

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANDREW BARTELL
Claimant

v.

AMARR CO A SUB CHAPTER S CORP
Respondent

AP-00-0461-296
CS-00-0459-441

and

TRAVELERS PROPERTY CASUALTY CO OF AMERICA
Insurance Carrier

ORDER

Claimant requests review of the September 22, 2021, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Roger D. Fincher appeared for Claimant. Katharine M. Collins appeared for Respondent and 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, held September 21, 2021, including Claimant's Exhibits A1-4 and Respondent's Exhibits B1-3; and the pleadings and orders contained in the administrative file.

ISSUES

1. Should the claim for benefits be denied under K.S.A. 44-501(b)(1)(E) because Claimant refused to submit to a drug test at the request of Respondent?
2. Does the Appeals Board possess authority to consider Respondent's request for review of the preliminary order for payment of past medical expenses?

3. If the Appeals Board possesses authority to review the preliminary order for payment of past medical expenses, did ALJ Roth err in ordering Respondent to pay past medical expenses?

FINDINGS OF FACT

Claimant worked for Respondent as a laborer assembling garage doors. Claimant initially worked for Respondent through a temporary agency, and was formally hired by Respondent in June 2021. As part of the hiring process, Claimant digitally signed a form confirming he received a Team Member Handbook containing Respondent's drug testing policy. Although Claimant signed the form, he testified he was not aware of Respondent's drug testing policy or had the drug testing policy explained to him. Respondent's drug testing policy states, in part:

Team members are subject to testing when they cause or contribute to accidents that seriously damage a Entrematic vehicle, machinery, equipment or property or result in an injury to themselves or another Team member requiring offsite medical attention. A circumstance that constitutes probable belief will be presumed to arise in any instance involving a work-related accident or injury in which a Team member who was operating a motorized vehicle (including a Entrematic forklift, pickup truck, overhead cranes, roll formers, press brakes and aerial/man-lifts) is found to be responsible for causing the accident. In any of these instances, the investigation and subsequent testing must take place within twenty four hours following the accident, if not sooner. Under no circumstances will the Team member be allowed to drive himself or herself to the testing facility.¹

On August 5, 2021, Claimant was at work, and walked past a two-foot long piece of metal. Claimant's left lower leg brushed against a sharp edge of the metal and he sustained a laceration. Respondent was notified. After first-aid and completion of an accident report, Claimant was transported by Respondent to Lawrence Memorial Hospital. Claimant received stitches for the laceration. Claimant testified he did nothing wrong when the accident occurred.

While Claimant was at the hospital, Respondent requested the hospital perform a drug test by urinalysis, citing Respondent's post-accident drug testing policy. Claimant was asked to undergo the drug test. Claimant admitted he refused to undergo the drug test at the hospital.² Claimant, however, testified he was willing to undergo a drug test via oral swab at Respondent's location. According to Claimant:

¹ P.H. Trans., Cl. Ex. A4 at 5.

² P.H. Trans. at 17.

I was asked. It was against my morals, though. I did not want to put anybody at risk contracting COVID at 2:00 a.m. at the only hospital in town and the only place that's open during a viral epidemic is probably the worst place to be, especially with an injured leg, and I don't want to waste the doctor's time or the nurse's time or the healthcare professional that is conducting the test due to the fact that there's heroin addicts out there for sure, people taking Fentanyl that can come into the ER at any time and they could possibly need these tests that are essential, and you have to respect the ER and the professionals that work there.³

Claimant subsequently testified he refused to undergo the drug test because:

Well, COVID is just a partial problem. The same test would be one that you would rule out someone that was suffering from the Fentanyl or a heroin overdose and that is in the emergency room when it's the only facility open at 2:00 o'clock in the morning, you don't want to take the chances with people's lives. There could be a theoretical situation where someone was dying of a Fentanyl overdose and if that medical professional was busy performing a frivolous test, someone very easily could die.⁴

The drug test was never performed at the hospital.

After Claimant was released from the hospital, he sent a text message to his supervisor resigning his employment. Claimant never appeared at Respondent's location to undergo the drug test he claimed he was willing to undergo. Respondent did not request Claimant undergo a drug test at their location. Claimant received no further medical treatment. Respondent denied responsibility for payment of the medical bills incurred at Lawrence Memorial Hospital.

Mr. McCurdy, Respondent's Safety Administrator, confirmed the contents of Respondent's drug testing policy and its enforcement.

Claimant sought payment of the bills incurred at Lawrence Memorial Hospital, as well as additional medical treatment for scarring and ongoing pain, and a preliminary hearing took place. Respondent confirmed it did not dispute Claimant's laceration was caused by an accident arising out of and in the course of his employment, notice, the employment relationship or coverage under the Act. Respondent argued compensation should be denied under K.S.A. 44-501(b)(1)(E).

³ *Id.* at 16-17.

⁴ *Id.* at 20-21.

ALJ Roth issued the Preliminary Hearing Order granting Claimant's requests in part. ALJ Roth found Respondent's drug testing policy clearly authorized post-injury drug testing. Claimant was obligated to follow Respondent's drug testing policy because he received the Team Member Handbook and because Claimant caused an accident resulting in an injury requiring off-site medical treatment. ALJ Roth found Claimant refused to undergo the drug test requested by Respondent, and Claimant lacked authority to dictate the location and manner of testing. ALJ Roth concluded Claimant forfeited his right to workers compensation benefits when he refused to undergo the drug test at the hospital. ALJ Roth, however, ordered Respondent to pay the bills incurred at Lawrence Memorial Hospital because the bills represented services incurred before Claimant forfeited his right to workers compensation benefits. This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues ALJ Roth erred because Claimant sustained a compensable left lower leg injury. With regard to Respondent's drug testing policy, Claimant argues it is unclear, and Claimant did not cause or contribute to the accident giving rise to a need for testing. Claimant also argues he did not refuse to undergo drug testing, and was willing to undergo testing at Respondent's location. Respondent argues ALJ Roth correctly ruled Claimant forfeited his right to compensation by refusing to undergo the drug testing requested by Respondent at the hospital. Respondent also asks the Appeals Board to reverse the order for Respondent to pay the bills incurred at Lawrence Memorial Hospital.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.⁵ The provisions of the Workers Compensation Act shall be applied impartially to all parties.⁶ The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.⁷ Respondent and Insurance Carrier, however, have the burden of proving any statutory defenses or exceptions.⁸

⁵ See K.S.A. 44-501b(a).

⁶ *Id.*

⁷ See K.S.A. 44-501b(c).

⁸ See *Johnson v. Stormont Vail Healthcare Inc.*, 57 Kan. App. 2d 44, 53, 445 P.3d 1183 (2019) *rev. denied* 311 Kan. 1046 (2020).

1. Claimant refused to submit to a drug test at Respondent's request under a policy clearly authorizing post-injury testing, and Claimant's right to compensation was forfeited.

The Appeals Board first considers whether ALJ Roth erred in determining Claimant forfeited his right to workers compensation benefits. The Workers Compensation Act states an employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits if the employer's policy clearly authorizes post-injury testing.⁹ When a workers compensation statute is plain and unambiguous, a court must give effect to its express language.¹⁰

Claimant argues Respondent's policy authorizing post-injury drug testing is not clear and does not apply to Claimant because he did nothing to cause or to contribute to the accident. Claimant received an employment manual containing Respondent's drug testing policy. The portion of Respondent's policy authorizing post-injury drug testing states, "Team members are subject to testing when they cause or contribute to accidents that seriously damage a Entrematic vehicle, machinery, equipment or property or result in an injury to themselves or another Team member requiring offsite medical attention." The plain and ordinary language of this provision indicates any employee is subject to testing if the employee causes or contributes to an accident causing an injury requiring offsite medical treatment. This language is sufficiently clear to satisfy K.S.A. 44-510(b)(1)(E).

Claimant next argues he is not bound by Respondent's post-injury drug test policy because he did not cause or contribute to the accident because he was not negligent or otherwise culpable. The plain language of Respondent's policy does not state an employee must negligently cause or contribute to the accident. Moreover, Claimant caused or contributed to the accident by walking against the piece of metal, which caused the injury. Claimant's argument fails.

Finally, Claimant argues his behavior does not constitute a refusal to submit to a post-accident drug test. Claimant admitted he refused to undergo the drug test at the hospital. Claimant testified he refused because of concern of COVID and because he did not want hospital personnel spending time and resources administering a test a potential overdose patient may require. The plain language of K.S.A. 44-510(b)(1)(E) does not contain an exception allowing an employee to refuse to undergo a drug test, and does not allow an employee to dictate the location or method of drug testing. Regardless of his motivation, Claimant refused to submit to a post-accident drug test clearly authorized by Respondent's policy. The forfeiture of benefits under K.S.A. 44-510(b)(1)(E) is affirmed.

⁹ See K.S.A. 44-501(b)(1)(E).

¹⁰ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

2. The Appeals Board does not possess legal authority at this time to separately consider Claimant's request for additional medical treatment or Respondent's request to reverse the order for payment of past medical expenses.

The Appeals Board next considers Respondent's request for reversal of the order of payment of past medical expenses. The Board possesses the authority to review preliminary orders on disputed issues of whether the employee suffered an accident, repetitive trauma or resulting injury; whether the injury arose out of and in the course of employment; whether notice was given; or whether certain defenses apply.¹¹ "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.¹² If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.¹³

Whether Respondent should be ordered to pay past medical expenses is not an issue concerning the compensability of Claimant's injury. The Appeals Board does not have jurisdiction under K.S.A. 44-534a to consider the issue at this time. The request for review of this issue is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Preliminary Hearing Order of Administrative Law Judge Steven M. Roth, dated September 22, 2021, is affirmed. Respondent's request for review of the order for payment of past medical expenses is dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2021.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR
Roger D. Fincher
Katharine M. Collins
Hon. Steven M. Roth

¹¹ See K.S.A. 44-534a(a)(2).

¹² See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

¹³ *Id.* at 676.