

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MANZERE KANYAMIBWA)
Claimant)
V.)
) AP-00-0461-392
KANSAS PACKAGING, LLC) CS-00-0459-231
Respondent)
AND)
)
OAK RIVER INSURANCE CO.)
Insurance Carrier)
AND)
)
KANSAS WORKERS COMPENSATION FUND¹)

ORDER

Respondent and its insurance carrier (respondent) request review of the September 20, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Brian D. Pistotnik appeared for Manzere Kanyamibwa. Stephen P. Doherty 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 September 1, 2021, with exhibits attached; the transcript of the Remote Discovery Deposition of Manzere Kanyamibwa taken August 30, 2021; and the documents of record filed with the Division.

ISSUES

The ALJ found the proximate cause of Mr. Kanyamibwa's accident was due to respondent's negligence; therefore, K.S.A. 44-508(f)(3)(B), the "going and coming rule,"

¹ A Motion to Implead the Workers Compensation Fund was filed with the Division on September 30, 2021.

did not apply. The ALJ ordered respondent to provide Mr. Kanyamibwa a list of two physicians from which to choose an authorized treating physician. Further, the ALJ ordered respondent to pay the medical expenses provided to date as authorized medical treatment. The ALJ declined to order temporary total disability benefits, pending further hearing.

Respondent argues Mr. Kanyamibwa failed to prove he suffered an injury by accident arising out of and in the course of his employment, and he failed to sustain his burden in establishing respondent's negligence. Respondent maintains Mr. Kanyamibwa's claim should be denied.

Mr. Kanyamibwa contends the ALJ's Order should be affirmed. Mr. Kanyamibwa argues the ALJ correctly interpreted the "going and coming rule," and his injuries arose out of and in the course of his employment.

FINDINGS OF FACT

Mr. Kanyamibwa immigrated from Rwanda in November 2018, and currently lives in Wichita, Kansas. Mr. Kanyamibwa worked at respondent's Ferguson manufacturing plant in McPherson, Kansas. Mr. Kanyamibwa voluntarily opted to use respondent's transport to get to and from work. Mr. Kanyamibwa was charged for using respondent's transportation, and the costs were deducted from his paychecks. He was not paid for traveling to or from work, and only earned wages while actively on the clock at the Ferguson plant.

On the morning of July 24, 2021, Mr. Kanyamibwa completed his work shift at the Ferguson plant. He chose to ride back to Wichita in respondent's transportation, a 2019 Chevrolet G35 van. Stephanie Manyseng, also an employee for respondent, drove the van. Mr. Kanyamibwa sat alone in the middle of three bench seats in the back of the van. Five other passengers rode with them.

Approximately 30 miles from the Ferguson plant, near Newton, Kansas, the van left the raised southbound I-135 roadway, struck a guardrail, and became airborne for 87 feet before striking a bridge structure on the northbound side. The van eventually came to rest on a concrete embankment below the highway surface. Both the driver and the front seat passenger were killed. Kansas Highway Patrol performed a download of data from the van's airbag module. This data showed the vehicle was traveling between 82 and 83 miles per hour, in an area with a posted speed limit of 75 miles per hour, 5 seconds before impact with the guardrail. The vehicle's cruise control was active, and no braking occurred until 0.5 seconds prior to impact with the guardrail. There were no tire marks on the highway surface, the roadway was clean and dry with no hazards present, and visibility was not obstructed. Officers at the scene concluded there was no obvious reason for the van

to have left the roadway. Mr. Kanyamibwa testified he was asleep at the time of the accident and did not know what happened.

Mr. Kanyamibwa extricated himself from the van following the incident and called 911. After emergency services arrived at the scene, Mr. Kanyamibwa was taken to Wesley Medical Center with complaints of pain in his left arm, left hip, and neck. Mr. Kanyamibwa was initially admitted to the hospital overnight, but signed himself out against the physicians' advice and returned home. The following day, Mr. Kanyamibwa returned to Wesley Medical Center and requested a work slip. He denied any complaints upon his return.

Mr. Kanyamibwa testified he did not pursue medical treatment with Wesley Medical Center because he was scared after the accident, and only returned the following day for a work slip at the urging of his father. Mr. Kanyamibwa stated, "I saw two people dead, was, I was with them in the same car, and I said I'm good. I was scared."² Mr. Kanyamibwa indicated he denied any complaints to the doctors because he did not want to stay in the hospital.

Mr. Kanyamibwa testified, however, he still experiences pain in his neck, left hip, and the entirety of his left arm. He has not received any other medical treatment. Mr. Kanyamibwa agreed no physician has taken him off work nor provided work restrictions.

Mr. Kanyamibwa is 19 years old and attends the 12th grade at Wichita West High School. Mr. Kanyamibwa had no intention of returning to work for respondent once the fall semester began, and the accident had no bearing on this decision. Mr. Kanyamibwa indicated he plans to work in the summer, once school is finished, depending on his physical condition.

PRINCIPLES OF LAW AND ANALYSIS

The "going and coming rule" contained in K.S.A. 44-508(f) states:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed

² Claimant Depo. at 60.

as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

Mr. Kanyamibwa was riding in a vehicle owned by respondent and being driven by an employee of respondent. Based upon the evidence in the record, the motor vehicle crash was caused by the negligence of respondent's employee, who was charged with the safety of those who chose to use respondent's transport service.

In its brief, respondent cites *Chavez v. Global Advance Technology, Inc.*, a factually similar case, where the Board denied a claim arising out of a motor vehicle wreck where the motor vehicle was owned by the respondent and used to shuttle workers to and from work. In *Chavez*, the Board wrote:

The statute specifically forecloses claimant's claim as she was in the process of traveling home from her normal work shift *and she had yet to assume her normal work duties*. The Board need not consider whether *Bergstrom* has affected the viability of what purports to be the "intrinsic travel" exception to the statute as it finds that this claimant had yet to assume the duties of her employment until such time as she clocked in at the workplace in McPherson. And even if there remains an exception to the "going and coming rule" for positions that compel travel to be performed as an intrinsic part of the job, claimant had no such job requirement. Her job was to be performed exclusively at the plant in McPherson.³

Chavez does not address the employer negligence issue and does not apply to the facts in this case. In *Madison v. Key Work Clothes, Inc.*, the Kansas Supreme Court wrote:

Where an employee sustains injuries occurring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is the employer's negligence, they are injuries arising out of and in the course of employment under G.S.1949, 44-508(k).⁴

G.S.1949, 44-508(k) provides:

The words "arising out of and in the course of employment" as used in this act shall not be construed to include injuries to the employee occurring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence.⁵

³ *Chavez v. Global Advance Technology, Inc.*, No. 1,041,824, 2010 WL 1445613 at *4 (Kan. WCAB Mar. 8, 2010).

⁴ *Madison v. Key Work Clothes, Inc.*, 182 Kan. 186, 192, 318 P.2d 991, 997 (1957).

⁵ See *Murray v. Ludowici-Celadon Co.*, 181 Kan. 556, 559, 313 P.2d 728, 730 (1957).

The language in G.S.1949, 44-508(k) relating to employer negligence is the same as K.S.A. 44-508(f). Notwithstanding the Board's prior holding in *Chavez*, the undersigned is bound by Supreme Court precedent and the plain language of K.S.A. 44-508(f) on this issue. After leaving his duties, Mr. Kanyamibwa sustained an injury which was the result of respondent's negligence. Mr. Kanyamibwa met the burden of proving he suffered a compensable injury arising out of and in 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.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), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated September 20, 2021, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2021.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Brian D. Pistotnik, Attorney for Mr. Kanyamibwa
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Kathryn Gonzales, Attorney for Kansas Workers Compensation Fund
Hon. Thomas Klein, Administrative Law Judge

⁶ K.S.A. 2020 Supp. 44-534a.