

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**CRAIG S. ANDERSON** )  
Claimant )  
V. )  
**CUSTOM CLEANING SOLUTIONS** ) Docket No. 1,070,269  
Respondent )  
AND )  
**AMERICAN INTERSTATE INS. CO.** )  
Insurance Carrier )

**ORDER**

Claimant, represented by John J. Bryan and Jan L. Fisher, requested review of Administrative Law Judge Rebecca Sanders' March 24, 2016 Award. Timothy G. Lutz appeared for respondent and its insurance carrier (respondent). The Board heard oral argument on September 8, 2016. The Board carefully considered the record and adopted the Award's stipulations.

**ISSUES**

Claimant was injured at work while cleaning out a concrete pump on June 23, 2014. That day, he submitted to a urine drug screen. However, the judge concluded claimant forfeited workers compensation benefits, pursuant to K.S.A. 2013 Supp. 44-501(b)(1)(E), because he refused to comply with respondent's separate request for blood alcohol testing, a request which the judge concluded was clearly authorized by respondent's policy.

Claimant urges the Board to reverse the judge's ruling because: (1) there was insufficient cause to suspect he was under the influence of drugs or alcohol at the time of his accident, such that chemical testing was unwarranted; (2) respondent's policy only clearly authorized urine testing, but did not clearly authorize post-injury blood alcohol testing; (3) he did not refuse to allow testing for alcohol; and (4) K.S.A. 2013 Supp. 44-501(b)(1)(E) is unconstitutional.

Respondent argues claimant did not raise the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) at the regular hearing and may not raise the issue for the first time on appeal. Respondent contends claimant did not sustain an injury by accident which arose out of or in the course of his employment because he did not follow proper procedure in cleaning out a concrete pump when injured. Otherwise, respondent requests the Award be affirmed, including that claimant refused a blood alcohol test that properly resulted in forfeiture of benefits under the Kansas Workers Compensation Act (KWCA).

In his reply brief, claimant argues respondent's employee handbook and safety manual (manuals) established the terms of his employment contract. Insofar as the safety manual only mentioned a required urine test in certain circumstances, to which claimant submitted, and said nothing specific about mandated blood alcohol testing, he argues giving a blood sample was not an enforceable term of his employment contract.

The issues are:

1. Did respondent have sufficient cause to suspect claimant was under the influence of drugs or alcohol?
2. Did respondent's policy clearly authorize post-injury chemical testing?
3. Did claimant forfeit workers compensation benefits by refusing to submit to a post-injury chemical test?
4. Did claimant sustain injury by accident arising out of and in the course of his employment?
5. Did claimant preserve arguments regarding the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) by first raising such arguments to the judge? If so, is the statute constitutional?

#### **FINDINGS OF FACT**

Claimant started working for respondent on April 11, 2014. That day, he signed and dated a receipt indicating: (1) he received a copy of respondent's employee handbook, which he was responsible to read; and (2) he understood the statements in the handbook did not constitute a contract. A footnote on the receipt stated, "This disclaimer insures that the Company is not bound by any promises, stated or implied, in the employee handbook."<sup>1</sup>

Page 9 of the employee handbook states:

To ensure CCS has a drug-free work environment, each employee will be required to complete and pass a drug screen before completing the hiring process. Employees also understand that CCS practices random drug screens. At any time, without notice, CCS reserves the right to screen any or all employees to ensure a drug-free work environment.<sup>2</sup>

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<sup>1</sup> P.H. Trans., Resp. Ex. E.

<sup>2</sup> Respondent's policy regarding pre-employment drug screens or random drug screens does not apply to post-injury drug or alcohol testing.

Respondent's safety manual states:

A Urine Analysis is required in all of the following situations:

- An employee sustaining injuries beyond the scope of first aid
- Any employee involved in an accident while operating machinery or motor vehicles, including non-injury accidents
- Suspicious behavior
- Random screenings<sup>3</sup>

Section 230.d of respondent's employee handbook states:

CCS reserves the right to request that you submit to random, post accident, or periodic drug and alcohol testing or when, based on observed behavior or other information, there is reason to believe that your use of drugs or alcohol is in violation of the Drug and Alcohol Free Workplace Policy.<sup>4</sup>

Claimant signed that he read respondent's safety manual. Claimant testified he signed the paperwork because he did not think he would be hired otherwise.

On June 23, 2014, claimant and multiple other employees worked inside a Cargill grain silo where they were pumping wet cement to make concrete walls. Work started between 5:30 and 6:30 a.m. Claimant was working about one foot away from his coworkers most of the day. No coworkers testified claimant exhibited any signs of being impaired by drugs or alcohol that day.

Claimant was asked to assist Randy Mercado, the pump operator, in cleaning out a concrete pump. Claimant had no training on this task. According to claimant, he asked Mercado how to remove the concrete and Mercado told him to turn the pump on and said a few other words, but claimant did not "know what was actually said."<sup>5</sup> Mercado left the area. Thereafter, claimant turned on the pump, raised a metal grate and used a hose to spray tubes and metal paddles. Claimant was distracted when a coworker, Hector, started speaking to him. Claimant looked away to speak to Hector and inadvertently got his right hand caught in the pump, fracturing his second and third metacarpals. Claimant was unsure why or how his hand became stuck in the pump. Respondent's safety policy required the pump to be turned off before lifting the grate to clean the pump and the pump operator should be present.<sup>6</sup>

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<sup>3</sup> *Id.*, Resp. Ex. G at 4.

<sup>4</sup> *Id.*, Resp. Ex. F at 14.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> K.S.A. 2013 Supp. 44-501(a) defenses, *i.e.*, "safety defenses," were not raised.

The accident occurred around 2:40 p.m. Claimant was immediately driven to Stormont-Vail Hospital (Stormont-Vail or hospital) by Jace Jacobs, respondent's site supervisor. Jacobs denied smelling alcohol on claimant. During the ride, Jacobs said nothing to claimant about taking a drug or alcohol test. Claimant's pain level on entering the hospital was a 10 on a 0-10 pain scale, in which 10 represents the most pain. He testified he did not use any drugs or alcohol in the 48 hours before his accident and he was not impaired by drugs or alcohol.

Laura Schulz, currently respondent's Vice-President of Operations, was respondent's Safety and Operations Director at the time of claimant's accident. Schulz indicated Jacobs contacted her while he and claimant were going to the hospital. She testified she told Jacobs she would contact the hospital about post-accident drug and alcohol testing. However, Schulz only requested claimant have a drug urinalysis when she first spoke with Andrew Barnes (Barnes), the hospital charge nurse. She testified that requesting a test for alcohol did not cross her mind at that time.

On arrival at the hospital at 2:49 p.m., claimant was taken to a treatment room. Jacobs told Stormont-Vail personnel that drug and alcohol testing was needed, a conversation which occurred outside of claimant's presence. Jacobs testified respondent's policy is "if there's any kind of an injury where someone has to be taken to the hospital, there's a drug and alcohol mandatory test."<sup>7</sup> Jacobs did not believe hospital personnel were aware of respondent's policy because respondent had never taken workers there before. Jacobs stayed at the hospital about 20 minutes before returning to the job site.

To conduct a drug screen, Stormont-Vail performs a urine drug screen (UDS). For an alcohol test, the hospital draws blood from the test subject.

Barnes testified he was phoned by a woman (presumably Schulz) with respondent at 2:50 p.m. on the date of accident and she indicated she was sending information over for collection of a UDS, as listed in his notes.

Claimant testified he did not read the employee handbook prior to his accident, he was unaware of respondent's policy regarding post-accident drug and alcohol testing and respondent never told him he had to take a drug or alcohol test if he was injured at work. Jacobs testified claimant should have known respondent's drug and alcohol testing requirements because Jacobs previously read the testing policy "page by page"<sup>8</sup> when claimant was a new employee, a process that took about one hour. Claimant testified Jacobs could not have completely read respondent's policy verbatim because claimant and other workers were touring the work facility within 30 minutes after being hired.

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<sup>7</sup> P.H. Trans. at 61.

<sup>8</sup> *Id.* at 70; see also p. 67.

Barnes was fairly certain respondent sent a fax asking for urine and blood testing and he gave such paperwork to the emergency room physician, Kyle Garrison, D.O., who ordered the tests. While Schulz initially testified she sent a fax to Stormont-Vail requesting a drug and alcohol test, she later provided an affidavit indicating all of her communication with the hospital was by telephone and she did not send a fax.

Claimant agreed to the UDS and provided a sample around 3:35 p.m. The test results, completed at 4:12 p.m., were negative for illegal drugs.

Dr. Garrison examined claimant at 4:28 p.m. Claimant had severe right hand pain, swelling, tenderness and abrasions, but his mood, affect, behavior, judgment and thought process were deemed normal. Right hand and wrist x-rays had been performed showing the metacarpal fractures. Dr. Garrison noted an orthopedic physician assistant named Ron would splint claimant's hand and surgery would be done the next week.

At some imprecise time after initially phoning the hospital, Schulz reviewed respondent's drug and alcohol testing policy and called Stormont-Vail to ask for an alcohol test. Schulz testified she was unaware the hospital tested for alcohol by drawing blood.

After the UDS came back negative, Barnes told Vernon Peters (Peters), a registered nurse, that the employer requested an alcohol test and to tell claimant they needed a blood sample to perform the test. Peters did not notice any odor of alcohol on claimant and he had no reason to suspect claimant was under the influence of alcohol. Peters did not know why it took respondent so long to ask for the alcohol test. He believed blood had already been drawn for routine laboratory work.<sup>9</sup> Based on Barnes' directive, Peters spoke with claimant around 5:23 p.m. about a blood alcohol test, which he described as follows:

I informed him that we needed to draw a little more blood to be able to test for alcohol, and he stated that he -- his employer had -- or his supervisor had been in the room and I believe his supervisor advised that he wasn't needed to test for the alcohol.

Then I proceeded to tell him that, according to what I've been told, we needed to do the test for alcohol and it required a blood sample, and at that time he refused to give a blood sample. And I explained to him several times to the point to where he actually got angry with me because I was trying to push the issue that it was a work related injury . . . and that the employer was requesting this and that it was for his benefit that he perform the test just due to the fact then I explained to him that work comp could possibly decline the claim just due to him refusing the alcohol.<sup>10</sup>

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<sup>9</sup> At the preliminary hearing, claimant did not recall having a blood draw when he got to the hospital, but he testified at the continuation of the regular hearing that blood was drawn at the hospital. Barnes could not say if claimant had blood drawn at the hospital in connection with his medical treatment.

<sup>10</sup> Peters Depo. at 8-9.

Peters testified he believed claimant understood what he was telling him and claimant related that, “his supervisor, or whoever the person was that was there, told him that he did not need to perform the test and that was the reason he was declining the test.”<sup>11</sup> Peters made the following notation in claimant’s chart:

Pt refuses to have his blood drawn for Alcohol test. It is explained to the pt that his employer is the one requesting this to be done. Pt still refuses to have this test done. It is also explained to him that since this happened while at his work place that it would be in his best interest to have this done. Pt continues to refuse this test.<sup>12</sup>

Shortly after 5:26 p.m., Peters advised Barnes that claimant refused to have his blood drawn for the alcohol test. Around 5:33 p.m., Barnes approached claimant to stress the importance of having the test done and indicated he was “looking out” for claimant’s interest.<sup>13</sup> Barnes summarized his interaction with claimant:

A. . . . I would have introduced myself . . . and I said Vernon brought it to my attention that you don’t want your blood drawn for this, and, . . . I reiterated that because it’s a work related injury that there’s a possibility that compensation may not be granted if you refuse to have that done.

Q. Anything else?

A. I recall him saying that something to the effect of, you know, he wasn’t concerned about it.<sup>14</sup>

Barnes testified claimant was not agitated during their conversation. The following notation was made in claimant’s chart by Barnes:

Leadership rounds completed. Pt still refuses to have a serum alcohol level drawn. Ron, PA, is at the bedside to complete splinting.<sup>15</sup>

Peters testified he was in the room with claimant and Barnes when claimant declined the blood alcohol test. Claimant testified he was never offered a blood test to detect alcohol. Both nurses testified claimant refused to submit to a blood alcohol test and claimant’s denial that he was ever asked to submit to such test or that he never refused such test was inaccurate. According to Barnes, claimant did not tell him that Jacobs had said a blood test was not needed.

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<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.*, Resp. Ex. 1 at 2.

<sup>13</sup> Barnes Depo. at 15.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> P.H. Trans., Cl. Ex. 4 at 11.

Claimant acknowledged being asked by hospital staff to submit to a blood draw, but testified he understood the test was not for the purpose of alcohol testing, but “was supposed to be for a surgery, and we wasn’t having surgery that day.”<sup>16</sup> Claimant stated he had no reason to decline a blood draw for an alcohol test because he was not impaired.

Claimant testified that around the time he was going to be discharged from the hospital, around 5:30 p.m., after he was asked about doing a blood draw, Jacobs came to his room. According to claimant’s preliminary hearing testimony, he told Jacobs that one of the nurses was rude and “arguing with me about something” and further said, “Well, I don’t know what’s the matter with [the rude nurse]. I submitted to the- - the urine. . . . They was talking about having surgery, but they’re not having surgery now, so I don’t know what he’s tripping with me about.”<sup>17</sup> Claimant testified at the continuation of the regular hearing that he had an argument with a nurse, but he did not know what the argument concerned.

Jacobs described his conversation with claimant as follows:

A. I just remember there was some kind of a problem between Craig and one of the nurses and being upset about having to take more tests and, you know, I - - being it was a new hospital, I’d never taken anybody, I didn’t know how they performed the test, so - -

Q. Okay. And what was your response to Mr. Anderson?

A. I didn’t know - - you know, I didn’t know what the - - you know, their policy on how they got the test.

Q. Did you ever at any time tell Mr. Anderson or imply to Mr. Anderson that he didn’t have to submit to a drug or alcohol test?

A. No.<sup>18</sup>

Claimant left the hospital, at which time his pain level remained a 10. Claimant testified nobody from respondent ever asked him to submit to a drug or alcohol test.

Craig Vosburgh, M.D., evaluated claimant on June 25, 2014. Dr. Vosburgh noted claimant was injured when “[t]he hose he was using to wash [a machine] out got caught and pulled his hand into the machine.”<sup>19</sup> Dr. Vosburgh surgically repaired claimant’s injuries the next day and he performed a second surgery on August 1, 2014.

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<sup>16</sup> *Id.* at 43. See also Cont. of R.H. Trans. at 7.

<sup>17</sup> P.H. Trans. at 46.

<sup>18</sup> *Id.* at 65.

<sup>19</sup> *Id.*, Cl. Ex. 3 at 30.

According to claimant, other employees were not required to submit to drug or alcohol testing after work injuries. Brian Thompson, a former employee of respondent, testified he had a right hand injury on May 30, 2014, while cleaning a concrete pump. Thompson hit his hand on the outside of a pump, but told respondent the incident was “no big deal”<sup>20</sup> and he did not need any medical treatment. Thompson knew respondent required post-accident drug or alcohol testing, but testified he was not asked by respondent to submit to a post-accident drug test. After respondent terminated his employment on July 9, 2014, Thompson requested medical treatment and respondent had him submit to a post-accident drug test the next day.

Schulz testified respondent’s policy is to require both drug and alcohol testing following every accident. She testified Thompson did not immediately submit to testing because she did not know about his injury until later. Schulz indicated respondent asked eight employees to submit to drug and alcohol testing in 2014.

After a September 2, 2014 preliminary hearing, Judge Sanders ruled claimant forfeited his right to benefits for refusing to take a post-accident alcohol test in accordance with respondent’s policy. The Order was appealed to the Board and on October 27, 2014, a single Board Member affirmed the judge’s Order.

Respondent’s owner, Cheyenne Wolford, testified respondent’s supervisors read the entire manuals to all workers because some employees may have reading problems. Wolford had no information showing claimant was ever trained how to clean the pump, but he indicated claimant did not follow proper procedure when he started cleaning the pump without the pump operator present or turning off the pump.

Wolford testified he and a representative of the pump manufacturer tried to reenact claimant’s accident with the pump turned off, but found it very difficult to get a hand that far down and into the center of the hopper to get it caught in the moving parts. They determined claimant should not have attempted to clean the running machine. Wolford found claimant having placed his hand into a hopper with moving parts to be suspicious.

Wolford testified neither he nor anyone at respondent personally asked claimant to take a alcohol or drug test, but he understood Schulz and Jacobs contacted the hospital about having claimant drug and alcohol tested. Nobody advised him claimant seemed impaired at the time of his accident, but Wolford testified employees are “always tested” for drugs and/or alcohol when they have an accident.<sup>21</sup> Wolford stated his belief that claimant submitted to a drug test at the hospital, but refused the alcohol test.

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<sup>20</sup> *Id.* at 10.

<sup>21</sup> Wolford Depo. at 10.

Respondent terminated claimant's employment in December 2014. Claimant testified Jacobs told him Cargill did not want him on their grounds because of his injury. Claimant has worked for other employers starting in January 2015.

On pages 9-11 of the March 24, 2016 Award, the judge stated:

Claimant refused to allow nursing personnel at the hospital where Claimant was being treated for his injuries to submit to a blood draw to be tested for alcohol. It is the hospital's policy that alcohol testing is done by a blood draw. Two nurses testified that Claimant on at least three occasions refused the blood draw to be tested for alcohol. At least one of the nurses told Claimant that if he refused to submit to this test he could be denied benefits for his work place injury. Claimant was also told that this was being done at the request of the employer.

Such circumstances clearly demonstrate an intent or willfulness to not submit to a blood draw. Even after receiving an explanation for the blood draw and possible consequences of not submitting to the blood draw Claimant would not allow the blood draw. This clearly is an intentional action and constitutes a refusal to submit to an authorized alcohol test.

These two nurses who testified have no financial or personal interest in the outcome of this claim. Their testimony is clearly credible and is substantiated in the hospital's records. Claimant on the other hand clearly has an interest in this case being decided in his favor.

The employer's policy states: "CCS reserves the right to request that an employee submit to random post accident drug and alcohol test of CCS also has the right to have an employee submit to a post accident or periodic drug and alcohol testing." To the Court that is a clear authorization for Respondent to ask Claimant to be submitted to post accident alcohol test. Claimant contends that the fact that no one affiliated with the employer personally asked Claimant to submit to the alcohol test renders his refusal ineffective and not a basis to deny benefits. That is a distinction without a difference. The employer asked hospital personnel on their behalf to test Claimant for alcohol. Claimant was told by hospital personnel that they were asking for the blood draw at the employer's behest. After all, proper testing procedure requires medical personnel to administer the test. The Court is not persuaded by this argument.

Claimant also argues that K.S.A. (2013 Supp.) 44[-]501(b)(1)(E) should be read as including the rebuttable presumption that a workers drug or alcohol use contributed to the work injury. In other words Claimant can avoid forfeiture of benefits by presenting evidence that his accidental injury was not due to drug or alcohol use. The evidence in this case shows that there was no evidence Claimant was under the influence of drugs or alcohol. The employer believed it was suspicious that someone would put their hand in the way of moving blades or machinery. But they acknowledged they could not find in their investigation that any one believed Claimant was under the influence of alcohol or drugs.

However this Court agrees with the Worker's Compensation Appeals Board "that grafting language on to what the legislature crafted or read the statute differently than it is written is contrary to the Supreme Court's holding in ***Bergstrom v. Spears Manufacturing*** [sic] ***Co.***, 289 Kan. 605, 607-608; 214 P.3d 676 (2009). The Court stated "When a worker's compensation statute is plain and unambiguous this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. It is paramount that plain meaning is to be applied when interpreting statutes." Claimant is clearly asking this Court to interpret and add language that is not within the plain and unambiguous meaning of K.S.A. (2013 Supp.) 44-501(b)(1)(E) and is contrary to the Kansas Supreme Court's holding in ***Bergstrom***.

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Claimant raises many constitutional arguments that the forfeiture of Claimant's benefits by refusing to submit to alcohol testing is in violation of equal protection, Claimant's 4<sup>th</sup> amendment rights and due process. This Court is not charged with jurisdiction or the authority to rule on constitutional arguments and thus declines to do so.

Since the Court is finding Claimant has forfeited his right to worker's compensation benefits it is not necessary to rule on other issues such as whether Claimant's accidental injury arose out of and in the course of Claimant's employment.

Claimant appealed.

#### **PRINCIPLES OF LAW & ANALYSIS**

**1. Respondent did not have sufficient cause to suspect claimant was under the influence of drugs or alcohol.**

K.S.A. 2013 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.

The evidence did not support respondent having sufficient cause to suspect claimant was under the influence of drugs or alcohol. Despite respondent's suspicion, there is a general *lack* of evidence suggesting claimant was using drugs or alcohol. Nevertheless, the "or" language in K.S.A. 2013 Supp. 44-501(b)(1)(E) allows chemical testing if respondent's policy clearly authorized post-injury chemical testing.

## 2. Respondent's policy clearly authorized post-injury chemical testing.

Section 230.d of the employee handbook states respondent had the "right to request" post-accident drug and alcohol testing. The Board concludes respondent's policy clearly authorized post-injury drug and alcohol testing.

Black's Law Dictionary 1324 (6th Ed. 1990) defines a "right" as "a power, privilege, faculty, or demand, inherent in one person and incident upon another" and "[a] legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act." A "right," according to Black's Law Dictionary 1517 (10th Ed. 2014), is "2. Something that is due to a person by just claim, legal guarantee, or moral principle . . . . 3. A power, privilege, or immunity secured to a person by law . . . . 4. A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong . . . ."

In Black's Law Dictionary 1304 (6th Ed. 1990), "request" means "To ask for something or for permission or authority to do, see, hear, etc., something; to solicit."

"Authorize" means "to endorse, empower, justify, or permit by or as if by some recognized or proper authority."<sup>22</sup> "Authorize" also means:

- "[t]o empower; to give a right to act, the connotation [of] being permissive rather than mandatory" and where "authorize" is construed to imply a mandate, it is because other words "have been used to express that intention"<sup>23</sup>
- "to give power or permission to (someone or something)" or "to give legal or official approval to or for (something)"<sup>24</sup>
- "1. To give authority or power to. 2. To approve or permit: SANCTION. 3. To be sufficient grounds for: JUSTIFY."<sup>25</sup>
- "1. To grant authority or power to. 2. To give permission for (something); sanction . . . ."<sup>26</sup>

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<sup>22</sup> *Rodriguez ex rel. Rodriguez v. Unified Sch. Dist. No. 500*, 302 Kan. 134, 146, 351 P.3d 1243 (2015) (citing Webster's Third New Int'l Dictionary 146 (1993) and noting "authorize" is an unambiguous term).

<sup>23</sup> Ballentine's Law Dictionary 112 (3d ed.1969).

<sup>24</sup> <http://www.merriam-webster.com/dictionary/authorize> (last visited Sept. 12, 2016).

<sup>25</sup> Webster's II New College Dictionary 76 (1995); see also Black's Law Dictionary 159 (10th ed. 2014) ("authorize" means "[t]o give legal authority; to empower" or "[t]o formally approve; to sanction").

<sup>26</sup> American Heritage Dictionary of the English Language 120 (2011).

Black's Law Dictionary 307 (10th ed. 2014) defines "clear" as "[f]ree from doubt; sure" and "[u]nambiguous." Black's Law Dictionary 251 (6th ed. 1990) defines "clearly" as "Visible, unmistakable, in words of no uncertain meaning. . . .; honestly, straightforwardly, and frankly; plainly. Without obscurity, . . . , confusion, or uncertainty. Unequivocal."

Claimant argues section 230.d does not clearly authorize blood alcohol testing. Citing *Black's Law Dictionary*, 9th Ed. (2009), claimant argues "clear" means free from doubt or unambiguous and "authorize" means to give legal authority, to formally approve or to sanction. Using these definitions, claimant argues "clearly authorizes" post-injury testing refers to an employer's policy "which is plain and unambiguous and absolutely sanctions or empowers the employer to test for blood and alcohol."<sup>27</sup>

Claimant also argues respondent's policy is vague and ambiguous. Claimant notes respondent's policy clearly authorizes urine testing because the safety manual states a "urine analysis is required," for example, when an employee sustains injuries beyond the scope of first aid or is involved in an accident while operating machinery, but section 230.d of the employee handbook only states respondent reserves the "right to request" post-accident drug and alcohol testing, but does not contain the "[u]rine analysis is required" language in the safety manual. From this, claimant states respondent's policy only clearly authorized a urine test, but not a blood test because a "request is permissive" and a "requirement is mandatory."<sup>28</sup> Claimant states he could rightfully refuse respondent's request for a blood test for chemicals.

The Board does not share claimant's perspective that section 230.d must absolutely sanction or empower respondent to require drug or alcohol testing. We do not view the statutory language – "clearly authorizes" – as meaning something akin to "absolutely sanctions" or as being "mandatory or obligatory language."<sup>29</sup>

K.S.A. 2013 Supp. 44-501(b)(1)(E) literally concerns "the request of the employer" to obtain a chemical test from the worker. The "request" language is echoed in section 230.d of the employee handbook. Synthesizing the definitions listed on pages 11-12, the Board interprets "clearly authorizes" as met when the employer's policy plainly and unmistakably allows or permits chemical testing. A "right to request" reasonably means the power, privilege or demand by an employer upon a worker for permission or authority to conduct testing. Likewise, "authorize" reasonably concerns power and permission. Respondent only has a right to request post-accident drug and alcohol tests, but not the power to force chemical screening. Our Legislature contemplated workers refusing such tests. Failure to abide by the request may have adverse consequences for an injured worker, but the employer cannot absolutely require a drug or alcohol test.

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<sup>27</sup> Claimant's Brief to the Board of Appeal (filed April 29, 2016) at 14; see also p. 15.

<sup>28</sup> *Id.* at 15.

<sup>29</sup> See generally *Id.* at 14, 17.

Claimant argues he may decline his employer's request for testing not listed in the manuals. However, the inclusion of "urine analysis" in the safety manual does not preclude other forms of testing. Section 230.d gives respondent the authority to ask employees to submit to post-injury testing without limiting the type of test. Respondent may request other forms of testing even though only a urine analysis is mentioned in the safety manual.

Claimant further suggests that forfeiture of workers compensation benefits cannot occur following a worker's refusal of a chemical test request because section 230.d only lists termination of employment as a possible consequence. K.S.A. 2013 Supp. 44-501(b)(1)(E) says otherwise. The employee manual does not supercede state laws.

Tacked on to his arguments on whether respondent's policy clearly authorized blood alcohol testing, claimant takes issue with the following language from the single Board Member's October 27, 2014 preliminary hearing Order:

"Claimant also argues respondent's policy merely reserved to it the right to request post-accident drug and alcohol testing and did not require mandatory testing. This argument does not impact the fact that respondent had a written policy authorizing testing. ..."

This is not the Claimant's argument. K.S.A. 44-501(b)(1)(E) does not require that the employer policy mandatorily test each employee who is injured. K.S.A. 44-501(b)(1)(E) refers to a policy that unambiguously informs the employee of the employer's right to test. The Legislature chose to emphasize the need for any policy to be concise and specific when it chose to include the adverb "clearly" with "authorize" post-accident testing.<sup>30</sup>

Claimant's complaint, a creature of his own creation, lacks merit. The Board agrees that even with a policy clearly authorizing testing, an employer may opt not to pursue testing. The preliminary ruling did not state otherwise. The prior ruling simply recognized and repeated claimant's argument at the preliminary level that respondent's policy did not require mandatory blood testing and its "right to request" post-injury alcohol testing was not a "right to require" or a "right to subject" employees to post-injury blood testing.<sup>31</sup> Even now, claimant still distinguishes between respondent having the mere right to request a test and the ability to force or compel mandatory testing.

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<sup>30</sup> Claimant's Brief to the Board of Appeal (filed April 29, 2016) at 17.

<sup>31</sup> Claimant's Workers' Compensation Appeals Board Brief (filed Oct. 2, 2014) at 8-9 ("There is no language in the Employer's policy that creates mandatory post injury blood testing. . . . If it was intended that an alcohol test was mandatory post accident, the Employer would have included the blood test or alcohol test in the same sentence with drug testing being made mandatory. . . . The Employee Handbook . . . merely reserves the right for Employer 'to ask' or 'request' Claimant take a post injury drug or alcohol test. . . . The Employer did not reserve the 'right to require' or the 'right to subject' Claimant to post injury blood testing."). See also Claimant's Argument Upon Submission of the Case (filed Feb. 4, 2016) at 4-5. ("Request is not the same as shall. It is not the same as required. It is not the same as mandatory.").

Claimant also argues respondent's manuals created an enforceable employment contract that only required a urine screen to which he complied. He argues respondent cannot require that he submit to a blood draw, a methodology not listed in the manuals. Claimant reiterates that respondent's manuals are vague as to whether blood testing is allowed and any ambiguity should be resolved in his favor and against the drafter of the manuals, the respondent.<sup>32</sup>

The KWCA is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure to obtaining it.<sup>33</sup> "Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes."<sup>34</sup> The Board generally lacks jurisdiction to construe contracts. We may conduct limited inquiries into contracts, such as whether an employer-employee relationship exists, and we have examined where contracts were formed to assess jurisdiction. Contract disputes are generally covered by Chapter 60, the Code of Civil Procedure. Claimant agreed at oral argument that the Board generally does not interpret contracts, but contends the Board must do so to ascertain whether respondent's policy clearly authorized a blood alcohol test.

This is a workers compensation matter, not a contractual matter. The Board is charged with a straightforward determination: did respondent's policy clearly authorize post-injury chemical testing? This question need not involve interpretation of a contract between claimant and respondent, only analysis of whether respondent's policy clearly authorized testing. The KWCA contains no requirement to construe a contract against respondent. The normal standard of proof applies – a "preponderance of the credible evidence" and a "more probably true than not true" standard.<sup>35</sup>

Claimant cites cases, *Sweet*<sup>36</sup> and *Dillard*,<sup>37</sup> for the proposition that employment handbooks establish binding employment contracts. Both cases involved disputes over payment of wages for unused and accumulated vacation time. In *Sweet*, the parties agreed provisions in an employee handbook were part of an employment contract. In *Dillard*, there did not appear to be any dispute that the employer's responsibility to pay the worker hinged on the employment contract and employer's policies.

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<sup>32</sup> Respondent contended at oral argument that such argument was precluded on appeal because it was not raised to the judge. Claimant argued to the Board, in his Oct. 2, 2014 brief, that a contract existed and such contract should be strictly construed against the drafter. Claimant incorporated such brief in his written argument filed with the judge on February 4, 2016.

<sup>33</sup> See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

<sup>34</sup> *Acosta v. Nat'l Beef Packing Co., L.P.*, 273 Kan. 385, 396, 44 P.3d 330 (2002).

<sup>35</sup> See K.S.A. 2013 Supp. 44-508(h).

<sup>36</sup> *Sweet v. Stormont-Vail Reg. Med. Ctr.*, 231 Kan. 604, 647 P.2d 1274 (1982).

<sup>37</sup> *Dillard Dep't Stores, Inc. v. State, Dep't of Human Res.*, 28 Kan. App. 2d 229, 13 P.3d 358 (2000).

In this case, unlike *Sweet* and *Dillard*, the parties do not agree respondent's manuals created binding terms of an employment contract. Respondent, at oral argument, denied the manuals created enforceable contractual rights. Moreover, while claimant's argument is premised on respondent's manuals creating enforceable contract rights, there is either no evidence, or at least insufficient evidence, that the parties intended the manuals to create terms and conditions of an employment contract. The language respondent included in the employee handbook showed an intent that such manual was not a contract containing any promises to claimant. Claimant contends he did not read the employee handbook and it was not read to him. As opposed to contractual language that was negotiated between two parties, the manuals seem to be more of a unilateral expression of company policy. "[P]ersonnel rules which are not bargained for cannot form an express or implied contract of employment as they are merely a unilateral expression of 'company policy.'"<sup>38</sup> Additionally, "Employers have latitude to include rules and policies in written instruments by which they intend to run their business without forming an employment contract with their employees; to find otherwise would consequently construe every employee handbook to be a contract for employment, something this court has opted not to do."<sup>39</sup> *Sweet* does not state a prophylactic rule that any and all provisions of employee handbooks are part of or binding terms of employment contracts.

Finally, we conclude the manuals are not vague or ambiguous with respect to whether testing was clearly authorized. Section 230.d of respondent's employee handbook states respondent may request employees to submit to post-accident drug and alcohol testing without limiting the type or manner of testing. A reasonable person would interpret such section as meaning exactly what it says.

### **3. Claimant forfeited workers compensation benefits by refusing to submit to a post-injury chemical test at respondent's request.**

The word "refusal," in the context of refusing an employer-requested chemical test, is not defined in the Kansas Workers Compensation Act. In *Seybold*,<sup>40</sup> a Board Member adopted the meaning of "refusal" for a chemical test by quoting the Supreme Court of Kansas' definition of the word "refusal" in the context of K.S.A. 44-518:

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<sup>38</sup> *Brokaw v. Bd. of Cty. Comm'rs of Cty. of Shawnee Cty.*, No. 103,625, 2011 WL 781553 (Kansas Court of Appeals unpublished opinion filed Mar. 4, 2011) (quoting *Getz v. Bd. of Cty. Comm'rs of the Cty. of Shawnee*, Kan., 194 F. Supp. 2d 1154, 1168 (D. Kan. 2002)). See also *Kastner v. Blue Cross & Blue Shield*, 21 Kan.App.2d 16, 26-27, 894 P.2d 909, *rev. denied* 257 Kan. 1092 (1995); *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 54, 551 P.2d 779 (1976).

<sup>39</sup> *Sander v. Liberal Animal Hosp., P.A.*, No. 101,260, 2010 WL 348277 (Kansas Court of Appeals unpublished opinion filed Jan. 22, 2010) (citing *Inscho v. Exide Corp.*, 29 Kan. App. 2d 892, 33 P.3d 249 (2001), *rev. denied* 273 Kan. 1036 (2002) and *Kastner*, 21 Kan. App. 2d 16).

<sup>40</sup> *Seybold v. Simplex Grinnell*, No. 1,067,611, 2014 WL 889883 (Kan. WCAB Feb. 18, 2014).

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).

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.

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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.<sup>41</sup>

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<sup>41</sup> *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003). At oral argument, the parties agreed the definition of "refusal" from *Neal* and *Seybold* applied to K.S.A. 2013 Supp. 44-501(b)(1)(E).

A “refusal” is an intent to not do something required. Respondent, through either Schulz or Jacobs, or both, asked Stormont-Vail to conduct a post-accident test to detect alcohol. Granted, while such blood alcohol testing was asked for belatedly by Schulz, respondent nonetheless asked for such testing. According to the two nurses, Barnes and Peters, claimant refused to submit to the blood alcohol test that was requested by respondent.

Contrary to claimant’s testimony, the Board concludes he was offered a blood alcohol test. By testifying he had already “submitted to . . . the urine,” in reference to a nurse arguing with him, claimant seems to acknowledge another form of testing for potentially impairing substances had been completed and another was requested. Claimant’s testimony that a nurse was arguing with him about “something” – the content of which he could not recall – and that he did not know why the nurse was “tripping,” seems evasive. Peters specifically recalled their dialogue concerned respondent’s request for a blood alcohol test and claimant’s refusal. Both nurses contemporaneously documented such refusal. Their testimony and the records they generated documenting claimant’s refusal are persuasive. The Board agrees with the judge’s determination claimant refused to submit to blood alcohol testing.

Claimant’s testimony that the requested blood test was only needed prior to surgery and there was no reason to do the test because surgery was not going to be done that day is not persuasive. Records generated by the nurses indicated claimant declined a blood test to detect alcohol, but do not indicate claimant declined testing because he believed such testing was only needed if surgery was imminent. There are no records showing claimant was told he was going to have surgery that day, only to have the surgery called off due to hand swelling. There is no documentation that claimant spoke to any physician other than Dr. Garrison, who indicated surgery was going to occur in the next week.

According to Peters, claimant told him that Jacobs said blood alcohol testing was not needed. Jacobs denied such statement.

Finally, claimant argues he did not consciously refuse testing “to frustrate the employer’s discovery of alcohol intoxication. Instead it was the reaction of an injured worker who was in considerable pain and stressed by the situation. He had been in the emergency room approximately three (3) hours and simply wanted to go home since he could not have surgery that day.”<sup>42</sup> While claimant was undoubtedly in pain, his argument lacks evidentiary support. He never testified he avoided blood testing because he was in pain, stressed and just wanted to go home.

By statute, claimant forfeited any workers compensation benefits by refusing his employer’s request that he undergo a post-injury blood alcohol test.

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<sup>42</sup> Claimant’s Brief to the Board of Appeal (filed April 29, 2016) at 21.

**4. The Board need not address whether claimant's injury by accident arose out of and in the course of his employment.**

Our determination that claimant refused a post-injury blood alcohol test at respondent's request renders this issue moot.

**5. Claimant argued the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) to the judge. The Board lacks jurisdiction to consider whether the statute is unconstitutional.**

Respondent argued claimant waived arguing the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) to the Board because claimant did not raise such issue at the regular hearing. In claimant's submission letter filed with the judge on February 4, 2016, claimant incorporated by reference written argument made to the Board on October 2, 2014, which included constitutionality arguments. Constitutionality arguments were made many times during the litigation. The judge's Award noted she lacked the jurisdiction to address claimant's arguments that K.S.A. 2013 Supp. 44-501(b)(1)(E) was unconstitutional. Claimant did not waive any constitutionality arguments.

Like the judge, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to rule upon the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E). Claimant may preserve any arguments for future determination before a proper court.

### **CONCLUSIONS**

1. Respondent did not have sufficient cause to suspect claimant was under the influence of drugs or alcohol. K.S.A. 2013 Supp. 44-501(b)(1)(E) still allows testing if respondent's policy clearly authorized post-injury chemical testing.

2. Respondent's policy clearly authorized post-injury chemical testing.

3. Claimant forfeited workers compensation benefits by refusing to submit to a post-injury chemical test at respondent's request.

4. Whether claimant sustained injury by accident arising out of and in the course of his employment is moot.

5. Claimant argued the constitutionality of K.S.A. 2013 Supp. 44-501(b)(1)(E) to the judge, but the Board lacks authority to rule on the statute's constitutionality.

**AWARD**

WHEREFORE, the Board affirms the March 24, 2016 Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2016.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
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