

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIO BENAVIDES BECERRA)	
Claimant)	
V.)	
)	
RACETTE CONSTRUCTION LLC)	AP-00-0472-701
Respondent)	CS-00-0460-987
AND)	
)	
KANSAS BUILDERS INSURANCE GROUP)	
Insurance Carrier)	

ORDER

The claimant, through Randy Stalcup, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary hearing Order dated December 16, 2022. Edward Heath, Jr., appeared for the 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:

- (1) deposition of the claimant, taken May 16, 2022;
- (2) preliminary hearing by deposition transcript of Michael Kinuthia, taken July 18, 2022;
- (3) preliminary hearing by deposition transcript of Kennan Racette, taken July 18, 2022;
- (4) preliminary hearing transcript, held July 20, 2022;
- (5) continuation of preliminary hearing by deposition of Michael Kinuthia, taken August 26, 2022;
- (6) continuation of preliminary hearing by deposition of Kennan Racette, taken August 26, 2022;
- (7) deposition of Raymondo Sandoval, taken July 28, 2022;
- (8) all exhibits attached to enumerated items 3-4; and
- (9) documents of record filed with the Division.

ISSUE

Did the claimant prove he sustained personal injury by accident arising out of and in the course of his employment on July 15, 2021?¹

FINDINGS OF FACT

The claimant, a Spanish-speaking man, began working for the respondent in June 2021. Through an interpreter, he testified he was working on July 15 when he stood up from a kneeling position and struck the middle of the top his head on a skid steer being operated by Raymondo Sandoval, a coworker. The claimant continued working.

Mr. Sandoval witnessed the claimant strike the top of his head on a skid steer when standing up while they were working on a fence job near the Wesleyan Church. Mr. Sandoval testified he saw the claimant grab his head with both hands. Mr. Sandoval testified Mr. Kinuthia witnessed this event. Mr. Sandoval testified the work done on July 15 concerned a fence for a woman with a Latin last name.

Mr. Kinuthia is the claimant's supervisor. Mr. Kinuthia testified the claimant bumped his head against the skid steer on June 3 when they were working south of the Wesleyan Church. Mr. Kinuthia did not witness the incident, but turned around and saw the claimant rubbing his head. Mr. Kinuthia asked what happened and Mr. Sandoval said the claimant hit his head on the skid steer. Mr. Kinuthia testified the claimant did not request medical treatment and continued working. He denied the claimant sustained a head injury on July 15. Mr. Kinuthia testified he, not Mr. Sandoval, operated the skid steer on July 15. Mr. Kinuthia testified the work on July 15 was fence work for a woman named Glenda.

Kennan Racette is the respondent's owner and operator. Mr. Racette testified the job the claimant was working south of the Wesleyan Church occurred on June 3 and involved work for a Mr. Morel. He indicated the job on July 15 was a half a block north and two and a half blocks west of the Wesleyan Church, and concerned fence work for a Glenda Perez.

Mr. Sandoval testified the claimant collapsed at work on July 16 from a headache, and both Mr. Kinuthia and Mr. Racette were present. At the time, the claimant was repairing a machine shop garage door. Both Mr. Kinuthia and Mr. Racette testified they worked with the claimant on July 16 and both denied the claimant collapsed that day. Mr. Racette testified the claimant worked a full day on July 16.

¹ All dates refer to 2021 unless specified otherwise.

On July 19, the claimant sought treatment at Logan County Hospital emergency department. His friend interpreted. The claimant reported a bad headache, chills, weakness and fatigue. The nurse practitioner suspected anemia. The claimant was placed on an IV and released.

On August 7, the claimant returned to Logan County Hospital emergency department complaining of headaches and dizziness for the past week, with blurred vision and numbness in his right hand. The claimant's son interpreted. The HPI stated:

41 YO male arrives to the ER with his son. He states he has a headache and is dizzy. He reports falling at his house during the week. He remembers that his son helped him up but he does not remember the fall. He states he was seen in the ER previously for headaches [. . .]²

A CT scan of the head without contrast, taken on August 7, revealed acute/subacute bifrontal subdural hematomas. The findings were listed as "a 1.7 cm in thickness right frontal and 1.8 cm in thickness left frontal hyperdense subdural hematomas. No significant midline shift. There is no hydrocephalus. No other hemorrhage. There is no intra-axial mass. There is diffuse cerebellar volume loss. There is consolidation of a left-sided ethmoid air cell. No skull fractures."³ A CT scan of the claimant's neck was negative for fractures or subluxations.

The claimant was transported to Wesley Medical Center on August 8. According to the claimant, his son interpreted. The claimant reported falling approximately three weeks ago, but did not recall the circumstances, and three subsequent falls from a standing position at home. The claimant reported balance problems, some neck pain, generalized motor weakness and headaches. He was admitted to the hospital and diagnosed with an acute on subacute bifrontal subdural hematomas. Matthew Henry, M.D., consulted. The doctor's report stated the claimant fell three weeks earlier due to unexplained or unrecalled circumstances. Dr. Henry described the right-sided hematoma as small to moderate and the left-sided hematoma as small. The claimant's Glasgow Coma scale score was 15. Dr. Henry offered surgery – a bilateral craniotomy – which the claimant declined. The claimant was discharged on August 10.

At his attorney's request, the claimant saw Dr. Daniel Zimmerman on October 29 for an independent medical examination (IME). A Spanish-speaking employee in Dr. Zimmerman's office interpreted. The claimant complained of a head injury from being struck by a Bobcat on July 15, although Dr. Zimmerman noted the claimant's history was vague. Dr. Zimmerman diagnosed the claimant with a subdural hematoma, in addition to

² P.H. Trans., Resp. Ex. 3 at 1.

³ *Id.*, Resp. Ex. 3 at 8.

a small posterior disc osteophyte complex, a mild facet arthropathy and mild central canal stenosis at C5-C6.

Dr. Zimmerman recommended additional treatment and imposed work restrictions. The doctor opined, "The prevailing factor for the residuals of the bilateral subdural hematomas and the cervical spine mediated sensory change in the upper extremities due to the discal lesions at C5-C6 and C6-C7 is the accident that occurred on July 15, 2021."⁴

The claimant continues to work for the respondent about 40 hours a week.

The ALJ stated:

The medical records presented, as well as the deposition testimony of witnesses suggests Claimant had sustained a non-work related injury, a hematoma, while falling and striking his head at home. After review of the evidence and hearing arguments of counsel, it is found that:

Claimant's preliminary hearing requests are considered and denied. Claimant has failed to sustain his/her burden of proof of personal injury by accident arising out of and in the course of his employment with Respondent.⁵

PRINCIPLES OF LAW AND ANALYSIS

The claimant argues he has proven he sustained personal injury arising out of and in the course of his employment and the work accident was the prevailing factor for his injury. The respondent maintains the Order should be affirmed.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.⁶ The Workers Compensation Act is liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.⁷ The provisions of the Workers Compensation Act are applied impartially to all parties.⁸ The employee has the burden of proof to establish the right to an award of compensation, including the various conditions upon which the right to

⁴ *Id.*, Cl. Ex. 2 at 7.

⁵ ALJ Order at 3.

⁶ See K.S.A. 44-501b(b).

⁷ See K.S.A. 44-501b(a).

⁸ See *id.*

compensation depends.⁹ The trier of fact considers the whole record in determining if a claimant satisfied the burden of proof.¹⁰

The Board's review of an order is de novo on the record.¹¹ A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.¹² On de novo review, the Board makes its own factual findings.¹³

The undersigned Board Member agrees with the ALJ's ruling, while noting there is conflicting evidence. The respondent acknowledges the claimant hit his head on a skid steer on June 3. The claimant continued working. Mr. Sandoval and the claimant testified the injury occurred on July 15. Mr. Sandoval testified the claimant was hurt on July 15 on a fence job for a woman with a Latin last name and the claimant collapsed the next day, July 16, while working on a garage door. Mr. Kinuthia and Mr. Racette testified the claimant was working a fence job on July 15 at the property of a woman named Glenda or Glenda Perez. Mr. Kinuthia and Mr. Racette acknowledged the claimant was working on a garage door on July 16, but they denied he claimant collapsed.

As noted by the ALJ, the medical evidence is more concise. The July 19 record from Logan County Hospital mentions a headache, but no work-related event. The records from the claimant's return to Logan County Hospital on August 7 mentioned headaches, dizziness, and a fall at home, but nothing about a work-related event. The Wesley Medical Center records dated August 8-10 mention headaches, dizziness and falls at home, but contain no mention of a work-related accident or injury. Dr. Zimmerman attributes the claimant's July 15 work event as the cause of his injury and medical condition, but this opinion appears faulty in the face of the treatment records and the dispute as to when the claimant hit his head. The claimant did not prove he sustained personal injury by accident on July 15 arising out of and in the course of his employment.

WHEREFORE, the Board affirms the Order dated December 16, 2022.

IT IS SO ORDERED.

⁹ See K.S.A. 44-501b(c).

¹⁰ See *id.*

¹¹ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

¹² See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

¹³ See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

MARIO BENAVIDES BECERRA

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Dated this _____ day of February, 2023.

**JOHN F. CARPINELLI
BOARD MEMBER**

c: (via OSCAR)
Randy Stalcup
Edward Heath, Jr.
Hon. David Bogdan