

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

DENNIS FOOS)	
Claimant)	
VS.)	
)	Docket No. 225,638
TERMINIX)	
Respondent)	
)	
and)	
)	
ZURICH AMERICA INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appealed the November 15, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on May 2, 2001.

Appearances

Roger D. Fincher, of Topeka, Kansas, appeared on behalf of the claimant. Rex W. Henoch, of Lenexa, Kansas, appeared on behalf of the respondent and its insurance carrier.

Record and Stipulations

The record considered by the Appeals Board (Board) and the parties stipulations are listed in the Award. The Board also considered the deposition testimony of Carl Ludvigsen, M.D., taken on behalf of respondent on September 21, 2000. Although the deposition of Dr. Ludvigsen was omitted from the ALJ's recitation of the record, the parties agreed during oral argument to the Board that Dr. Ludvigsen's testimony was a part of the record and should be considered by the Board. During oral argument to the Board the

parties also stipulated to a 45 percent impairment of function as claimant's permanent partial disability.

Issues

The Administrative Law Judge (ALJ) denied claimant workers' compensation benefits, finding claimant was impaired due to alcohol use and further that claimant's use of alcohol contributed to his accident. Claimant seeks review of that finding and argues that respondent and its insurance carrier should be precluded from introducing blood test evidence pertaining to alcohol due to their failure to satisfy the foundational requirements of K.S.A. 44-501(d)(2). Respondent and its insurance carrier (respondent) dispute this and further dispute that claimant's automobile accident arose out of and in the course of his employment.

The nature and extent of claimant's disability was not reached by the Judge Avery due to his finding that the claim was not compensable. That issue was resolved by the parties' stipulation to Dr. Prostic's 45 percent functional impairment rating as the measure of claimant's permanent partial disability.

Findings of Fact and Conclusions of Law

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

Claimant was injured in an automobile accident between 7:00 and 7:30 p.m. on May 2, 1997 while westbound on Interstate-70 between Junction City and Abilene. At the time of the accident, claimant was traveling on what would have been a direct route to either his residence or his last customer service call before heading home. It is not disputed that travel was intrinsic to the nature, conditions, obligations and incidents of claimant's employment with respondent.¹ What is disputed is whether claimant had deviated from his employment and, if so, whether he had returned to his employment at the time of the accident. The Board finds that it is more likely than not, that claimant had deviated from his employment. However, the Board also finds that claimant had returned to a direct route home and, therefore, was in the course of his employment at the time of the accident. Accordingly, claimant has proven his automobile accident and resulting injuries arose out of and in the course of his employment with respondent.²

¹ *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P. 3d 278, *rev. denied* ___ Kan. ___ (2001); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

² *Kindel v. Ferco Rental, Inc.*, 258 K. 272, 285, 899 P.2d 1058 (1995).

The next question is whether Mr. Foos' claim is barred by the so-called intoxication defense; that is, whether claimant's injury was contributed to by his use or consumption of alcohol.

K.S.A. 44-501(d)(2) provides in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol It shall be conclusively presumed that the employee was impaired due to alcohol if it is shown that at the time of the injury that the employee had enough alcohol concentration of .04 or more.³

A blood test was conducted at the University of Kansas Medical Center (KUMC). The question is whether the results of that blood test are admissible to prove impairment. Claimant contends that the foundational requirements of K.S.A. 44-501(d)(2) were not met. The Board agrees.

The Kansas Workers' Compensation Act provides that before the results of a chemical test can be admitted there must be ". . . probable cause to believe the employee used, had possession of, or was impaired by the drug or alcohol while working"⁴ and furthermore, that "the test sample was collected at a time contemporaneous with the events establishing probable cause."⁵

The medical records show that the blood sample was taken at approximately 11:10 p.m. on May 2, 1997.⁶ At that point there had been no evidence or indication that claimant had used alcohol before the accident. There was no mention of alcohol or the odor of alcohol in any of the records or reports by law enforcement, emergency medical, nor hospital personnel. The first indication of alcohol use came at approximately 1:10 a.m. on May 3, 1997, from claimant himself upon questioning by a nurse and an anesthesiologist for the pre-operative history and physical assessment.⁷ Neither the nurse nor the anesthesiologist that questioned claimant testified, but the KUMC Pre-Operative History

³ K.S.A. 1996 Supp. 44-501(d)(2).

⁴ K.S.A. 44-501(d)(2)(A).

⁵ K.S.A. 44-501(d)(2)(B).

⁶ Depo of Debra Jordan, p. 6 and Ex. 1 (Oct. 9, 2000).

⁷ Depo of Debra Jordan, p. 13 and Ex. 1 (Oct. 9, 2000).

and Physical Assessment form indicates that claimant reported “cocaine 1 week ago/9 beers & shots tonight.”⁸

The Kansas Workers Compensation Act is complete in itself and cannot be supplemented by other statutory provisions.⁹ There exists a presumption that the legislature does not intend to enact useless or meaningless law.¹⁰ Therefore, the Board assumes that the probable cause requirement in the statute was put there for a reason. Blood tests are an invasive procedure and, as with all chemical testing, there are privacy issues at stake. Accordingly, although the statute requires that probable cause be contemporaneous with the testing, the Board believes that the probable cause requirement makes sense only if it is present before the testing. Furthermore, there are no exceptions in the statute to the probable cause requirement. Therefore, probable cause is necessary even where the blood test was performed in the normal course of medical treatment. As there was no probable cause to believe claimant was impaired or even that claimant had consumed alcohol before the blood sample was taken, the test results are not admissible. The expert testimony concerning impairment from alcohol that is tied to the blood test results is likewise inadmissible.

The question becomes whether claimant’s purported statement of consuming nine beers and shots can form the basis for finding claimant was impaired and that his impairment caused or contributed to his injury. Unfortunately, this question was not answered by any of the medical experts. In the absence of collaboration from the blood test results, the Board questions the reliability of subsequent statements claimant purportedly made at the hospital after having suffered extreme trauma and which were possibly also given under the influence of pain medications, including morphine.¹¹ Nevertheless, Dr. Ludvigsen came the closest to addressing that question when he was asked:

Q. (Mr. Henoeh) Doctor, I want you to assume with me the following facts. Please assume that Mr. Foos testified at the hearing that he has no memory of his actions or events from approximately 12 noon on Friday, May 2nd to the date of the accident, until approximately sometime on Sunday, May 4, 2000 - I’m sorry - May 1997, at K.U. Medical Center. Please assume that when he was admitted to the medical center he was conscious, alert, and oriented to person, place and time. That he

⁸ Depo of Carl Ludvigsen, M.D., Respondent’s Ex. 4 (Sept. 21, 2000).

⁹ *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

¹⁰ *KPERS v. Reimer & Koger Assoc.’s Inc.*, 262 Kan. 635, 643, 941 P.2d 1321 (1997).

¹¹ The medical records show claimant had been given morphine while at the Geary County Community Hospital before being transferred to KUMC. Tr. of Prel. H., Claimant’s Ex. 2 (Oct. 6, 1997).

was in a one-vehicle accident. There was no evidence of any mechanical failure of the car. I'm sorry. It was a truck actually, pick up truck. That he was traveling straight on the roadway I-70 prior to leaving the roadway. That the medical records document a history of alcohol use on May 2nd, 1997, specifically that Mr. Foos had consumed 9 beers and shots on May 2nd, 1997. **Based upon your review of the medical records** and these facts I just asked you to assume, **[do] you have an opinion whether there was probable cause to believe** that Mr. Foos had either used, possessed, or was impaired by alcohol while working on May 2nd, 1997 at the time of his accident? (emphasis added)

A. Yes.

Mr. Fincher: Let me object. Asking him to assume facts not in evidence, and asking him to comment on a legal conclusion.

Q. What is your opinion?

A. That he was impaired.¹²

As the medical records Dr. Ludvigsen reviewed and was asked to consider contained the inadmissible blood test results, this opinion is flawed. In addition, this opinion does not establish that claimant was impaired. Instead, it only establishes that, at some point, there was probable cause to believe that claimant was impaired. Furthermore, although Dr. Ludvigsen was asked whether there was probable cause to believe that claimant was impaired, the facts he was asked to assume were not all available before claimant's blood sample was taken. Therefore, his answer is without proper foundation and is insufficient to establish probable cause. Moreover, Dr. Ludvigsen was not asked his opinion concerning whether such impairment contributed to the employee's accident and injury.

Dr. Prostic also gave an opinion that claimant was impaired by the use of alcohol in response to a hypothetical question that asked him to assume that, **in addition to his blood test results**, claimant also:

. . . had no memory of the day of his accident from 12:00 noon on May 2 until sometime Sunday on May 4th, 1997; assume that when he was admitted to KU Medical Center he was conscious, alert, oriented to person, place, and time and he understood and consented to surgery; that there was no mechanical failure of the car; and that he was traveling straight prior to

¹² Depo of Carl Ludvigsen, M.D., pp. 11-12 (Sept. 21, 2000).

leaving the roadway which resulted in the accident when he hit a guardrail.¹³

But when the blood test results are excluded from this hypothetical, Dr. Prostic's opinion lacks foundation and is simply not credible. The same is true for the similar opinion given by Dr. Ludvigsen. There can be many reasons for a one-vehicle accident such as respondent's counsel described in his hypothetical question.

Absent the blood test results, respondent has failed to prove impairment and contribution. Accordingly, claimant is entitled to an award for workers' compensation benefits, including permanent partial disability compensation based upon the stipulated 45 percent impairment of function.

Award

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 15, 2000 Award entered by Administrative Law Judge Brad E. Avery should be, and is hereby, reversed and an Award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant Dennis Foos who is granted compensation from the respondent, Terminix and its insurance carrier, Zurich America Insurance Company for a May 2, 1997 accident and resulting disability, based upon an average weekly wage of \$344.42 and a compensation rate of \$229.62, for 12.86 weeks of temporary total disability or \$2,952.91 followed by 186.75 weeks of permanent partial disability and a compensation rate of \$229.62 or \$42,881.54 making a total award of \$45,834.45 which is all due and owing.

All reasonable and related past medical expenses incurred by claimant are ordered paid by respondent and its insurance carrier.

Future medical benefits may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to \$500 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

¹³ Depo of Edward Prostic, M.D., p. 6 (Oct. 20, 2000).

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	\$ 50.40
General Court Reporting	Unknown
Curtis, Schloetzer, Hedberg, Foster & Assoc.	\$505.95
Curtis, Schloetzer, Hedberg, Foster & Assoc.	\$191.40
Jay E. Suddreth & Assoc., Inc.	\$353.80
Hostetler & Associates, Inc.	\$122.00
Nora Lyon & Associates	\$192.20
Appino & Biggs Reporting Service, L.L.C.	\$ 80.00
Hostetler & Associates, Inc.	\$ 74.30

IT IS SO ORDERED.

Dated this _____ day of June 2002

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Dissent

The undersigned Board Member respectfully dissents from the opinion of the majority. Respondent argued in the above matter that probable cause was not necessary when the blood test was performed in the normal course of medical treatment. The Board disagreed and excluded the blood test finding that probable cause did not exist at the time the blood test was administered. The Kansas Court of Appeals in *State v. Hickey*, 12 Kan. App. 2d 781, 757 P.2d 735 (1988) was asked to consider the statutory requirements of K.S.A. 1985 Supp. 8-1001(f)(1) dealing with the required notice to a defendant before blood could be taken in a DUI action. The Court held that blood testing done by a hospital which is relevant to the medical history, diagnoses, and treatment of a defendant is a part

of the regular course of hospital business, and, as such, the blood testing is not subject to the notice requirements of K.S.A. 1985 Supp. 8-1001(f)(1).

Here the blood tests were drawn by the University of Kansas Medical Center in the normal course of their business in preparation for treatment of claimant. The same logic used in *State v. Hickey* applies in this instance. Where the blood testing is done by the hospital for the purposes of obtaining relevant medical, diagnoses and treatment information the results should be made available in workers compensation litigation to determine whether an injured worker was impaired at the time of the accident. In this instance the claimant's blood alcohol level was .134, well beyond the allowable limits contained in K.S.A. 44-501(d)(2) of .04. Additionally, the admission of the blood tests brings into focus the opinion of Dr. Prostic who held that claimant was impaired by his use of alcohol. Dr. Prostic's opinion was, in part based upon the blood test results.

The undersigned Board Member would allow the blood test evidence to be included in the record and would deny claimant benefits under K.S.A. 44-501(d)(2).

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Rex W. Henoeh, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director