

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LINDA HUGHES TAYLOR)	
Claimant)	
V.)	
)	AP-00-0490-435
NATIONAL EXPRESS, LLC)	CS-00-0488-164
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (Respondent) request review of the May 23, 2025, preliminary hearing Order entered by Administrative Law Judge (ALJ) Julie A.N. Sample.

APPEARANCES

Michael Haight appeared for Claimant. Christopher J. McCurdy 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 May 14, 2025, with exhibits attached; the transcript of the Evidentiary Deposition of Megan Kephart from May 15, 2025; the documents of record filed with the Division, and the briefs filed by the parties.

ISSUES

1. Did Claimant's injury to the left shoulder and neck arise out of and in the course of her employment with Respondent?
2. Should compensation be disallowed for a reckless safety violation?
3. Is Claimant entitled to an award of temporary total disability (TTD) benefits?

FINDINGS OF FACT

Claimant began working for Respondent in August 2024 as a school bus driver. After completing her route on the morning of February 21, 2025, Claimant slipped and fell on ice and snow while conducting a required post-trip inspection of the bus. Claimant was not wearing ice cleats at the time of the fall. Respondent provided ice cleats for employees: a type of rubber bootie with spikes on the bottom, made to slip over an individual's shoes.

Claimant explained her husband dropped her off at work on February 21, 2025, and she inadvertently left her ice cleats in the car. Claimant stated there was no ice or snow in the parking lot, but there was accumulation where the buses were parked. Claimant testified Respondent sends employees a text message when ice cleats are supposed to be worn, and she did not receive a text message. Claimant further stated Respondent posted signs when ice cleats are to be worn, and she did not see signage on February 21, 2025. Claimant testified no one was wearing ice cleats that day.¹ Claimant has never been warned or reprimanded for not wearing ice cleats.

After the fall, Claimant notified dispatch of the incident. Megan Kephart, Respondent's operations supervisor, walked to the bus to investigate. Ms. Kephart wore ice cleats. Ms. Kephart noted Claimant was not wearing cleats. According to Ms. Kephart, Claimant was not wearing cleats because Claimant did not think they were necessary. Claimant wore snow boots to work on February 21, 2025. Ms. Kephart described Claimant's boots as having soles with a "roughened surface" which "looked like it was intended for icier – icier things."²

Ms. Kephart testified Respondent's policy is "anytime there's frozen precipitation of any amount on the ground, ice cleats are required."³ There is no evidence in the record that the policy is in writing. Ms. Kephart explained the use of the text message system is not always consistent, as it is a friendly reminder and not policy. Not every employee has access to text messages. Ms. Kephart stated the signs posted around the facility indicating "Ice Cleats Required" are also friendly reminders.⁴

Claimant attended a training session on December 6, 2024, which included the use of ice cleats. Slide no. 4 of the presentation states, in part:

¹ P.H. Trans. at 8.

² Kephart Depo. at 23.

³ *Id.* at 5.

⁴ *Id.* at 8.

Ice cleats for shoes or boots can prove to be lifesavers in winter conditions by helping you avoid dangerous falls and keeping you safe.

Get in the habit of using Ice Cleats whenever going outdoors in times of snow or ice. Be especially vigilant when temperatures are below freezing.⁵

Ms. Kephart explained bus drivers stop at the dispatch office each morning to retrieve their bus keys and to clock in to work. Dispatchers in the facility, who distribute keys to the drivers, have windows to observe whether employees are wearing proper footwear. Ms. Kephart testified regarding policy enforcement:

Our direction is to just correct the behavior immediately and get them what we deem as the necessary PPE immediately so that they can continue their job. That's how we enforce it; so it's just by visible observation.

Leaders – so our management staff and also our dispatchers are people who are sitting there saying, “Hey, wear your cleats.” They're reminding them to wear their cleats and stuff like that. And if they feel that somebody is not taking their direction to wear their cleats, they will come find us so that we can redirect.⁶

Ms. Kephart was not aware of any employee being reprimanded or written up for not wearing ice cleats, including Claimant. Ms. Kephart indicated enforcement of the policy is to prevent injury and maintain safety, which is why the ice cleats are provided by Respondent. The only person Ms. Kephart witnessed not wearing ice cleats on February 21, 2025, was Claimant. Ms. Kephart noted spare ice cleats were available for Claimant's use.

Ms. Kephart testified ice cleat signs were displayed on the day of the accident. One of the signs was located 8 to 10 feet from the door leading to the buses, and Claimant would have walked past the sign on the way to the bus. While speaking with Claimant immediately after the incident, Claimant told Ms. Kephart the sign was not there. Ms. Kephart specifically looked for the sign when she and Claimant returned to the building, and the sign was present.

After she returned to the office, Claimant was put in touch with a nurse triage service. During this call, Claimant stated she landed on her right arm when she fell and sustained injury to her right upper arm.⁷ Claimant called the nurse triage service again on February 24, 2025, with complaints of increased pain. Claimant reported pain in the left

⁵ P.H. Trans., Resp. Ex. A at 4.

⁶ Kephart Depo. at 14.

⁷ See P.H. Trans., Resp. Ex. E.

side of her neck going down her left arm, pain in her left leg from the knee down, and pain in her upper right arm and right shoulder.⁸ At the preliminary hearing, Claimant did not recall telling the nurse anything other than experiencing pain on her left side from her neck and shoulder after the fall. Claimant testified she felt pain in the left side of her neck, in the left side of her arm, and down the left side of her arm after the accident. Claimant described pain “all on [her] left side,” including her left hip, knee, and leg areas.⁹

Respondent initially provided medical treatment at the University of Kansas Health System. On February 26, 2025, Claimant was diagnosed with neck strain, left shoulder strain, contusion of the left hip, sprain of the left knee, and sprain of the left ankle. Work restrictions of no professional driving, no climbing stairs or ladders, and no lifting greater than 15 pounds with the left arm were provided. Respondent later denied Claimant’s claim based on a violation of safety rules. Claimant sought treatment on her own and was eventually referred to Dr. Ellsworth for her left shoulder. Claimant testified she requires surgery for her left shoulder, in addition to treatment for her continued neck complaints.

On April 9, 2025, Claimant was examined, at her counsel’s request, by Dr. Carrie Pohl. Dr. Pohl reviewed Claimant’s available history and medical records, noting Claimant sustained injuries to her left leg and left shoulder in a motor vehicle collision approximately 20 years prior. Following a physical examination, Dr. Pohl determined Claimant sustained:

1. Cervical strain and cervicalgia
2. Left shoulder, rotator cuff syndrome
3. Thoracic strain
4. Lumbar strain
5. Left intrinsic hip pain, symptoms, and exam consistent with labral tear
6. Left sacroiliitis
7. Left knee strain, symptoms consistent with LCL injury¹⁰

Dr. Pohl recommended additional treatment and light-duty work restrictions. Dr. Pohl opined the prevailing factor causing all of Claimant’s diagnoses was the work accident of February 21, 2025.

At the preliminary hearing, Claimant testified she had prior left shoulder and neck complaints approximately 20 years ago. She further testified she must have misunderstood this line of questioning when she answered differently during a deposition. Claimant’s deposition is not in the record. Claimant alleged left neck pain extending to her

⁸ See *id.*

⁹ P.H. Trans. at 15.

¹⁰ P.H. Trans., Cl. Ex. 1 at 5.

shoulder following a work incident on June 14, 2001. Dr. Sandow performed an independent medical evaluation in November 2003 and assigned a permanent partial impairment rating, of which 50 percent was due to degenerative disease and 50 percent due to the work injury.¹¹

Respondent offered Claimant transitional work through ReEmployability when her restrictions could not be accommodated. Claimant was assigned to a charity clothing store starting April 22, 2025. She was instructed to pull empty hangers off the racks and put them in a bin. Claimant said she was told she could take breaks as needed, according to the paperwork provided by Respondent.¹² Claimant testified she completed the work using only her right arm, but the reaching and pulling activity increased her left shoulder pain. Claimant acknowledged she took breaks to address the pain when necessary. Her transitional employment was terminated by April 25, 2025, due to limited contribution and excessive breaks. Claimant was not offered additional assignments.

The ALJ determined Claimant did not recklessly violate Respondent's safety rule regarding ice cleats, noting the record does not indicate Respondent uniformly and consistently enforced the rule. The ALJ ordered medical treatment for Claimant's injuries and TTD from February 24, 2025, to April 21, 2025, and from April 26, 2025, and continuing until Claimant is accommodated, returned to gainful employment, or found to be at maximum medical improvement.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the ALJ's Order should be reversed. Respondent argues Claimant's neck and left shoulder injuries did not arise out of or in the course of her employment due to preexisting degenerative conditions. Respondent maintains Claimant recklessly violated a safety rule by not wearing ice cleats. Further, Respondent argues Claimant is not entitled to TTD because she was terminated for cause.

Claimant contends the ALJ's Order should be affirmed. Claimant argues the Board lacks jurisdiction to review issues related to TTD at this juncture; therefore, Respondent's request to review TTD should be dismissed.

¹¹ See P.H. Trans., Resp. Ex. B at 5.

¹² See P.H. Trans., Resp. Ex. C at 3.

1. Did Claimant's injury to the left shoulder and neck arise out of and in the course of her employment with Respondent?

An injury is compensable only if it arises out of and in the course of employment.¹³ The two phrases "arising out of" and "in the course of" have two separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the worker was at work in her employer's service. The phrase "arising out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.¹⁴

To receive workers compensation benefits, a claimant must prove by the preponderance of the evidence the accidental injury occurred while working. The evidence must include specifics as to time the accident occurred and under what circumstances the accidental injury occurred.

The uncontroverted evidence supports a finding Claimant slipped and fell on ice and snow while conducting a required post-trip inspection of the bus. Claimant was conducting a required task at the time of her injury. The injury arose out of the nature, conditions, obligations, and incidents of her employment. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹⁵

The undersigned finds Claimant's injury to her left shoulder and neck arose out of and in the course of her employment with Respondent.

2. Should compensation be disallowed for a reckless safety violation?

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

(a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

¹³ K.S.A 44-508(f)(2).

¹⁴ See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190,197-98, 689 P.2d. 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, ¶1, 512 P.2d. 497 (1973).

¹⁵ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

...

(D) the employee's reckless violation of their employer's workplace safety rules or regulations;

“Reckless” is not defined in K.S.A. 44-501(a)(1)(D), but it has been defined by the Kansas Court of Appeals as meaning either (1) an actor knows or has reason to know of facts creating a high degree or risk of physical harm and deliberately acts or fails to act in conscious disregard or indifference to that risk, or (2) an actor knows or has reason to know, but does not appreciate the high degree of risk, although a reasonable person in the actor's position would do so.¹⁶ The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.¹⁷ A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.¹⁸ The preponderance of the credible evidence must support a conscious disregard of a known risk that exceeds negligence; recklessness is akin to gross, culpable or wanton negligence.¹⁹

To prevail arguing a reckless violation of its workplace safety rule or regulation, Respondent has the burden of proving Claimant has reason to know of facts creating a high degree or risk of physical harm and deliberately acts or fails to act in conscious disregard or indifference to that risk, or Claimant knows or has reason to know, but does not appreciate the high degree of risk, although a reasonable person in the actor's position would do so.

Claimant stated there was no ice or snow in the parking lot, but there was accumulation where the buses were parked. Claimant did not receive a text message requiring ice cleats. Claimant did not see signage requiring ice cleats. No one else was wearing ice cleats that day. Claimant has never been warned or reprimanded for not wearing ice cleats. Claimant was wearing snow boots at the time of her injury.

Ms. Kephart testified the use of the text message system is not consistent. She also testified she was not aware of any employee being reprimanded or written up for not wearing ice cleats, including Claimant.

¹⁶ See *Anderson v. PAR Electrical Contractors, Inc.*, No. 118,999, 2018 WL 6074279, 430 P.3d 493, (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

¹⁷ See *Van Le v. Exacta Aerospace, Inc.*, No. 1,060,178, 2012 WL 6101126 (Kan. WCAB Nov. 27, 2012).

¹⁸ See *id.*

¹⁹ See *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494 (Kan. WCAB June 10, 2013).

Respondent has failed to meet the burden of proving Claimant was aware of facts creating a high degree or risk of physical harm and deliberately acted or failed to act in conscious disregard or indifference to the risk.

3. Is Claimant entitled to an award of TTD benefits?

This is an appeal from a preliminary hearing order. Not every alleged error is subject to review. The Board can review preliminary hearing orders in which an ALJ has exceeded his or her jurisdiction.²⁰ Moreover, the Board has specific authority to review the preliminary hearing issues listed in K.S.A. 2024 Supp. 44-534a, which are:

1. Whether the employee suffered an accident, repetitive trauma or resulting injury,
2. Whether the injury arose out of and in the course of the employee's employment,
3. Whether notice is given, or
4. Whether certain defenses apply, shall be considered jurisdictional, and subject to review by the Board.

The term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.²¹

The issue of Claimant's entitlement to TTD or temporary partial disability is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing, not one of the jurisdictional issues listed in K.S.A. 2024 Supp. 44-534a and not subject to review from a preliminary hearing order.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Julie A.N. Sample dated May 23, 2025, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2025.

SETH G. VALERIUS
BOARD MEMBER

²⁰ K.S.A. 2024 Supp. 44-551(l)(2)(A).

²¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

LINDA HUGHES TAYLOR

9

AP-00-0490-435
CS-00-0488-164

c: Via OSCAR

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Hon. Julie A.N. Sample, Administrative Law Judge