BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GUILLERMO ARIAS FIGUEROA	)	
Claimant	)	
V.	)	
	)	AP-00-0472-268
LOCOMOTIVE SERVICE, INC.	)	CS-00-0464-931
Respondent	)	
AND	)	
	)	
BERKSHIRE HATHAWAY HOMESTATE INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 16, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Brent A. Jepson appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Preliminary Hearing Transcript held September 8, 2022 with exhibits;
2. Preliminary Hearing by Deposition taken September 29, 2022;
3. Deposition of Dean Osgood taken September 29, 2022.

ISSUES

Was Claimant's conduct a reckless violation of Respondent's workplace safety rules and procedures?

FINDINGS OF FACT

The essential facts of this case are not in dispute. Claimant was employed with Respondent for approximately one year prior to his injury on March 30, 2022. Claimant was a truck driver and field technician, which required him to refuel trains (locomotives). Claimant received safety training, which included flag and light placement procedures, along with radio communications and protocol. Claimant readily admitted he was aware of the rules and procedures and failed to follow them prior to his accidental injury.

On March 30, 2022, Claimant was instructed to refuel a locomotive on Track 9, but he could not find it. He was instructed by radio to refuel two locomotives in the 500 area. The 500 area is where locomotives are parked for two to three days. After Claimant completed his work in the 500 area, he was to move to line 10 for another refueling. Claimant suffered an accidental injury when the locomotive he was refueling in the 500 area started to move. Claimant attempted to disconnect the nozzle, but was unable to do so. The nozzle disconnected by itself, striking Claimant on the left forearm, knocking him back and from the train. Claimant suffered injuries to his rib cage, left forearm, right shoulder and fingers.

Claimant testified he did not place flags pursuant to the rules and procedures because he was trying to save time. Claimant intended to put flags out after the refueling started. Claimant believed it was okay to start refueling because he had been instructed to do so and he believed the trains were parked and unmanned. Claimant admitted he connected the fuel line to the train, despite not having communicated with the yard master and crew, and failed to put up flags and lights around the train.

Claimant reported the injury to Respondent and was taken to Herrington Hospital ER by EMS. He was evaluated at the ER and released the same day. Claimant returned to work on April 2 and was terminated for failing to follow flagging procedures. He has not worked or earned any income since his termination.

Claimant testified he had never failed to put flags out prior to his injury. He had never been warned, written up or received any disciplinary warnings for performance or attitude.

Dean Osgood, Respondent's General Manager, testified regarding Respondent's safety rules and procedures. Claimant received safety training and was aware the purpose of the training was to ensure everyone around the train was aware the train was being refueled.

The ALJ found Claimant's conduct was negligent, but not reckless. He stated:

> Arias Figueroa had been trained in the proper safety procedures to refuel trains. He was aware of the requirements. In the present case, however, the undisputed evidence is that he was dispatched to the location where the train was to be refueled, and assumed that everyone knew that was what he was going to be doing. He did not expect the train to be moving, as he had just been told to refuel it. He thought the train was parked, and did not expect a crew to be on board. He intended to connect the fuel hose to the train and then set the flags and lights. While he says it was to save time, there is no evidence in the record of any time constraints on the day of the accident.
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> In short, Arias Figueroa made several mistakes. First, he assumed that the train he was attempting to refuel was the one he was dispatched to refuel. Second and third, he failed to check with the yard master or the train's crew to make sure he was at the right train and that it was appropriate for him to start the refueling process. Third, he failed to post the flags and lights that would have warned the train's crew against moving the train. Thinking the train was parked and not crewed, Arias Figueroa failed to appreciate the risks posed by his mistakes.
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> While Arias Figueroa violated several safety policies, warranting his termination, his conduct does not demonstrate an awareness of a risk of harm to others and a conscious disregard of that risk without regard to the consequences. He got in a hurry, took some shortcuts, and the accident resulted. There is no evidence of a headstrong attitude to disregard safety policies, and no documented history of safety violations. Arias Figueroa's conduct was negligent, but not reckless.[1]

Respondent argues Claimant's knowing violation of Respondent's safety rules and procedures constitute a reckless violation resulting in the denial of benefits. Claimant maintains the Board should affirm the ALJ's Order.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b(c) states claimant carries the burden of proof to establish the right to an award of compensation and to prove the various conditions on which claimant's rights depends. Under K.S.A. 44-508(h), the trier of fact shall consider the whole record. The burden of proving an affirmative defense is on the employer.[2]

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[1] ALJ Order (Nov 16, 2022) at 4.

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

Compensation for an injury shall be disallowed if such injury results from the employee's reckless violation of their employer's workplace safety rules or regulations.[3]

The Workers Compensation Act does not define "reckless." The Appeals Board, looking to prior case law, defines "reckless" as either (1) where an actor knows or has reason to know of facts creating a high degree or risk of physical harm and deliberately acts or fails to act in conscious disregard or indifference to that risk, or (2) where an actor knows or has reason to know, but does not appreciate the high degree of risk, although a reasonable person in the actor's position would do so. The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.[4] A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.[5] The preponderance of the credible evidence must support a conscious disregard of a known risk that exceeds negligence; recklessness is akin to gross, culpable or wanton negligence.[6]

It is not disputed Claimant was trained and was aware of several safety rules and procedures he failed to follow prior to his accident. The question before the Board is did his failure to comply with those rules and procedures rise to the level of recklessness resulting in the denial of his claim pursuant to K.S.A. 44-501(a)(1)(D).

This Board Member agrees with the ALJ's analysis. Claimant's conduct was negligent, but not reckless. Claimant was instructed by radio to refuel two trains located in track 500, an area where trains were parked for 2-3 days. When the track 500 refueling was completed, Claimant was instructed to move to Track 10 to refuel another train. Claimant had no reason to believe other workers were present when he arrived at track 500. No evidence was presented Claimant failed to follow the safety rules due to stubborness or with conscious disregard for the rules. Claimant had no prior warnings or reprimands for not following Respondent's safety rules. Claimant did not recklessly violate Respondent's workplace safety rules and procedures.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Bruce E. Moore dated November 16, 2022, is affirmed.

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[3] See K.S.A. 44-501(a)(1)(D).

[4] *Van Le v. Exacta Aerospace, Inc.,* No 1,060,178, 2012 WL 6101126 (Kan. WCAB Nov. 27, 2012).

[5] *Id.,* at 6-7.

[6] *Hardiman v. Kellogg Snack Division,* No. 1,062,612, 2013 WL 3368494 (Kan. WCAB 2013)

IT IS SO ORDERED.

Dated this ___ day of January 2023.

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CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Claimant
Brent A. Jepson, Attorney for Respondent and its Insurance Carrier
Hon. Bruce E. Moore, Administrative Law Judge