BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBIN S. ROBERTS	)	
Claimant	)	
	)	
VS.	)	
	)	
GEAR FOR SPORT INC.	)	
Respondent	)	Docket Nos. 1,007,862
	)	1,007,863
AND	)	
	)	
CHUBB GROUP OF INS. COMPANIES	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 21, 2003, preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

When the preliminary hearing was held, claimant had returned to work but she requested 5.42 weeks of temporary total disability compensation for two separate periods of time before her return to work. Respondent and its insurance carrier argued the date of accident would make the respondent's previous insurance carrier responsible for benefits for her repetitive trauma injuries. Compensability of the claims was not disputed.

The Administrative Law Judge (ALJ) denied claimant's request for temporary total disability compensation and medical treatment but left those issues for decision until the respondent's previous insurance carrier was joined as a party.

Claimant requested review and argues she is entitled to temporary total disability compensation for the time periods she was off work before her return to work. Claimant further argues that the fact she was back at work, although not determinative, was relied on by the ALJ in denying her temporary total disability compensation.

Respondent argues the Board does not have jurisdiction to review this appeal and therefore it should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

The claimant described the onset of symptoms in her hands as she performed her job as a truck driver for respondent. Ultimately, claimant underwent surgery and testified regarding the time periods she was off work after each surgery. On cross-examination, the respondent focused on the onset of symptoms and claimant's transfer from a data entry position to the truck driver job. Respondent was attempting to establish a date of accident before its current insurance carrier had the risk.

The ALJ interrupted the cross-examination and expressed concern about proceeding without the other carrier being present. After further colloquy between the ALJ and counsel, the ALJ expressed frustration about deciding the case without all the interested parties being present. The ALJ then noted he would take the matter under advisement pending determination and joinder of the other carrier. At that point claimant's counsel requested the ALJ issue an order so it could be appealed and expressed frustration regarding the time it took to get the case heard. The ALJ then stated he would deny claimant's request for temporary total disability benefits.

Claimant argues that the ALJ noted claimant was back at work when he initially stated he would take the matter under advisement. Claimant argues that the fact claimant was working at the time of the preliminary hearing is not determinative of her entitlement to temporary total disability compensation for the previous time periods that she was off work. Claimant argues the ALJ ignored the uncontroverted evidence that she was off work for surgery due to the undisputed work-related injuries.

Claimant further argues that it is respondent's duty to contact the appropriate insurance carrier, or carriers, to conduct its defense. And delaying the matter while another insurance carrier is added as a party unfairly penalizes claimant. The Board agrees that it is not the claimant's burden to notify the insurance carrier or carriers.

The arguments regarding what date of accident should control for purposes of determining which insurance carrier is liable do not give rise to a disputed issue of whether claimant's injury occurred as a result of an accident which arose out of and in the course of claimant's employment with respondent. Regardless of which date of accident (or accidents) is found to be the precipitating cause for claimant's medical treatment, it does not alter the fact that the injury (or injuries) is the result of claimant's employment with respondent. That fact appears to be undisputed.

Furthermore, it is inconsistent with the intent of the Workers Compensation Act for a respondent to delay preliminary hearing benefits to an injured employee while its

insurance carriers litigate their respective liability. The employee is not concerned with questions concerning this responsibility for payment once the respondent's general liability under the Act has been acknowledged or established.[1]

But the Board concludes that when date of accident is an issue only because it pertains to which insurance carrier is responsible for providing preliminary hearing benefits, that finding is not appealable from a preliminary hearing order.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:[2]

(1) Did the worker sustain an accidental injury?

(2) Did the injury arise out of and in the course of employment?

(3) Did the worker provide timely notice and timely written claim?

(4) Is there any defense to the compensability of the claim?

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.[3] Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.[4]

An Administrative Law Judge has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Therefore, Judge Foerschler did not exceed his jurisdiction. The issue of whether claimant's medical condition and employment situation entitles claimant to receive temporary total disability benefits is not an issue that is reviewable from a preliminary hearing order. At this juncture of the proceeding, the Board does not have the authority to reweigh the evidence and redetermine if claimant is entitled to temporary total disability compensation.

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[1] *Kuhn v. Grant County*, 201 Kan. 163, 439 P.2d 155 (1968); *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961).

[2] K.S.A. 44-534a.

[3] K.S.A. 44-551.

[4] See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683, P.2d 902 (1984).

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[5]

AWARD

WHEREFORE, the Board finds that claimant's appeal is dismissed. The Order of Administrative Law Judge Robert H. Foerschler dated February 21, 2003, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

_____
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation

[5] K.S.A. 44-534a(a)(2).