BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RYAN BENNETT	)	
Claimant	)	
V.	)	
	)	AP-00-0483-332
RENTAL MANAGEMENT SOLUTIONS, LLC	)	CS-00-0480-539
Respondent	)	
AND	)	
	)	
KANSAS BUILDERS INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 22, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) David J. Bogdan.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Edward D. Heath, Jr., appeared for 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 transcript of the Preliminary Hearing held March 6, 2024, with exhibits attached, and the documents of record filed with the Division.

ISSUES

1. Did Claimant forfeit workers compensation benefits pursuant to K.S.A. 44-501(b)(1)(E) by refusing to submit to a post-injury chemical test?

2. What is the prevailing factor causing Claimant's injury and medical condition?

FINDINGS OF FACT

Claimant began working for Respondent in August 2023. As part of the hiring process, Claimant signed a document indicating he reviewed and understood the Employee Handbook, including its chemical testing policy. Respondent's policy states:

> Each employee, as a condition of employment, will be required to participate in pre-employment, random, post-accident, reasonable suspicion and follow-up testing upon selection or request of management.[1]

On October 9, 2023, Claimant lost his balance while working on a ladder and fell to the sidewalk, dislocating his right shoulder. Claimant was alone at the job site at the time of the incident. Shortly thereafter, Matthew Smith, Claimant's coworker, returned from his lunch break and found Claimant lying on the ground. Mr. Smith helped Claimant pop his shoulder back into place. Claimant testified he was familiar with this type of injury because he had dislocated his right shoulder 12 years earlier, while playing softball.

Kim Filby, Respondent's general manager, was contacted. Ms. Filby directed Claimant to get medical treatment at Tallgrass, an occupational medical facility. Claimant declined. Claimant testified he declined medical treatment because he "didn't think [he] needed it. Didn't think the injuries were that severe."[2] Claimant stated he was not impaired or under the influence of drugs or alcohol at the time of the accident.

Mr. Smith provided a witness statement of the incident and testified at the preliminary hearing. Mr. Smith initially called Ms. Filby to inform her Claimant's shoulder was injured. He was instructed to stop working and take Claimant to Tallgrass for a work-related injury. When Mr. Smith relayed this to Claimant, Claimant "got mad and said, 'Why can't you motherfuckers keep your mouths shut and just help out. I am not going to Tallgrass I will not pass a drug test due to weed.'"[3] Mr. Smith called Ms. Filby back to inform her Claimant denied treatment. Mr. Smith testified:

> I called [Ms. Filby] and she answered, and I handed [Claimant] the phone and it was on speaker. And at that time Travis was involved with the call. Um, [Claimant] had got on there and said that he was not going to go to Tallgrass for workman's comp because he would not pass the drug test due to marijuana. He told Travis that.[4]

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[1] P.H. Trans., Resp. Ex. 1 at 1.

[2] P.H. Trans. at 10.

[3] *Id.*, Resp. Ex. 3 at 3.

[4] P.H. Trans. at 35.

Travis Maurath, Respondent's owner, left the office for the job site as soon as the call with Ms. Filby and Claimant ended. Upon his arrival at the site, Mr. Maurath intended to take Claimant to Tallgrass for medical treatment. Mr. Maurath testified Claimant was concerned "he would test dirty" at Tallgrass and declined treatment.[5] Mr. Maurath testified:

> Q. During that conversation what did you tell [Claimant] about the necessity for him to be tested after his workers compensation injury?
>
> A. I don't know that I – I don't know that I instructed him of the necessity. I would have told him that it was part of our policy.[6]

Mr. Maurath directed Claimant to return to the office and provide a statement confirming his refusal of medical treatment.

Claimant testified no one requested that he submit to a drug test regardless of whether he went to Tallgrass. Mr. Smith agreed he heard both Ms. Filby and Mr. Maurath direct Claimant to Tallgrass, but he did not hear them specifically tell Claimant to submit to a drug test. Mr. Maurath testified he informed Claimant drug testing would be done at the medical facility. Mr. Maurath stated he tells employees who have been injured they need to submit to a chemical test if they require medical treatment.

Claimant testified he was concerned about chemical testing because he had smoked marijuana over two weeks prior to the accident. Claimant stated he was not under the influence of drugs or alcohol on October 9, 2023. Mr. Smith and Mr. Maurath testified Claimant did not seem impaired on the day of the accident.

Claimant returned to work the following day, October 10, 2023, with pain in his right shoulder. Claimant's symptoms worsened until he could no longer raise his arm above his head, and he informed Ms. Filby he was going to make an appointment with his personal physician. Claimant testified Ms. Filby told him to "keep her posted" but did not instruct him to go to Tallgrass or submit to a drug test.[7]

Claimant received treatment for his right shoulder at Cotton O'Neil under his personal insurance. Cotton O'Neil Family Medicine records, dated October 17, 2023, record a discussion about obtaining an x-ray to rule out fractures due to the traumatic

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[5] *Id.* at 42.

[6] *Id.* at 42-43.

[7] *Id.* at 14.

nature of the injury, Claimant's age, and "first dislocation."[8] Cotton O'Neil Orthopedics and Sports Medicine records, dated October 23, 2023, state Claimant "has never had a dislocation in the past."[9] Also noted is an additional incident, occurring at Claimant's home, where his shoulder dislocated and returned to its socket while reaching across a table. Claimant agreed he reported a second dislocation event; however, Claimant denied reporting the work injury as a first dislocation.

On November 14, 2023, Dr. Brian Wilson performed a right shoulder rotator cuff repair. Claimant treated with Dr. Wilson post-operatively, including physical therapy, but did not improve. Dr. Wilson referred Claimant to Dr. Jake Diester for a right shoulder replacement on February 12, 2024. Claimant testified the replacement surgery has not been scheduled due to a lack of insurance. Claimant explained he no longer has health insurance because he has not worked anywhere since October 10, 2023, and cannot afford it. Claimant stated he kept Respondent informed of his medical treatment throughout and provided his restrictions, but he was never offered an accommodated position.

The ALJ denied Claimant's preliminary hearing requests, finding he failed to comply with the recommended treatment and testing offered by Respondent pursuant to K.S.A. 44-501b(1)(E). The ALJ determined Claimant's refusal of medical treatment was "more than a matter of neglect or omission but seems more in line with a refusal . . . with at least a mental determination not to comply, if not a positive denial of the application or command."[10] The ALJ did not address the prevailing factor issue.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues he was never asked or instructed by Respondent to submit to a chemical test; therefore, there was no refusal of said testing. Claimant contends the credible evidence supports the work accident occurring October 9, 2023, was the prevailing factor causing his injury and medical condition.

Respondent argues the ALJ's Order should be affirmed. Respondent maintains the issue of prevailing factor is rendered moot by the ALJ's ruling, but preserves the issue, noting facts supporting an additional injury after the date of accident and the lack of evidence supporting Claimant's prevailing factor argument.

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[8] P.H. Trans., Cl. Ex. 1 at 41.

[9] *Id.* at 50.

[10] ALJ Order (May 22, 2024) at 4.

Did Claimant forfeit workers compensation benefits pursuant to K.S.A. 44-501(b)(1)(E) by refusing to submit to a post-injury chemical test?

An employee's refusal to submit to a chemical test at the employer's request results in 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.[11] A "refusal" requires an element of willfulness or intent.[12]

Respondent's policy required a chemical screening in the event of a work-related accident. Claimant testified he knew about the policy. After his work-related injury, Claimant was directed to seek treatment at Tallgrass occupational medicine, Respondent's authorized medical provider for work-related accidents. Claimant declined, knowing Tallgrass was Respondent's choice of clinics.

Mr. Smith was instructed to take Claimant to Tallgrass for examination and informed Claimant. Claimant was angered by the instructions and told Mr. Smith he was not going to Tallgrass because he would not pass a drug test due to weed. Mr. Maurath was also instructed and attempted to take Claimant to Tallgrass, but Claimant refused because he was concerned he would fail the chemical test.

The Kansas Supreme Court, in *Carter v. Koch Engineering,* defined "willful" as follows:

> [T]he meaning of the word "willful," as used in the statute includes the element of intractableness, the headstrong disposition to act by the rule of contradiction.... "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)[13]

Claimant was certainly acting by the rules of contradiction in his adamant refusal to accept the referral to Tallgrass. His refusal to accept Respondent's authorized medical treatment provider was based solely upon his desire not to take a drug test. While Respondent did not formally ask Claimant to undergo a drug screening, Claimant clearly knew one would be required. The undersigned agrees with the conclusion of the ALJ and finds Claimant willfully refused to submit to a post-accident chemical screening, resulting in the forfeiture of benefits under the workers compensation act.

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[11] See K.S.A. 44-501(b)(1)(E).

[12] *Neal v. Hy–Vee, Inc.* 277 Kan. 1, 16, 81 P.3d 425 (2003).

[13] *Carter v. Koch Engineering,* 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987) (quoting *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 P. 934 [1920]).

The prevailing factor issue is moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ David J. Bodgan dated May 22, 2024, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2024.

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SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent and its Insurance Carrier
Hon. David J. Bogdan, Administrative Law Judge