

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY EUGENE FREEMAN)	
Claimant)	
)	
VS.)	
)	
PAUL TRANSPORTATION)	
Respondent)	Docket No. 1,044,270
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the March 17, 2009 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

ISSUES

The ALJ denied claimant's request for workers compensation benefits after concluding that although he "sustained significant injuries" in a motor vehicle accident on December 17, 2008, his injuries "resulted from claimant's willful failure to use seat-shoulder belt restraint" and "[a]ny compensation in respect to that injury is disallowed per K.S.A. 44-501(d)(1).¹

Claimant requests review of this decision and argues first, that he believes he was wearing his seatbelt at the time of the accident. Second, even if he was not wearing the seatbelt, his failure to do so was merely negligent and not willful. Thus, the safety device defense embodied in K.S.A. 44-501(d)(1) does not apply and benefits should have been ordered.

Respondent argues that the ALJ's Order should be affirmed in all respects.

¹ ALJ Order (Mar. 17, 2009) at 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Based upon the contents of the transcript from the preliminary hearing, it appears that the underlying compensability of the claimant's motor vehicle accident that occurred on December 17, 2008 is not in dispute. The road on which claimant was driving was icy and at some point, the tractor-trailer slid off the road and went down an embankment.

Claimant testified that it was his habit to wear his seatbelt while driving his truck and on this day, he believed he had his seatbelt on. He further acknowledged that it was respondent's policy for its drivers to wear seatbelts while driving and respondent had a policy and practice of disciplining drivers when they failed to wear seatbelts. However, there is no evidence that claimant has ever been disciplined for failing to wear his seatbelt while driving.

The hospital records indicate claimant was not restrained at the time of the accident. There is some suggestion in the record that claimant told the investigating officer, Justin Rugg he was not wearing a seatbelt. Claimant does not recall telling Officer Rugg this, nor does recall much about the accident itself. Unfortunately, the police report is not contained within the record and Officer Rugg did not testify.

Respondent hired an individual to do an accident reconstruction analysis and that individual, William Kennedy, concluded that claimant must have been unrestrained in the accident as there was blood on the passenger side door and given the distance from the driver's seat, had he been restrained, claimant's head could not have reached the passenger side of the cab.

The record also contains the testimony of Kevin Andrew, the safety director for respondent. Mr. Andrew testified about respondent's policy with respect to seatbelts. He confirmed that claimant has never been disciplined for failing to wear a seatbelt. He also confirmed that no one has done any tests or inspections upon the seatbelt contained within the cab of the tractor claimant was driving. Thus, he was unable to confirm that the seatbelt was presently working or had failed in the accident.

The ALJ denied claimant's request for benefits after concluding that claimant's failure to wear his seatbelt at the time of the accident was willful. Thus, under K.S.A. 44-501(d)(1), respondent had no liability. This Board Member has reviewed the entire record as well as the parties' briefs and concludes the ALJ's Order should be reversed.

K.S.A. 2005 Supp. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*² and the Court of Appeals in a much more recent decision in *Carter*³ have defined "willful" to necessarily include:

. . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'⁴

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.⁵

In this instance, claimant testified that he believed he had his seatbelt on at the time of the accident and in fact, at all times during his various trips during that day. There is no testimony within the record from any witness who says they observed claimant without the seatbelt on, or that it was his habit not to wear a seatbelt. To the contrary, claimant testified it was his habit to wear a seatbelt while driving.

While there is some suggestion within the record that claimant - or someone else - may have told the investigating officer and/or the hospital that claimant was unrestrained in the accident, those are mere suggestions. Claimant denies any recollection of talking to either of those sources. Those conversations would have occurred after his accident, when he was injured and in need of immediate medical assistance. Those sources and their factual assertions have yet to be carefully examined or subjected to cross examination. Until this aspect of the claim has been more fully explored, this member of the Board is unwilling to accept those assertions as more probable than not when weighed against claimant's testimony that he was wearing a seatbelt.

² *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

³ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

⁴ *Id.* at 85

⁵ *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

Moreover, even if one assumes that claimant *was not* wearing a seatbelt at the time of the accident, that fact alone is not sufficient to invoke the protections of the statute. As the Board has stated in the past, “[c]laimant’s actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate.”⁶ In this instance, claimant testified that it is his habit to wear a seatbelt and no one contradicts that assertion. Even if he failed to wear a seatbelt on this particular occasion, under these facts that failure would amount to negligence and carelessness, not to a willful, intentional or deliberate attempt to defy his employer’s rules.

For these reasons, this Board Member finds the ALJ’s Order should be reversed and the matter is remanded to the ALJ for further proceedings consistent with the findings set forth above.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁷ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 17, 2009, is reversed and remanded to the ALJ for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁶ *Wiehe v. Kissick Construction Company*, No. 1,026,227, 2006 WL 2328102 (WCAB July 27, 2006).

⁷ K.S.A. 44-534a.