

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**CYNTHIA BEITZINGER**  
Claimant

v.

**UNIFIED SCHOOL DISTRICT 250**  
Respondent

AP-00-0461-864  
CS-00-0450-577

and

**ACCIDENT FUND INS. CO. OF AMERICA**  
Insurance Carrier

**ORDER**

Respondent requests review of the October 18, 2021, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

**APPEARANCES**

William L. Phalen appeared for Claimant. Bill W. Richerson appeared for Respondent and its Insurance Carrier.

**RECORD AND STIPULATIONS**

The Board adopted the stipulations and considered the same record as ALJ Roth, consisting of the Transcript of Preliminary Hearing, held August 27, 2021, including Exhibits A1-2 and B1-3; the transcript of Deposition of Cynthia Beitzinger, taken September 13, 2021, including Exhibits A1-4 and B1-5; the transcript of Deposition (Preliminary Hearing Deposition) of Lita Biggs, taken September 15, 2021, including Exhibits A5-8 and B6; the transcript of Deposition (Preliminary Hearing Deposition) of Leslie Garner, taken September 13, 2021, including Exhibits A1-4 and B1-5; and the pleadings and orders contained in the administrative file. The Appeals Board also reviewed the parties' briefs.

**ISSUE**

Did Claimant sustain an injury to her right shoulder from an accident arising out of and in the course of her employment with Respondent?

FINDINGS OF FACT

Claimant worked for Respondent in the kitchen of the elementary school cafeteria on September 4 and 5, 2019. Claimant assisted in the preparation of food. Claimant worked with three other individuals: Ms. Garner, Ms. Watkins, and "Dina." Claimant was recently transferred to the kitchen, after working in a different department for approximately twenty-three years.

On September 4, 2019, Claimant sustained a burn to her abdomen as she was removing a pizza from an oven. An accident report was not completed at the time, but was completed the following day. Immediate medical care was not provided, and Claimant continued working.

On September 5, 2019, Claimant was removing a pan of food from a commercial steamer, while food was being served to the students. As Claimant removed the pan, hot water rolled off the pan and onto Claimant's left foot. Claimant was wearing fabric shoes, and the hot water soaked the fabric and contacted Claimant's foot. Claimant felt an immediate onset of pain as the hot water burned her foot. It is undisputed Claimant sustained a burn injury to the left foot from the accident. The event was unwitnessed.

Claimant testified she tried to take the shoe off immediately after the accident. According to Claimant, she slipped on water on the floor as she was taking her shoe off, and fell on her right side. Claimant estimated a cup of water was on the floor. Claimant alleges she injured her right shoulder as a result of the slip and fall. The event was also unwitnessed. Although Dina was directly in front of Claimant's working area, Dina had her back to Claimant. Racks may have blocked the view between Claimant and Dina. Claimant testified she got up, walked to a storage room to the side of the kitchen and called for help. Claimant testified her right shoulder was painful, but her left foot was much more painful at the time.

Apparently Claimant's call for help was not heard, and Claimant yelled a second time. Ms. Watkins heard Claimant yelling for help and told Ms. Garner, who was working at the computer station in the cafeteria. Ms. Garner went to Claimant in the storage area. According to Ms. Garner, Claimant was sitting in a chair and said she burned her foot and needed ice. Ms. Garner told Ms. Watkins to get the school nurse, and called Ms. Warren, who was in charge of the cafeteria, for further instruction.

Claimant testified her foot was more painful than her shoulder when she saw Ms. Garner in the storage area, but she told Ms. Garner she fell. Ms. Garner testified Claimant never told her she fell or injured her shoulder. Ms. Garner completed written reports concerning the September 4 and 5 incidents, and neither report mentions a fall or a shoulder injury. Ms. Garner testified she would have recorded a shoulder injury in her report if Claimant said she hurt her shoulder.

The school nurse took Claimant to the nurse's office, and the nurse rendered first aid for the foot. Claimant testified paperwork was prepared at the nurse's office. Claimant also testified she told the nurse she burned her foot, fell and injured her shoulder. Apparently no shoulder treatment was rendered. The school nurse did not testify. Claimant's daughter came to the nurse's office and took Claimant to Via Christi Hospital for further treatment.

Claimant received treatment at Via Christi Hospital's occupational medicine clinic on September 5, 2019. Claimant testified her foot was more painful than her shoulder, but she told the treating nurse practitioner she injured her foot and shoulder. Treatment was rendered for the foot only. According to the clinic's records, there is no record of Claimant reporting a fall or a shoulder injury. The records document burn injuries to the left foot from the event with the steamer, and burn injuries to the abdomen from an accident occurring the previous day. Claimant was diagnosed with first and second-degree burns to the foot and abdomen. No diagnosis was made or treatment rendered for the shoulder. Claimant was released to return to work regular duty, and instructed to return for follow-up treatment on September 10, 2019.

Following Claimant's appointment at the occupational medicine clinic, she took photographs of her foot and abdomen documenting the burns.

Notwithstanding the release to return to work, Claimant did not believe she could return to work because of her foot injury. Claimant testified she called Ms. Garner and was told to take more time off work for her foot to heal. Claimant returned to work the following Monday in a position outside the kitchen, and worked for two weeks. Claimant testified her foot became progressively more painful. Claimant testified she did not mention her shoulder pain to Ms. Garner, Ms. Warren or Dina during this time.

Ms. Biggs, the director of business operations for Respondent, testified Ms. Warren informed her Claimant sustained a left foot injury. Ms. Biggs spoke with Claimant about her foot injury after Claimant returned to work. Claimant testified she did not tell Ms. Biggs she injured her shoulder. According to Ms. Biggs, she first became aware Claimant was alleging a shoulder injury when she spoke with Respondent's counsel in May 2021. Ms. Biggs spoke with Ms. Warren, the school nurse and Ms. Garner, and no one was aware of a shoulder injury. Ms. Biggs did not speak with Dina or Ms. Watkins.

Ms. Garner testified Claimant reported a left foot injury on September 5, 2019, but did not report a right shoulder injury or a fall. Ms. Garner completed an accident report on September 5, 2019, which stated Claimant suffered a left foot injury. The accident report did not indicate Claimant fell or injured her right shoulder. Ms. Garner also testified Ms. Watkins completed a written accident report concerning the September 5, 2019, accident, which did not state what happened or what part of the body was affected. According to Ms. Watkins' statement, someone asked for an ice pack. Ms. Garner thought there was

approximately one tablespoon of water on the floor around the steamer after the accident. Ms. Garner confirmed Claimant did not mention a fall occurring at work after she returned to work for Respondent.

Claimant apparently did not attend the follow-up appointment on September 10, 2019. Claimant received conservative care at the occupational medicine clinic on September 20 and 30, 2019. There is no record Claimant reported shoulder problems during those appointments, but Claimant testified she told the treating physician, Dr. Coltharp, she had shoulder problems. Despite this, Claimant only received treatment for the foot. Claimant was released from care on September 30, 2019, but she continued to have foot problems. No work restrictions were imposed.

Claimant testified she also received treatment from Dr. Barnica, a podiatrist. The podiatrist's records are not in evidence. According to Claimant, she received treatment for her foot only. Claimant testified she reported shoulder symptoms to Dr. Barnica, but was told there was nothing Dr. Barnica could do because she was a podiatrist. Claimant sought no further treatment.

From September 10 through October 22, 2019, Claimant incurred multiple absences without calling in or responding to calls from Respondent. Claimant was terminated on October 22, 2019, for excessive absenteeism.

Claimant was evaluated by Dr. Murati on September 11, 2020. Dr. Murati reviewed medical records from Via Christi Hospital and the occupational medicine clinic, but no radiological films. Dr. Murati noted a history of a left foot burn from scalding hot water, with Claimant subsequently falling on her right side. Claimant reported pain in the left foot, and soreness in the right shoulder and hip. Examination was notable for tenderness on the right side of the L5 region, tenderness at the right trochanteric bursa, and full range of motion. Dr. Murati diagnosed post-burn of the left foot, right-sided rotator cuff tear versus a sprain, a low-back sprain due to altered gait, right-sided trochanteric bursitis due to altered gait and a left-sided MCL sprain due to altered gait. Dr. Murati recommended additional medical treatment for the shoulder, low back and hip, and the MCL sprain. Dr. Murati did not impose temporary restrictions.

Dr. Do evaluated Claimant on November 3, 2020, and recommended an MRI scan and x-rays of the right shoulder, which were performed on July 14, 2021. On August 10, 2021, Dr. Do interpreted the MRI as showing full-thickness tears of the supraspinatus and infraspinatus tendons and fatty atrophic changes. The x-rays were interpreted as showing low-grade degenerative changes. Dr. Do recommended physical therapy and rotator cuff repair, without consideration of causation. Dr. Do noted the passage of time between September 4-5, 2019, and August 10, 2021, could produce the fatty atrophic changes identified in the MRI.

When Dr. Murati evaluated Claimant, she was working part-time as a home health aide. Claimant continues to experience pain in her right shoulder and left foot. Claimant reported low range of motion of the left great toe. Claimant walks with a limp and has low back and hip symptoms, and she cannot raise her right arm overhead. Claimant wanted additional medical treatment and temporary total disability compensation.

Following the preliminary hearing and submission of evidence, ALJ Roth issued the Preliminary Hearing Order, dated October 18, 2021. ALJ Roth noted the burn injuries were undisputed, but Respondent denied Claimant sustained a right shoulder injury from a compensable fall on September 5, 2019. ALJ Roth found Claimant's testimony regarding the occurrence of the fall more credible, and noted no evidence proving the fall did not occur. ALJ Roth found Respondent did not prove Dr. Murati was more likely lying when he identified a shoulder injury from the fall of September 5, 2019. Medical treatment for the right shoulder was awarded, but the request for temporary total disability compensation was denied. This appeal follows.

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

The issue for review is whether Claimant met her burden of proving by a greater weight of the credible evidence she sustained an injury to her right shoulder from a fall occurring as a consequence of the initial compensable left foot injury of September 5, 2019. Essentially, Respondent argues Claimant did not prove by a greater weight of the credible evidence the fall occurred. Claimant argues ALJ Roth's finding the fall occurred was correct, and no contrary medical evidence establishes the fall was not the prevailing factor causing the shoulder injury and need for medical treatment.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.<sup>1</sup> The provisions of the Workers Compensation Act shall be applied impartially to all parties.<sup>2</sup> 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.<sup>3</sup>

The Appeals Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges,<sup>4</sup> and the Board

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<sup>1</sup> See K.S.A. 44-501b(a).

<sup>2</sup> See *id.*

<sup>3</sup> See K.S.A. 44-501b(c).

<sup>4</sup> See K.S.A. 44-555c(a).

possesses the authority to grant or refuse compensation, or to increase or diminish an award of compensation.<sup>5</sup> A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.<sup>6</sup> Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,<sup>7</sup> the Board is not required to do so, and may modify an award as it deems necessary.<sup>8</sup> Moreover, the Board is as equally capable as an administrative law judge in reviewing evidence when a witness does not testify live.<sup>9</sup> Personal observation of testifying witnesses is a common basis for determining witness credibility, but another method to determine credibility is analyzing the facts and determining which testimony makes the most sense based on those facts.<sup>10</sup>

In this case, there is no dispute Claimant sustained burn injuries to her left foot after hot water spilled on her foot on September 5, 2019. The issue is whether Claimant proved she subsequently injured her right shoulder when she fell on her right side after slipping on water after her left foot was burned. Dr. Murati stated the fall was the prevailing factor causing the right shoulder injury and need for additional medical treatment, and Dr. Do indicated the fatty atrophy finding on the right shoulder MRI was consistent with the passage of time between September 4-5, 2019 and August 10, 2021. Both medical opinions, however, are premised on Claimant actually falling on her right side on September 5, 2019. ALJ Roth did not observe the witnesses testify live, and the Board is not required to defer to ALJ Roth's credibility determination.

The greater weight of the credible evidence does not establish Claimant fell on September 5, 2019. Claimant's alleged fall was unwitnessed. Claimant testified at her deposition she fell, but Ms. Garner contradicted Claimant's testimony. There is no record in the written statements of Ms. Garner or Ms. Watkins Claimant said she fell or sustained a shoulder injury. Claimant did not tell Ms. Biggs she fell or injured her shoulder when it was allegedly symptomatic. Although Claimant apparently sustained a shoulder injury on

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<sup>5</sup> See K.S.A. 44-551(l)(1).

<sup>6</sup> See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555, at \*4 (Kan. WCAB June 22, 2017).

<sup>7</sup> See, e.g., *Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143; 1,069,144; 1,069,145, 2014 WL 5798471, at \*9 (Kan. WCAB Oct. 14, 2014).

<sup>8</sup> See *Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241, at \*3 (Kan. WCAB June 22, 2011).

<sup>9</sup> See *Gilmore v. Henke Manufacturing Co.*, No. 1,074,792, 2016 WL 3208237, at \*3 (Kan. WCAB May 12, 2016).

<sup>10</sup> See *Dick v. Park Electrochemical Corp.*, No. CS-00-0444-763, 2020 WL 2991808, at \*2 (Kan. WCAB Mar. 19, 2020).

September 5, 2019, impacting her ability to use her right arm, she continued to work for Respondent for two weeks without mentioning her right shoulder. While Claimant's burn injuries could have initially covered the shoulder symptoms, it is likely those symptoms would have subsided enough to call Claimant's attention to her shoulder. It is illogical to find Claimant failed to report her injured, symptomatic shoulder to anyone during the two-week period after the accident when Claimant was still working for Respondent.

More importantly, there is no record Claimant told the occupational medicine clinic she fell on September 5, 2019, although there is a record Claimant reported her prior abdomen burn. It strains credulity to believe the clinic reported a prior injury, but failed to record all the reported injuries occurring that day. Following the initial appointment, Claimant took photographs of her burns, but made no record of a shoulder injury. There is no record Claimant reported a shoulder injury or a work-related fall on her two return visits. There is no record Claimant sought medical treatment on her own for her shoulder, which seems unusual if Claimant sustained a rotator cuff tear impacting her ability to use the right arm. Instead, Claimant obtained work as a home health aide, and saw no health care providers for her right shoulder until the examination by Dr. Murati approximately one year after the alleged fall.

Claimant's testimony was contradicted by the other witnesses and the health care providers who treated Claimant during the month after the accident. Claimant's behavior following her return to work was not consistent with someone who sustained a serious shoulder injury from a work-related fall and needed medical treatment. After considering the entire record, the undersigned finds Claimant's testimony, alone, is not credible evidence. Claimant failed to prove by a greater weight of the credible evidence she was involved in a work-related fall on September 5, 2019, resulting in a right shoulder injury. Accordingly, the preliminary order finding Claimant sustained a compensable right shoulder injury and awarding medical treatment should be reversed, and Claimant's request for benefits in connection with a fall occurring on September 5, 2019, should be denied.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Preliminary Hearing Order of ALJ Steven M. Roth, dated October 18, 2021, is reversed. Claimant failed to prove by a greater weight of the credible evidence she sustained a right shoulder injury from an accident arising out of and in the course of her employment with Respondent on September 5, 2019. Claimant's request for medical treatment and temporary total disability compensation is denied.

**CYNTHIA BEITZINGER**

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**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2022.

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**WILLIAM G. BELDEN  
BOARD MEMBER**

c: Via OSCAR

William L. Phalen  
Bill W. Richerson  
Hon. Steven M. Roth