BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICHAEL STRATTON	)	
Claimant	)	
V.	)	
	)	AP-00-0474-534
AMERICAN PHOENIX, INC.	)	CS-00-0469-532
Respondent	)	
AND	)	
	)	
LM INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (Respondent) requested review of the March 17, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

Jeff Cooper and Jordan K. Cooper appeared for Claimant. Jeffrey D. Slattery 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 October 19, 2022, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Is Claimant barred from receiving compensation for a personal injury by accident arising out of and in the course of his employment due to reckless violation of Respondent's safety rules?

2. Is Claimant barred from receiving compensation for a personal injury by accident arising out of and in the course of his employment resulting from horseplay?

FINDINGS OF FACT

Claimant worked for Respondent for approximately one year by the time of the incident and had been promoted to Operator I position filling the hoppers, ensuring product quality, sealing bags, and loading bags into shipping containers. On June 19, 2022, Claimant was in charge of running the line, meaning he was responsible for his regular duties in addition to controlling the line and resulting product.

On June 19, 2022, a bag of chemical could not unload into its hopper because the material had clumped, a situation which occurs on occasion. Claimant stated Respondent provides tools as options to clear material, including a rod, rubber mallets, and a bat. Claimant had been told he could hit bags with his hand, as well. Claimant testified he looked for these tools to clear the bag, but could not locate any. Instead, Claimant attempted to kick the bag to clear it of chemical. Claimant explained:

Q. And I think you answered a little bit of this but why did you kick the bag?

A. Just trying to get it to open up in a timely fashion so we can get back to running the line.

Q. When you say open up?

A. To get the chemical to flow out of it.

Q. So essentially trying to break up that chemical that is clumped?

A. Yeah.

Q. Is that yes?

A. Yes, sir.

Q. Was breaking up the chemical something you needed to do to complete that job task?

A. Yes.

Q. Is it something that you had done before?

A. Yes.

Q. Had you ever been told to not kick that bag?

A. No.[1]

Marcus Fletchers, Claimant's supervisor, agreed he never told Claimant not to kick a bag of material. He stated if he had seen Claimant doing so, he would have stopped Claimant and instructed him to use a mallet, bat, or bar. Mr. Fletchers explained employees are told they may push on a bag, but not hit a bag, with their hands. Mr. Fletchers noted Respondent's rules state an employee should not improvise if a tool fails to work and instead should locate a supervisor. Mr. Fletchers testified he was on-site at the time of the incident, and Claimant did not ask him for help or advice.

Specifically, Respondent's General Safety Rules states:

> Employees shall not use unfamiliar tools or equipment without proper instruction and permission from their immediate Supervisor. Always use the correct tool for the job, do not improvise.[2]

Respondent's Employee Handbook states, in part:

> Every employee must follow our safety rules:
>
> - Horseplay, rough-housing and other physical acts that may endanger employees or cause accidents are prohibited.
> - Employees must follow their Supervisor/Managers' safety instructions.[3]

Claimant signed documentation acknowledging his receipt and understanding of Respondent's Employee Handbook and Safety Rules. Claimant agreed he did not ask Mr. Fletchers for help or advice at the time of the incident.

Video evidence of the incident was submitted into the record.[4] Both Claimant and Mr. Fletchers reviewed the video. In the video, Claimant's coworker, Russell Paul, is seen attempting to clear the bag by striking or pushing the bag with his hands. Claimant walks around the area and is at times not visible to the camera. His coworker obtains a rod and continues to try and loosen the chemical. Claimant returns to the bag momentarily before leaving to scan additional items on the line. After this, Claimant returns to the bag and attempts to clear the bag by hitting it with his hand. Claimant then steps back and attempts to kick the bag, falling to the floor. Throughout the video, a forklift travels around the area. Mr. Fletchers confirmed he was the one driving the forklift.

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[1] P.H. Trans. at 11.

[2] *Id.*, Resp. Ex. B.

[3] P.H. Trans., Resp. Ex. A. at 5-6.

[4] *See* P.H. Trans., Resp. Ex. E.

Claimant described the incident:

> A. The Meocidax [chemical] kind of congealed in the bag and wasn't flowing as it should. I looked for a hammer and not finding one readily, I kicked the bag after having limited success hitting it.
>
> Q. What happened when you attempted to kick the bag?
>
> A. My feet came out from under me and I fell.[5]
>
> . . .
>
> Q. Okay. Now when you came up there on the platform as we see in the video you walk up next to Mr. Paul, is that right?
>
> A. Yes.
>
> Q. And Mr. Paul is still there working, trying to get the product out using the rod, is that right?
>
> A. Yes.
>
> Q. And did you tell Mr. Paul to step back so you could kick it or what happened?
>
> A. No, initially I asked him to try opening the rest of the spout and then I walked off and finished getting the other chemicals scanned in and then I kicked the bag, came back and kicked the bag.[6]

Mr. Fletchers agreed Claimant did not seem to be running around or joking with his coworker at the time of the incident. According to Claimant, he had kicked bags before, apparently without incident. Mr. Fletchers stated Claimant had never been disciplined or suspended for any safety violation prior to June 19, 2022.

Claimant went to the emergency room at Stormont Vail Health following his fall and was found to have a compression fracture at T11 and a nondisplaced fracture of the head of the right radius. Claimant was provided a brace for his thoracic spine and a splint for his right wrist. Records from the hospital indicate Claimant could follow-up with work care and would need an orthopedic referral.[7]

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[5] P.H. Trans. at 9.

[6] *Id*. at 32-33.

[7] *See id*., Cl. Ex. 2 at 4.

Claimant was taken off work. Claimant presented at Cotton O'Neil WorkCare on July 28, 2022, to obtain FMLA paperwork, where he was placed on work restrictions. Claimant was told no work was available for him with Respondent. Claimant has not worked anywhere since the date of the accident, and he has not received medical treatment since July 28, 2022.

The ALJ found Claimant sustained his burden of proving a personal injury by accident arising out of and in the course of his employment. The ALJ wrote:

> Acting as an Operator I, clearing the line would be within the course and scope of employment. The methods engaged may be considered questionable, but Claimant had taken these actions in the past without reproach. Hitting or kicking materials on the line to free a clog may not have been recommended but the supervisor testified using a hand to push the materials, as well as other tools to beat the material was acceptable. The safety materials do not suggest nor anticipate an accident such as this accident would result.
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> . . .
>
> There was no evidence presented that Claimant was participating in actions that were not work related, nor involving other employees but for the fact of attempting to move the production line forward.[8]

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant deliberately disregarded its known safety rules and work procedures to willfully engage in a voluntary, prohibited, hazardous activity. Respondent maintains Claimant's accident is not compensable and the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed. Claimant argues his actions were not a reckless violation of workplace safety rules, but were rather performed in the spirit of problem solving, and kicking the bag was not a clear and obvious danger. Further, Claimant argues he was not engaged in horseplay with a coworker, and Respondent's horseplay defense should not be considered.

1. Is Claimant barred from receiving compensation for a personal injury by accident arising out of and in the course of his employment due to reckless violation of Respondent's safety rules?

K.S.A. 44-501 states, in part:

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[8] ALJ Order (Mar. 17, 2023) at 3-4.

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> . . .
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations;
> . . .

"Reckless" is not defined in K.S.A. 44-501(a)(1)(D), but it has been defined by the Kansas Court of Appeals as meaning either (1) 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) 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.[9] The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.[10] A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.[11] 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.[12]

To prevail arguing a reckless violation of its employer's workplace safety rule or regulation, Respondent has the burden of proving Claimant 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 Claimant 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.

There is no evidence in the record Claimant acted deliberately in violation of a safety rule by kicking the bag to loosen the product. Claimant had kicked bags before, apparently without incident or injury. He was never told not to kick the bags. He simply thought this was the most effective way to get the product to flow.

There is also no indication in the record Claimant's action of kicking the bag was in conscious disregard or indifference to a known risk, or Claimant did not appreciate the high

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[9] *See Anderson v. PAR Electrical Contractors, Inc.*, No. 118,999, 2018 WL 6074279, 430 P.3d 493, (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

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

[11] *See id.*

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

degree of risk. Claimant was trying to get the job done in the most efficient manner. Claimant's action of kicking the bag does not rise to the level of recklessness required by K.S.A. 44-501(a)(1)(D).

Respondent has the burden to prove the defenses contained in K.S.A. 2021 Supp. 44-501(a).[13] The undersigned finds Respondent has failed to meet the burden of proving Claimant committed a reckless violation of Respondent's workplace safety rules.

2. Is Claimant barred from receiving compensation for a personal injury by accident arising out of and in the course of his employment resulting from horseplay?

K.S.A. 44-501 states, in part:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> . . .
>
> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

In *Fishman v. U.S.D. 229,*[14] the Court of Appeals stated:

> K.S.A. 2017 Supp. 44-501(a)(1)(E) disallows compensation for an injury if it results from "the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise." Somewhat surprisingly, there is no statutory definition of horseplay in Kansas, either under the workers compensation law or elsewhere. Likewise, we have been unable to locate any Kansas caselaw which specifically embraces a particular definition. Notably, our Supreme Court recently held that, in the context of a civil battery lawsuit, the idea of horseplay is a "nebulous concept" which has "no legal meaning." *McElhaney v. Thomas*, 307 Kan. 45, Syl. ¶ 4, 56, 405 P.3d 1214 (2017). Turning to colloquial sources, the dictionary defines horseplay as "rough, boisterous play." Webster's New World College Dictionary 703 (5th ed. 2016).[15]

Fishman provides several examples of horseplay from case law, including a worker kicking or placing his foot on a spinning tire balancing machine to disrupt a coworker's

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[13] *See Vera-Ruiz v. Dupree Landscaping and Lawn Services,* No. 1,066,283, 2015 WL 4716614 (Kan. WCAB July 29, 2015); *see also Unruh v. Rex Stanley Feed Yard, Inc.*, No. 1,053,222, 2014 WL 4976735 (Kan. WCAB Sept. 29, 2014).

[14] *Fishman v. U.S.D. 229*, No. 118,327, 2018 WL 3485612 (Kansas Court of Appeals unpublished opinion filed July 20, 2018).

[15] *Id.* at *5.

readings, a worker being injured after "bear-hugging" another employee, dumping a coworker out of her chair, trying to lift large rolls of waxed paper overhead, trying to shock a coworker with an electrically charged wire fastened to a metal door, and throwing mortar at a coworker. The Court of Appeals noted these cases involved potentially hazardous activities and showed the workers stepped away from their job duties and interfered with their coworkers' abilities to do their job duties.

In his Order, the ALJ wrote, "There was no evidence presented that Claimant was participating in actions that were not work related, nor involving other employees but for the fact of attempting to move the production line forward."[16] The undersigned agrees. Claimant's testimony was he kicked the bag to get the Meocidax to flow from the bag. This is not horseplay. Claimant was attempting to do his job. He had not abandoned his job duties.

The undersigned agrees with the ALJ's finding Claimant was not engaged in horseplay at the time of his injury.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ David J. Bogdan, dated March 17, 2023, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2023.

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SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jeff Cooper, Attorney for Claimant
Jordan K. Cooper, Esq., Attorney for Claimant
Jeffrey D. Slattery, Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge

[16] ALJ Order (Mar. 17, 2023) at 4.