

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

STEPHEN DALMAN
Claimant

v.

MERCURY MANAGEMENT LLC
Respondent

AP-00-0473-388
CS-00-0472-407

and

AMERICAN INTERSTATE INS. CO.
Insurance Carrier

ORDER

Respondent requests review of the January 24, 2023, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

George H. Pearson, III, appeared for Claimant. Terry J. Torline appeared for Respondent and 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, held January 11, 2023, including Exhibits A1-7, A9-10, A12-14 and B1-4; the transcript of Evidentiary Deposition of Stephen Dalman, taken January 9, 2023, including Exhibits 1-8; the transcript of Evidentiary Deposition of Austin Adolphson, taken January 9, 2023, including Exhibits A-E; the transcript of Evidentiary Deposition of David Schneider, taken January 9, 2023; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Is Claimant's request for compensation disallowed under K.S.A. 44-501(a)(1)(C) for willful failure to use a reasonable and proper guard and protection voluntarily furnished by Respondent?
2. Is Claimant's request for compensation disallowed under K.S.A. 44-501(a)(1)(D) for reckless violation of Respondent's workplace safety rules or regulations?

FINDINGS OF FACT

Claimant worked for Respondent as a Field Service Tech installing residential high-speed internet receivers from July 26, 2021, through November 28, 2022. Claimant received work orders from Respondent's office, which would indicate whether the job required one or more technicians. After receiving the work order, Claimant traveled to the customer's location, ensured a functional signal was received by Respondent's device, and installed the receiver to the exterior of a customer's residence. Claimant used a ladder during the installation process. Respondent provided Claimant a work vehicle with various tools, ladders and bungee cords to secure the ladders.

Claimant was provided an employee handbook when he was hired by Respondent, although the employee handbook does not reference safety rules. Respondent also conducted regular safety meetings, and employees signed a sheet to confirm their attendance. Claimant attended a meeting concerning ladder safety on September 8, 2021, where employees were instructed to extend the side rails of a ladder three feet above the surface supporting the ladder (three-foot rule); to extend the bottom of the ladder one foot for every four feet of height (four-to-one rule); to tie down, block or otherwise secure the tops of ladders to prevent them from falling; and to maintain three points of contact with the ladder while standing on the ladder. Claimant attended two other safety meetings concerning ladder safety on August 3, 2022, and November 2, 2022.

Claimant previously injured his right ankle in an accident involving a ladder on May 6, 2022. Claimant subsequently was told by his supervisors the ladder should have been tied down, but Claimant was not disciplined for violating a safety rule. Claimant received medical treatment and was placed on temporary restrictions. While under restrictions, Claimant was involved in a second accident on August 9, 2022, when he aggravated his right ankle injury after slipping from a roof and landing on a lower porch roof because he failed to tie down a ladder. Claimant was not disciplined for violating a safety rule, but was told he would be terminated if he climbed onto another roof while under medical restrictions. The medical restrictions were lifted on August 12, 2022.

On November 28, 2022, Claimant was dispatched to perform an installation at a farm outside Emporia, Kansas. The work order did not state the job required more than one technician. Claimant did not ask for assistance because the work order did not state more than one technician was required. The customer instructed Claimant to install the receiver on the barn with a peaked roof Claimant estimated to be twenty-five feet high. Claimant used a thirty-two foot extension ladder to access the west side of the barn, slightly to the left of the peak. Claimant testified he did not have the ladder fully extended, but it was sufficiently extended for the top of the ladder to be three feet above the roof line. Claimant also believed he complied with the four-to-one rule. Claimant climbed to the roof, and tied the ladder to the roof using a three-foot-long bungee cord. Claimant testified he provided the three-foot bungee cord because the bungee cords Respondent provided were

not long enough to tie down the ladder. Claimant believed he was in compliance with Respondent's rule to tie down the ladder.

After tying down the ladder, Claimant retrieved a tool and began installation. Claimant was working near the roof line. Claimant testified his feet and one of his arms were in contact with the ladder, while Claimant used his other hand and arm to operate the drill. As Claimant pushed the drill to install self-tapping screws, the ladder pushed away from the barn. The bungee cord snapped loose, the ladder became untied and began to fall. Claimant dropped the drill and held onto the edge of the roof while the ladder fell to the ground. Claimant was unable to pull himself onto the roof, and he moved to the left side of the wall with his arms to avoid falling onto the ladder. Eventually, Claimant pushed off the wall with his legs, fell fifteen to twenty feet to the ground, and landed on his feet. Claimant injured both lower extremities and was unable to walk.

After landing, Claimant discovered the bungee cord on the ground. Claimant testified he grabbed the cord and put it into his coat pocket to prove he used it to tie down the ladder. Claimant crawled to his vehicle and called a supervisor, David Schneider, for assistance.

Claimant testified he told Mr. Schneider about the accident, and said, "I know I messed up."¹ Claimant testified he stated he "messed up" because he fell from the roof. Claimant also told Mr. Schneider he needed an ambulance. At the time, Claimant was in pain and was focused on getting medical care, but denied admitting he violated any safety rule or failed to use a safety guard. Claimant testified Mr. Schneider said, "This ain't good."² An ambulance came to the accident scene and transported Claimant to the hospital. At some point on November 28, Claimant sent Mr. Schneider a text message stating he understood he would be terminated. Claimant believed he would be terminated because he sustained multiple injuries.

Claimant was transported from the local hospital via helicopter to Stormont-Vail, where he received emergency treatment. Claimant was diagnosed with an open left tibia-fibula fracture and a right calcaneous fracture. Claimant initially received medical treatment and was confined to a wheelchair. Respondent subsequently sent Claimant a letter advising he was terminated, effective December 21, 2022, for violating safety rules and failing to follow instructions. Workers compensation benefits were also denied by Respondent.

¹ P.H. Trans. at 106.

² *Id.* at 45.

Claimant's wife was notified of the accident and she went to Stormont Vail. Ms. Dalman received Claimant's coat, which held the bungee cord, from hospital staff. Ms. Dalman discovered the bungee cord, but unaware of its significance put it in the tool box in her car. After the workers compensation claim was denied, Ms. Dalman retrieved the bungee cord from the tool box and took a photograph of it.

Mr. Schneider testified he spoke with Claimant on November 28, after the accident. According to Mr. Schneider, Claimant said, "I know I messed up," and he knew he would be fired.³ Mr. Schneider told Claimant the situation "was not good."⁴ Mr. Schneider also testified Claimant did not admit to failing to use safeguards. Mr. Schneider subsequently completed an accident report stating Claimant admitted he did not have safeguards in place. Mr. Schneider based this statement on Claimant saying "I know I messed up," because Claimant did not produce the bungee cord he used, and because a photograph showed a dent in the wall of the barn. Mr. Schneider assumed the ladder created the dent.

Two other coworkers completed the job assignment on November 30, 2022, and performed an investigation of the accident scene. According to a work order prepared by Respondent after the accident, the job was described as requiring more than one technician. The ladder Claimant used was found, but the bungee cord was not found. The coworkers also saw Claimant's vehicle, and noted bungee cords were inside. The coworkers thought the ladder was not placed in a secure spot, safety gear was located in the vehicle, and wind conditions made it unsafe to use a ladder if it was not tied down.

Respondent's General Manager, Austin Adolphson, initially testified Claimant was terminated for failing to follow instructions and violating Respondent's safety rules. Mr. Adolphson later testified Claimant was terminated because he had numerous injuries throughout the year. Mr. Adolphson did not speak with Claimant or view the accident scene. According to Mr. Adolphson, the instruction Claimant violated was failing to use his discretion in refusing to perform an unsafe job. Mr. Adolphson also testified he concluded Claimant did not tie down the ladder because there was no evidence Claimant used a bungee cord, Claimant violated the three-foot rule because Claimant's ladder was not long enough, the investigation revealed a safer way to reach the roof, and because Claimant did not maintain three points of contact with the ladder while climbing it.

Following a preliminary hearing, ALJ Roth issued the Preliminary Hearing Order. ALJ Roth found Claimant sustained compensable injuries to both lower extremities, and considered whether Respondent proved Claimant was barred from receiving compensation under K.S.A. 44-501(a). ALJ Roth found Respondent did not prove Claimant violated

³ *Id.* at 92.

⁴ *Id.* at 93.

Respondent's safety rules. ALJ Roth also concluded Respondent did not prove Claimant acted recklessly. Medical compensation and temporary total disability compensation were awarded. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

In its application for review, Respondent argues compensation should be denied because Claimant willfully failed to use a safety guard, and because Claimant recklessly violated Respondent's safety rules. In its brief, however, Respondent argued Claimant willfully and recklessly violated Respondent's safety rules and procedures. Claimant argues the preliminary decision was decided correctly and should be affirmed.

It is undisputed Claimant sustained compensable injuries to both lower extremities from the fall from the ladder while working for Respondent on November 28, 2022. At issue is whether Claimant is barred from receiving compensation because he either willfully failed to use a reasonable and proper guard and protection voluntarily furnished by Respondent or because he recklessly violated Respondent's workplace safety rules or regulations. In workers compensation proceedings, after the employee proves compensability the employer has the burden of proving an exception barring compensation applies.⁵ The Board addresses both issues initially raised by Respondent.

1. Respondent failed to prove Claimant is barred from receiving compensation because he willfully failed to use a reasonable and proper guard and protection voluntarily furnished by Respondent.

Compensation for an injury shall be disallowed if such injury results from the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer.⁶ "Willful" includes the element of intractableness or the headstrong disposition to act by the rule of contradiction.⁷ "Willfulness" entails a higher standard of culpability than "recklessness."⁸

⁵ See *Anderson v PAR Electrical Contractors, Inc.*, No. 118,999, 430 P.3d 493, 2018 WL 6074279, at *3 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018)(citing *Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731,751, 298 P.3d 371 (2013)).

⁶ See K.S.A. 44-501(a)(1)(C).

⁷ See *Lira v. Preferred Personnel, Inc.*, No. 1,067,794, 2014 WL 1758045, at *5 (Kan. WCAB Apr. 10, 2014).

⁸ See *id.*; see also *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494, at *3 (Kan. WCAB June 10, 2013).

The undersigned finds Respondent provided no guards or protections to prevent the injuries Claimant sustained on November 28, 2022. The technicians who investigated the accident scene indicated Claimant did not use bungee cords because they were inside Claimant's work vehicle. Claimant testified the bungee cords Respondent provided were not large enough to safely tie the ladder to the barn, and Claimant used a bungee cord he provided. The coworkers investigating the accident scene did not find a bungee cord because Claimant took it with him. Claimant's testimony on this subject was uncontradicted and is believable.

Even if Claimant failed to use a guard or protection, Respondent failed to prove Claimant's behavior was willful. Claimant testified he used the bungee cord and was acting in a safe manner. Claimant stated he "messed up" because he fell, and not because he failed to use a guard or protection. Mr. Schneider conceded he interpreted Claimant's statement he "messed up" to mean he did not use safety guards, but Claimant did not admit he failed to have safeguards in place. Mr. Schneider's misunderstanding, coupled with Claimant having the bungee cord he used in his possession, led to Mr. Schneider's statement Claimant failed to have safeguards in place. Mr. Schneider's conclusion is flawed and is not as credible as Claimant's testimony concerning his mental state. Claimant expressed remorse because he believed he would be terminated for having multiple injuries. Mr. Adolphson's testimony supports Claimant's belief. The record does not indicate Claimant's behavior was intractable or with an intent to use the ladder without guards or protections.

2. Respondent failed to prove Claimant is barred from receiving compensation because he recklessly violated Respondent's workplace safety rules or regulations.

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.⁹ "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.¹⁰ The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct

⁹ See K.S.A. 44-501(a)(1)(D).

¹⁰ 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).

negligent.¹¹ A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.¹² 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.¹³

Respondent argues Claimant violated five safety rules: (1) the three-foot rule, (2) the four-to-one rule, (3) tying down ladders, (4) maintaining three points of contact on a ladder, and (5) failing to decline performing an unsafe job. Respondent provided no witnesses to the accident, while Claimant testified he complied with Respondent's safety rules. Again, Claimant told Mr. Schneider he "messed up" because he fell, and not because he violated Respondent's safety rule. Mr. Schneider did not write in his statement Claimant failed to follow safety rules. Claimant testified he took the bungee cord with him after the fall, which was the reason the bungee cord was not subsequently located, and Claimant's testimony was not contradicted. With regard to the charge of failing to decline performing an unsafe job, Mr. Adolphson testified a technician had the discretion to decline performing a job, which does not rise to the level of a safety rule. Respondent did not prove by a greater weight of the evidence Claimant violated Respondent's safety rules.

Respondent also failed to prove Claimant acted recklessly, if rule violations occurred. Claimant believed he was acting reasonably. Claimant believed he securely tied the ladder before he started the installation work. Claimant also believed the sides of the ladder extended three feet from the roof line, he complied with the four-to-one rule, and he maintained three points of contact while on the ladder. The evidence in the record shows Claimant appreciated the risk of injury from falling from the ladder, and reasonably acted to avoid the risk of injury. Respondent presented no evidence Claimant exhibited gross, culpable or wanton negligence constituting recklessness. Claimant is not barred from receiving compensation under K.S.A. 44-501(a)(1)(D).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Preliminary Hearing Order issued by ALJ Steven M. Roth, dated January 24, 2023, is affirmed.

IT IS SO ORDERED.

¹¹ See *Van Le v. Exacta Aerospace, Inc.*, No. 1,060,178, 2012 WL 6101126, at *4 (Kan. WCAB Nov. 27, 2012).

¹² See *id.* at *5.

¹³ See *Hardiman*, 2013 WL 3368494, at *2.

STEPHEN DALMAN

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Dated this _____ day of March, 2023.

**WILLIAM G. BELDEN
APPEALS BOARD MEMBER**

c: Via OSCAR

George H. Pearson, III
Terry J. Torline
Hon. Steven M. Roth