BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD CHRISTENER	)	
Claimant	)	
	)	
VS.	)	
	)	
STAN KOCH & SONS TRUCKING CO., INC.	)	
Respondent	)	Docket Nos. 1,024,222 & 1,024,224
	)	
AND	)	
	)	
GREAT WEST CASUALTY CO. and COMMERCE & INDUSTRIES INS. CO.	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, Great West Casualty Company (Great West), requested review of the July 12, 2007, preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery. Neil A. Dean, of Topeka, Kansas, appeared for claimant. Jeffrey D. Slattery, of Kansas City, Missouri, appeared for respondent and Great West. Anton C. Andersen appeared for respondent and Commerce & Industries Insurance Company (Commerce).

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment with respondent and ordered respondent to pay claimant temporary total disability compensation commencing June 8, 2007, to June 27, 2007.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 10, 2007, preliminary hearing, the transcript of the preliminary hearing held July 20, 2006, and the transcripts of the two April 10, 2007, preliminary hearings and the exhibits attached to each, together with the pleadings contained in the administrative files.

ISSUES

Respondent and Great West request review of the ALJ's finding that claimant suffered an injury that arose out of and in the course of his employment with respondent by a series of accidents ending June 28, 2005. Respondent and Great West argue that since claimant last worked for respondent on June 27, 2005, he was not an employee of respondent on June 28, 2005, the date the ALJ found to be the date of accident. And since there was no employer/employee relationship between Koch and claimant on June 28, 2005, the ALJ had no jurisdiction to award claimant benefits from Koch.

Neither respondent/Commerce nor claimant filed a brief in this appeal.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over this appeal?

(2) If so, was there an employer/employee relationship between claimant and respondent on June 28, 2005, the date the ALJ found to be the date of accident in Docket Nos. 1,024,222 and 1,024,224?

(3) Did claimant suffer subsequent intervening injuries?

(4) Was the claimant capable of substantial and gainful employment during the period respondent was ordered to pay temporary total disability compensation?

(5) Which insurance carrier should be responsible for paying those benefits?

FINDINGS OF FACT

These cases came on for preliminary hearing on July 10, 2007. At that time, an appeal from these cases was pending before the Board from the previous preliminary hearing order. One of the questions on appeal was whether there was an employer/employee relationship between respondent and claimant on June 28, 2005. That issue was identical to the issue here.

At the preliminary hearing, the ALJ stated:

> The respondent's position in regard to temporary total disability is the claimant was capable of substantial and gainful employment during that period of time and they're also disputing the compensability of the claim based on the accident arising out of and in the course of. That issue is before the Workers' Compensation Board, and

> the Court will address the issue of whether the claimant was capable of substantial and gainful employment.[1]

On July 23, 2007, the Board issued its Order in the above-mentioned appeal, holding:

> Based on the record presented as of April 10, 2007, this Board Member finds that claimant suffered injuries to his back and his bilateral upper extremities by a series of accidents each and every working day through June 28, 2005, his last day of work for respondent Koch. These accidents arose out of and in the course of his employment with respondent Koch. Therefore, Koch, together with its insurance carrier, Great West, are responsible for the cost of providing reasonable medical care and treatment to cure and relieve claimant from the effects of those injuries to his bilateral upper extremities and back. With this finding, the remaining issues are rendered moot.[2]

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> 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. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional,

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[1] P.H. Trans. (July 10, 2007) at 3-4.

[2] *Christener v. Stan Koch & Sons Trucking, Inc.*, Docket Nos. 1,024,222; 1,024,224; 1,030,168; 1,030,169; 1,030,170; 1,030,171; 1,030,172 and 1,030,173, 2007 WL 2296132 (Kan. WCAB July 23, 2007).

> and subject to review by the board. . . 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.

In *Allen*,[3] the Kansas Court of Appeals stated:

> 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.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[4]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The ALJ held that because the compensability issue raised by respondent/Great West was on appeal to this Board, he would not hear evidence on that issue. Instead, the ALJ limited the preliminary hearing to only the question of whether claimant was capable of substantial and gainful employment during the period he was requesting payment of temporary total disability compensation. This is not an issue listed in K.S.A. 44-534a(a)(2), *i.e.*, whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply.

CONCLUSION

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. The ALJ did not exceed his jurisdiction by granting

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[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).

[5] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2006 Supp. 44-555c(k).

claimant temporary total disability compensation. This appeal does not give rise to any of the issues that are deemed jurisdictional by K.S.A. 44-534a(a)(2). Accordingly, the Board does not have jurisdiction to address the issue raised in this appeal at this juncture of the proceedings.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the appeal by respondent and Great West is dismissed and the preliminary Order for Compensation of Administrative Law Judge Brad E. Avery dated July 12, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

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BOARD MEMBER

c: Neil A. Dean, Attorney for Claimant
Jeffrey D. Slattery, Attorney for Respondent and its Insurance Carrier, Great West Casualty Company
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier, Commerce & Industry Insurance Co.
Brad E. Avery, Administrative Law Judge