

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

JEFFREY A. SEYBOLD)
Claimant)
V.)
SIMPLEX GRINNELL)
Respondent)
AND)
NEW HAMPSHIRE INSURANCE CO.)
Insurance Carrier)

Docket No. 1,067,611

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Gary K. Jones' December 30, 2013 preliminary hearing Order. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. David P. Mosh of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the December 23, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

On September 10, 2013, claimant was testing the water pressure in a fire pump when a piece of pipe and valve came off striking him in the chest.

Following the preliminary hearing, the judge: (1) ordered medical treatment, finding claimant did not refuse to take a post-injury drug test as required under K.S.A. 44-501(b)(1)(E); but (2) denied claimant's request for temporary total disability benefits because respondent could have provided him accommodated work, but for his termination for cause.

Respondent argues claimant refused to submit to a post-accident drug screen, thus forfeiting his benefits under K.S.A. 44-501(b)(1)(E), such that the Order should be reversed. Claimant requests the Order be affirmed.

The sole issue for the Board's review is: Did claimant forfeit workers compensation benefits by refusing to submit to a post-accident drug test, pursuant to K.S.A. 44-501(b)(1)(E)?

FINDINGS OF FACT

Claimant began working for respondent a second time on June 4, 2012, as a fire sprinkler technician/inspector. He had previously worked for respondent from 1996 until 2003. His duties involved inspecting, servicing and repairing fire sprinkler systems.

On September 10, 2013, claimant was with the lead inspector, Wade Gilbertson, at the Hyatt Regency in Wichita, Kansas, assembling and testing water pump and sprinkler systems. As they were testing the water pressure through the fire pump test header,¹ a piece of pipe and valve came off and struck claimant in the chest, lifting him off the ground and throwing him back about eight feet. He landed on his left side and immediately experienced intense pain in his chest and back. Claimant drove himself to Via Christi, where hospital staff performed an exam, took x-rays and requested he provide a urine sample for drug screening. Claimant testified he was unable to urinate. After being given two “little tiny”² cups of water, he again attempted to provide a urine sample with no success. He was released without restrictions.

Claimant was questioned why he did not provide a urine sample the day of his accident. He testified:

Q. And on both occasions did you try to provide a urine sample?

A. Yes.

Q. And what happened when you tried to provide a urine sample?

A. I was unable to urinate.

Q. Do you have some condition that causes you to sweat a lot?

A. Yes, called hyperhidrosis. I've had it since I was a young man. It runs in my family, so we get dehydrated really easily, and we drink massive amounts of water, you know, and that day I wasn't hydrated enough to urinate.

Q. And has a doctor ever treated you for that condition or ever diagnosed that condition?

A. In my 20s.

...

¹ P.H. Trans., Cl. Ex. 4 and 5.

² *Id.* at 23.

- Q. Now, at some point did Via Christi tell you you could go ahead and leave, or that they wanted you to stay for the urine sample, or what happened next?
- A. After my second attempt she just said, okay, she was going to write down, unable to provide, and I said, "What's going to happen with that?" She said, "Well, we'll just say unable to provide," and I said, "Okay."³

No Via Christi records detailing the circumstances of the attempted drug test were admitted into evidence.

On September 12, 2013, claimant, while working in western Kansas, was contacted by respondent's manager, Aaron Westerman, and instructed to immediately report to a clinic in Hays, Kansas, for a drug screening. Claimant complied and underwent a urine test, which was positive for marijuana. Respondent terminated claimant's employment the following day.

Claimant was aware of respondent's policy regarding drugs and alcohol, having read and signed such policy when he began working for respondent. The policy states in part:

At the Company's sole discretion, any accident, regardless of cause, may result in a referral for drug/alcohol testing. Any employee required to take a post-accident drug/alcohol test must complete it within eight hours of the accident.⁴

Mr. Westerman testified claimant was terminated not only for initially refusing the drug screen, but for failing the drug screen when it was taken two days after the accident. Mr. Westerman indicated that even without the accident, the positive drug test would have been sufficient cause for claimant's termination pursuant to policy.

On December 11, 2013, claimant was seen at his attorney's request by Pedro Murati, M.D., who diagnosed claimant with probable cervical/lumbar myelopathy, left carpal tunnel syndrome, left cubital tunnel syndrome, left rotator cuff tear, low back pain with radiculopathy, left SI joint dysfunction, probable TMJ dysfunction, status post-concussion, bilateral tinnitus, partial anosmia, probable erectile dysfunction and probable neurogenic bladder. Dr. Murati recommended additional medical treatment and opined that the prevailing factor in the development of claimant's diagnoses was the accident at work.

Claimant testified he currently experiences headaches, bilateral tinnitus, jaw discomfort, neck stiffness, left shoulder soreness, pain and spasms in his back, left hip discomfort, left hand numbness, urinary incontinence and rectal issues.

³ *Id.* at 24-25.

⁴ *Id.*, Resp. Ex. 1 at 3.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501(b)(1)(E) states:

An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

K.S.A. 2012 Supp. 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. 2012 Supp. 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.

K.S.A. 2012 Supp. 44-534a(a)(2) states, in part:

A finding with regard to . . . whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

A plain and unambiguous statute should be applied based on its express language and not read in a manner that adds something not contained therein.⁵

ANALYSIS

The word "refusal," in the context of refusing an employer-requested chemical test, is not defined in the Kansas Workers Compensation Act. Respondent, in its brief, referenced K.S.A. 8-1001 *et seq.*, which concern driving under the influence of alcohol or drugs. K.S.A. 8-1001(q) states:

Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

⁵ *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 188, 239 P.3d 66 (2010).

Definitions used in K.S.A. 8-1001 *et seq.* are listed in K.S.A. 8-1013. Subsection (i) states:

“Test refusal” or “refuses a test” refers to a person's failure to submit to or complete any test of the person's blood, breath, urine or other bodily substance, other than a preliminary screening test, in accordance with this act, and includes refusal of any such test on a military reservation.

A problem with using definitions of “test refusal” and “refuses a test” from statutes concerning driving under the influence is that such definitions are not necessarily based on plain meaning of the words. *Bergstrom*⁶ makes it clear that interpreting statutes using plain meaning is paramount.

The better method to discern the meaning of “refusal” is to look at Kansas Supreme Court precedent precisely concerning the definition of “refusal” in the context of our workers compensation law. This Board Member sees no reason to define “refusal” for K.S.A. 2012 Supp. 44-501(b)(E) purposes any differently than the Kansas Supreme Court defined “refusal” for K.S.A. 44-518 purposes in *Neal*:⁷

The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: “Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]” *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).

Black's Law Dictionary defines “refusal” as “[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it.” Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be “*as the result of a positive intention to disobey.*” (Emphasis added.) *Refusal* is often coupled with “neglect,” but Black's notes that neglect signifies a mere omission of a duty “*while ‘refusal’ implies the positive denial of an application or command, or at least a mental determination not to comply.*” (Emphasis added.) Black's Law Dictionary 1282 (6th ed. 1990).

“Obstruct” is defined as “[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow.... To impede.” Black's Law Dictionary 1077 (6th ed. 1990).

⁶ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

⁷ *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

The ordinary meaning of the words used in K.S.A. 44-518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44-518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.

...

Based upon the cases cited above and the clear import of K.S.A. 44-518 we, like the Board, conclude that the terms "refusal" and "unnecessarily obstructs" carry with them an element of willfulness or intent.⁸

Respondent argues the judge erred in considering claimant's explanation as to why he was unable to provide a sample, as K.S.A. 2012 Supp. 44-501(b)(1)(E) contains no language regarding excuses, including those based on medical conditions, or just cause. Respondent asserts whether the judge found claimant credible or believed claimant's explanation is irrelevant.

Respondent also equates claimant's failure to give a sample as synonymous with him refusing to give a sample. Stated another way, respondent asserts claimant could only not refuse to provide a sample if he actually provided a sample. Respondent also states claimant's failure to remain at the hospital until he was able to provide a urine sample shows he refused to provide a sample.

Further, respondent notes the legislature allows a person to prove a failure to provide a breath sample or other sample, in the context of impaired driving, was due to a medical condition unrelated to use of alcohol or drugs. Along these lines, respondent argues the legislature was aware a person might be unable to provide a sample and the legislature having not included such provision in K.S.A. 2012 Supp. 44-501(b)(1)(E) proves no exception exists in the workers compensation arena.

This Board Member does not agree that the legislature's inclusion of a "medical excuse provision" in regards to testing for impaired driving necessarily means the legislature carefully decided that no such provision would apply to post-accident drug or alcohol testing after a work accident, a wholly different area of the law. This Board Member associates a refusal with intent to not do something required. *Neal* utilizes the plain meaning rule made clear in *Bergstrom*. Under the *Neal* definition of "refusal," an analysis questioning whether claimant did or did not submit or complete the test is not enough. A claimant simply not undergoing a chemical test is not the same as a refusal, as willful intent to avoid the test is necessary.

⁸ *Id.* at 15-16.

While claimant's rationale as to why he did not initially provide a test sample could be viewed with skepticism, the judge concluded claimant did not refuse to provide a sample for a chemical test. Although conducting de novo review, this Board Member gives some credence to the judge's first-hand opportunity to assess witness credibility.⁹ Further, based on the *Neal* definition of "refusal," this Board Member finds claimant did not deliberately or willfully decline or "refuse" to submit to a chemical test. The legislature has the authority to make it clear that any failure to get a drug or alcohol test, for any reason, is a refusal to have the test. Such directive is not in the plain language of K.S.A. 2012 Supp. 44-501(b)(1)(E).

CONCLUSION

K.S.A. 2012 Supp. 44-501(b)(1)(E) does not result in claimant forfeiting benefits. The current evidence does not prove he "refused" respondent's request for a chemical test.

WHEREFORE, the undersigned Board Member affirms the December 30, 2013 preliminary hearing Order.¹⁰

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Kenton D. Wirth
deanna@kslegaleagles.com

David P. Mosh
dmosh@evans-dixon.com

Brandon A. Lawson
blawson@evans-dixon.com

Honorable Gary K. Jones

⁹ 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).

¹⁰ By statute, the above preliminary findings and conclusions are neither final nor binding, as they may be modified upon a full hearing of the claim. 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.