BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALEXIS GUERRORO	)	
Claimant	)	
V.	)	
	)	AP-00-0474-816
WICHITA DRYWALL & ACOUSTICS LLC	)	CS-00-0472-647
Respondent	)	
AND	)	
	)	
NATIONAL AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appealed the March 29, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

R. Todd King appeared for Claimant. Ronald Laskowski appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from March 13, 2023, with exhibits attached; Evidentiary Deposition of Bryan Kyllonen from March 20, 2023, with exhibits attached, and the documents of record filed with the Division. Respondent's brief was reviewed.

ISSUE

Did the ALJ err by finding Claimant did not refuse post-accident drug testing?

FINDINGS OF FACT

Claimant began working for Respondent on December 6, 2022, doing drywall work. Claimant cut his right thumb on December 7, 2022, when he was doing layout work. The injury caused a lot of bleeding. Claimant was taken to Wesley Hospital emergency room by his coworker, Chucky.

Clamant testified he told the hospital he cut his thumb with a knife and did not report anything about being injured at work. Claimant testified no one told him to report the injury to Bryan Kyllonen, the supervisor and owner, who was not on site that day. Claimant did not think his thumb injury was too bad and he thought he would be able to work the next day. After he left Wesley Hospital, Claimant went back to work and finished out the rest of the day. Claimant did not go to work the next day because his thumb was numb from the injection he received at the hospital, and he was still bleeding. He reported his injury to Mr. Kyllonen when he did not go to work. Claimant was afraid of getting fired if he filed a workers compensation claim.

Claimant testified he was never told by anyone that he needed to undergo a drug test after he was injured.

The employee handbook says injured employees are required to submit to a drug test after a work-related injury at a location chosen by Respondent. The employee handbook also states any injury is to be reported immediately to either Mr. Kyllonen or the employer's office. There is no evidence Claimant was given the employee handbook or Claimant was told of these policies. Respondent alleged an unnamed superintendent who worked for the primary contractor told Claimant he needed to contact Mr. Kyllonen immediately to report his injury.

Claimant was referred by the hospital to Dr. Bollinger, who said Claimant needed surgery on his right thumb. Dr. Bollinger assigned restrictions of no pushing, pulling or grasping with the right upper extremity. Claimant has not had surgery and his thumb is numb.

Mr. Kyllonen confirmed he sent Claimant out on a job on December 7, 2022, with two other employees who had worked for Respondent for several years to do sheetrock work. Respondent was a subcontractor on this job. Mr. Kyllonen considered himself to be the supervisor, but did not go to the job site with the workers. Claimant was given Mr. Kyllonen's contact information.

Mr. Kyllonen testified Claimant reported the injury to him on December 8 or 9 when Claimant came to the office turn in his timecard, and Mr. Kyllonen saw Claimant's finger was taped up and asked what happened. Claimant described how the injury occurred. Mr. Kyllonen spoke with the other two employees who were with Claimant on December 7, 2022. They confirmed Claimant was injured at work. Claimant expressed concern he would be fired if he filed a workers compensation claim. Mr. Kyllonen denied Claimant would be fired for filing a workers compensation claim because the employer pays insurance premiums for workers compensation coverage.

Mr. Kyllonen testified Med Express is where Respondent sends employees for drug screening. Mr. Kyllonen testified a timely sample was not collected from Claimant when he was in the office on December 8 or 9 because Claimant was instructed by his attorney to not speak with anyone affiliated with the employer about this incident. He did tell Claimant about the drug testing policy on December 8 or 9. Claimant and Mr. Kyllonen also talked about Claimant smoking marijuana a few days before he became employed with Respondent and Claimant expressed concern about testing positive for marijuana. Mr. Kyllonen testified it is not a given Claimant would have been fired if he took a drug test and it was positive. He testified the process with insurance would have to play out first, especially if Claimant required medical treatment. Mr. Kyllonen believes one cannot fire anyone while they are receiving treatment. Mr. Kyllonen did not ever send Claimant to Med Express for drug testing.

Mr. Kyllonen testified the last conversation he had with Claimant was a text message about having surgery and the estimated cost for the surgery. Mr. Kyllonen told Claimant insurance would handle the information about the surgery because a claim had been filed. Claimant did not return to work after the December 7 accident.

Mr. Kyllonen does not deny Claimant was injured at work.

The ALJ found Claimant suffered an injury to his right thumb on December 7, 2022, while working for Respondent. The ALJ further found Claimant did not refuse to submit to a chemical test for drugs as Claimant was not asked to submit to a drug test and there was no evidence Clamant was aware of Respondent's drug testing policy. The ALJ ordered temporary total benefits pursuant to K.S.A. 44-510c(b)(2)(B) beginning December 8, 2022, and continuing until released to return to work, has been offered accommodated work with the temporary restrictions, has reached maximum medical improvement, or has returned to work. Medical treatment was authorized with Dr. Bollinger.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues Claimant never returned to work after his accident and injury because he did not want to take a drug test and get terminated. Claimant did not report his injury as work-related until he knew he would not test positive for drugs and this constitutes a refusal according to Respondent.

K.S.A. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

There is no dispute Claimant was injured on the job while working for Respondent.

Once a compensable injury is proven and Respondent disputes compensability by alleging an affirmative defense of disallowing benefits due to violation of the substance abuse statute set out K.S.A. 44-501, the burden of proof is on Respondent to prove by a preponderance of the evidence Claimant violated the statute on substance abuse and testing.[1]

K.S.A. 44-501(b)(1)(A) 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. 44-501(b)(1)(E) 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.

Respondent alleges Claimant should be denied benefits because he refused to take a drug test in accordance with employer's drug testing policy. This Board member disagrees. The employer never instructed Claimant to take a drug test. Respondent argues Claimant was told about employer's drug testing policy when the employer became aware of Claimant"s injury. However, Claimant had retained counsel when this conversation occurred and Claimant had been instructed not to discuss his case with the employer. This is standard legal practice once a party retains legal representation. There was no refusal to take a drug test. No specifics were communicated to where and when a drug test would occur. Claimant is not disallowed benefits. The ALJ's decision is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Gary K. Jones, dated March 29, 2023, is affirmed.

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[1] *See Johnson v. Stormont Health Care*, 57Kan. App.44, 445 P.3d 1183 (2019), *rev. denied* February 25, 2020.

IT IS SO ORDERED.

Dated this _____ day of June, 2023.

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REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

R. Todd King, Attorney for Claimant
Ronald Laskowski, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge