

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

DENNIS T. BOHANNON)	
Claimant)	
VS.)	
)	Docket No. 230,500
DYNAMIC DRYWALL)	
Respondent)	
AND)	
)	
AMERICAN FAMILY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appeals from a preliminary hearing Order entered by Administrative Law Judge John D. Clark on February 19, 1998.

ISSUES

The Administrative Law Judge denied benefits, finding that claimant's injury was contributed to by the employee's use of marijuana. Claimant appeals from that finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order should be reversed.

The Appeals Board has limited jurisdiction in appeals from preliminary hearings. The Appeals Board may consider allegations that the administrative law judge exceeded his or her jurisdiction. K.S.A. 1997 Supp. 44-551. Examples of jurisdictional issues are identified in K.S.A. 1997 Supp. 44-534a. That lists includes the category described as "certain defenses." The Appeals Board has previously held that "certain defenses" contemplated by K.S.A. 1997 Supp. 44-534a are defenses which go to the compensability of the claim. This includes the defense of intoxication or use of illegal drugs. K.S.A. 1996 Supp. 44-501. Ivey v. Buckley Industries, Inc., Docket No. 217,041 (January 1997).

Claimant was injured when he fell from a ladder he had placed on top of some scaffolding to install drywall in a room with a vaulted ceiling. The decision by the ALJ relies on the report from Dr. Larry K. Wilkinson interpreting results of a urine drug test done on December 10, 1997. Claimant has objected to the introduction and consideration of that drug test on the grounds that there was not probable cause that the claimant was in possession of or was impaired by a drug. As amended in 1993, K.S.A. 44-501(d) states in pertinent part:

The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:
(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
(B) the test sample was collected at a time contemporaneous with the events establishing probable cause

The Board finds that under the circumstances of this case, claimant’s objection to the introduction of the report from Dr. Wilkinson was a valid objection. From the record presented, respondent only knew claimant fell from the ladder and scaffolding. The record contains no other indication of any factors which would have established probable cause at the time the test was taken. The fall itself does not constitute such probable cause and the Board finds the results of the chemical test are not admissible. The opinions based upon those tests are opinions based upon facts not in evidence. The decision by the ALJ denying benefits should be reversed.

At the outset of the preliminary hearing the parties agreed that if medical was ordered it should be ordered by authorizing Dr. J. Stanley Jones.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark, dated February 19, 1998, should be, and hereby is, reversed. Claimant is entitled to medical treatment at respondent’s expense with Dr. J. Stanley Jones as authorized treating physician. The Appeals Board also finds claimant is entitled to temporary total disability benefits commencing as of the date the Application for Preliminary Hearing was filed, January 21, 1998, and continuing thereafter until claimant is released to return to work or reaches maximum medical improvement. Temporary total disability benefits are to be paid at the rate of \$351 per week.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

- c: Robert R. Lee, Wichita, KS
- William L. Townsley, III, Wichita, KS
- John D. Clark, Administrative Law Judge
- Philip S. Harness, Director