

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>SCOTT HIRD</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0457-838
<b>CITY OF OTTAWA</b>	)	CS-00-0456-732
Respondent	)	
AND	)	
	)	
<b>KANSAS EASTERN REGION INSURANCE TRUST</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the April 29, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

**APPEARANCES**

Sally G. Kelsey appeared for Claimant. Karl Wenger and Sara N. Boston appeared for Respondent and its 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 from April 28, 2021, with exhibits attached, and the documents of record filed with the Division.

**ISSUE**

Whether the alleged injury, contracting COVID-19 due to exposure from an infected co-worker arose out of and in the course of Claimant's employment, and is the exposure an accidental injury or occupational disease?<sup>1</sup>

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<sup>1</sup> Occupational disease defense was not argued at the April 28, 2021, preliminary hearing. It was argued under a Motion for Reconsideration filed May 7, 2021, and Order from the ALJ denying the motion's argument on May 10, 2021. That Order was not appealed.

**FINDINGS OF FACT**

The ALJ denied Claimant's request for benefits, finding K.S.A. 44-508 limits workers compensation benefits to "injuries", and the record in this case established an injury, but not an accidental injury. There were no symptoms at the time, which does not fit the "accident" definition, and would seemingly always be the case when an employee contracts a virus from a coworker. The ALJ opined Claimant's alleged injury was pled as accidental and not as an occupational disease.

Claimant has been working for Respondent as a firefighter/EMT since April 19, 2017. Claimant currently works as an engineer, driver/operator for Respondent.

Claimant alleges on October 25, 2020, while at work he was exposed to and contracted COVID-19 from a co-worker. On October 25 the crew responded to a fire call in a small kitchen area. The crew wore N95 masks at the scene and any time they were out in public on a call.

Upon return to the station, most of the crew members had their masks pulled down or did not wear them. The crew is together for 24 hours, did cook and eat together.

Claimant, while at the fire station, worked in a work room, to complete paperwork using computers. The work stations are about two feet apart. The fire station also has a bunk room. The bunk room is set up with five bunks, 10 feet apart.

Claimant works a 24-hour shift. The usual routine for the crew is to be in the work room about 3 to 4 hours from 8 a.m. to 5 p.m. if not on a call or checking out trucks. Crew members are allowed to sleep as long as there is no medical or prior emergency requiring response. There was no emergency the night of October 25, 2020, so the crew stayed in the bunk room from 11:00 p.m. to 7 a.m.

Within a week of October 25, 2020, Claimant and other crew members were informed a crew member, had contracted COVID-19. Claimant and the rest of the crew were instructed to get tested for COVID-19. Claimant tested positive for COVID-19. Claimant and the rest of the crew who worked with the infected crew member were required to quarantine for 14 days.

None of the other crew members who worked with Claimant and the infected crew member contracted COVID-19.

Claimant is not alleging he contracted COVID-19 while out on a call as firefighter or EMT, but from exposure to a co-worker. Other than work, Claimant did not go anywhere, but the grocery store and gas station around October 25. He wore a mask at those places. He could not think of anyone else he could have been exposed to who had COVID-19

other than the infected crew member. Claimant's wife works for Lawrence Memorial Hospital as a CT technician in a division, testing people for COVID-19. According to Claimant, she has never been tested to confirm whether she has any COVID-19 antibodies. Although Claimant's wife is a nurse, she has only been tested twice and one of those times was due to Claimant's exposure. Claimant believes since his wife was provided personal protective equipment for her job there was no need for her to be tested.

Claimant developed COVID-19 symptoms of fatigue after he was tested and during his quarantine. A couple of weeks after being quarantined, Claimant developed a rash on his extremities. Claimant believes this rash is related to COVID-19.

Claimant saw a doctor on January 8, 2021, for the rash. Claimant was given topical medication to treat the rash. The medical report does not link Claimant's rash with COVID-19. The medical report did not contain confirmation of the cause of Claimant's COVID-19 infection.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2020 Supp. 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. 2020 Supp.44-508 (f)(2) states:

An injury is compensable only if it arises out of and in the course of employment.

...

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

- (I) There is a casual 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 and impairment.

K.S.A. 2020 Supp. 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.

Claimant argues his contracting COVID-19 from a co-worker meets the statutory definition of “personal injury” regardless of whether it was caused by accident or by occupational disease. Since Claimant suffered from a rash involving open sores, he contends meets the definition of a change in the physical structure of the body. Claimant requests the ALJ’s Order be reversed so he can be compensated for temporary total disability from December 9, 2020, to March 19, 2021, and for medical benefits.

Respondent argues the ALJ’s Order should be affirmed. Respondent contends Claimant’s alleged injury did not arise out of, nor did it occur within the course of his employment because any alleged injury resulting from COVID-19 occurred as a result of Claimant’s normal day to day activities and was a neutral risk with no particular link to his employment. In addition, there is no causal connection between Claimant’s COVID-19 diagnosis and his employment. Also, Claimant was as equally exposed to COVID-19 at his workplace as he was outside of work, and according to Kansas law his injury is not compensable. Respondent contends there is no way to connect Claimant’s COVID-19 diagnosis to his work.

Claimant has not established by the preponderance of the credible evidence his working with a co-worker who contracted COVID-19 is the prevailing factor for Claimant’s diagnosis of COVID-19. Claimant presented no medical evidence he contracted COVID-19 as a result of his work or working conditions. Claimant’s exposure to another employee who had COVID-19 was limited. Claimant was the only one on the crew who tested positive for COVID-19, even after the same exposure. Claimant’s spouse is a hospital employee and as part of her job administers CT scans to individuals who believe they have COVID-19. For these reasons, it is found and concluded Claimant’s COVID-19 diagnosis did not arise out and in the course of Claimant’s employment. The evidence is not persuasive Claimant contracted COVID-19 during the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> 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), unlike appeals of final orders, which are considered by all five members of the Board.

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<sup>2</sup> K.S.A. 2020 Supp. 44-534a.

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 29, 2021, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2021.

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HONORABLE REBECCA SANDERS  
BOARD MEMBER

c: Via OSCAR

Sally G. Kelsey, Attorney for Claimant  
Karl Wenger and Sara N. Boston, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge