

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

BRET A. CLARK)	
Claimant)	
VS.)	
)	Docket No. 219,549
PALMER TRUCKING, INC.)	
Respondent)	
AND)	
)	
GRANITE STATE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent requested Appeals Board review of the preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample on June 26, 1997.

ISSUES

Whether claimant suffered a work-related accidental injury is the single issue before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue raised by the respondent is an issue that subjects a preliminary hearing order to review by the Appeals Board. See K.S.A. 44-534a, as amended.

Claimant requested authorization for Jay S. Zwibelman, M.D., a neurologist, to conduct neuropsychological screening in an effort to determine what, if any, permanent neurological problems claimant received from exposure to carbon monoxide. In the Order

that is the subject of this appeal, the Administrative Law Judge authorized the neurophysiological screening. Respondent has appealed that Order to the Appeals Board arguing that claimant failed to prove a causal connection between his alleged exposure to carbon monoxide and his employment.

On the date of the alleged exposure, November 21, 1996, claimant was employed by the respondent as a truck driver. The respondent is engaged in the trucking business of supplying rock and gravel to various ready mix concrete companies in the Kansas City, Kansas, area. On that particular day, claimant was driving truck number 9 which was a Mack truck and was not the truck claimant normally drove for the respondent. Claimant's regularly assigned truck had been taken out of service the day before by the highway patrol.

Claimant alleges he became sick from exposure to carbon monoxide poisoning while he was hauling rock from the quarry to a ready mix concrete company. Claimant testified that he started working on the date of the exposure at 7:15 a.m. He testified he started having what he characterized as flu-like symptoms at approximately 10:30 a.m. Claimant testified that he had to quit driving around 1:30 p.m. because of his increasing sickness. He also testified that at that time he opened the hood of the truck and observed an exhaust leak behind the turbo in the engine of the truck.

Claimant immediately sought medical treatment for his sickness that afternoon at Providence Medical Center emergency department located in Kansas City, Kansas. The medical center's emergency records were admitted into evidence at the preliminary hearing. These records indicate that after an examination and laboratory testing the emergency department physician concluded that claimant had some degree of carbon monoxide exposure. Claimant was referred for further testing to St. Joseph Health Center in Kansas City, Missouri.

On November 25, 1996, claimant was examined and tested at St. Joseph Health Center for carbon monoxide exposure. The results of the examination and testing were included in an Hyperbaric Oxygen Consultation Report which was also admitted into evidence at the preliminary hearing. The report's clinical impression was carbon monoxide exposure with possible mild cerebral dysfunction. However, the reporting physician could not definitely attribute the test results to carbon monoxide poisoning. The physician suggested that claimant follow up with a neurological consultation.

On December 24, 1996, claimant was seen by neurologist Jay S. Zwibelman, M.D. Dr. Zwibelman's medical report dated December 24, 1996, was also admitted into evidence at the preliminary hearing. Claimant and his wife related a history to Dr. Zwibelman that claimant had slowness in his thinking and poor judgment of distance following the carbon monoxide exposure. Dr. Zwibelman opined that claimant had sustained carbon monoxide exposure and his concern was that the exposure had impaired his driving ability as well as

his cognitive ability. However, Dr. Zwibelman indicated that additional testing was necessary before he could objectify claimant's subjective complaints.

John Thomas, respondent's owner, also testified in person before the Administrative Law Judge at the preliminary hearing. Mr. Thomas presented various maintenance records, inspection records, and an air contamination evaluation by the University of Kansas Medical Center of the Mack truck claimant had driven when he suffered the alleged carbon monoxide exposure. Mr. Thomas testified that the Mack truck had not been repaired between November 21, 1996, and the date of the inspections and the air contamination evaluation that was completed on February 5, 1997. The air contamination evaluation of the Mack truck by the University of Kansas Medical Center was conducted by Thomas Pierce, Ph.D. In Dr. Pierce's report dated February 14, 1997, he concluded that he was unable to find any significant carbon monoxide contamination in or around the cab of the truck. He also concluded that the carboxyhemoglobin value of 8.2 percent found in claimant's blood when he was examined at the Providence Medical Center emergency department was not attributable to the truck in its present state of repair and would be better explained by the claimant's personal smoking history. Mr. Thomas also presented affidavits from two of his maintenance employees who were assigned to do the maintenance work on his trucks. Both of those employees stated that the Mack truck had not undergone any repairs following November 21, 1996.

Claimant testified that he talked to Mr. Thomas after the exposure incident on November 25, 1996, in reference to the exhaust leak in the Mack truck. The claimant testified that Mr. Thomas at that time had indicated that he had found the leak and had repaired the leak by tightening a loose clamp at the turbo. In contrast, Mr. Thomas testified that he had looked at the engine but had not repaired anything in the engine because there was no exhaust leak.

The Appeals Board acknowledges that the testing and inspection results that have been presented by the respondent are persuasive that the Mack truck did not have a defect in its exhaust system at the time the truck was inspected and tested. However, the inspection and test results are premised on the fact that no repairs were completed on the Mack truck following November 21, 1996. As previously noted, the claimant testified that Mr. Thomas told him he made repairs on the truck. However, Mr. Thomas testified that he did not make those repairs.

At this juncture of the proceeding, the Appeals Board finds that whether claimant suffered an exposure to carbon monoxide poisoning at work hinges somewhat on the credibility of the witnesses who testified before the Administrative Law Judge. Both the claimant and respondent's owner, John Thomas, testified in person before the Administrative Law Judge at the preliminary hearing. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions in this case because she had the opportunity to assess the credibility of the witnesses. Therefore, the Appeals Board concludes the Administrative Law Judge's finding that claimant was

exposed to carbon monoxide poisoning on November 21, 1996, while he was driving the truck for the respondent is affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample dated June 26, 1997, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

c: William W. Hutton, Kansas City, KS
Matthew S. Crowley, Topeka, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director