BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SCOTT SUITTER	)	
Claimant	)	
V.	)	
	)	
JOHNSONVILLE SAUSAGE LLC	)	AP-00-0464-769
Respondent	)	CS-00-0457-142
AND	)	
	)	
ZURICH AMERICAN INS. CO.	)	
Insurance Carrier	)	

ORDER

The claimant, through Brad Avery, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary hearing Order dated March 31, 2022. Brian Fowler and John Ryan appeared for the respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript, held February 16, 2022; the evidentiary deposition transcript of Randi Stahl with exhibits, taken July 16, 2021; the evidentiary deposition transcript of the claimant with exhibits, taken February 23, 2022; the evidentiary deposition of Jessica Fitzgerald, taken February 23, 2022; and documents of record filed with the Division.

ISSUES

1. Did the claimant forfeit workers compensation benefits by refusing to submit to a post-accident drug test, pursuant to K.S.A. 44-501(b)(1)(E)?

2. Is K.S.A. 44-501(b)(1)(E) unconstitutional?

FINDINGS OF FACT

The claimant was employed by the respondent as a driver. The claimant acknowledged the respondent provided him a Member Handbook on March 27, 2018. The Member Handbook states:

> Future drug and alcohol tests are required if Members are injured on the job, are involved in an injury on the job, appear to be under the influence, or are involved in an incident where Company property is damaged.[1]

Pursuant to this policy, the claimant twice submitted to a urine test for the respondent following damage to property.

The claimant used a truck to move 50-75 trailers from bay doors or from the lot. The main yard was gravel and prone to potholes. The claimant stated the truck seat offered no lumbar support and the truck had poor shock absorbers, resulting in significant bouncing, causing him to develop back pain. He reported his symptoms to his supervisor at a time not designated in the record. According to the claimant, the respondent did not schedule a medical examination, so he self-directed to Community HealthCare starting November 20, 2020. The medical records note the claimant attributed his low back pain to driving in a truck seat with no lumbar support, poor shock absorbers and significant bouncing.

On December 8, 2020, the claimant met the respondent's health and safety manager, Randi Stahl, at the Cotton O'Neil clinic. The claimant testified he was told the appointment was to evaluate his range of motion to determine if he was capable to do his job. In describing what transpired that day, the claimant testified:

> A. Walked into the lobby and we signed in and was sitting down waiting to be seen. I realized I'd left my phone in my car which had pertinent information like pictures of, you know, the condition of the truck and the seats and the yard and stuff so I could show the examiner. Instead of explaining to her by mouth, I could show her pictures so she could evaluate me better. And I realized my phone was in the car and I said to Randi, I said, "Should I go get my phone?" And [s]he said, "No, we'll just use mine, you sent me the pictures." And I said, "Okay." Then when we went into the room, Randi didn't come with us. And so the - - so the lady starts asking me, you know, basic information questions, you know, name, blah-blah-blah, the date of the injury. And I said that there's no date of the injury, that it's a progressive injury, it's a repetitive motion thing. And she starts - - so she says, "All right, we'll just write this down." And I said, "No, I want you to have it right. Can you get Randi for me so we can look over the notes?" And she said, "No, she can't come in here." And I said, "Well, I need my phone, I'm going to need my phone." And she says, "Well, you can't leave the room?" I said, "What do you mean I can't leave the room? I need my phone. If Randi can't [come] back here, I'm going to get my phone." And she says, "Well, the UA's going to come up positive if you leave." I said, "I'm going to get my phone." And she said, "You can't leave." And then, basically, I walked to go get my phone

[1] Claimant Depo., Ex. 3 at 19.

> which was literally 25 feet from the front door. There's a big, big window and you can see my truck. I said, "You can come with me if you want." And as I was walking out, she was saying like "Automatic positive," like a child, "automatic positive." And I said, "Well, if that's the case," just started my truck and I left.[2]

The Cotton O'Neil employee who wanted to administer the test appears to be Stephanie Rice, a medical assistant. Despite Ms. Stahl telling the claimant she would provide Cotton-O'Neil information she had on her phone concerning the claimant's injury, the claimant testified she did not relay the information because she was not allowed in the examination room. The claimant testified he was willing to take the urine test, but when Ms. Rice kept saying automatic positive, he felt her "mind was set."[3] The claimant testified he did not refuse a drug test, and he would have taken the drug test had he been allowed to retrieve his phone. He offered to let Ms. Rice go with him to his truck to get his phone. The claimant stated Ms. Stahl tried to tell him in the lobby leaving the premises would be considered a positive test, but Ms. Rice was "talking over" or "shouting" while Ms. Stahl was trying to speak.[4] It appears the claimant was told the next day, December 9, 2020, what Ms. Stahl was trying to say. Nevertheless, the claimant understood from Ms. Rice's "yelling" that leaving the facility would be considered a positive urinalysis.[5] He also understood from both Ms. Rice and Ms. Stahl leaving the premises would be considered a positive test when he was in the lobby in the process of leaving.[6]

There is some potential contradiction in the record. The claimant testified he was aware the respondent had a policy drug and alcohol testing may be required following a work-related injury. He also testified he did not realize a drug test was required after a work injury if there was no accident.[7]

Ms. Stahl testified the claimant reported being injured on the job, which necessitated the drug test. Ms. Stahl characterized drug testing after a work injury as standard practice. She admitted there was no evidence the claimant was under the influence of illegal drugs or alcohol when injured. Ms. Stahl was present at Cotton O'Neil on December 8, 2020, but

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[2] *Id*. at 12-14.

[3] *Id*. at 27.

[4] *Id*. at 24-25.

[5] *Id*. at 25.

[6] See *id*. at 35-36, 38.

[7] *Id*. at 28, 31-32.

did not accompany the claimant into the examination room. She testified the claimant came out of the examination room and the following occurred:

> Q. Was there discussion about the drug test? Did [the claimant] ask you about that?
>
> A. He did.
>
> Q. What did he specifically ask you?
>
> A. He asked if it was standard practice.
>
> Q. And what did you inform him?
>
> A. That it was.
>
> Q. What did he then do or say?
>
> A. He was upset, wanted to know why or if I normally came with employees to the clinic and I said yes.
>
> Q. And was there anymore discussion about him staying for the drug test, doing the drug test, what happened next?
>
> A. He was attempting to explain that he wanted to go get his cell phone so that he could identify what dates of injury because the medical staff were asking, and I told him that I can pull that information up from my phone and that he could stay and get his testing.
>
> Q. What did he do next?
>
> A. He got upset and turned around and left the facility, went out the door, got into his car and drove off.
>
> Q. Did you tell him what ramifications, if any, there would be if he left the facility?
>
> A. I did. I told him that, I was attempting to tell him that he would be - - it would be considered a denial or incomplete test.
>
> Q. Okay. And did you then memorialize what happened that day?
>
> A. I did.[8]

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[8] Stahl Depo. at 11-12; see also pp. 24, 28, 32-33.

Ms. Stahl testified Ms. Rice was also present in the lobby. According to Ms. Stahl, the Cotton O'Neil employee tried to tell the claimant several times if he left the building, he would be considered to have tested positive for drugs or alcohol. Ms. Stahl testified she told the claimant leaving the building would be considered a refusal to submit to testing due to Cotton O'Neil's policy equating leaving the building without a test being considered a positive drug test. She acknowledged the claimant never stated he was refusing to take a drug test. He asked permission to retrieve a cell phone from his vehicle. Ms. Stahl acknowledged the respondent had no policy preventing the claimant from retrieving his cell phone. She testified the claimant left the building without getting tested and did not return to the Cotton-O'Neil clinic.

An office note of Holly Johnson, a physician assistant, dated December 8, 2020, states:

> On 12/08/2020 at 1430 Scott was informed once in the room that he was not allowed to leave the building due to needing a UA. He asked to talk to his supervisor, Randi, in the waiting room, I [led] him to the waiting room. He was informed a second time that if he left the building his drug test would be announced positive. I witnessed Scott get in his car and drive off. Randi was in waiting room and also witnessed. Stephanie Rice, MA[9]

The claimant was terminated by the respondent on December 9, 2020, for not remaining in the clinic long enough to give a sample for the drug screen. The respondent's documentation indicated the claimant left the examination room and asked Ms. Stahl why a urinalysis was needed. After she told him it was standard practice, the claimant denied having an incident, so no test was needed. The document further indicated a nurse told him leaving the clinic would be considered a positive test result.

At his attorney's request, the claimant saw Dr. Harold Hess on May 7, 2021, for an independent medical examination. The doctor diagnosed the claimant with lumbar discogenic pain. Dr. Hess' report stated:

> [The claimant] has no history of low back pain prior to 10/01/2020, and on that day he had constant jarring of his low back with bouncing up and down in potholes, as well as securing his cab to the trailers. It is well known that trauma can produce a tear in the annulus of a disc and lead to the condition known as discogenic pain. It is my impression, within a reasonable degree of medical certainty, that the work injury of 10/01/20 is the prevailing factor in causing this patient's current medical condition and his current symptoms.[10]

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[9] *Id*., Ex. E.

[10] Claimant Depo., Ex. 2 at 2.

The claimant submitted the testimony of Jessica Fitzgerald, a former employee of the respondent, who testified she was not required to take a drug test or urinalysis test after her work injury dated approximately September 1, 2018.

The ALJ ruled the claimant refused a drug test and forfeited benefits under the Kansas Workers Compensation Act.

The claimant argues testing is not permitted when an employee alleges a workers compensation injury because the claimant was never sent out for treatment, and the respondent's counsel denied the claimant suffered a work-related injury. The claimant further argues he did not refuse a drug test. He argues he simply wanted to consult his cell phone to answer the questions posed by Ms. Rice. The respondent maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

The employee carries the burden of proof to establish the right to an award of compensation.[11] Respondent has the burden of proving any statutory defenses or exceptions.[12] One such defense is K.S.A. 44-501(b)(1)(E), which states:

> An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

When a workers compensation statute is plain and unambiguous, a court must give effect to its express language.[13] "[T]he term "refusal" . . . carries with it an element of willfulness or intent."[14]

1. The claimant refused to submit to a drug test at the respondent's request under a policy authorizing post-injury testing. The claimant forfeited his right to compensation.

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[11] *See* K.S.A. 44-501b(c).

[12] *See Johnson v. Stormont Vail Healthcare Inc.*, 57 Kan. App. 2d 44, 53, 445 P.3d 1183 (2019) *rev. denied* 311 Kan. 1046 (2020).

[13] *See Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

[14] *Byers v. Acme Foundry*, 53 Kan. App. 2d 485, 490, 388 P.3d 621 (2017).

The claimant was asked to submit to a urinalysis. The claimant then asked Ms. Stahl why testing was necessary, and she told him it was standard procedure following a work injury. The claimant understood leaving the Cotton O'Neil premises would be considered a positive drug test. He received this information both from Ms. Stahl and Ms. Rice. The claimant went to his truck, ostensibly to retrieve his cell phone to provide information to Ms. Rice. The claimant then drove away. He did not submit to the testing. The claimant willfully refused to submit to a post-accident drug test clearly authorized by the respondent's policy. The forfeiture of benefits under K.S.A. 44-501(b)(1)(E) is affirmed.

2. The Board may not address the constitutionality of K.S.A. 44-501(b)(1)(E).

The law is clear: the Board lacks the authority to rule on the constitutionality of any statute.[15] The Board further lacks jurisdictional authority to review this issue from an appeal of a preliminary hearing under K.S.A. 44-534a.

WHEREFORE, the Board affirms the Order dated March 31, 2022.

IT IS SO ORDERED.

Dated this _____ day of May, 2022.

_____
JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)
Brad Avery
John Ryan
Brian Fowler
Hon. David Bogdan

[15] *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).