends their argument is separate and distinct from the personal comfort doctrine the ALJ focused on and whether Claimant was on a break is irrelevant. Respondent argues the injury is not compensable under the Act, as she was not performing any work duties or due to any reason associated with her employment. Claimant's injury, according to Respondent, arose out of a neutral risk with no particular employment or personal character was an activity of daily living or was the result of an idiopathic event. Respondent also argues the ALJ ignored Respondent's argument. The Order, according to Respondent, should be reversed.

Claimant argues the Order should be affirmed because the personal comfort doctrine was applied correctly in this case.

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.

K.S.A. 44-508(f)(2) and (3) provide in pertinent part:

(2) An injury is compensable only if it arises out of and in the course of employment.
. . .

. . .

(B) An injury by accident shall be deemed to arise out of employment if:

(i) There is a casual 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 and impairment.

(3)(A) The word “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Respondent argues Claimant’s accidental injury arose out of a neutral risk and an activity of daily living, walking, and the ALJ did not analyze the concepts of risk in her decision. Respondent’s argument the ALJ did not deal with their neutral risk argument is not persuasive. The personal comfort doctrine determines whether an accidental injury arises out and in the course of employment, specifically did the events causing the injury arise out the employment.

The ALJ, in her analysis, wrote:

The Kansas Court of Appeals in their unpublished decision of *Gould v. Wright Tree Service, Inc.*, No. 114,482, 2016 WL 2811983 (May 13, 2016), rev. denied, not only analyzed the personal comfort doctrine but also discussed categories of risk. The Court examined a case where the Claimant worked as a groundsman for a tree service company. The Claimant filled a chainsaw with gasoline, which was one of his job duties, and then handed the chainsaw to a co-worker, causing some gasoline to spill out of the chainsaw onto the claimant's shirt. A few minutes later, the Claimant, who remained on the clock, walked 20 feet away from his work area and took a short smoke break. When lighting his cigarette, the claimant's gasoline-soaked shirt caught fire, and the claimant sustained burn injuries. *Id.* at *3.

The Court of Appeals affirmed the Board's finding that the claimant's accidental injury arose out of and in the course of his employment with the respondent. In discussing whether the claimant's accident was a neutral or personal risk rather than a work-related risk, the Court of Appeals looked to the Kansas Supreme Court's holding in *Hensley v. Glass*, 226 Kan. 256 (1979), which defined the three types of risk in workers compensation cases as: "(1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) the so-called neutral risks which have no particular employment or personal character." The Court of Appeals stated:

> As Wright notes in its brief, work-related risks are risks "distinctly associated" with employment, and nothing in the amended KWCA appears to have abrogated this language. Catching fire is obviously a risk distinctly associated with working with flammable liquids such as gasoline. Thus, even though Gould's burns did not occur at the moment gasoline spilled on his shirt, his injury still arose out of a risk distinctly associated with his job.
> *Id*. at *8-*9.

The Court of Appeals went on to analyze the personal comfort doctrine, which it defined as follows:

> "Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the

> employment." *Williams v. Allied Staffing*, Docket No. 1,058,426, 2012 WL 1142973, at *3 (Kan. Work. Comp. Bd. 2012) (quoting 1 Larson's Workers' Compensation Law § 21 [2006]).

The Court of Appeals noted that, "This rule generally recognizes that tending to personal comfort is an incident of employment, and activities which are incidents of employment also 'arise out of' employment." *Id.* at *9-*10. The Court of Appeals concluded that while smoking was not a condition of the claimant's employment or a necessity, it is still one way employees can relieve stress and cope with the work day and is thus a personal comfort covered by the personal comfort doctrine. *Id*.at *12.

The Board has considered the personal comfort doctrine on multiple occasions since the Court of Appeals issued its decision in *Gould*. In *Willoughby v. Williams Seasoning*, No. 1,070,914, 2017 WL 1825146 (Kan. W.C.A.B. April 19, 2017), the claimant took a 15-minute paid break from his shift and walked across the street from the respondent's facility to smoke a cigarette. As he was walking through the parking lot on his way to his car, the claimant slipped and fell on the ice and sustained injuries. The Board found the injuries compensable, and in discussing *Gould*, commented, "Simply because an employer does not require certain conduct on a break, accidental break time injuries are still compensable . . ." *Id.* The Board further determined that a claimant does not have to be actively performing working during the break in order for the break to be compensable. The Board stated:

> The Board disagrees with the concept that only break time accidents might be compensable if the employee is actively performing work during the break. To require otherwise would mean a work break is not a work break, but somehow a personal break wholly disconnected from or void of any work connection. If the Legislature meant to exclude from compensation injuries occurring during breaks, it may state so in the law, but it is not the Board's prerogative to make such call. *Id.*

Similarly, in *Ross v. A&C Enterprises, Inc.,* No. 1,078,395, 2017 WL 491310 (Kan. W.C.A.B. Jan. 20, 2017), the Board held that the personal comfort doctrine applied to a case where the claimant slipped and fell in the parking lot when she was taking some personal packages to her vehicle in the parking lot during a paid break. The Board stated: "The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment." " Id. at *4 (quoting Larson's Workers' Compensation Law § 13.05(4) (2006)).

> Since the Court of Appeals entered its decision in *Gould*, the Board has consistently applied the personal comfort doctrine to injuries that occur when an employee is conducting personal activities while on a break from work. *See e.g. Richie v. General Motors Corp*, No. CS-00-0436-380, 2019 WL 1595640, at *3 (Kan. W.C.A.B. March 7, 2019) ("Taking a work break is part of employment, so Richie's fall had a causal connection to her required work. Because taking a break is inherent to and causally connected to Richie's job, it is not a neutral risk without any particular employment character."); *Edmonds v. Weller's Bar & Grill,* No. 1,079,903, 2018 WL 1720638 (Kan. W.C.A.B. March 21, 2018) (finding that a claimant's injuries that occurred during a smoke break were compensable under the personal comfort doctrine); *Laughlin v. Goodyear Tire & Rubber Co.,* No. 1,077,657, 2016 WL 7655590 (Kan. W.C.A.B. Dec. 14, 2016), (finding that a claimant taking a short break to walk out to the respondent's loading dock to get some fresh air fell within the personal comfort doctrine and was compensable).

Claimant, was walking in order to go the bathroom, which is clearly to tend to her personal comfort, using the bathroom. The type of stop Claimant and the bus driver made to use the bathroom was sanctioned by Respondent because it was on their route and kept them on time to pick up students and get them to school. Claimant was clearly engaged in an activity incidental to her employment and within the confines of the personal comfort doctrine. Claimant's accidental injury arose out of and in the course of her employment and is a compensable injury.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant, dated July 20, 2022, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2022.

_____
REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Phillip Slape, Attorney for Claimant
Christopher McCurdy, Attorney for Respondent and its Insurance Carrier
Hon. Ali N. Marchant, Administrative Law Judge