

Claimant worked for Respondent as a groundsman maintaining the work truck, chipping brush, and performing all groundwork in a two-person crew. The work truck was

an F-750 bucket truck with a boom on top. The truck's boom was supported by an open platform approximately 8 to 10 feet above the ground. The platform was approximately 8 to 10 feet long and wide, with the boom bucket in the middle, leaving an area about 4 feet wide and 8 feet long where crew may stand.

On December 4, 2024, Claimant and his foreman, José Lopez, drove to a work site. Claimant was tasked with connecting a hose needed to operate a saw located on the top of the truck. Due to the weather, the hose connection was frozen, and Claimant could not connect the hose. Mr. Lopez questioned why Claimant was unable to connect the hose. Mr. Lopez climbed onto the truck platform with Claimant and attached the hose before a verbal argument ensued.

Claimant testified Mr. Lopez yelled at him, calling him a “dumbass” in Spanish.¹ Claimant indicated he and Mr. Lopez were standing about two or three feet apart on the platform. Claimant stated he told Mr. Lopez, “You don’t have to yell, call me names. I understand.”² Claimant testified he put his head down and was struck by Mr. Lopez from behind. Claimant did not know what he was hit with, but he recalled Mr. Lopez holding the frozen hose. Claimant indicated he fell, either unconscious or nearly so, and was kicked repeatedly by Mr. Lopez in his ribs and both legs. Claimant submitted photographic evidence of his swollen face and bruises on his leg. Claimant denied hitting, pushing, or fighting Mr. Lopez.

Mr. Lopez disputed Claimant’s testimony, stating he slapped Claimant with an open hand after Claimant pushed him while they were both on the truck’s platform. Mr. Lopez testified Claimant constantly questioned him while they were working, including on the date of the incident. Mr. Lopez admitted to using the word “pendejo,” a Spanish word meaning “stupid person.”³ Mr. Lopez explained he was not calling Claimant a name, only stating that he, Mr. Lopez, was not doing a stupid thing. Mr. Lopez denied kicking Claimant and denied that Claimant fell. Mr. Lopez called his supervisor, general foreman Shawn Perry, immediately following the incident.

Mr. Perry arrived at the work site with Tommy Pearson, project manager, and Aldo Leal, a foreman and interpreter. Mr. Perry began investigating the incident, speaking with Claimant and Mr. Lopez individually with the help of Mr. Leal. Mr. Perry testified:

Q. And what did your investigation determine was going on?

¹ P.H. Trans. at 6.

² *Id.* at 8.

³ Lopez Depo. at 11.

A. Well, it was kind of a he-said, he-said, but it ended up being an issue over hooking up some hoses on the top. And José Lopez was telling me that [Claimant] got in up against him and was felt threatened [*sic*]. Then I don't know if – and José Lopez, from my understanding, slapped him, but I wasn't there and so I don't know for sure.⁴

Mr. Perry told Claimant and Mr. Lopez they could either continue working together, or they could both be terminated. They decided to continue working together. Mr. Perry testified neither Claimant nor Mr. Lopez had any signs of physical injuries, and no one requested medical treatment.

Mr. Perry noted Claimant and Mr. Lopez had worked together approximately two months prior to the incident. Mr. Perry moved Claimant from his prior crew to Mr. Lopez' crew following a verbal altercation between Claimant and Claimant's previous foreman.

Claimant worked the rest of his shift on December 4, 2024. Claimant worked his shift the following day. On the evening of December 5, 2024, Mr. Perry received a text from Claimant stating, "Shawn, me no work tomorrow, me no good."⁵ On December 6, 2024, Claimant called Mr. Perry to request two-weeks' vacation time. Mr. Perry approved Claimant's request. Mr. Perry testified he did not know the reason Claimant requested vacation, but he assumed it was related to Claimant's divorce proceedings.

Claimant sought treatment from his personal physician, Dr. Jonathan Bates, on December 6, 2024. Dr. Bates recorded a history of a fistfight at work on December 4, 2024, in which Claimant was hit along the left maxilla, fell, hit his head on the hitch of a vehicle, and lost consciousness for an unknown duration. Claimant reported being kicked on his right thigh and left knee while he regained consciousness. Claimant complained of headache, left cheek pain, and epigastric pain. Dr. Bates ordered a CT scan of Claimant's head, facial bones, and abdomen.

Claimant returned to Dr. Bates on December 19, 2024. Claimant reported his abdominal symptoms had resolved, but he continued to experience headache, dizziness, and double vision when looking to the right. Dr. Bates moved Claimant's CT scan appointment to immediately after his examination, stressing the importance of the scan to Claimant. Claimant did not obtain the CT scans.

On February 12, 2025, Claimant reported constant headache and ringing in his ears with occasional dizziness. Dr. Bates recommended cancelling the CT scans previously

⁴ Perry Depo. at 14.

⁵ *Id.* at 25.

ordered. Dr. Bates opined Claimant's dizziness was mostly due to dehydration and orthostatic hypotension.

On May 15, 2025, Dr. Pedro Murati examined Claimant at his counsel's request. Claimant complained of left ear aches with a constant muffled sound, numbness of the left side of his face, daily headaches, neck and upper back pain, and occasional left knee pain. Claimant reported a work-related injury when he was struck by a coworker in the head and face with frozen tools. Claimant told Dr. Murati "he was kicked all over his body including his ribs, bilateral lower extremities, thighs and left knee. He sustained several bruises."⁶ Claimant reported hitting his head on the truck during the altercation. Dr. Murati reviewed Claimant's medical records and performed a physical examination, finding Claimant sustained:

1. Post concussion syndrome.
2. Trigeminal neuropathy.
3. Left sided hearing loss.
4. Occipital neuropathy with headaches.
5. Myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals.
6. Left patellofemoral syndrome.⁷

Dr. Murati opined the prevailing factor causing Claimant's conditions was the incident at work and imposed temporary restrictions.

Claimant has not worked anywhere since taking vacation leave in December 2024. Respondent offered Claimant a different position following his vacation leave, but Claimant indicated he did not feel well enough to accept it. Claimant has not received medical treatment for his complaints since treating with Dr. Bates. Claimant began receiving Social Security retirement benefits in June 2025.

The ALJ found Claimant was a voluntary participant in the events of December 6, 2024, and not entitled to benefits. The ALJ was not persuaded by Claimant's version of the events, "specifically that he was merely passive and did nothing to participate in the altercation with Jose Lopez. Logically, there had to be something to prompt Mr. Lopez, who at least in this record, has absolutely no history of slapping or striking coworkers, to slap Claimant."⁸

⁶ P.H. Trans., Cl. Ex. 1 at 2.

⁷ *Id.* at 4-5.

⁸ ALJ Order (Sept. 15, 2025) at 5.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ's Order should be reversed. Claimant contends his testimony is more credible than that of Mr. Lopez and should be adopted by the Board. Further, Claimant argues the ALJ's finding was flawed because it was based not on evidence but conjecture. Claimant requests medical treatment as recommended by Dr. Murati and temporary total disability benefits starting May 15, 2025, and continuing.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues Claimant failed to carry his burden of proof, and it is clear Claimant was a voluntary participant in a fight with his coworker.

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.⁹ The provisions of the Workers Compensation Act shall be applied impartially to all parties.¹⁰

K.S.A. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 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.

Claimant alleges he was struck in the face by something his supervisor had in his hand and fell from the truck where they were arguing. The supervisor confirms he slapped Claimant in the face because Claimant pushed him. Claimant denies pushing him. The evidence supports a finding Claimant was struck in the face by his supervisor.

⁹ See K.S.A. 44-501b(a).

¹⁰ See *id.*

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

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

...

(E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

The respondent has the burden of proving any statutory defenses or exceptions.¹¹ In support of proving the statutory defense, Respondent submitted the testimony of Claimant's supervisor, Mr. Lopez. Mr. Lopez testified Claimant started the physical altercation by pushing him. The ALJ was persuaded by Mr. Lopez' version of the events.

The ALJ did not believe Claimant's version of the events leading up to his injury, writing:

... after thoughtful consideration and repeated reviews of all the depositions, and Claimant's testimony and demeanor at the hearing which the Court witnessed personally, the Court concludes Claimant was a voluntary participant in this event and as such, he is not entitled to benefits under the Kansas Workers Compensation Act, K.S.A. 44-501a(1)(E).¹²

The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.¹³ Appellate tribunals are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor.¹⁴

Based upon the record and the ALJ's findings regarding credibility, the undersigned finds Respondent met the burden of proving Claimant participated in fighting with a co-employee. Claimant is not entitled to benefits pursuant to K.S.A. 44-501a(1)(E).

¹¹ See *Johnson v. Stormont Vail Healthcare Inc.*, 57 Kan. App. 2d 44, 53, 445 P.3d 1183 (2019), rev. denied 311 Kan. 1046 (2020).

¹² ALJ Order (Sept. 15, 2025) at 5.

¹³ See *Garner v. Kitselman Construction, LLC*, No. 1,069,084, 2016 WL 3208233 (Kan. WCAB May 31, 2016).

¹⁴ See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Julie A.N. Sample dated September 15, 2025, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2025.

SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jordan K. Cooper, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
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Hon. Julie A.N. Sample, Administrative Law Judge