

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

<b>RICHARD L. EVANS, Deceased</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>FRAKES TRUCKING</b>	)	
Respondent	)	Docket No. 234,610
	)	
AND	)	
	)	
<b>KANSAS RISK SERVICES GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed Administrative Law Judge Brad E. Avery's Award dated December 22, 2000. The Board heard oral argument on June 13, 2001, in Topeka, Kansas.

**APPEARANCES**

The surviving children, Michael Lee Evans, Lisa Renae Christopher and Christopher Lee Evans, appeared by their attorney, John J. Bryan. Respondent and insurance carrier appeared by their attorney, John R. Emerson. Mr. Robert Keeshan appeared on behalf of Juanita North, conservator for Lisa Renae Christopher and Christopher Lee Evans.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument before the Board, the parties agreed the record includes the depositions of Tammy Rook and George F. Jackson, Ph.D. Also, the parties agreed that the decedent's stipulated average weekly wage was \$320.

**ISSUES**

On December 22, 2000, the Administrative Law Judge found claimant was impaired due to alcohol use and claimant's use of alcohol contributed to his accident. Accordingly, the Administrative Law Judge denied the claim.

The claimant raised the following issues on review: (1) admissibility of the blood test; (2) whether probable cause existed to suspect alcohol use prior to or after the accident; (3) whether claimant was "impaired" by the use of alcohol to an extent that it "contributed" to the accident; and, (4) whether respondent should be required to produce the maintenance records concerning the vehicle involved in the accident as was agreed, and whether the same should be considered as part of the evidentiary record. The claimant additionally raised several issues regarding the constitutionality of K.S.A. 44-501(d)(2).

The respondent raised at oral argument the following issues on review: (1) whether respondent met its burden of proof on the intoxication defense; (2) whether the respondent has proved that alcohol contributed to the accident; (3) whether K.S.A. 44-501(d)(2) is valid, constitutional, and does not contradict other Kansas law.

#### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

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

The parties stipulated the decedent, Richard L. Evans, on July 10, 1997, had met an untimely accidental death arising out of and in the course of his employment with the respondent. The decedent was killed when the truck he was driving left the road bed and overturned.

The respondent presented evidence that at the time of decedent's death, he had a blood alcohol concentration of .05 percent. The Administrative Law Judge found, in accordance with K.S.A. 1997 Supp. 44-501(d)(2), the decedent was impaired due to alcohol at the time of the accident and such impairment contributed to his accident.

The blood samples used for the drug tests were taken during decedent's autopsy the day after the accident. The claimant contends the results of the drug testing are inadmissible because the respondent did not have probable cause to believe decedent used, had possession of, or was impaired by alcohol while working.

The Workers Compensation Act restricts the admission of drug screen test results. The Act requires that six facts must be proven before drug test results can be admitted into evidence:<sup>1</sup>

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

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<sup>1</sup>K.S.A. 1997 Supp. 44-501(d)(2).

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

The Workers Compensation Act does not define probable cause. The Board believes the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.<sup>2</sup>

The decedent began his work day at the office of respondent where he met with the office secretary who dispatched the truck drivers regarding where to pick up and deliver loads. She testified that on the date of accident she did not observe anything out of the ordinary and the decedent did not give her any indication he had been drinking. As he left the office she specifically noted his gait was not wobbly or unsteady. The decedent proceeded to Martin Marietta Quarry and picked up a load of rock. Respondent's owner testified personnel at the quarry would have advised him if one of his drivers smelled of alcohol and he had no reason to believe decedent had been drinking until the test report was received.

The accident was unwitnessed and occurred a few miles from the quarry. The

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<sup>2</sup>See Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994) and In re Estate of Campbell, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), both of which define probable cause in the context of civil proceedings. In Lindenman, the Kansas Supreme Court defined probable cause in a malicious prosecution case as "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining." In Campbell, the Court of Appeals defined probable cause in a will contest as "the existence of evidence . . . which would lead a reasonable person, properly informed and advised, to conclude . . ."

investigating highway patrol trooper, Kelly Zimmerman, testified there were no indications of the presence of alcohol at the scene. He did not detect the odor of alcohol nor did he find any containers of alcohol at the scene. Moreover, the original accident report did not note alcohol contributed to the accident. The trooper concluded it appeared the decedent went off the road, over corrected to get back on the roadway and rolled the truck onto its side.

At oral argument before the Board, the respondent conceded there was probably not any evidence decedent was impaired absent the blood alcohol test. The evidence fails to establish that when the blood sample was taken during decedent's autopsy, the respondent had probable cause to believe the decedent had either used, had possession of, or was impaired by drugs or alcohol at the time of his accident. There were admittedly no indications he was impaired by alcohol.

The claimant arrived at work and was advised where to load and unload his truck. There was no evidence that decedent drove his truck in an erratic manner before the accident. The manner in which an accident occurs may be considered in determining whether there is probable cause to believe that a worker was impaired at that time. But standing alone, decedent's accident would not lead a reasonable person to conclude he was impaired when his vehicle left the roadway. Therefore, the Board concludes respondent lacked probable cause to request the drug test sample.

Here, the blood alcohol test was required because it is a routine procedure where a commercial driver is involved in a fatality accident. Respondent contends this requirement by the Department of Transportation eliminates the necessity for probable cause. The Board disagrees. The Board concludes that K.S.A. 1997 Supp. 44-501(d)(2)(A) requires probable cause to be determined by looking at the facts known by the employer at the time the drug screen is requested. If those facts do not establish probable cause to believe the injured worker had been using drugs or was impaired at the time of the accident, the results from the drug screen are inadmissible. The fact that drug screens may be required because of company policy or other statutory provisions may be significant for personnel or other actions unrelated to a workers compensation claim. However, such requirements cannot be a substitute for the specific statutory requirement of probable cause mandated by K.S.A. 1997 Supp. 44-501(d)(2)(A).

The evidence fails to establish there was probable cause to believe decedent had used, had possession of, or was impaired by drugs or alcohol while working. Therefore, the drug screen results are not admissible and should not be considered in this proceeding. Because Dr. Jackson's opinion that decedent was impaired by alcohol at the time of the accident was premised upon the drug screen results, this opinion is likewise inadmissible.

The burden is placed on the respondent to defeat a workers compensation claim

based on claimant's intoxication.<sup>3</sup> Here, the respondent has failed to meet that burden. Accordingly, the Administrative Law Judge's decision is reversed and the decedent's surviving children are entitled to death benefits. The parties stipulated in the event the claim was found compensable respondent would pay \$4,300 to the provider of the funeral service.

The uncontradicted evidence established decedent had three surviving children.<sup>4</sup> Lisa Renae Christopher who was born December 26, 1982, Christopher Lee Evans who was born December 21, 1985, and Michael Lee Evans who was born January 25, 1992. The decedent's average weekly wage was stipulated at \$320. Accordingly, each dependent minor is entitled to weekly benefits of \$71.11. The Board is not unmindful that the eldest child has reached the age of 18, however, the record is silent whether she is enrolled as a full-time student in an accredited institution of higher education and still entitled to compensation.<sup>5</sup> The effect of a cessation of benefits to the eldest child is addressed in the Award.

Lastly, the claimant, in his brief, raised several issues regarding the constitutionality of K.S.A. 1997 Supp. 44-501(d)(2). The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the state of Kansas. A statute is presumed constitutional. Baker v. List and Clark Construction Co., 222 Kan. 127, 563 P.2d 431 (1977). The Board shall apply K.S.A. 1997 Supp. 44-501(d)(2) as written until instructed otherwise by a court of competent jurisdiction.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 22, 2000, is reversed.

**AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF** Lisa Renae Christopher, Christopher Lee Evans and Michael Lee Evans, as surviving minor dependents, and against the respondent, Frakes Trucking, and the insurance carrier, Kansas Risk Services, for an accidental injury which occurred on July 10, 1997, and based on an average weekly wage of \$320, for compensation at the rate of \$213.34 per week from July 10, 1997.

Subject to the provisions below and K.S.A. 1997 Supp. 44-510b, one-third of the

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<sup>3</sup>See Poole v. Earp Meat Co., 242 Kan. 638, Syl. ¶4, 750 P.2d 1000 (1998).

<sup>4</sup> The record indicates decedent also had a surviving spouse, Sonja Evans. She did not file an Application for Hearing seeking a share of the benefits for herself. However, she did arrange for an attorney to represent the minor dependent, Michael Lee Evans, who resides with her.

<sup>5</sup>K.S.A. 1997 Supp. 44-510b(a)(3).

payment shall be paid to Lisa Renae Christopher, a former minor dependent who has attained the age of majority, one-third of the payment to the conservator of Christopher Lee Evans, a minor dependent and one-third of the payment to the natural guardian of Michael Lee Evans, a minor dependent. The payments shall continue to the minor dependents until he or she reaches 18 years of age. After that date the minor dependent will continue to receive payment until he or she reaches 23 years of age only if he or she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if he or she is physically or mentally unable to earn wages in any type of substantial or gainful employment.

Once there is a cessation of benefits to the older sibling, benefits should be reapportioned such that the entire weekly compensation benefit would be payable to the remaining minor children. In this way, the amount of the weekly benefit payable remains the same, just as it does with the reapportionment to the minor children upon the cessation of benefits to a surviving spouse.

For the period from July 10, 1997 to December 26, 2000, when Lisa Renae Christopher reached 18 years of age, she is entitled to \$71.11 per week for 180.86 weeks, or \$12,860.95, which is currently due and owing, less amounts previously paid. Thereafter, additional payment, if any, is to be made to Lisa Renae Christopher as provided above.

For the period from July 10, 1997 to December 26, 2000, Christopher Lee Evans, is entitled to \$71.11 per week for 180.86 weeks, or \$12,860.95, which is currently due and owing, less amounts previously paid. Thereafter, payment for an additional 48.57 weeks to November 30, 2001, is also currently due and owing in the amount of \$71.11 per week, if Lisa Renae Christopher is still entitled to benefits, or in the amount of \$106.67 per week upon a cessation of benefits to Lisa Renae Christopher.

For the period from July 10, 1997 to December 26, 2000, Michael Lee Evans is entitled to \$71.11 per week for 180.86 weeks, or \$12,860.95, which is currently due and owing, less amounts previously paid. Thereafter, payment for an additional 48.57 weeks to November 30, 2001, is also currently due and owing in the amount of \$71.11 per week if Lisa Renae Christopher is still entitled to benefits, or in the amount of \$106.67 per week upon a cessation of benefits to Lisa Renae Christopher.

Notwithstanding language to the contrary, the maximum amount of compensation payable to decedent's dependents shall not exceed \$200,000 and when such total amount has been paid the liability of the employer for any further compensation under K.S.A. 1997 Supp. 44-510b to dependents, other than the minor dependent of the decedent, shall cease, except that the payment of compensation to any minor dependent of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated and shall not be subject to termination until such child becomes 18 years of age.

The respondent and insurance carrier are ordered to pay or reimburse the maximum sum of \$4,300, for funeral expenses incurred.

Claimant's attorney fee contract is approved insofar as it does not contravene the provisions of the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as assessed by the Administrative Law Judge's Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: John J. Bryan, Attorney for Claimant
- John R. Emerson, Attorney for Respondent
- Brad E. Avery, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director