

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>AMY KRAFT</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0474-538
<b>METRO COURIER, INC.</b>	)	CS-00-0461-954
Respondent	)	
AND	)	
	)	
<b>KS TRUCKERS RISK MGMT GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the March 21, 2023, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant.

**APPEARANCES**

Phillip B. Slape appeared for Claimant. Todd Cowell appeared for Respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, the documents of record filed with the Division and the following:

1. Evidentiary Deposition of Greta Azember taken Nov. 7, 2022 with attached exhibits;
2. Preliminary Hearing held January 24, 2023, with attached exhibits.

**ISSUE**

Was Claimant's conduct a reckless violation of Respondent's workplace safety rules and procedures?

**FINDINGS OF FACT**

The essential facts are not in dispute. Claimant became employed with Respondent as a courier driver on September 5, 2018. She loaded and unloaded a vehicle and delivered the items loaded.

On August 9, 2021, Claimant was driving a company vehicle in the middle of the day, on a flat, straight surface. She was smoking a cigarette. There were no cars or obstacles on the road. The van veered to the left and off the road. When Claimant steered the vehicle back onto the road, she lost control causing the vehicle to roll. Claimant testified she vaguely remembered the accident. She remembered looking up after looking down and then blacking out.

Respondent's van had a video recording system. It recorded a split-screen with one camera pointed toward the front windshield showing the road and one camera pointed at the driver of the vehicle.

Claimant was taken by ambulance to Ascension Via Christi St. Francis. Those records state Claimant lost consciousness and had no memory of the accident. Claimant suffered multiple broken vertebrae in her cervical spine, as well as a fractured left occipital condyle. Dr. Ashley Barks performed an anterior cervical discectomy and fusion at C5-6 on August 11, 2021. Claimant was hospitalized through August 18, 2021.

Respondent terminated Claimant's employment on August 20, 2021, because of damage to company property because of a violation of the employee policy prohibiting smoking.<sup>1</sup>

Claimant testified she regularly smoked inside company vehicles while driving, despite knowing it was prohibited. She did so because Respondent did not enforce the rule. Claimant was aware of co-workers who smoked in company vehicles and could often smell cigarette smoke when driving them. Claimant testified Respondent did not tell her smoking in company vehicles was a safety violation and she was not told to stop smoking. Claimant stated she had never been reprimanded for smoking. While driving company vehicles, Claimant was allowed to have drinks and to listen to the radio.

Mark Bledsoe was a former Respondent employee and co-worker with Claimant. He testified at the January 24, 2023, preliminary hearing. Mr. Bledsoe retired shortly before Claimant's accidental injury. He testified smoking was against company policy, but he smoked in company vehicles and he was aware of several drivers who did as well. He believed Respondent permitted smoking in company vehicles unless non-smoking drivers

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<sup>1</sup> Azember Depo. at 19.

complained of the smoke smell. He testified Respondent did not tell him smoking in the company vehicles was a safety issue.

Greta Azember has been Respondent's HR Director since September, 2020. She testified Respondent has courier vehicles and box trucks in Kansas. Claimant drove a courier vehicle. She testified Claimant was terminated because she wrecked a company vehicle while smoking, which caused the motor vehicle accident and is a safety violation. Smoking while driving is a safety violation because it is a distraction. Ms. Azember testified there is not any paperwork supporting her testimony smoking in a vehicle is a safety violation. The only mention of smoking contained in Claimant's employee file is located in the employee manual and it does not appear under the safety section of the manual.

The ALJ found Claimant's conduct may have been negligent, but not reckless, as contemplated by K.S.A. 44-501(a)(1)(D). She stated:

Although the Court agrees that it is questionable whether Respondent's policy prohibiting smoking in its vehicles constitutes a safety rule and whether Respondent consistently enforced that rule, even if the Court considers it to be a consistently enforced safety rule, the Court does not believe that Claimant's actions of smoking while driving Respondent's vehicle rise to the level of reckless conduct as contemplated by K.S.A. 44-501(a)(1)(D). Claimant's action of smoking while operating a vehicle is not conduct that involves a risk of harm to others substantially in excess of that necessary to make it negligent. This is evidenced by the fact that people often smoke while operating motor vehicles. Although Claimant's smoking while driving a vehicle may have been negligent, the Court finds that it does not rise to the level of recklessness.<sup>2</sup>

Respondent appealed arguing Claimant's smoking while driving a company vehicle is a safety violation which Claimant knowingly violated. Respondent argues Claimant's conduct constitutes a reckless violation of their safety rules, which should result in the denial of Claimant's request for benefits, the payment of her outstanding medical bills. Claimant maintains the March 21, 2023 Order should be affirmed.

### **PRINCIPLES OF LAW AND ANALYSIS**

**Claimant's conduct, smoking while driving a company vehicle, is not a reckless violation of Respondent's workplace safety rules and procedures.**

K.S.A. 44-501b(c) states Claimant carries the burden of proof to establish the right to an award of compensation and to prove the various conditions on which Claimant's

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<sup>2</sup> ALJ Order (Jan. 24, 2023) at 5.

rights depend. 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>3</sup>

Compensation for an injury shall be disallowed if such injury results from the employee's reckless violation of their employer's workplace safety rules or regulations.<sup>4</sup>

The Workers Compensation Act does not define "reckless." The Appeals Board, looking to prior case law, defines "reckless" as either: (1) where an actor knows or has reason to know of facts creating a high degree or risk of physical harm and deliberately acts or fails to act in conscious disregard or indifference to that risk, or (2) where an actor knows or has reason to know, but does not appreciate the high degree of risk, although a reasonable person in the actor's position would do so. The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.<sup>5</sup> A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.<sup>6</sup> The preponderance of the credible evidence must support a conscious disregard of a known risk that exceeds negligence; recklessness is akin to gross, culpable or wanton negligence.<sup>7</sup>

It is not disputed Claimant was aware smoking inside company vehicles while driving was prohibited. She did so believing Respondent did not enforce the rule. Claimant was not informed smoking, while driving, was a safety violation and she was not instructed not to do so. She had not been reprimanded for smoking. She was allowed to have drinks and listen to the radio while driving. Claimant was aware of other drivers regularly smoking in company vehicles. The question before the Board is did Claimant's smoking while driving a company vehicle rise to the level of recklessness resulting in the denial of her claim pursuant to K.S.A. 44-501(a)(1)(D).

This Board Member agrees with the ALJ's analysis. The Order is well-reasoned and supported by the evidence. Claimant's conduct may have been negligent, but not reckless. Claimant and other drivers regularly smoked while driving company vehicles. Smoking is not a significant distraction. Claimant's smoking did not constitute reckless behavior. Claimant did not recklessly violate Respondent's workplace safety rules and procedures.

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

<sup>4</sup> See K.S.A. 44-501(a)(1)(D).

<sup>5</sup> *Van Le v. Exacta Aerospace, Inc.*, No 1,060,178, 2012 WL 6101126 (Kan. WCAB Nov. 27, 2012).

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

<sup>7</sup> *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494 (Kan. WCAB 2013).

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member, the Order of ALJ Ali Marchant, dated March 21, 2023, is affirmed.

**IT IS SO ORDERED.**

Dated this day of April 2023.

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CHRIS A. CLEMENTS  
BOARD MEMBER

c: Via OSCAR

Phillip A. Slape, Attorney for Claimant  
Todd Cowell, Attorney for Respondent and Insurance Carrier  
Hon. Ali Marchant, Administrative Law Judge