BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

WANDA LARA	)	
Claimant	)	
V.	)	
	)	AP-00-0473-092
APAC KANSAS, INC.	)	CS-00-0470-378
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (Respondent) requested review of the January 12, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Timothy G. Lutz appeared for 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 November 9, 2022, with exhibits attached; the transcript of the Remote Evidentiary Deposition of David W. Duncan from November 22, 2022; the transcript of the Remote Evidentiary Deposition of Bradley E. Gover from November 22, 2022, with exhibits attached; and the documents of record filed with the Division.

ISSUE

Did Claimant recklessly violate Respondent's safety rules?

FINDINGS OF FACT

Respondent is a highway construction business, performing mostly road resurfacing services. Claimant worked at Respondent's location in Emporia, Kansas. The work is seasonal, and Respondent's employees are laid off each winter.

Bradley Gover has been Respondent's environmental health and safety manager for 24 years. In this position, Mr. Gover oversees any incidents, road cause analysis and corrective actions, in addition to directing safety training. Mr. Gover testified Respondent's top priority as a company is safety, and every meeting starts with safety training. Mr. Gover indicated any new employee hired as a truck driver undergoes a DOT shadow program, a training program, and overall orientation, which includes at least a full day of safety training. Additionally, Respondent holds annual, weekly, and daily meetings. Each employee is provided a Safety Policy Manual. Claimant signed documentation acknowledging her receipt and understanding of the Safety Policy Manual in April 2015.

Claimant began employment with Respondent in June 2014 as a dump truck driver and returned each year through 2022. Claimant attended a mandatory safety orientation each April before commencing work. Claimant estimated she operated the bed of her dump truck thousands of times over the course of her employment. On July 20, 2022, Claimant hauled a load of asphalt with her dump truck to a work site in Lyon County. Claimant unloaded at the site, lowered the truck bed, and pulled the truck forward to clean the bed per company policy prior to obtaining another load. Claimant raised the truck bed, cleaned it, and returned to the truck. Video of the incident shows Claimant's truck with the bed raised, moving forward and striking an overpass bridge. Claimant testified she has limited memory of the incident, but reviewed the videos in evidence. One video shows Claimant after cleaning the bed and returning to the truck. The camera angle does not include the truck's dashboard or any controls, but Claimant is clearly visible. Claimant enters the truck, closes her door, reaches to her right, removes her hard hat, fastens her seatbelt, and pulls into traffic. Claimant is seen looking out her window prior to merging into traffic.

After watching the video, Claimant stated she hit the brake to release it and pressed the Power Take-Off (PTO) button to disengage and lower the truck bed. Claimant is seen leaning in the direction of the PTO button, but any action is not visible. Claimant stated her normal practice after cleaning the truck bed was to turn off the PTO, lower the bed, and close the tailgate. Claimant could not recall specifically whether she lowered the truck bed prior to the incident. Claimant testified her dump truck had a history of the bed sticking, or failing to lower, and reported it to her supervisor and Respondent's mechanics. Respondent could not confirm any written or verbal reports of mechanical problems related to Claimant's dump truck.

The truck had an indicator on the dash which flashed a blue light when the truck bed was raised. David Duncan, Respondent's Emporia branch manager of over 31 years, testified he took a video of the warning light indicator flashing in Claimant's truck within 30 minutes after the incident. Mr. Duncan explained he checked the light to verify it was working, although he could not say whether it was flashing immediately before impact with the overpass. Mr. Duncan reviewed the video of Claimant leaving the work site. Mr. Duncan confirmed Claimant released the brake and confirmed Claimant reached to her right side, but he did not know if she pushed the lever forward to lower the bed. Mr. Duncan explained to lower the truck bed, the driver presses a button on a lever and pushes the lever forward. He testified:

> So then when you get back in [the truck] you have to – there's a hold position in the middle, so wherever you stopped that raising or lowering, it holds the bed there. Then she would have had to push that button down and pushed it all the way forward to lower the bed. That takes a considerable amount of time for the bed to go down. It's probably 20, 30 seconds.[1]

Claimant testified she did not, to her knowledge, disregard the warning light at any time, and if the light was flashing, she would have lowered the truck bed. Claimant stated she was familiar with Respondent's safety rules and did not make a conscious decision to drive with the truck bed raised. Claimant was on Respondent's safety committee for eight years and was never written up for safety violations. Claimant testified she did not intentionally disregard any safety rules. Both Mr. Gover and Mr. Duncan testified the incident was preventable, and failure to lower the truck bed prior to driving was a direct violation of Respondent's safety regulations. Claimant also acknowledged the accident would have been prevented had the truck bed been lowered.

Claimant was transported to Stormont Vail hospital in Topeka for treatment of fractures to her ribs, face, and spine. Claimant was later transferred to Newman Rehab Hospital and received authorized medical treatment from various providers. Claimant received temporary total disability (TTD) benefits through September 9, 2022. Claimant was terminated from Respondent on August 23, 2022. Claimant has not been released by any physicians from her restrictions, which include light-duty work with no lifting, pushing, pulling, bending, or twisting. Claimant has not worked anywhere since July 20, 2022.

The ALJ found Claimant sustained her burden of proving personal injury by accident arising out of and in the course of her employment, writing:

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[1] Duncan Depo. at 9.

> Understanding there were mechanics in place to remind the driver of the bed location, there is no evidence that Claimant recklessly nor willfully disregarded the safety measures provided. The evidence presented does not suggest Claimant's actions were taken as either a conscious disregard of a known risk, nor a conscious disregard to the risk presented. Claimant's actions could possibly or likely be considered as negligent but not reckless, nor willful in contradicting any safety rule.[2]

ALJ Bogdan ordered TTD beginning September 10, 2022, until Claimant is released to accommodated duty or reaches maximum medical improvement. The ALJ also ordered Respondent to provide authorized medical treatment and payment of treatment already received for Claimant's work-related injuries.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant recklessly violated its safety rules and procedures under the provisions of K.S.A. 44-501(a)(1)(D); therefore, Claimant's accident and injuries did not arise out of and in the course of her employment.

Claimant contends the ALJ's Order should be affirmed. Claimant argues there is no evidence she acted with a conscious disregard for Respondent's safety policy or with an indifference to harm.

K.S.A. 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. 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. 44-534a(a)(2) states, in part:

> A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and

[2] ALJ Order at 5.

> in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

Compensation for an injury shall be disallowed if such injury results from the employee's reckless violation of the employer's workplace safety rules or regulations.[3] "Reckless" has been defined 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.[4] The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.[5] A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.[6] 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.[7]

The ALJ found no evidence to suggest Claimant's actions constituted a conscious disregard of a known risk, and Claimant's actions could have been negligent, but not reckless or willful. The ALJ conducted the preliminary hearing via video conference and had the opportunity to observe Claimant testify. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.[8]

Claimant testified she did not disregard the warning light, and if the light was flashing, she would have lowered the truck bed. Claimant stated she did not make a conscious decision to drive with the truck bed raised. Claimant was on Respondent's

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

[4] *See Anderson,* 2018 WL 6074279, at *8; *see also Gould v. Wright Tree Service, Inc.,* No. 114,482, 376 P.3d 94, 2016 WL 2811983, at *10 (Kansas Court of Appeals unpublished opinion filed May 13, 2016), *rev. denied* 306 Kan. 1317 (2017).

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

[6] *See id.* at *5.

[7] *See Hardiman v. Kellogg Snack Division,* No. 1,062,612, 2013 WL 3368494, at *2 (Kan. WCAB June 10, 2013).

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

safety committee for eight years and had a good safety record. The undersigned finds Claimant did not willfully or recklessly violate Respondent's workplace safety rules.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ David J. Bogdan, dated January 12, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2023.

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SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge