

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

EDD W. FULLER)	
Claimant)	
VS.)	
)	
)	Docket Nos. 1,031,973
)	& 1,031,974
AMERICAN LEGION BALL MCCOLM POST NO. 5)	
Respondent)	
AND)	
)	
WESTPORT INSURANCE CORPORATION)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the May 23, 2007, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleges he injured both upper extremities, and possibly his neck, working as a cook for respondent. In the May 23, 2007, Order, Judge Avery granted claimant temporary partial disability benefits. Because wrists are not specifically mentioned in the schedules of K.S.A. 44-510d, the Judge reasoned claimant had sustained a non-scheduled injury and, therefore, he would be entitled to receive temporary partial disability benefits.

Respondent contends Judge Avery erred. Respondent argues the Judge exceeded his jurisdiction by awarding temporary partial disability benefits for scheduled injuries. Consequently, respondent requests the Board to reverse the May 23, 2007, Order.

Conversely, claimant contends the Order should be affirmed. Claimant argues he has not reached maximum medical improvement and, therefore, it is unknown whether he has sustained multiple scheduled injuries or a non-scheduled injury for purposes of computing his permanent disability benefits. Moreover, claimant points out that there is a question whether claimant has also injured his cervical spine as one of claimant's doctors requested an MRI of the neck. In addition, claimant agrees with Judge Avery that wrists

are not listed in the schedules of K.S.A. 44-510d and, therefore, disability compensation for those types of injuries should be compensated under K.S.A. 44-510e.

The issue before the Board on this appeal is whether the Judge exceeded his jurisdiction in granting claimant temporary partial disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes this appeal should be dismissed.

Claimant alleges that he injured both upper extremities and perhaps his neck working as a cook for respondent. Most, if not all, of claimant's present symptoms are in his wrists, hands, and arms. But one of claimant's treating physicians, Dr. Jonson Huang, apparently suspected a problem in claimant's neck and in November 2006 the doctor recommended an MRI of the cervical spine. The doctor's November 6, 2006, office notes read:

In view of persistent right arm pain with numbness with *[sic]* spread proximally, including shoulder, recommendation for MRI cervical spine, which patient wished to defer at present.¹

Judge Avery did not comment upon what weight he gave claimant's potential neck problem. But reasoning that wrists were not included in the schedules of K.S.A. 44-510d, the Judge determined claimant sustained a non-scheduled injury and awarded claimant temporary partial disability benefits.

Respondent challenges the May 23, 2007, Order on the basis that claimant has sustained scheduled injuries only and, therefore, he is not entitled to receive temporary partial disability benefits. There is no question the Judge has the authority to enter a preliminary hearing award of temporary partial disability benefits under the proper circumstances. But respondent contends claimant does not qualify for temporary partial disability benefits because all of his injuries are scheduled injuries. In essence, respondent requests the Board to review the preliminary hearing order and redetermine the nature and extent of claimant's injuries.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board has the authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are (1) did the worker sustain an accidental

¹ P.H. Trans., Cl. Ex. 1, Section 4.

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, and (4) do certain other defenses apply. The term “certain defenses” refers to disputes over the compensability of the injury under the Workers Compensation Act.² Moreover, the Board can review allegations that an administrative law judge has exceeded his or her jurisdiction.³

As there is evidence claimant’s injuries may extend beyond those set forth in the schedules of K.S.A. 44-510d, it cannot be said that Judge Avery exceeded his jurisdiction by awarding claimant temporary partial disability benefits. Moreover, the Judge found claimant sustained a non-scheduled injury. And the nature and extent of an injury is not one of the issues that the Board has jurisdiction to review from a preliminary hearing order.

The issue whether a worker satisfies the definition of being temporarily and partially disabled is not a jurisdictional issue listed in K.S.A. 44-534a. Moreover, the issue whether a worker meets the definition of being temporarily and partially disabled is a combined question of law and fact over which an administrative law judge 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.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), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the Board dismisses the appeal of the May 23, 2007, preliminary hearing Order for Compensation entered by Judge Brad E. Avery.

IT IS SO ORDERED.

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

³ K.S.A. 2006 Supp. 44-551.

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁵ K.S.A. 44-534a.

EDD W. FULLER

DOCKET NOS. 1,031,973 & 1,031,974

Dated this ____ day of August, 2007.

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Thomas J. Walsh, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge