

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>KENNETH WILKERSON</b>	)	
Claimant	)	
V.	)	
	)	
<b>JDK TRUCKING, LLC</b>	)	AP-00-0495-311
Respondent	)	CS-00-0494-165
AND	)	
	)	
<b>KANSAS TRUCKERS RISK MGMT GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

The respondent and its insurance carrier (respondent), through David Menghini, requested review of Administrative Law Judge (ALJ) Brian Brown's preliminary hearing Order dated March 12, 2026. Phillip Slape appeared for the claimant.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) transcript of preliminary hearing, held March 2, 2026, with exhibits; (2) transcript of the claimant's deposition, taken March 2, 2026; (3) transcript of David Smith's deposition, taken March 2, 2026; and (4) documents of record filed with the Division, including the parties' briefs.

**ISSUES**

1. Did the claimant's injury arise out of and in the course of his employment?
2. Did the ALJ exceed his authorization and/or jurisdiction in granting benefits?
3. Did the claimant violate K.S.A. 44-501(a)(1)?
4. Did the claimant willfully fail to use a guard or protection?
5. Did the claimant recklessly violate safety rules and/or regulations?

**FINDINGS OF FACT**

The claimant worked for the respondent as a truck driver for approximately 14 years. On December 9, 2025, the claimant was transporting approximately 80 head of cattle from Tulsa, Oklahoma, to Beaumont, Kansas. He remembers passing Cherryvale, Kansas, on US 169. He does not recall anything after that point. There is a railroad crossing about a quarter mile after Cherryvale, following a curve in the road. At around 11:00 a.m., the Peterbilt semi-truck the claimant was driving struck a moving train crossing US 169.

The claimant's next memory was waking up at Mercy Hospital in Springfield, Missouri, where he was admitted for facial fractures and cervical spinous process fractures at C6-7. The hospital record reflects the claimant was not wearing a seat belt at the time of the accident.<sup>1</sup> The claimant was discharged on January 2, 2026, and transferred to Ascension Via Christi Rehabilitation Hospital, where he remained until January 14, 2026. On January 19, 2026, Roy Cole, DDS, an oral surgeon, restricted the claimant from driving until seen by an ophthalmologist. The discharge record shows the claimant was scheduled to be examined by Ascension Via Christi Stroke Clinic on February 13, 2026.

The "Kansas Motor Vehicle Crash Report", dated December 9, 2025, showed the claimant was unable to stop "for an unknown reason" before striking the crossing arm and moving train railcar. It was unknown whether the claimant was restrained.<sup>2</sup> The Kansas Highway Patrol Driver/Vehicle Examination Report completed that same day stated, in part:

CMV WAS INVOLVED IN A CRASH. SUBJECT APPEARED TO HAVE BEEN DISTRACTED AND DIDN'T SEE THE TRAIN TRAVELING ACROSS THE HIGHWAY. DRIVER LOCKED UP HIS BRAKES LESS THAN 200 FEET FROM THE TRAIN AND HIT THE TRAIN.

WHEN EMERGENCY [PERSONNEL] GOT TO HIM, HIS PHONE WAS LAYING ON THE FLOOR PLAYING A TV SHOW.<sup>3</sup>

The claimant was cited for having an improperly located television/video display device and no phone holder was found. He was cited for using a cell phone while operating a commercial motor vehicle. The claimant was not cited for failure to use a seatbelt.

The claimant acknowledged the highway patrol found his phone playing a show after the crash.<sup>4</sup> His testimony was based on what other people told him, as he has no recollection of the events just before and after the accident. The video was an episode of "Benson." He testified the radio did not work in the truck so he played YouTube videos on his phone for background noise. The phone was kept in a holder, located on the dash to the right of the steering wheel, while driving. The claimant agreed he is not supposed to watch videos while driving and testified it was just for background noise. He used a hands-free headset whenever he was talking on the phone.

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<sup>1</sup> See P.H. Trans., Cl. Ex. 1.

<sup>2</sup> *Id.*, Resp. Ex. B at 5.

<sup>3</sup> *Id.*, Resp. Ex. A at 2.

<sup>4</sup> See *id.*, Resp. Ex. C.

The claimant does not remember whether he was wearing a seat belt at the time of the accident. He testified if he was not wearing a seat belt, it was not intentional. It would have been because he was in a hurry after loading cattle. He stated there were several trucks waiting to load behind him. He testified it was his normal practice to wear a seat belt. He denied ever being ticketed by law enforcement or reprimanded for not wearing a seat belt while working for the respondent.

David Smith is the respondent's owner. He drove the route the claimant had taken many times. He testified there is nothing obstructing a driver's view of the railroad tracks following the curve in the road.

Mr. Smith acknowledged he would sometimes call his drivers while they were driving. He testified when DOT passed a law preventing drivers from being on their phones, he purchased a hands-free headset for each driver and told the drivers it was their responsibility to purchase any replacements. He also told them it was to comply with DOT regulations and state law. Mr. Smith stated the cell phone must be mounted and the employee must use voice activation to answer it. It is against policy to look at or touch the phone while driving. There was no prohibition on drivers listening to the radio. Mr. Smith was unaware the radio in the claimant's truck was not working. Contrary to the indication in the Kansas Highway Patrol report, Mr. Smith testified there was (and still is) a phone holder mounted to the dash of the truck.

Mr. Smith denied ever having to discipline any of the drivers about improperly using their cell phone while driving. He testified if a driver violated the policy, the driver would be reprimanded for a first violation, taken off work for a second violation, and terminated for a third violation. He indicated he would use the same approach for a seat belt violation.

The ALJ stated, "There is no dispute that Claimant's accident arose out of and in the course of his employment with Respondent."<sup>5</sup> He further stated, "Watching a video on a phone while operating a car, let alone a full cattle truck, is textbook negligent driving" and the claimant merely being tempted to glance at a video in such circumstances borders on recklessness.<sup>6</sup> However, the ALJ found the possibility the claimant was distracted by his phone was speculation – the claimant might have been watching the video, not paying attention or drifting off to sleep. Of note, the ALJ specified the court took the claimant's testimony at face value, accepting the claimant's testimony he listened to his phone just as he would a radio. The ALJ concluded the claimant playing a YouTube video while driving was not, in this instance and under these facts, "reckless" under Kansas law. Finally, the ALJ concluded the claimant failed to wear his seat belt, but his failure to wear

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<sup>5</sup> P.H. Order at 6.

<sup>6</sup> *Id* at 7.

a seat belt at the time of his accident was not reckless under Kansas workers compensation law. The ALJ again specifically accepted the claimant's testimony to show he simply had an isolated lapse in judgement in not wearing the seat belt, as opposed to a pattern of willful noncompliance. The claimant was awarded temporary total disability benefits and medical treatment, which had been requested at the hearing.

### PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the claimant's claim is not compensable because he violated the respondent's safety policies. The respondent contends the claimant watching his phone at the time of the accident falls directly within the bounds of the definition of "recklessness." The respondent further contends the claimant's extensive practice of wearing a seat belt suggests the claimant's failure to wear a seat belt created a high degree or risk of physical harm and was taken in conscious disregard or indifference to that risk. The claimant maintains the Order should be affirmed.

K.S.A. 44-501b(c) states the claimant carries the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends. Under K.S.A. 44-508(h), the trier of fact shall consider the whole record. The burden of proving an affirmative defense is on the employer.<sup>7</sup>

The Board possesses authority to review *de novo* all decisions, findings, orders and awards of compensation issued by administrative law judges.<sup>8</sup> A *de novo* hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the administrative law judge.<sup>9</sup> Although the Board frequently gives some credence to an administrative law judge's credibility determination of witnesses who testify live,<sup>10</sup> the Board is not required to do so and may modify an award as it deems necessary.<sup>11</sup>

K.S.A. 44-501(a) states:

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<sup>7</sup> See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Foos v. Terminix*, 277 Kan. 687, 693, 89 P.3d 546 (2004).

<sup>8</sup> K.S.A. 44-555c(a).

<sup>9</sup> See *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2017 WL 2991555 (Kan. WCAB June 22, 2017).

<sup>10</sup> See *Parker v. Deffenbaugh Industries, Inc.*, Nos. 1,069,143, 1,069,144 and 1,069,145, 2014 WL 5798471 (Kan. WCAB Oct. 14, 2014).

<sup>11</sup> See *Samples v. City of Glasco*, No. 265,499, 2011 WL 2693241 (Kan. WCAB June 22, 2011).

(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

. . .

(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;

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

Black's Law Dictionary, defines "willful misconduct of employee":

Under workers' compensation acts, precluding compensation, means more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences.<sup>12</sup>

*Carter* states, "[The] 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."<sup>13</sup>

Regarding the definition of "reckless," *Anderson* states:

The applicable workers compensation statutes do not define recklessness. Accordingly, courts determining whether an employee recklessly violated an employer safety policy for the purposes of K.S.A. 2017 Supp. 44-501(a)(1)(D) look to other areas of law for guidance. This court has looked to the Restatement (Second) of Torts and statutory criminal law for definitions of recklessness for prior workers compensation cases. [Citation omitted].

The Restatement (Second) of Torts § 500(a) (1965) recognizes two kinds of reckless conduct. In the first, "the actor knows, or has reason to know ... of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." In the second, "the actor has such knowledge, or reason to know, of the facts,

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<sup>12</sup> Black's Law Dictionary 1600 (6<sup>th</sup> ed. 1990).

<sup>13</sup> *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.”

Under the Kansas Criminal Code, a person acts recklessly “when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” K.S.A. 2017 Supp. 21-5202(j).<sup>14</sup>

**1. The claimant’s injury arose out of and in the course of his employment.**

The ALJ concluded there was no dispute the claimant’s accident arose out of and in the course of his employment. This is true. The focus is whether safety defenses disallow payment of compensation.

**2. The ALJ did not exceed his authorization and/or jurisdiction in granting benefits?**

The ALJ was within his authorization and jurisdiction to award benefits. K.S.A. 44-534a allows a preliminary award of medical treatment and temporary disability benefits.

**3. The claimant did not violate K.S.A. 44-501(a)(1).**

**4. The claimant did not wilfully fail to use a guard or protection.**

**5. The claimant did not recklessly violate safety rules and/or regulations.**

The respondent’s defenses concern allegation the claimant was watching a YouTube video and not wearing a seat belt.

Recklessness contemplates something beyond ordinary negligence or carelessness. To conclude the claimant acted with recklessness, the preponderance of the credible evidence must support a deliberate and conscious disregard of a known or obvious risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence, but is a lesser standard than intentional conduct. Recklessness concerns the conscious disregard of a substantial and unjustifiable risk and involves a gross deviation of care.

Willfulness is similar, as it is more than mere negligence. It has been defined as acting with intractable contradiction. Willfulness is intentionally doing something likely to result in serious injuries, or acting with reckless disregard to the risk of injury.

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<sup>14</sup> *Anderson v. PAR Elec. Contractors, Inc.*, No. 118,999, 2018 WL 6074279, at \*7-8 (Kansas Court of Appeals unpublished opinion filed Nov. 21, 2018).

This evidence is conflicting and speculative. This is a close case. The ALJ, who witnessed the claimant's preliminary hearing testimony, specifically found the claimant to be generally credible. The ALJ believed the claimant's testimony he was playing the YouTube video as background, akin to a radio. Playing a radio would not be a safety violation.

The evidence does not establish the claimant acted recklessly. The preponderance of the credible evidence does not support a deliberate and conscious disregard of a known or obvious risk exceeding negligence.

The evidence does not establish the claimant acted willfully. The claimant testified he regularly used a seat belt. The evidence is conflicting whether the claimant was wearing a seat belt. He was not cited for failure to use a seat belt. However, if he was not wearing a seat belt, it was a matter of oversight or mistake, not a matter of willfully refusing to wear a seat belt. The claimant has never received a traffic ticket for failure to wear a seat belt and he was never disciplined for failure to use a seat belt.

The Board agrees with the ALJ's finding the claimant was negligent. He failed to keep a proper lookout. Mere inattentive driving is not recklessness.

At this juncture, the respondent did not prove the claimant recklessly violated the respondent's safety rules or willfully failed to use a seat belt. The evidence does not establish the claimant's injuries were the result of recklessly violating the respondent's safety rules or intentionally not wearing a seat belt. The ALJ's preliminary Order is affirmed.

**WHEREFORE**, the undersigned Board member affirms the preliminary hearing Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2026.

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JOHN F. CARPINELLI  
BOARD MEMBER

c: (via OSCAR)  
Phillip Slape  
David Menghini  
Hon. Brian Brown