BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

FERNANDO ESPARZA	)	
Claimant	)	
V.	)	
	)	AP-00-0458-770
PLATINUM DRYWALL	)	CS-00-0456-551
Respondent	)	
AND	)	
	)	
ACUITY MUTUAL A INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and Respondent appealed the June 28, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

C. Albert Herdoiza appeared for Claimant. Samantha Benjamin-House 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 Evidentiary Deposition of Fernando Esparza Gallardo Vol. I (Apr. 19, 2021); Evidentiary Deposition of Darrin Smith (Apr. 16, 2021); Preliminary Hearing Transcript (Apr. 22, 2021), with exhibits attached; Evidentiary Deposition of Fernando Esparza Gallardo Vol. II (Apr. 26, 2021); Evidentiary Deposition of Victor Manuel Hernandez Ruvalcaba (Apr. 26, 2021); Evidentiary Deposition of Jason Villegas (Apr. 27, 2021), with exhibits attached; Evidentiary Deposition of Omar Jurado (Apr. 27, 2021); Evidentiary Deposition of Jack Jensen (Apr. 27, 2021), with exhibits attached; Evidentiary Deposition of Shannon Hardesty (May 3, 2021), with exhibits attached; Evidentiary Deposition of Juan Armenta (May 10, 2021), with exhibits attached; Evidentiary Deposition of Victor Manuel Hernandez Ruvalcaba (May 13, 2021); Evidentiary Deposition of Reymar Castillo (June 2, 2021); Evidentiary Deposition of Victor Manuel Hernandez Ruvalcaba (June 2, 2021) and the documents of record filed with the Division.

ISSUES

The issues on appeal are:

1. Shall compensation for Claimant's injury be denied because Claimant willfully failed to use reasonable safety protection and/or recklessly violated Respondent's workplace safety rules?

2. Are the results of Claimant's February 2, 2021, drug test admissible pursuant to K.S.A. 2020 Supp. 44-501(2)(B)?

3. Should Claimant be denied compensation for his injuries due to Claimant's alleged impairment due to drug use?

FINDINGS OF FACT

The ALJ found Claimant's injury did not result from Claimant's willful failure to use a reasonable safety protection against injury or due to a willful violation of safety rules. Compensation was denied because Claimant was impaired by drugs and his impairment contributed to the accident. Claimant's request for temporary total benefits from February 8, 2021, forward, medical treatment and payment of medical bills is denied.

Claimant began working for Respondent in December 2020 installing sheetrock and completing framework.

On February 8, 2021, at the beginning of his shift, Claimant was instructed by his supervisor, Juan Armenta, to unload boxes of sheetrock materials from the supervisor's truck into an 8 foot by 4 foot plywood box. This plywood box will be referred to as the "trash box". The trash box is secured to the forks of a forklift. The forklift raises the trash box to the various floors of the building where Claimant was working to collect trash and deliver materials to various floors of the building.

On February 8, 2021, Darrin Smith, the forklift operator, was asked by Mr. Armenta to use the forklift to raise some boxes of sheetrock material to the fourth floor of the building where Claimant was working. These are the materials Claimant was unloading from Mr. Armenta's truck. The sheetrock material boxes were estimated to be 1 foot by 1 foot and weigh about 50 pounds each. Mr. Smith estimated there were 10 to 15 material boxes in the trash box on February 8, 2021. The trash box could hold up to 50 boxes.

Mr. Smith had to move the forklift 40 or 50 feet to get it in position at the window on the fourth floor. Mr. Smith put on the emergency break and waited for the door to open on the fourth floor to know the materials were being unloaded. He estimated he placed the trash box within inches of the building wall. He estimated the space between the building

and the trash box was not large enough for a human foot to get between the building wall and the trash box.

Once the trash box was secured against the building, the unloading began with Claimant stepping into the trash box to lift the boxes out of the trash box and pass them to the other workers to stack. According to Claimant, he entered the trash box because there was no other means to unload the boxes. While Claimant was inside the trash box, it tipped off the forklift and fell four stories to the ground with Claimant in it.

Claimant was taken by ambulance to Research Medical Center. Claimant suffered extensive injuries, eighteen fractures, including fractures to his right leg, pelvis, clavicle and sternum. He spent a month and half in the hospital and as of April 2021 was bedridden.

Respondent believes if Claimant had secured himself with a safely harness he would not have been injured. According to Respondent, their practices and Occupational Health and Safety standards require workers to be secured with safety harnesses when employees are working 6 feet above ground.

There was a great deal of testimony from both parties about the presence or absence of a means to secure a safety harness on the fourth floor of the building where Claimant was working. There was testimony about a D-ring, ancala or butterfly clip, which are all the same thing. For the purposes of this decision, it will be referred to as the "D-ring". A D-ring is about 12 to 16 inches long, 4 inches wide and about 3 inches high. It is a circular item secured to a floor, a wall or beam. The D-ring is a tool used to secure a safety harness. A safety harness attaches to the D-ring using a lanyard.

Claimant used a safety harness when working above ground outside a building and once when he was working on a heating and cooling tower inside a building.

According to Claimant, there was no D-ring present on the fourth floor where he was unloading boxes where he could attach a safety harness. There was no other means on the fourth floor to secure a safety harness on February 8, 2021. On the day of his accident, Claimant was not instructed or reminded by his employer to use a safety harness to unload boxes from the trash box on the fourth floor.

Victor Hernandez was employed by Respondent at the time of Claimant's accident and was Claimant's roommate. On the day of Claimant's accident, he was working at the same job site as Claimant on the second floor. According to Mr. Hernandez, there was no D-ring on the fourth floor or other means to secure a safety harness at the time of Claimant's accident. A D-ring was installed immediately following Claimant's accident.

On February 8, 2021, Jason Villegas, a working foreman for Respondent, was not working at the same job site as Claimant. He was contacted by the Respondent after

Claimant's accident and was instructed to ascertain if a D-ring was on the fourth floor. Mr. Villegas was also instructed if there was not a D-ring, it should be installed. He did not know if there was a D-ring on the fourth floor at the time of Claimant's accident. Mr. Villegas agreed with Claimant one must step into the trash box to unload all the boxes.

February 8, 2021, was the first day Reymar Castillo was working at the same job site as Claimant. About an hour and half after Claimant's accident Mr. Castillo was instructed by Jason Villegas to install a D-ring on the fourth floor as close to the window as possible. According to Mr. Castillo, there were no other D-rings on the fourth floor until he installed the D-ring.

Juan Armenta testified D-rings had been installed on the fourth floor a week before work had started on the fourth floor.

Darrin Smith worked for one of the contractors, Haren Companies, on the same job as Claimant. Mr. Smith believed D-rings had been installed on all floors of the building where Claimant worked before Claimant's accident.

Shannon Hardesty, the owner of Respondent did not know if D-rings were installed on the fourth floor on February 8, 2021. Immediately after Claimant's accident, he instructed Jason Villegas to be certain D-rings were installed on not only the fourth floor, but all floors of the building where Claimant worked.

On February 8, 2021, Claimant was taken to Research Medical Center for treatment of his injuries. As part of trauma treatment protocol Research Medical Center has a urine sample was taken from Claimant for drug testing. Upon admission drug testing was ordered because different drugs have interactions with anesthesia. The drug test was done on the orders of the trauma surgeon Dr. Heidi Kemmer.

Jack Jensen is the laboratory director for Research Medical Center and is the custodian of records for Research Medical Center's pathology and laboratory departments. When a urine sample is collected in the emergency room for drug testing, the samples are hand carried to the laboratory for testing. According to Mr. Jensen, there is no confirmation testing done on the drug screens by mass spectrometry unless there is a request by the ordering physician. Research uses an Eminase runoff of a Siemens Vista platform for drug testing. If a legal purpose was present for the testing, Research would order a GC/MS confirmation, which would be sent to a reference lab. It was not requested in Claimant's case.

Blood was drawn for blood alcohol testing on Claimant at 8:08 a.m., on February 8, 2021, and received at 8:15 a.m. Claimant's results were negative for alcohol.

Claimant's urine was collected at 8:51 a.m. and was delivered to the lab and logged in at 8:55 a.m. The results of Claimant's drug screen were positive for amphetamines, THC or marijuana and cocaine. The only test results provided showed: THC greater than 50 nanograms per milliliter; amphetamines greater than 1,000 nanograms per milliliter and cocaine greater than 300 nanograms per milliliter. Mr. Jensen testified the exact numbers could be provided if necessary, but there would be no direct correlation with the true quantities. The thresholds set by the Research Medical Center laboratory are set at a fairly high level, so there is little risk of false positive results.

None of the Claimant's urine sample is available for further testing, as Research Medical Center only keeps those samples for seven days.

Research Medical Center laboratory uses a Mobilab system, a bar-coded specimen system. Bar codes are scanned off the patient's identification and the bar code on the samples. The two bar codes have to match. There is an electronic signature of the person who collected the sample and the person who received the sample. There are time stamps at the time the sample is received and when the results are done.

Mr. Jensen opined within a reasonable degree of medical certainty the drug test results are accurate for Claimant. According to Mr. Jensen, there is no way to confirm if Claimant was impaired at the time of his injury and whether the findings of the test would be relevant as to the proximate cause of the accident.

Claimant told the doctor he smoked cigarettes, drank beer and used marijuana and cocaine. Claimant admitted he drank 10 to 15 beers on the Saturday before his accident and he used a little cocaine. When pressed about the amount of cocaine, he invoked his right against self incrimination. When Claimant was asked about smoking marijuana, Claimant also invoked his right against self incrimination.

On February 8, 2021, Claimant's roommate Victor Hernandez spent about an hour with Claimant before going to work testified Claimant seemed normal to him. Claimant did not appear restless, drowsy, sleepy, angry, paranoid or non-responsive. Claimant's eyes were not red. He acknowledges he has seen Claimant smoke marijuana on his personal time.

On February 8, 2021, Juan Armenta, who did not see Claimant but for minute before his accident, observed Claimant looked tired and his eyes were red.

PRINCIPLES OF LAW AND ANALYSIS

Claimant appeals, arguing the ALJ's Order should be reversed as the evidence is not sufficient evidence to prove impairment and any alleged impairment was not contributory to the February 8, 2021, accident. Claimant agrees with the ALJ's conclusion

Respondent's safety defense failed because the injury did not result from Claimant's failure to use safety devices.

Respondent also appeals and argues the ALJ's Order should be affirmed to the extent benefits were denied due to Claimant's impairment from consumption of illegal drugs contributing to his injury. The ALJ should be reversed to the extent Claimant was found to not have willfully failed to use a reasonable and proper guard furnished by Respondent or recklessly violated the workplace safety rules and regulations.

K.S.A. 2020 Supp. 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.

In this case Respondent raised two affirmative defenses to Claimant's receiving workers compensation benefits. When an affirmative defense is raised the burden of proof is on the party raising the defense.[1]

1. Did Claimant willfully fail to use a reasonable safety guard against injury and/or recklessly violate safety rules?

No.

K.S.A. 2020 Supp. 44-501 states in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . .
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> . . .
>
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations;

[1] *See Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 53-54, 445 P.3d 1183 (2019), *rev. denied* February 25, 2020.

Respondent contends Claimant willfully failed to use a safety harness, which is a protection against accidental injury, constitutes a reckless violation of employer's safety rules.

The crux of this issue is whether in the area where Claimant was working had a D-ring, a device where a safety harness can be attached. If there is no means to use the safety harness provided by the employer, then it's rules cannot be followed and protection devices cannot be used.

The preponderance of the evidence is this case proves no D-ring was present on the fourth floor when Claimant had his accident. The Claimant and two other employees testified there was no D-ring or means to secure a safety harness on the fourth floor before Claimant had his accident. Respondent's evidence was either it was not certain a D-ring was on the fourth floor at the time of Claimant's accident, or it was a normal practice to have D-rings installed on all floors of the building where work was performed. However, none of the Respondent's witnesses could confirm a D-ring was on the fourth floor at the time of the time of Claimant's accident. There is testimony from one employee who was instructed by Mr. Villegas, who was instructed by Respondent's owner, to install a D-ring on the fourth floor shortly after Claimant's accident. At the time of the accident it was impossible for Claimant to use the safety harness or follow Respondent's safety rules. For these reasons is found and concluded Claimant did not recklessly violate a safety rule or willfully fail to use a safety device.

2. Are the results of Claimant's drug test admissible in accordance with K.S.A. 2020 Supp. 44- 501(b)(2)(B)?

Yes.

K.S.A. 2020 Supp.44-501 states in part:

> (2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:
>
> . . .
>
> (B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

In the recent case of *Woessner v. Labor Max Staffing*,[2] the Kansas Supreme Court held the results of drug test are admissible when collected in the course of medical treatment and are not subject to the conditions set out in K.S.A. 44-501(b)(3) for admissibility. The Supreme Court pointed out those requirements only relate to drug tests ordered by an employer. When a drug test is done in the course of medical treatment the requirements in K.S.A. 44-501(b)(3) do not apply.

In this case Claimant's drug test was administered pursuant to medical treatment and not at the order of the Respondent. The drug test results are admissible are therefore admissible even though the requirements set out in K.S.A. 44-501(b)(3) were not strictly followed.

3. Did Claimant's impairment due to drugs contribute to Claimant's accidental injury, which would deny Claimant compensation?

No.

The results of Claimant's drug test create a presumption Claimant was impaired.[3] But, K.S.A. 2020 Supp. 44-501(b)(1)(D) states such results create a rebuttable presumption the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption by clear and convincing evidence

In the *Woessner* case,[4] the Kansas Supreme Court affirmed the Appeals Board's finding despite the admissible drug test results creating a presumption of impairment, the claimant rebutted the presumption with testimony of claimant's co-worker. The co-worker testified the claimant was a careful worker and did not notice the claimant acting any differently than he normally did. The co-worker also denied seeing signs of marijuana use by the claimant.

The facts in this case are similar. The drug test results create a presumption Claimant was impaired. Claimant's roommate, who spent more time around Claimant than anyone else on the morning before Claimant's accident, testified Claimant acted normal. Mr. Hernandez also answered in the negative to any questions about symptoms of impairment Claimant could have had.

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[2] *Woessner v. Labor Max Staffing*, 312 Kan. 36, 471 P.3d 1 (2020).

[3] K.S.A. 2020 Supp. 44-501(b)(1)(C).

[4] *Woessner*, 312 Kan. 36 at 52.

The director of the laboratory where the drug test was performed could not confirm, based on the results of Claimant's drug test, Claimant was impaired at the time of his accident, or the drug results showed a proximate cause of Claimant's accident.

The undersigned finds Claimant overcame the rebuttable presumption of impairment by clear and convincing evidence and Claimant's alleged impairment did not contribute to his accident.

Claimant is not denied compensation for his accidental injuries. Claimant did not willfully fail to use a reasonable safety guard or recklessly violate the employer's work place safety rules. Secondly, Claimant's impairment did not contribute to Claimant's accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated June 28, 2021, is reversed in part, affirmed in part and is remanded to the ALJ to determine an award of compensation consistent with this order.

IT IS SO ORDERED.

Dated this _____ day of August, 2021.

_____
HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

C. Albert Herdoiza, Attorney for Claimant
Samantha Benajmin-House, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[5] K.S.A. 2020 Supp. 44-534a.