

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

<b>JASON SHORT</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,066,124 &
<b>STERICYCLE, INC.</b>	)	1,066,125
Respondent	)	
AND	)	
	)	
<b>HARTFORD INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests review of the September 23, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden.

**APPEARANCES**

Keith V. Yarwood, of Kansas City, Missouri, appeared for the claimant. Michelle Daum Haskins, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the September 18, 2013, preliminary hearing with exhibits attached; the transcript of the deposition of John Lamb taken September 12, 2013, and the documents of record filed with the Division of Workers Compensation.

**ISSUES**

At the preliminary hearing, claimant announced he is not seeking a change in benefits with regard to Docket Number 1,066,124. Accordingly, Docket Number 1,066,124 is not the subject of this Order.

Claimant alleges he met with personal injury by accident arising out of and in the course of his employment with respondent on June 15, 2013. That matter was assigned Docket Number 1,066,125. Respondent and its insurance carrier did not dispute the occurrence of an incident on June 15, 2013, but did dispute claimant met with personal injury arising out of and in the course of his employment and assert the injury resulted from the reckless violation of a workplace safety rule. For preliminary hearing purposes, respondent did not dispute notice, the employment relationship or coverage under the Kansas Workers Compensation Act.

The ALJ found claimant's injury did not result from the violation of a workplace safety rule or regulation, and although claimant obviously violated the instruction to have at least one employee walking respondent's grounds at all times, it is unknown whether this violation caused a fire to occur, and the fire did not cause claimant's injuries. Claimant was hurt when he tripped over the fire extinguisher hose. As a result, the ALJ found and concluded claimant's injury was not caused by the violation of respondent's rule and K.S.A. 44-501(a)(1)(D) is not applicable. Additionally, the ALJ found that even if claimant's injury resulted from a violation of respondent's safety rule, respondent did not prove the violation was reckless. Claimant violated respondent's clear instruction by spending an extended period of time in the break room and failing to have at least one of the coworkers he was supervising walking the floor, and although this action was a violation of instruction and negligent, it is not the product of intractableness or contradiction, therefore, the ALJ found claimant's violation does not rise to the level of reckless mandated by K.S.A. 44-501(a)(1)(D).

The ALJ concluded claimant sustained injuries to his right shoulder as the result of an accident arising out of and in the course of his employment with respondent on June 15, 2013. As such, respondent was ordered to provide medical treatment to cure and relieve the effects of the work-related injury. The ALJ found that, although claimant was terminated for cause, respondent could not have accommodated the work restrictions imposed by State Avenue Health Care. The ALJ determined that, as claimant is not receiving unemployment compensation, the prohibition of K.S.A. 2012 Supp. 44-510c(b) does not apply. The ALJ ordered temporary total disability compensation to be paid starting June 17, 2013, and continuing until claimant reaches maximum medical improvement or until claimant returns to any substantial and gainful employment.

Respondent appeals, arguing claimant did not sustain personal injury by accident arising out of and in the course of his employment. Respondent asserts claimant was in violation of certain safety rules. Therefore, pursuant to K.S.A. 2012 Supp. 44-501(a)(1)(D), respondent contends the Order should be reversed and benefits denied.

Claimant argues the Order should be affirmed as respondent failed to explain how claimant's absence on the floor for 15 minutes to check the grounds around the facility created a higher degree of risk of injury than would his absence from the floor for 25 minutes.

FINDINGS OF FACT

The preliminary hearing focuses on Docket No. 1,066,125, and whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent on June 15, 2013. Respondent argues claimant violated a safety rule and benefits should be denied.

Claimant began working for respondent, a medical waste disposal facility, on June 16, 2010. He started out as a plant worker and over time was promoted to lead plant worker, which is considered a shift supervisor or lead worker position. This lead worker position is responsible for conducting facility walks to make sure everything is running properly, to make sure any trailers are locked and secure and to manage breaks and lunches. Claimant confirmed the facility is approximately 5,000 square feet and the offices take up about 1,000 square feet. The outside area is an additional 10,000 square feet. Claimant is also required to walk the outside area. He testified it takes roughly 30 to 45 minutes to do a walkthrough correctly and meticulously. Claimant testified there are also times when the walkthrough could take an extra 30 minutes because pH levels must be checked and if they are too high that must be addressed before moving on. Ideally, walkthroughs are conducted every hour.

Claimant testified that when the accident occurred, he had already completed his walkthrough of the facility and after a short break was going to complete his walkthrough of the yard outside of the facility and to check the trailers. He testified that this task would take about 25 minutes. Claimant testified that after routing the hole at the back of the incinerator and running the scoop, he proceeded to the break room to presumably cool off for a moment as the temperature was 120 degrees. A video of the break room indicates claimant was on break for about 10 minutes before a fire broke out. While in the break room one of the workers noticed a fire out on the floor. Claimant and the other workers quickly made their way to the floor and followed procedure to put the fire out. Claimant testified hydraulic fluid from the incinerator had made its way to the floor and caught fire. Claimant acknowledged it was his responsibility to notify John Lamb, respondent's plant manager, if hydraulic fluid was present in the hole under the incinerator. In this case claimant had seen the fluid earlier in the day and had notified Mr. Lamb.

Claimant testified the fire was too much for a small extinguisher and he went for a larger one, which was heavy and had a hose. As he was stretching the hose, he tripped in his rush to get to the fire and his right arm landed on a guardrail. Claimant attempted to notify John Lamb, respondent's plant manager, about the fire after it was extinguished, but there was no answer. He was able to report everything the next day. He was sent for medical treatment and was diagnosed with a contusion/sprain to the right shoulder and conjunctivitis. Claimant was allowed medically to return to work with limited use of the right arm.

Claimant's last day of work for respondent was June 15, 2013, as he was suspended without pay. He was officially let go on June 24, 2013. Claimant was told he was terminated for violation of a safety rule that cost the company thousands of dollars. Claimant asked for proof of the violation, but respondent was unable to provide any proof. Company policy is to inform the facility manager or the plant manager when hydraulic fluid ends up on the floor.

Claimant admits Mr. Lamb informed the workers there must always be one person on the floor at all times due to the risk of a fire breaking out. At the same time, claimant was not sure it was strict policy. When he and his workers were provided this information they were all brought off the floor at the same time for the announcement. Claimant indicated it is not possible to do a walkthrough and keep your eyes open for forklift safety, cleanliness, SS, proper PPE worn, fire extinguishers, emergency showers, spill kits, etc. and keep an eye on the incinerator at the same time. There are times where the incinerator cannot be seen. Claimant testified Mr. Lamb did not indicate someone had to be within eyeshot of the incinerator at all times. In fact, by the very nature of a walk-through, there would be times when the incinerator would be out of eye sight.

Claimant testified that, had he stayed on his route and not taken a break, the fire would not have been seen for at least another 30 minutes or until it got big enough to be seen over the top of the other equipment.

John Lamb is in charge of all operations in the plant. He sets the work schedule, trains the employees, is in charge of the long-haul trucking operations, makes sure the trailers are processed correctly and on time and that the customers' materials are disposed of correctly. He is also involved in the hiring and firing of employees.

Mr. Lamb testified respondent runs 4 work shifts to dispose of medical waste. Claimant was on the 3rd shift and worked 42 hours a week. Mr. Lamb identified a total of three employees working 3rd shift. Claimant was the shift lead. Mr. Lamb found out about the June 15, 2013, fire behind the incinerator, from claimant. Claimant indicated to Mr. Lamb over the phone that it was a hydraulic fire, but he wasn't for sure how it started. Claimant did not convey, at the time of his phone call, that he was injured.

After being called, Mr. Lamb arrived at the site in about 45 minutes. It should be noted that when Mr. Lamb showed up on site after the fire, claimant was by the trailer doors and was lifting them and trying to put them back on their hinges.

Mr. Lamb and claimant examined the area where the fire occurred. He decided to check the security video to see what happened. After it was determined the fire started around 3:00 p.m., he checked the video and saw claimant and the other two workers in the break room for what seemed like quite a while, at least 12 to 15 minutes, talking. Mr. Lamb observed claimant without his safety glasses or gloves on and another employee with his safety glasses on top of his head. He then asked the workers to put in writing what

happened. A few hours later, Mr. Lamb told claimant and one of the other workers that they were being suspended pending further investigation. Ultimately, claimant's employment was terminated for violation of rules and policy, i.e. leaving the floor unattended. Claimant declined to sign the termination paperwork.

Mr. Lamb testified there have only been three fires in the seven years he has worked for respondent, and those were all hydraulic fires in the front of the incinerator, where a piece of material dropped out of the incinerator and either immediately caught fire, or heated up a hydraulic line and created a fire after spewing hydraulic fluid. Mr. Lamb testified it is rare for a fire to start at the back of an incinerator and after checking the scene he couldn't figure out how it happened.

Mr. Lamb testified the policy of having one person on the floor at all times has been in effect for at least the seven years he has worked there. The last time there was a fire was a month before this incident. No one was on the floor at that time either and those individuals were also terminated. After that incident, the employees were reminded of the policy and that breaks are to be rotated. The policy of one person on the floor at all times was not written down.

Claimant reported the injury to his shoulder only after he was told he was being terminated.

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

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) 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. 2012 Supp 44-501(a)(1)(D) states:

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

...

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

A review of the video provided in this matter indicates claimant was in the break room for approximately ten minutes before the fire was discovered. Claimant testified that he had completed his walkthrough of the interior of the facility and, after a short break, was going to complete his walkthrough of the yard. It was during this short break that the fire was discovered. It is clear from this record that all three employees were not to be in the break room simultaneously and to do so was a violation of a company policy. As claimant was the supervisor on site at the time, the responsibility fell on him to both be aware of and to enforce the company safety rules. However, the Kansas legislature has required that any workplace safety rule or regulation violation be "reckless" in its nature.

The Kansas Supreme Court, in *Wiehe*<sup>1</sup>, quoted Restatement (Second) of Torts § 500 (a) (1965), pp. 587-588:

**Types of reckless conduct.** Reckless may consist of either of two different types of conduct. In one 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 indifferent to, that risk. In the other 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. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

"For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .

"For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."<sup>2</sup>

Claimant testified to taking a break due to the temperature in the facility. He was in the break room for only about 10 minutes when the fire was discovered. Respondent argues claimant's actions were reckless to the extent he should be denied workers compensation benefits. However, this Board Member finds claimant's actions, while negligent, do not reach the level of reckless. It cannot be said claimant's actions were unreasonable or created a perceptible danger of death or substantial physical harm.

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<sup>1</sup> *Wiehe v. Kukul*, 225 Kan. 478, 592 P.2d 860 (1979).

<sup>2</sup> *Id.* at 483-484.

It cannot be said that claimant's injury resulted from this negligent behavior. Claimant suffered injury while putting out the fire. It was while fighting the fire that claimant suffered the injuries in question, not while he was on break in violation of respondent's policy.

Additionally, claimant's actions did not start the fire. In fact, claimant's testimony was that his being in the break room at that time may have actually caused the fire to be discovered earlier than what would have otherwise occurred. While this may have been nothing other than blind luck, it is still uncontradicted testimony regarding the circumstances surrounding the fire.

This Board Member finds claimant did not violate the provisions of K.S.A. 2012 Supp. 44-501(a)(1)(D), such that his access to workers compensation benefits under the Act should be denied. Respondent has failed to prove claimant's actions were "reckless". The award of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

#### **CONCLUSIONS**

After reviewing the record compiled to date, the undersigned Board Member concludes, respondent has failed to prove claimant's actions rose to the level of "reckless" such that claimant should be denied benefits herein. Therefore, the preliminary hearing Order should be affirmed

#### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated September 23, 2013, is affirmed.

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<sup>3</sup> K.S.A. 2012 Supp. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2013.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

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William G. Belden, Administrative Law Judge