BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BILLY PRUITT	)	
Claimant	)	
V.	)	
	)	
HURRICANE SERVICES INC.	)	AP-00-0483-763
Respondent	)	CS-00-0480-241
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier, through Samantha Benjamin-House, requested review of Administrative Law Judge (ALJ) Larry Gurney's preliminary hearing Order, dated June 24, 2024. David Farris appeared for the claimant.

ISSUE

Did the claimant recklessly violate the respondent's workplace safety rules and regulations?

FINDINGS OF FACT

The claimant was a truck driver for the respondent starting in December 2022. The claimant drove trucks requiring a CDL license. The claimant was a truck driver for 30 years. The respondent trained the claimant regarding the operation of a water truck on November 16, 17 and 20, 2023. For the respondent, he would haul water from oil production site tank batteries to disposal wells. The large commercial truck the claimant drove weighed 30-32,000 pounds empty and 66,000 pounds when loaded with water. The claimant's job required driving on highways and county roads, including gravel roads.

On November 24, 2023, the claimant sustained injuries in a motor vehicle accident while driving an 80-barrel water truck for the respondent. Snow was falling and the roads were icy. The claimant did not want to drive on November 24 because of the weather. Jesse Spargo, Jr., the respondent's supervisor, testified the drivers did not have set schedules and would take care of company business on their own schedule. Christopher Pruitt, the claimant's son, who also drives for the respondent, testified the claimant was not planning to work because of the weather. However, the claimant testified Mr. Spargo had Christopher Pruitt convince the claimant to work that day.

The claimant did not provide much insight into how the accident occurred. The claimant testified his only memory is veering off into the right ditch and later coming to his senses in the ditch, under the step leading to the door of the cab. He did not recall anything in between. According to the claimant, he walked several miles to obtain assistance and was hospitalized for several days. The claimant testified he believed he was wearing a seat belt at the time of the accident. The claimant testified he routinely wears a seat belt in both commercial and non-commercial vehicles. The claimant testified he did not know if he was thrown from the truck, exited the truck or removed his seat belt to get out of the truck. He admitted he did speed while working for the respondent, but denied intentionally speeding or refusing to wear a seat belt on the day of the accident.

The Kansas Highway Patrol "Crash Information" from the accident, which are pictures of a computer or smart phone screen, showed "no safety restraint."[1] The actual Kansas Highway Patrol Kansas Motor Vehicle Crash Report stated the claimant "was largely [incoherent] due to injuries but was able to relate a few details. [The claimant] believed he had been ejected from V1 and was awoken by his dog, lying on the ground outside the vehicle. He walked approximately 2.75 miles to the highway and flagged down help."[2] The Crash Report also indicated the accident occurred on a gravel road.

The claimant was assessed by Logan County emergency medical services, taken to Logan County Hospital, and transferred to Wesley Medical Center. None of these records are in evidence. The claimant was seen at his attorney's request by David Hufford, M.D. The doctor's report stated the claimant had no recollection of the impact, whether the vehicle rolled or whether he was ejected from the cab. The claimant had many resulting injuries, including left-sided rib fractures, a small left pneumothorax, acute L1-L4 and right L2 transverse process fractures, left L4 superior facet fracture, moderate left abdominal wall subcutaneous soft tissue stranding/hematoma, moderate independent bibasilar groundglass pulmonary opacities, concussion and right shoulder and wrist injuries.

The respondent's employee handbook states, in part: "Drivers must conform to all traffic laws with allowances made for adverse weather and traffic conditions. . . . Employees violating this policy will be subject to corrective action up to and including termination."[3] The claimant testified he was required to sign several documents during the hiring process. He signed a form acknowledging receipt and review of the respondent's handbook, but denied actually seeing or reading the handbook. Christopher Pruitt testified he signed a document online indicating he received the employee handbook, but was not actually provided a handbook.

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[1] Sporing Depo., Ex. 1 at 3.

[2] KHP Crash Report at 5.

[3] Gabel Depo., Ex. 4 at 13.

Mr. Spargo testified the respondent's policy is for drivers to wear seat belts. He was asked, "Are your drivers instructed by Hurricane to follow the state laws and regulations with regard to traffic, driving?" Mr. Spargo replied, "Well, no, they're not. I wouldn't say they're – you tell them to make sure that they follow the speed limits, but in – or, you know, local laws. I mean it's just something as a driver you have to do."[4]

If a driver is speeding, Mr. Spargo testified he or someone within the company will tell the driver to slow down. Mr. Spargo testified he told the claimant to slow down on one occasion after it was reported by another company man the claimant was driving too fast on rough terrain at a well. He also reminded the claimant to slow down when it was muddy, snowing or icy to avoid having an accident or something terrible happening. Mr. Spargo was not aware of the claimant receiving any tickets for violations while driving one of the respondent's trucks, nor did the claimant ever receive a written warning from the respondent for a safety violation.

Mr. Spargo went to the accident location the day it occurred. He did not observe the driver's side seat belt on the date of the accident. At some other time and place, Mr. Spargo later saw the seat belt locked in an "up" position. He testified the seat belt locks in whatever position it was in at the time of the accident. Mr. Spargo surmised the claimant was never wearing the seat belt because it was in the "up" position. On cross-examination, Mr. Spargo acknowledged he did not personally know if the claimant was wearing a seat belt, how fast the claimant was driving and if he unbuckled himself after the accident.

Raven Sporing has worked for the respondent for two years. Mr. Sporing testified he trained the claimant on November 16, 17 and 20, 2023. He testified he had to tell the claimant to put his seat belt on during training. He indicated wearing a seat belt is a safety rule of the respondent, as well as state and federal law. Mr. Sporing also told the claimant to slow down. He later cautioned the claimant about speeding on a couple of occasions either in person or by phone. Mr. Sporing never wrote the claimant up for traffic concerns and did not see the claimant speeding or not wearing a seat belt on the date of the accident. The claimant denied Mr. Sporing ever told him to slow down.

Blaine Gabel is the respondent's vice-president of safety and compliance. He testified all of the respondent's drivers must comply with all traffic laws and account for adverse weather conditions. Mr. Gabel testified the respondent uses Samsara GPS Tracking System (Samsara) to track vehicle speed; locations; oil changes; DVIR, which is a pre-and post-trip check to ensure a vehicle is functioning properly; harsh braking and over-aggressive turning. While determining if a driver was speeding was accessible at the time of the claimant's accident, the respondent did not have an alert for speeding set up

[4] Spargo Depo. at 12.

in November 2023 to immediately alert supervisors. Instant alerts were not set up until January 1, 2024.

Using Samsara, Mr. Gabel generated a description of the claimant's location at specific time intervals, the claimant's speed while traveling, and the posted speed limit at the time from September 1, 2023 through November 24, 2023.[5] The documentation purported to show the claimant was speeding in the respondent's vehicles the entire time. Mr. Gabel was not aware of the claimant ever being written up even though the Samsara records purport to show the claimant repeatedly sped from September 1 until the date of his accident.

With regard to November 24, 2023, Mr. Gabel testified Samsara showed the claimant was speeding from the moment he began his shift until the accident. At the time of the accident at 1:21 p.m., Samsara showed the claimant was going 78 miles per hour, and then dropped to 67 mph. Mr. Gabel testified "at 78 is when he started to deviate from the road, and that's when he lost control. I think that next piece is 67, that's as he starts to lose control."[6]

The claimant disagreed with the driving logs, stating there were times he left Highway 161 for water pits and the logs did not reflect that. The logs also show the claimant driving 73 miles an hour on a dirt road, which he stated was not possible.

Christopher Pruitt also disagreed with the driving log. He testified the log showed the claimant running up and down the highway all day, but hauling water is mostly done on dirt or county roads. Mr. Pruitt also believed the listed speeds were not completely accurate because the area they haul involves a "lot of up and down hills."[7] Mr. Pruitt testified he knows he is not supposed to speed and should wear a seat belt. He testified the respondent never told him anything about abiding by traffic laws. He admitted he does not always go the speed limit, but denied ever being written up or receiving a verbal warning for a safety violation from the respondent. Mr. Pruitt testified he witnessed his father, the claimant, wearing a seat belt regularly.

On December 21, 2023, the respondent terminated the claimant's employment for failure to comply with company policy, namely speeding and failure to use a seat belt. The claimant denied intentionally speeding or refusing to wear his seat belt on the date of accident. He denied ever receiving a written warning or reprimand for speeding, not wearing a seat belt, or inattentive/reckless driving. The claimant had not heard of any

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[5] Gabel Depo., Ex. 8.

[6] Gabel Depo. at 37.

[7] Pruitt Depo. at 8.

other employees receiving written warnings or being terminated for speeding or a seat belt violation. Mr. Spargo testified the claimant was terminated for violating company policy. He admitted employees are not normally terminated for speeding because "everybody's in a hurry [some]times, I guess."[8]

The claimant continues to experience constant headaches, sharp pains in his back radiating across his side to his hip, constant leg pain, severe pain when laying down, constant neck and right shoulder pain, and wrist pain.

The claimant acknowledged a conviction for theft by check in 1995 and "jumping" bail in 2006. The ALJ found the claimant to be generally credible. The ALJ had many questions about the Samsara data:

> However, the Court has several reasons to question the completeness and accuracy of the information presented by Exhibit 8, without further clarification or explanation. First, there is **never** an instance from September 1 through November 24 that claimant is not shown to be driving over the speed limit. Second, from October 30 through November 17, claimant is not shown as an operator of any respondent owned truck, however according to Mr. Sporing's testimony, he trained claimant to drive a water truck on November 16. On November 18 & 20, the two other days of training, claimant is shown to be speeding at every data point, with two instances showing speeds as high as 23 miles per hour over the posted speed limit. These are days that Mr. Sporing testified he was driving either in front of or behind the vehicle that claimant was operating. Third, the first 4 pages of Exhibit 8 purport to show claimant driving on September 1, at speeds as high as 78 miles per hour (18 miles over the posted speed limit of 60), from 7:30 AM until 5:17 PM without ever leaving Highway 161. The data on same date indicates that claimant never got farther than 48.2 [miles] north-northwest of Colby on Hwy. 161 and never got closer than 43.8 miles north-northwest of Colby on the same highway. In other words, the data for September 1 shows that claimant drove back and forth on Hwy. 161, speeding all day long on trip legs that were never further than 4.4 miles. According to the exhibit, claimant then does not drive again until September 8. Finally, according to the exhibit, claimant only drove for a total of 6 days between October 30 and November 24, a four week period.
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> Each of these items, without further explanation or clarification, is difficult to believe. Perhaps there is a good explanation, but it is not contained in the record presently before the Court. It should also be noted, these are only a few observations from the Court's review of the exhibit, not a detailed analysis of all of it's content.[9]

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[8] Spargo Depo. at 33.

[9] ALJ Order at 7.

The ALJ's Order stated:

Having reviewed the evidentiary record and the briefs submitted by counsel, the Court finds and concludes that respondent has failed to prove by a preponderance of the evidence that claimant recklessly violated respondent's workplace safety rules or regulations in the motor vehicle accident in question.

The evidence is somewhat lacking in establishing what precise workplace rules are specifically communicated to water truck drivers. Claimant and his son testified that they were required to "acknowledge" that [they] received, reviewed and understood respondent's Employee Handbook. Both also testified that the acknowledgement was merely a required step in the new hire process but that they never actually received or read the Handbook. Mr. Spargo testified that respondent's drivers are not instructed "to follow the state laws and regulations with regard to traffic...." However, the evidence does establish that all of the drivers understand that they are generally expected to, and attempted to, obey traffic rules relating to speed and seatbelt usage. Accordingly, the Court accepts the proposition that is it he respondent's "workplace rule" that drivers are to drive at or below the speed limit and use their seatbelt.

Focusing on the speeding issue, respondent has presented evidence: (a) that Mr. Sporing witnessed claimant driving at speeds in excess of the speed limit and counseled him against speeding; (b) that Mr. Spargo received a complaint that claimant drove too fast on a well site and was counseled to slow down to avoid damage to the vehicle, and; (c) the Samsara GPS device shows that the claimant was speeding at the time of the accident. Regarding testimony of Mr. Sporing and Mr. Spargo, even if the testimony is fully credited, the testimony does not establish that claimant was speeding, or driving at an unsafe speed, *at the time of his accident*. Their testimony also does not establish that it is claimant's practice and custom to drive in excess of the speed limit...they relate specific instances from observations on particular dates or times. This is particularly so since there is no documentation of the instances of speeding and no evidence of a warning or adverse statement [in] claimant's record with respondent. There is no evidence that claimant received a traffic citation while operating a vehicle owned by respondent. Mr. Sporing's comments to claimant were not reprimands or warnings to [claimant] because there is no evidence that he is claimant's superior. The comment from Mr. Spargo was please slow down because the terrain was rough, on a particular instance in a particular field.

Regarding the Samsara evidence, the Court admits the exhibit over claimant's objection, concluding that Mr. Gabel has provided suitable evidentiary foundation for [its] admissibility. However, Mr. Gabel's testimony is, in the opinion of the Court, insufficient to explain in enough detail how the system works to provide a basis to accept the results presented. Perhaps additional evidence and explanations for the obvious gaps in the data would case the Court to reach a different conclusion. But at this juncture, the Court does not believe that respondent has established that claimant was driving 78 miles per hour in a 55 mile per hour

speed zone at the time of his accident. The weather on the day of the accident was bad enough that claimant did not want to work. The roads were icy and there was blowing snow. In such conditions, it is difficult to conclude that claimant was traveling at 78 miles per hour on a road where "you go over a hill and kind of through a couple of curves, light curves" per the testimony of Mr. Sporing.

On the issue of seatbelt usage at the time of the accident, claimant testified that he believed he was using a seatbelt. There were no witnesses to the accident to contradict that testimony. Claimant came to his senses outside of the truck following the accident. He did not know whether he had been thrown from the vehicle or unhooked his seatbelt and exited. The "statements" attributed tot he Kansas Highway Patrol are contradictory when comparing the KHP website screenshot with the accident report. There is no evidence that any type of accident reconstruction analysis has been performed. Absent something more, the Court concludes that respondent has failed to prove that claimant was not wearing a seatbelt at the time of the accident.

Finally, based upon the present record, the Court finds that even if "workplace safety rules or regulations" were violated, such violations have not been shown to be "reckless" and such rules have not been show to be "rigidly enforced" by the respondent.[10]

PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the evidence shows the claimant committed a reckless violation of the respondent's workplace safety rules and regulations. The respondent also argues the evidence establishes the respondent adequately enforced its safety policies. The claimant maintains the Order should be affirmed.

K.S.A. 44-501b(c) states the claimant carries the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends. Under K.S.A. 44-508(h), the trier of fact shall consider the whole record. The burden of proving an affirmative defense is on the employer.[11]

K.S.A. 44-508(h) provides:

"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.

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[10] *Id.* at 9-10.

[11] See *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

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

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

Regarding the definition of "reckless", *Anderson*[12] states:

> The applicable workers compensation statutes do not define recklessness. Accordingly, courts determining whether an employee recklessly violated an employer safety policy for the purposes of K.S.A. 2017 Supp. 44-501(a)(1)(D) look to other areas of law for guidance. This court has looked to the Restatement (Second) of Torts and statutory criminal law for definitions of recklessness for prior workers compensation cases. [Citation omitted].
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> The Restatement (Second) of Torts § 500(a) (1965) recognizes two kinds of reckless conduct. In the first, "the actor knows, or has reason to know ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." In the second, "the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so."
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> Under the Kansas Criminal Code, a person acts recklessly "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2017 Supp. 21-5202(j).

The respondent did not prove the claimant's injuries resulted from recklessly violating the respondent's workplace safety rules regarding speeding or wearing a seat belt.

Recklessness contemplates something beyond ordinary negligence or carelessness. To conclude the claimant acted with recklessness, the preponderance of the credible evidence must support his conscious disregard of a known or obvious risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence, but is a lesser

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[12] *Anderson v. PAR Elec. Contractors, Inc.*, No. 118,999, 2018 WL 6074279, at *7-8 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

standard than intentional conduct. Here, the claimant denied speeding or failing to wear a seat belt on the date of accident.

The Samsara documentation requires more explanation. It is difficult to believe the claimant was always speeding when driving for the respondent. Yet, the Samsara records never document the claimant doing anything but breaking the speed limit. Driving starts at 0 miles per hour and coming to full stops involve slowing down to 0 miles per hour. The Samsara records only show the claimant speeding. The ALJ had many other concerns about the accuracy of the Samsara records.

The use of a seat belt presents a much closer question. The claimant testified he was wearing a seat belt at the time of his accident. Mr. Spargo testified he did not observe the seat belt placement on the date of accident, but later saw the seat belt in the "up" position. Mr. Spargo theorized the seat belt locked into the "up" position and the claimant never was using the seat belt. This evidence is speculative. Mr. Spargo did not know if the claimant was wearing a seat belt on the date of accident. The evidence indicates the claimant may have been ejected from the truck. The claimant told a Kansas Highway Patrol officer he may have been ejected from the truck. The officer observed the claimant to be largely incoherent. The evidence also indicates the claimant could have removed his seat belt and exited the truck. There is no medical evidence establishing the claimant was ejected from the truck or his injuries would only be compatible with having been thrown from the vehicle.

The evidence is conflicting. This is a very close case. The ALJ found the claimant to be generally credible. The record presents many more questions than answers. At this juncture, the respondent did not prove the claimant recklessly violated the respondent's safety rules. The evidence does not establish the claimant's injuries were the result of recklessly violating the respondent's safety rules regarding speeding or use of his seat belt. The ALJ's preliminary Order is affirmed.

WHEREFORE, the undersigned Board member affirms the Order.

IT IS SO ORDERED.

Dated this _____ day of August, 2024.

_____
JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
David Farris
Samantha Benjamin-House
Hon. Larry Gurney