BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLENNA S. REED Claimant	)	
VS.	)	
MATT SHERMAN[1] Respondent	)	Docket No. 1,005,775
AND	)	
WESTERN AGRICULTURAL INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 10, 2005 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

After a preliminary hearing on January 31, 2005, the Administrative Law Judge (ALJ) ordered respondent to provide temporary total disability compensation (TTD) and that an independent medical evaluation (IME) be performed by Dr. James Eyman. Those decisions were not appealed to the Board. Another hearing was conducted on June 9, 2005, at which time no additional evidence was presented, only statements of counsel. Thereafter, an order was issued whereby respondent was to provide claimant with an additional period of TTD and medical treatment with Dr. Eyman.

Respondent argues the ALJ lacked the jurisdiction to order respondent to provide medical treatment with a specific physician because respondent had already designated an authorized treating physician. Accordingly, respondent contends there was no dispute

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[1] Although the respondent in this case was originally listed as Independence, Inc., pursuant to an agreement set out in the transcript of the Preliminary Hearing held December 19, 2002, at page 5, the correct respondent should be Matt Sherman. The Board also notes an Amended Application for Hearing was filed September 8, 2004, with a letter to the Director stating that the amendment was being made to reflect Matt Sherman as the respondent, not Independence, Inc.

or controversy. Respondent further alleges that the ALJ exceeded his jurisdiction by changing the treating physician when there was no seven-day demand for such relief. Consequently, respondent requests the Board to reverse the ALJ's Order.

Claimant requests that the respondent's appeal be dismissed for lack of jurisdiction or, in the alternative, that the ALJ's order be affirmed. Initially, claimant argues that respondent does not raise an issue that the Board has jurisdiction to review on an appeal from a preliminary hearing. Claimant further argues the ALJ had jurisdiction because claimant filed a seven-day notice of intent letter on November 29, 2004, for psychiatric or psychological treatment and TTD and on December 7, 2004, claimant requested a preliminary hearing.[2] Another seven-day demand letter was sent to respondent by claimant on April 12, 2005, specifically requesting that Dr. Eyman be authorized to treat claimant. When no such treatment was authorized by respondent, claimant again requested a preliminary hearing on April 21, 2005.[3] It was not until the preliminary hearing was about to commence before respondent designated Dr. Terry Palauski to treat claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Respondent argues the ALJ did not have jurisdiction to conduct the June 9, 2005 hearing because there was no controversy for the ALJ to decide. There was no witness testimony nor any other evidence presented at the June 9, 2005 hearing, only statements of counsel. The following colloquy occurred at the June 9, 2005 hearing.

> **JUDGE AVERY:** Okay. Ms. Fisher, we've had discussions off the record about what the claimant is requesting, . . . psychiatric care or psychological care with Doctor [Eyman], temporary total disability from 11/22/04 until 2/2/05, but if you want to summarize what we've discussed off the record.
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> **MS. FISHER:** Sure. Basically, my point is that to make an 11th hour authorization of a doctor basically two to three hours before the preliminary hearing today is in fact a denial of benefits, and as such the claimant should be able to designate their own doctor. Further, she's already seen three psychiatrists, to send her to a fourth, get that evaluation and treatment is just--is a further delay when she's already waited over--well, it's a little over seven months for treatment. So

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[2] Form K-WC E-3 Application for Preliminary Hearing filed Dec. 13, 2004.

[3] Form K-WC E-3 Application for Preliminary Hearing filed Apr. 22, 2005.

we'd ask that you designate either Doctor Bickelhaupt or Doctor [Eyman] for the psychological treatment.

In regards to the issue of temporary total disability, I know there is an issue as to jurisdiction. As I indicated off the record, the board has repeatedly ruled that if you're coming back on a secondary preliminary on the same issue that they retain jurisdiction, and so in fact you don't even need to send the seven day. The original seven day is in your file. It did include both TTD and request for medical treatment and as such you do have jurisdiction to consider this issue, and we are requesting TTD from the date that Doctor Bickelhaupt indicated she was unable to work because of her psychological conditions, which is November 22nd of '04, until the date that the respondent started paying per the court order, and they started paying on 2/2/05 and the rate has been previously established as 219 something.

JUDGE AVERY: Yeah. I've got that in the order.

MS. FISHER: Okay.

JUDGE AVERY: Mr. Kubin?

MR. KUBIN: Thank you, Your Honor. The psychological aspect of this came into the claim quite late. It was after the claimant was released from her orthopedic treatment. It was after that release the claimant was sent by her attorney to Doctor Bickelhaupt. Doctor Bickelhaupt came back with the opinion the claimant was in need of some psychological care. At that time a demand was made for that psychological care, and my client in response sent the claimant to a board certified psychiatrist, Dr. Patrick Hughes. Doctor Hughes came back with the opinion that the claimant was not in need of any care for her psychological complaints that she was making that were related to the accident.

We came before you on February the 2nd, or actually I think toward the end of January of 2005. You issued your order on February the 2nd and appointed Dr. James [Eyman] to do an independent medical examination. Doctor [Eyman] met with the claimant starting in, I think, February--February the 18th, 2005, and continued to see the claimant for the evaluation clear up until April the 4th, 2005, during that time charging my client $1,900 for the one time evaluation that was ordered by the court. At that--after that was complete, Dr. [Eyman] came back with the opinion that the claimant was yes, in need of some psychological care. Demand was made for that. We have offered the care through Dr. Terry Palauski . . . at the Rehabilitation Institute in Lawrence, so I don't think that there's any issue properly before the court today on the issue of medical treatment.

What the claimant is trying to do is subtrovert [*sic*] what her rights are under the statute. The statute clearly gives the employer the right to designate the physician. The employer has selected the physician to treat and prior to the court making an--making an order on it, so there is no issue, there's no dispute between the parties because there's been an offer of medical care, so there's no controversy

for the court to rule on in regard to that issue. If the claimant didn't like Doctor Palauski, which seems to be the--which seems to be underlying this somehow, the proper procedure would be to show that the care was inadequate, and then the respondent would still get an opportunity to provide a list of three physicians to provide that care. Nowhere is there relief indicated that the claimant can select the doctor they want to go to. Also, it should be noted that the claimant doesn't have care, so we're designating a physician in Lawrence that's going to cut down significantly on the need for transportation for this particular claimant.

In regard to the issue of temporary total, it would be our position that you've already ruled on that very issue in your--in your February 2nd order where you issued an order on the temporary total disability when you did not award it during that period of time. That should not be disturbed. Claimant is currently drawing temporary total. She's been drawing temporary total since your order in February. So at this point the demand is for current temporary total, which is being satisfied by the respondent and carrier and there's no controversy in regard to that.

Our position on the prior, it's not really a jurisdictional question, it's a question that you've already ruled on that controversy and that there's no new demand for that controversy in this case. So there's no controversy for the court to decide today. Temporary total is being provided, medical care has been offered. It's up to the claimant to accept that offer or reject it and go out and get her own care at her own expense.

JUDGE AVERY: Do you have a report from Doctor Palauski available?

MR. KUBIN: She hasn't seen Doctor Palauski yet, Your Honor.

JUDGE AVERY: All right. Thank you very much. I'll incorporate the preliminary hearing from January 31st, 2005, into the record. I'll get an order to you shortly. Thank you.[4]

Because there is no limit to the number of preliminary hearings that can be held in any given workers compensation matter,[5] the decision of whether a claim is compensable, *i.e.,* whether an injury by accident arose out of and in the course of one's employment, whether timely notice and claim were given respondent or whether certain defenses apply, can change based upon the evidence offered. This ongoing review, while contrary to general civil litigation principles, is a necessary procedure in the workers compensation field.

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[4] P.H. Trans. (June 9, 2005) at 3-9.

[5] *Hanna v. M. Bruenger & Co., Inc. & Leona Bruenger & Co., Inc.*, No. 222,182, 1997 WL 802901 (Kan. WCAB Dec. 19, 1997).

The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.[6] Further, the Division is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.[7]

Claimant acknowledges that when this matter came before the ALJ on June 9, 2005, respondent had designated a treating physician. It is apparent from a review of the hearing transcript and the arguments of the parties that the dispute in this matter centers around whether respondent's "11th hour" authorization of Dr. Palauski was timely. Authorization of a physician to provide medical treatment and the payment of TTD are preliminary hearing issues under K.S.A. 44-534a that the ALJ has the jurisdiction and authority to address.

Claimant's requests for psychiatric or psychological treatment and TTD under K.S.A. 44-534a reach back to claimant's initial November 29, 2004 demand. Although respondent had earlier sent claimant to be examined by Dr. Patrick Hughes, who had determined claimant was not in need of additional treatment, there is no dispute that respondent did not authorize Dr. Palauski until June 9, 2005.

First, the Board has previously held, and continues to hold, that the Division retains jurisdiction over the parties and the issues presented at the initial preliminary hearing. Therefore, later hearings conducted to address those same preliminary hearing issues are treated as a continuation of the initial hearing. That interpretation of the Act affords the parties expeditious hearings and avoids cumbersome procedures that would only serve to delay prompt decisions.

Second, even if a party were required to file another application for a preliminary hearing and a new notice of intent every time a hearing is needed to address an ongoing preliminary hearing issue that already has been addressed, claimant complied with such a requirement with its second seven-day demand on April 12, 2005.

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[6] *Pyeatt v. Roadway Express, Inc.*, 243 Kan. 200, 205, 756 P.2d 438 (1988); *Kuhn v. Grant Co.*, 201 Kan. 163, 439 P.2d 155 (1968).

[7] K.S.A. 2004 Supp. 44-523(a); *Pyeatt*, *supra*.

After the preliminary hearing on January 31, 2005, the ALJ ordered TTD and an IME with Dr. James Eyman.[8] In his report, Dr. Eyman found claimant was not at maximum medical improvement, and he recommended claimant receive additional treatment.[9]

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.[10] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) 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.[11]

The issue of whether a worker satisfies the definition of being temporarily and totally disabled or is in need of additional medical treatment are not jurisdictional issues listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled or is at maximum medical improvement are questions of law and fact over which an ALJ 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.[12]

An ALJ has the jurisdiction and authority to order additional medical treatment and grant temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[13] Accordingly, respondent and carrier's appeal is dismissed.

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[8] ALJ Order Referring Claimant for Independent Medical Evaluation (Feb. 2, 2005) and ALJ Order for Compensation (Feb. 2, 2005).

[9] Dr. James Eyman's Independent Psychological Evaluation (filed Apr. 12, 2005) at 4.

[10] K.S.A. 2004 Supp. 44-551.

[11] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[12] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[13] *See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

The respondent may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statutes provides in pertinent part:

> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

WHEREFORE, respondent's appeal of the Order for Compensation entered by Administrative Law Judge Brad E. Avery dated June 10, 2005, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

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BOARD MEMBER

c: Jan Fisher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director