

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DANIEL DARRAH)	
Claimant)	
)	
V.)	
)	
GUNTER CONSTRUCTION CO.)	CS-00-0453-106
Respondent)	AP-00-0457-490
)	
AND)	
)	
CHARTER OAK FIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 7, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample. Adam Brillhart appeared for Mr. Darrah. Larry Dawson appeared for respondent.

The ALJ found Mr. Darrah sustained a compensable accident and resulting injury on September 1, 2020. The ALJ ordered respondent to provide medical treatment and temporary total disability benefits for the period Mr. Darrah was off work.

The record on appeal is the same as considered by the ALJ and consists of the transcript of the March 17, 2021, Preliminary Hearing and the exhibits; the transcript of the March 15, 2021, remote evidentiary deposition of Scott Cramer and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Respondent argues Mr. Darrah failed to sustain his burden of proving his right to an award of compensation. Respondent maintains Mr. Darrah did not provide evidence showing an accident occurred or he was injured by the events of September 1, 2020. Additionally, respondent argues the ALJ erred in considering facts not in evidence. Respondent also alleges the ALJ improperly considered facts contained in hypothetical questions proffered to Mr. Cramer by Mr. Darrah's attorney.

Mr. Darrah contends the ALJ's Order should be affirmed. Mr. Darrah argues he suffered an injury by accident arising out of and in the course of his employment with

respondent. Mr. Darrah states nothing in the record indicates he has credibility issues, and the September 1, 2020, work-related accident is the prevailing factor causing his current symptoms.

The issues for the Board's review are:

1. Did Mr. Darrah sustain an injury by accident arising out of and in the course of his employment on September 1, 2020?
2. Did the ALJ err in including facts not presented into evidence?

FINDINGS OF FACT

Mr. Darrah was hired by respondent as an equipment operator. On September 1, 2020, Mr. Darrah was assigned to dig a sidewalk grade using a bulldozer. Mr. Darrah testified his manager, Randall Sharp, told him all the electrical lines were moved or disconnected. Mr. Darrah painted lines to how far he needed to dig and then called Mr. Sharp to verify he could dig. Mr. Sharp confirmed it was safe to dig. Mr. Darrah ran the bulldozer approximately 20 to 25 feet before he hit an electrical line buried about one foot underground.

Mr. Darrah described:

There was a big flash, explosion, and smoke. My left arm went numb and my tongue went numb. Then I shut down the machine and went and told the guys that I had hit a line and it shocked me. I immediately called [Mr. Sharp]. He got whoever needed to be out there to take me to see the OHS I think it's called.¹

Mr. Darrah explained he was holding the bulldozer's levers in each hand, which are used to move the machine and for steering. The levers consist of a plastic cap, measuring about three inches, atop a metal rod. Mr. Darrah further stated he was sitting on the bulldozer's seat, which has a thin cushion, when he struck the electrical line. The bulldozer's cab was not enclosed, and the weather was sunny.

Mr. Darrah was initially sent to Concentra, where he was tested for drugs and alcohol. Mr. Darrah testified a doctor told him the feeling would return to his hands in two days before sending him back to the job site. Respondent's owner told Mr. Darrah he had permission to see his primary physician if he wanted. Mr. Darrah was told by his physician, Dr. William Irby, to report to the emergency room.

¹ Cramer Depo., Ex. 3 (Claimant's Depo.) at 25.

Mr. Darrah went to North Kansas City Hospital on September 1, 2020. Hospital records state:

[Mr. Darrah] felt an immediate electrocution injury to his left hand which was touching the gear shift mechanism and felt an immediate electrocution type sensation into the left arm and into the chest. He got a chest pain that radiated up into his jaw bilaterally. He describes an anxious type feeling as well. On arrival here he complains of pain to his left chest and left arm including a numb left hand with the exception of his index finger. There is no skin burn or other obvious trauma.²

Mr. Darrah underwent various testing at the hospital before he was discharged the following day. Mr. Darrah's echocardiogram and chest x-ray demonstrated no abnormalities. The hospital's physician recommended Mr. Darrah follow up with his primary care physician, in addition to arranging an evaluation by an ophthalmologist. Mr. Darrah was also told to be aware of possible new symptoms developing in the following few weeks to several months.

Mr. Darrah followed up with Dr. Irby, on September 3, 2020. Mr. Darrah complained of tingling in both arms and feeling as if his hands were paralyzed. Mr. Darrah continued to have these symptoms on September 8, 2020. Dr. Irby prescribed Gabapentin and indicated Mr. Darrah was not permitted to work. Mr. Darrah underwent an ophthalmologic evaluation on September 4, 2020, which was within acceptable parameters.

Dr. Irby later prescribed medication because Mr. Darrah developed depression and anger issues after the incident. Mr. Darrah stated he had no behavioral health symptoms and required no behavioral health treatment prior to September 1, 2020.

Dr. Daniel Zimmerman examined Mr. Darrah at his counsel's request on December 15, 2020. Mr. Darrah complained of numbness and tingling affecting the digits of both hands, and pain/discomfort affecting his elbows. Dr. Zimmerman reviewed Mr. Darrah's history, medical records, and performed a physical examination. Dr. Zimmerman concluded Mr. Darrah sustained an electrocution injury on September 1, 2020. Specifically, Dr. Zimmerman reported:

I would state as a direct, proximate, and prevailing factor that the electrocution injury that occurred on September 1, 2020 has caused sensory symptoms affecting the right and left upper extremities, right and left medial epicondylitis, and behavioral health symptoms manifested by issues with anger control and depression.³

² P.H. Trans., Cl. Ex. 2 (North Kansas City Hospital Records) at 1.

³ P.H. Trans., Cl. Ex. 1 (Zimmerman Report) at 5.

Dr. Zimmerman found Mr. Darrah had not reached maximum medical improvement and recommended additional medical treatment and work restrictions.

Scott Cramer, a consulting electrical engineer, was hired to investigate the incident. On November 16, 2020, Mr. Cramer went to the job site and took information from the utility transformer and the equipment the transformer had served. He looked at the impacted line. He inspected the bulldozer, which had been moved from the site. Mr. Cramer traced the path from the bulldozer blade to the levers and measured the resistance. He contacted the utility company to discover the available fault current to the line and examined the resistance of human skin.

In his report dated February 24, 2021, Mr. Cramer concluded:

1. The available fault current, meaning the maximum fault current possible on the primary side of the transformer was 3,552 Amps. The ratio of transformer voltages was approximately 52. Therefore, the available fault current on the secondary side was 52 times 3552 or approximately 185,000 Amps.
2. Because the steel resistance path is so low as compared to the resistance through the body, the total resistance calculates to be the same value as the steel resistance.
3. The approximate calculated value of the current through the body was less than one thousandth of the human perceived current threshold of one milliamp.
4. Based upon the available information, Mr. Darrah did not receive an electrical shock or an electrical current that could be perceived.⁴

Mr. Cramer explained the heat from the electricity would have been sufficient to damage the bulldozer's blade. He stated the electrical current would travel the path of least resistance, in this case, through the steel blade or the bulldozer's tracks into the ground. Mr. Cramer testified even if the electricity went through the bulldozer to where Mr. Darrah sat, it is highly likely the electricity would not have passed through Mr. Darrah's body because if the two levers were of the same resistance, they would not form a pathway for electricity to travel into Mr. Darrah. Mr. Cramer further explained even if electricity had gone into Mr. Darrah's body, the amperage would have been so low Mr. Darrah would not perceive any shock.

Mr. Cramer testified he did not have access to Mr. Darrah to test his skin resistance. Instead, he used scholarly material and calculations made measuring himself and some of his colleagues. Mr. Cramer did not know whether the bulldozer was used or damaged between the September 2020 incident and his inspection in November, nor does he recall

⁴ Cramer Depo., Ex. 2 at 9.

asking whether there were any modifications or repairs to the bulldozer during that time. Mr. Cramer did not know which parts of the control levers Mr. Darrah was touching at the time of the incident. He also assumed there was a voltage differential between the two levers, even though he did not believe there was actually a difference in the voltage. Mr. Cramer testified:

Q. Okay. So, it seems like there's a number of assumptions that were relied upon to basically come to your conclusions.

A. There were and they were all worst case.⁵

Mr. Darrah stated he continues to have numbness in his hands, along with mental depression, anger, and forgetfulness. If he fails to take his medication, he has pain in his elbows and forearms. Mr. Darrah is not currently working.

PRINCIPLES OF LAW

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. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

⁵ Cramer Depo. at 62.

K.S.A. 44-508(f) states, in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

1. Did Mr. Darrah sustain an injury by accident arising out of and in the course of his employment on September 1, 2020?

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

⁷ K.S.A. 2020 Supp. 44-555c(j).

There is no dispute Mr. Darrah hit a live electric line with his bulldozer on the date of the accident. Mr. Darrah felt immediate physical symptoms as a result of the incident. Mr. Darrah immediately shut down his bulldozer and told Randall Sharp he had been shocked. On the day of the accident, Mr. Darrah was treated at North Kansas City Hospital and gave a history consistent with suffering an electric shock. Mr. Darrah was taken off work by Dr. Irby. Dr. Zimmerman recommends additional medical treatment.

Respondent's only argument is the electric line hit by Mr. Darrah did not have the power to travel through the bulldozer and deliver an electric shock, as alleged by Mr. Darrah.

In her analysis of the claim, the ALJ wrote:

After reviewing the record in its entirety, the Court finds that Claimant has sustained his burden of establishing that he sustained a work related injury on 9/1/20, and that he sustained an electrical shock in that accidental injury. With all due respect to the electrical engineer, who obviously knows more about electricity than anyone else involved in this case, the Court finds that Claimant was working, operating a bulldozer, and encountered a live conduit line which damaged the blade on the bulldozer and sent some amount of current through the bulldozer and into Claimant's body. The engineer did not have the ability to examine the bulldozer at the site in the moments after the incident, nor did he have any assurances that the bulldozer had not been modified or altered in any way before his examination. That leaves doubt in the Court's mind as to whether the bulldozer's condition could have precluded the shock, as Mr. Cramer suggests. What is clear is that Claimant struck the line, the line was energized, he observed the resulting explosion and felt a shock. He shut the equipment down and sought out medical treatment. His recitation of the event is consistent. The Court is persuaded that it is more likely than not that he was shocked on 9/1/20 and that he sustained injury and that Claimant requires medical treatment.

The undersigned agrees. Mr. Darrah's behavior and the medical evidence are consistent with him having suffered an electrical shock. The medical evidence supporting causation is uncontradicted. The undersigned finds Mr. Darrah met the burden of proving he suffered an injury arising out of and in the course of his employment with respondent.

2. Did the ALJ err in including facts not presented into evidence?

Respondent alleges the ALJ improperly considered facts contained in hypothetical questions proffered to Mr. Cramer by Mr. Darrah's attorney. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. K.S.A. 2020 Supp. 44-551(l)(2)(A) gives the Board jurisdiction to review decisions from a preliminary hearing

where one of the parties alleged the ALJ exceeded his or her jurisdiction. K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to specific jurisdictional issues; accidental injury, injury arising out of and in the course of employment, timely notice and certain other defenses. The Court of Appeals, in *Carpenter v. National Filter Service*, stated “[b]ecause in 44-534a jurisdiction means coverage by the Act, ‘certain defenses’ are subject to review only if they dispute the compensability of the injury under the Act.”⁸ The Board has also held the term “certain other defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁹

Evidentiary objections do not come within the scope of review granted to the Board in K.S.A. 44-534a(a)(2) and K.S.A. 2020 Supp. 44-551(l)(2)(A), and may not be reviewed by the Board at this stage of the proceedings.

CONCLUSION

Mr. Darrah suffered and electric shock arising out of and in the course of his employment with respondent. The Board does not have jurisdiction to rule on evidentiary objections.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Julie A.N. Sample dated April 7, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Adam Brillhart, Attorney for Mr. Darrah
Larry Dawson, Attorney for Respondent and its Insurance Carrier
Hon. Julie A.N. Sample, Administrative Law Judge

⁸ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁹ See *Williams v. Durham School Services*, No. 1,027,861, 2006 WL 3891445 (Kan. WCAB Dec. 22, 2006); *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2013 WL 3368492 (Kan. WCAB June 18, 2013).