

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHARLES MACKEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,401
<b>DEFFENBAUGH INDUSTRIES</b>	)	
Respondent	)	
AND	)	
	)	
<b>ZURICH U S INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the May 6, 2002 preliminary hearing Order entered by Administrative Law Judge Julie A. N. Sample.

**ISSUES**

This is a claim for a November 11, 2001 accident and injuries to the neck and left upper extremity. Claimant died on April 17, 2002, only weeks before the May 1, 2002 preliminary hearing, which had been sought to address claimant's request for temporary total disability benefits and the payment of medical expenses. In the May 6, 2002 Order, the Judge granted the request for medical benefits and temporary total disability benefits, which, of course, terminated on the date of death.

Respondent and its insurance carrier contend the Judge erred. They argue the Judge exceeded her authority by awarding the past-due temporary total disability benefits to the surviving spouse. They also argue the Judge erred by allowing a preliminary hearing as claimant was deceased and the temporary total disability benefits issue centered on the reason for claimant's termination. In short, respondent and its insurance carrier argue a regular hearing, rather than a preliminary hearing, was the proper forum to litigate the issues surrounding claimant's termination and, thus, the entitlement to temporary total disability benefits. Finally, they argue the Board should review the Judge's preliminary hearing findings concerning claimant's entitlement to temporary total disability benefits as

the May 6, 2002 Order is essentially a final order because the preliminary hearing was “effectively the final hearing in this matter.”

Conversely, claimant’s attorney argues the appeal should be dismissed as the Board lacks jurisdiction at this juncture to review the preliminary hearing Order. Claimant’s attorney argues that respondent and its insurance carrier have failed to raise any of the jurisdictional issues listed in K.S.A. 44-534a, which governs preliminary hearing appeals. Claimant’s attorney also requests the Board to assess interest and penalties against respondent and its insurance carrier as deemed appropriate.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction from a preliminary hearing order to determine whether a worker satisfies the definition of being temporarily and totally disabled?
2. If so, was claimant temporarily and totally disabled before his death on April 17, 2002?
3. Should the Board assess interest and penalties against respondent and its insurance carrier?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

This is an appeal from a preliminary hearing order. The issue raised by respondent and its insurance carrier is not a jurisdictional issue and is not subject to review at this juncture of the proceedings.

The Board’s review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2001 Supp. 44-551. This includes review of the preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term “certain defenses” refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>1</sup>

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a. Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>2</sup>

Respondent and its insurance carrier now contend the Judge exceeded her jurisdiction by addressing the request for temporary total disability benefits at the May 1, 2002 preliminary hearing rather than at a regular hearing. They also now contend they have not been afforded a proper opportunity to present evidence and conduct further discovery regarding claimant's termination. But the record fails to show these issues were presented to the Judge and the Board will not hear them for the first time on appeal. As provided by K.S.A. 44-555c, the Board's review "shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."

Claimant's attorney's request for interest and penalties is denied. Claimant's attorney cites no authority to support the request and, accordingly, the Board finds the request unfounded. Further, claimant did not raise that issue before the Judge and, accordingly, the Board will not address it for the first time on appeal.

As provided by the Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.<sup>3</sup> Despite claimant's death, the parties are not prohibited from further hearings and introducing additional evidence on the issues.

**WHEREFORE**, the Board dismisses respondent and its insurance carrier's appeal of the May 6, 2002 Order entered by Judge Sample.

Respondent and its insurance carrier filed their application for review in this appeal under docket numbers 1,001,400 and 1,001,401. As it appears the appeal under docket number 1,001,400 was made in error, the Board dismisses that appeal.

**IT IS SO ORDERED.**

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<sup>2</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>3</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of July 2002.

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BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant  
Steven C. Alberg, Attorney for Respondent and its Insurance Carrier  
Julie A. N. Sample, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director