

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID P. HUBERT)	
Claimant)	
V.)	
)	AP-00-0473-812
USD 440 BENTLEY PRIMARY SCHOOL)	CS-00-0471-352
Respondent)	
AND)	
)	
SFM MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant appeals the February 17, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Lawrence M. Gurney appeared for Claimant. Samantha N. Benjamin-House 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 January 4, 2022, with exhibits;
2. Deposition of David P. Huebert, taken November 21, 2022;
3. Deposition of Ronald F. Barry, E.D.D., taken January 19, 2023, with an exhibit.

ISSUES

Did Claimant's August 25, 2022, injury arise out of and was in the course of his employment?

FINDINGS OF FACT

Claimant became employed with Respondent as a custodian in July 2016. He was the only daytime custodian, working 6:30 a.m. to 3:00 p.m. His tasks included cleaning offices, sinks, bathrooms, locker rooms, taking out trash, mopping floors, and operating the Zamboni (a scrubber).

At approximately 2:00 pm, on August 25, 2022, Claimant was asked by a football coach if he could take out the dirty laundry. Claimant retrieved the dirty laundry from the locker room, took it to the laundry room and put it into the washing machine. Claimant was returning the empty laundry basket (cart) to the locker room when he encountered a group of photography class students in the hallway. The students asked if Claimant could get in the cart so they could take his picture. While attempting to get in the cart, it tipped backwards, causing Claimant to fall and land on his right shoulder. Claimant needed help from a student to get up. Claimant went to the school nurse. Shortly thereafter, Jenny Kimball, from HR, drove Claimant to see a local physician.

Claimant came under the care of Dr. Prohaska who performed surgery to repair his right shoulder on October 5, 2022. Following surgery, Claimant missed ten school days. He used his sick days. Respondent and Claimant's personal health insurance declined responsibility for his medical treatment.

Claimant has never been written up for any type of safety violation, including this incident. He has, on occasion, gotten into trash receptacles and dumpsters to help students look for lost property, such as iPads and retainers. Claimant is active with the students. He has granted requests from students to do interviews and has participated in skits. All of these activities occurred during the day while Claimant was on the clock.

Ronald F. Barry, E.D.D. is the superintendent of schools at USD 440, Halstead-Bentley School District (Respondent). Dr. Barry is familiar with Claimant because he was the custodian at the middle school when Dr. Barry was the principal. Claimant cleans the district area office every day. Dr. Barry testified getting in and out of a laundry basket is not included in the job description of school custodian. He testified he would expect a school employee to decline a student request to engage in an activity considered hazardous or dangerous. Dr. Barry expects employees of the school to lead by example because students are watching. He opined Claimant was not acting in a safe manner when he climbed into the cart.

Dr. Barry confirmed Claimant was not given an official write up or disciplined for the cart incident. He acknowledged climbing into a trash dumpster to retrieve a student's lost property is not contained in the custodian job description. He testified interacting with students is one of Claimant's job duties and he is well-liked by the students. Dr. Barry stated:

Q. All right. Is one of his duties to interact with children and young people in the high school setting?

A. That would -- that would be a component of working in a school setting, yes.

Q. And you expect him to maintain good relationships with the kids and other co-workers, true?

A. Yes.

...

Q. But the kids like him

A. Yes.

Q. -- a lot, don't they? In fact, he took another job with a different School District and they wrote to him and asked him to come back, correct?

A. Correct.

Q. Okay. And that wasn't you recruiting him back, that's the kids recruiting him back, correct?

A. Yes. There was an event that we held with a local organization that asked students to write a letter to somebody they care about, and it ended up being a large number of students that wrote to him as a result of that activity.

Q. And I assume that as a superintendent, you value employees having that kind of relationships with the students there in the district, correct?

A. Yes.

Q. And Mr. Huebert is a valued member of the team there at USD --

A. 440.

Q -- 440, correct?

A. Yes.

Q. Okay. He, Mr. Huebert, told us in his deposition that students ask him frequently to do different things, including give interviews for school projects and things of that nature. You would expect him, time permitting, to participate in those activities, correct?

A. As long as he could maintain his responsibilities, yes.¹

In denying Claimant's request for benefits, he ALJ stated:

The question is whether or not Claimant's behavior is far enough outside Claimant's duties as to take his activity outside the protection of the Workers Compensation Act. In what the Court considers to be a close decision, the Court finds that the Claimant's behavior in this circumstance takes him outside the course and scope of employment and the Court denies Claimant's request for benefits. It would be one thing if the Claimant merely was posing for a picture for the yearbook when he slipped and fell, and quite another to agree to be photographed jumping off the roof or some other inherently dangerous activity. In the Court's view, Claimant's behavior of climbing into a wheeled laundry basket in this circumstance is dangerous enough to take him outside the protection of the Act.²

The Claimant requests the Board reverse the ALJ's Order denying benefits as Claimant engaged in an activity with students for their photography project which is conduct arising out of and in the course of his employment. Respondent asks the Board to affirm the ALJ's Order denying benefits.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.³ The provisions of the Act shall be applied impartially to all parties.⁴ The burden of proof shall be on the employee to establish the right to an award of compensation and to prove the various conditions on which the right to compensation depends.⁵

The issue is whether Claimant's personal injury by accident on August 25, 2022, arose out of and in the course of his employment with Respondent. It is undisputed Claimant suffered an injury to his right shoulder when he fell while trying to climb into a cart at the request of a group of photography students during his regular work hours. Is the fall excluded from the definition of arising out of and in the course of employment under K.S.A. 44-508(f)(3)(A)?

¹ Berry's Depo. At 18-20.

² ALJ Order (Feb. 17, 2023) at 2.

³ See K.S.A. 44-501b(a).

⁴ See *id.*

⁵ See K.S.A. 44-501b(c).

Appellate courts have resorted to case law interpretations of “arising out of” and “in the course of” employment.⁶ Kansas looks at the context of what a worker was doing when he or she was injured. Here, Claimant was asked to do laundry by a football coach, a task not listed in his job description. While returning the cart, photography students asked Claimant to get into the cart so they could take his picture. Climbing into the cart requires climbing and balancing—tasks included in his job description. Unfortunately, Claimant was injured when the cart fell over. This Board Member does not see the difference between posing for a photograph and granting interviews and performing in school skits.

Respondent argues climbing into a wheeled cart is inherently dangerous and unsafe. Again, this Board Member does not see much of a difference between climbing into a wheeled cart and a dumpster, which Claimant had done in the past. While the dumpster may not be on wheels, it still requires climbing and balancing. More importantly, rummaging through a trash filled dumpster contains unknown dangers. An argument could easily be made the dumpster diving is more dangerous than crawling into a wheeled cart.

Claimant was a well-liked member of Respondent’s staff. He regularly engaged in activities not specifically listed in his job description, which helped him maintain his popularity. A lot of custodians would not risk dumpster diving to assist a student looking for lost property. This Board Member finds and concludes the evidence supports the finding Claimant’s activity of posing for a picture in the cart at the request of the photography students arose out of and in the course of his employment. The ALJ’s denial of Claimant’s request for medical benefits is reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member, the Order of ALJ Thomas Klein, dated February 17, 2023, is reversed.

⁶ See *Fishman v. U.S.D.* 228, No. 118,329, 2018 WL 3485612 (Kan. Court of Appeals unpublished opinion filed July 20, 2018).

DAVE HUBERT

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IT IS SO ORDERED.

Dated this day of April, 2023

**CHRIS A. CLEMENTS
BOARD MEMBER**

c: (Via OSCAR)

Lawrence Gurney, Attorney for Claimant
Samantha Benjamin-House, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge