

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

MARSHALL BATTLES)
Claimant)
VS.)
BOEING COMPANY)
Respondent)
AND)
INDEMNITY INSURANCE COMPANY)
OF NORTH AMERICA)
Insurance Carrier)

Docket No. 1,021,394

ORDER

Respondent and its insurance carrier request review of the August 25, 2005 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary total disability benefits from June 16, 2005, until released to substantial and gainful employment by the authorized treating physician.

The respondent requests review of: (1) whether claimant is entitled to temporary total disability benefits while receiving wage continuation benefits from the employer; and, (2) whether the ALJ exceeded his authority in granting temporary total disability benefits. Respondent argues the claimant is not entitled to temporary total disability benefits because claimant voluntarily retired from respondent's employment.

Claimant argues that he is entitled to temporary total disability benefits even though he is receiving "wage continuation benefits," and requests the Board affirm the ALJ's order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, together with the briefs of the parties, the Board finds and concludes that it does not have jurisdiction of the issues raised at this juncture of the proceedings and, therefore, this appeal from the ALJ's preliminary order should be dismissed.

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.¹ 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.²

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue 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 is a question 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.³

An ALJ has the jurisdiction and authority to 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.⁴ Accordingly, respondent and carrier's appeal is dismissed.

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

¹K.S.A. 2004 Supp. 44-551.

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

³*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁴*See State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

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, it is the finding of the Board that the respondent's appeal is dismissed and Administrative Law Judge Thomas Klein's Order dated August 25, 2005, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of October, 2005.

BOARD MEMBER

c: Dennis Phelps, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director