

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

ROBERT E. GERACI)	
Claimant)	
)	
VS.)	
)	
SUPERIOR HARDWOOD FLOORS)	
Respondent)	Docket No. 1,016,297
)	
AND)	
)	
EMPLOYERS MUTUAL CASUALTY CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the November 19, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to reimburse claimant for medical mileage expenses and to reimburse claimant for certain medical and prescription expenses.

The respondent argues that while its attorney was conducting cross-examination of claimant the ALJ stopped further questioning and indicated the hearing was in recess. The ALJ entered the order without any further proceedings on the record. Consequently, the respondent argues the ALJ exceeded his jurisdiction by issuing the order without affording the respondent and insurance carrier the statutory right to be heard and present evidence.

Claimant argues that because compensability was not an issue at the preliminary hearing the Board does not have jurisdiction to review this Order and therefore the respondent's appeal should be dismissed.

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:

The issue identified for determination at the preliminary hearing was claimant's request for reimbursement for prescription, medical and mileage expenses. Respondent agreed that compensability was not an issue for the purposes of the hearing.

Claimant testified identifying certain purported prescription, medical and mileage expense exhibits and the dollar amounts that he was requesting respondent to reimburse. The respondent's counsel then began cross-examination of claimant. The cross-examination was interrupted by a colloquy between the attorneys regarding whether respondent had already paid the bills to the providers and led the ALJ to interrupt the proceeding with the admonition the hearing was in recess. The ALJ commented:

"THE COURT: All right, stop. Stop. This hearing is in recess. I don't know what you guys were doing for an hour while you were waiting to come in here, but obviously you weren't sitting down and trying figure out which bills had been paid and which bills hadn't been paid. So we're going to do that right now."¹

The hearing transcript concluded with a reporter's note that the hearing was adjourned, to be continued at a later date.²

The ALJ never reconvened the hearing and what occurred or if anything was resolved during the recess is not a matter of record.

K.S.A. 44-534a(2) provides:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, *except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.* (Emphasis added).

¹ P.H. Trans. at 18.

² Id. at 18.

The respondent contends the ALJ exceeded his jurisdiction when he stopped the proceedings while respondent's counsel was conducting cross examination of claimant and before respondent could proffer its evidence. Respondent argues limiting his cross-examination of claimant was a denial of due process. Respondent further argues that terminating the hearing without affording respondent the opportunity to present evidence violated K.S.A. 44-534a(2) because respondent was not afforded the opportunity to present evidence. Consequently, respondent also contends the ALJ exceeded his jurisdiction.

Workers compensation proceedings have been and remain adversarial proceedings.³ Although not bound by the technical rules of procedure, the ALJ is required to give the parties a reasonable opportunity to be heard and to present evidence, to ensure the employee an expeditious hearing and to act reasonably without partiality.⁴

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.⁵ The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.⁶

In *Adams*⁷, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They

³ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 281, 949 P.2d 613 (1997).

⁴ K.S.A. 44-523(a).

⁵ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

⁶ *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

⁷ *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . '

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:

' . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . . '

The preliminary hearing in this matter was limited to the issue of claimant's entitlement to reimbursement of prescription, medical and mileage expenses. In this instance, the respondent's cross-examination of the claimant was interrupted and respondent was never afforded the opportunity to complete his cross-examination or present evidence because the parties never reconvened the hearing before the ALJ issued the decision.

K.S.A. 44-555c(a) provides: "The review by the board 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."

The Board is bound by the record made before the administrative law judge and in this case the record indicates the matter was recessed and then continued. While the record indicated that certain issues were to be addressed during the recess, the record was not reopened and the matters addressed among the ALJ and parties during the recess were not made a part of the record.

The Board finds the ALJ's decision to recess the hearing was well within his jurisdiction. However, issuing an order without providing the respondent the opportunity to complete cross-examination of the claimant or to present rebuttal evidence was a denial of due process. Based upon the record compiled to date, the Board, therefore, finds this matter should be remanded to the ALJ with instructions to reopen the record and allow the respondent the opportunity complete cross-examination of the claimant and to present evidence.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated November 19, 2004, is reversed and remanded to reopen the record and allow respondent the opportunity to complete cross-examination of the claimant and to present evidence.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director