

60-mile-an-hour zone. Claimant began driving erratically, lost control of his truck, crashed through a guardrail and laid the truck on its side. A passenger in the truck, Leonard James Carley, was ejected from the truck and died. Claimant was later convicted of manslaughter. An autopsy performed on Mr. Carley tested positive for cannabinoids, benzoylecgonine (a cocaine derivative), and cocaine.

After the accident, Kirk Spriggs, Operations Manager for respondent, requested a urine drug screen on claimant, pursuant to federal regulations. The drug urinalysis test was performed by David Crumbley, Chief Executive Officer of Biochem Employee Substance Testing, Inc., in Euless, Texas. Biochem's chief business function was obtaining and processing urine samples for drug screens. Mr. Crumbley's affidavit submitted into evidence discusses in detail the procedures followed, and his experience and training in performing these drug tests, of which he has performed thousands.

Mr. Crumbley, after being dispatched by Bob Larabie of U.S. Drug Testing, proceeded to the hospital, informed claimant of his intentions, obtained a signed release from claimant and obtained the urine sample. The test sample was collected within 27 hours of the accident. Claimant was asked at the preliminary hearing whether he had obtained or used any cocaine between the time of the accident and the time of the drug testing, and claimant testified that he had not. The test was performed and the samples obtained pursuant to Federal Regulation CFR 40.25(f)(10)(ii). The statutory procedures set out in K.S.A. 1996 Supp. 44-501(d)(2) were followed by respondent. The test results were then provided to Dr. Curtis Klaassen, a Ph.D. in pharmacology and a professor of pharmacology and toxicology at the University of Kansas Medical Center. Dr. Klaassen is board certified by the American Board of Toxicology and the Academy of Toxicology Sciences.

Dr. Klaassen was provided medical reports, including blood samples from the deceased, Leonard Carley, and urine test results from claimant. He noted that the urine test on claimant was done by gas chromatography/mass spectrometry. Dr. Klaassen identified this as being an excellent state-of-the-art method for measuring benzoylecgonine, which he identified as being a metabolized substance from cocaine which is excreted into the urine. The benzoylecgonine is then used to determine whether a person has been using cocaine.

In testing cocaine use, the National Institute of Drug Abuse (NIDA) can measure levels as low as 50 ng/ml. The NIDA considers testing in excess of 300 ng/ml for cocaine to be positive. In claimant's case, the urine test results were at 5,140 ng/ml. Dr. Klaassen also estimated that, because the urine sample was taken approximately 27 hours after the accident, the body had time to eliminate most of the cocaine. He calculated that, at the time of the accident, claimant would have had approximately 25,000 ng/ml in his system. He also stated that it was feasible, if claimant were abusing cocaine, that this level of cocaine could have been in claimant's system at the time of the accident.

Dr. Klaassen, in his report of February 5, 1999, opined that claimant was under the influence of cocaine at the time of the accident. He went on to state that, because cocaine affects the brain, which interferes with the ability to operate a motor vehicle, the use of cocaine by claimant was a major factor resulting in this accident.

Claimant denies using cocaine at any time in his life. He acknowledges that Mr. Carley had used cocaine in the past, but denied Mr. Carley used cocaine at any time during the trip. Claimant testified that Mr. Carley and Shenette Rene Sims, Mr. Carley's girlfriend, were going to be utilized at lumpers; that is, unloading the truck, when they arrived at the destination.

When questioned at preliminary hearing, claimant acknowledged that Mr. Carley was a friend.

Mr. Spriggs, after reviewing company records, could find no record of Mr. Carley being approved by the Kroger Distribution Center in Kileen, Texas, claimant's ultimate destination, to work as a lumper. This indicated that Mr. Carley was a social acquaintance of claimant, simply going along for the ride. Ms. Sims was in the cab of the truck asleep at the time of the accident.

CONCLUSIONS OF LAW

K.S.A. 1996 Supp. 44-501(d)(2) states 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 or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

K.S.A. 1996 Supp. 44-501(d)(2) sets out specific criteria which must be followed before chemical tests can be admitted into evidence. Respondent has provided several affidavits of expert witnesses dealing with the method by which the test sample was collected, the labeling of the test sample, and the way the test was performed by the laboratory which was approved by the United States Department of Health and Human Services. The use of the gas chromatography/mass spectroscopy, and affidavits regarding the chain of custody used, ensure that the test results were from claimant's sample.

The statute requires that probable cause to believe the employee had used, was in possession of or was impaired by drugs or alcohol, be established. In this instance, respondent was provided affidavits from eyewitnesses at the scene, and a police report

indicating claimant was driving erratically and at an excessive rate of speed immediately prior to the accident. The collecting procedures specified in the statute were followed, as well as the procedures required to properly identify the sample as being from claimant.

Expert testimony provided from Dr. Klaassen verifies that the levels of cocaine (benzoylecgonine) substantially exceeded the NIDA positive test levels. Dr. Klaassen was clear in his opinion that claimant was under the influence of cocaine at the time of the accident, and that the use of cocaine by claimant was a major factor resulting in this accident.

The Administrative Law Judge denied claimant benefits in this instance, finding that claimant's injury was contributed to by claimant's use of drugs. The Appeals Board concurs and finds that the Order of the Administrative Law Judge, denying claimant benefits, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated February 17, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1999.

BOARD MEMBER

c: Albert Brooks, DeSoto, TX
Daniel N. Allmayer, Kansas City, MO
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director