

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

**THOMAS D. HOUSH** )  
                    Claimant )

VS. )

Docket Nos. 1,025,085  
& 1,032,810

**ATCHISON CASTING CORPORATION** )  
                    Respondent )

AND )

**AMERICAN HOME ASSURANCE COMPANY and/or)**  
**COMMERCE & INDUSTRY INSURANCE COMPANY)**  
                    Insurance Carrier )

**ORDER**

Respondent and its insurance carrier appealed the May 8, 2009, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders.

**ISSUES**

Claimant alleges injury to his upper extremities. In the May 8, 2009, Order, Judge Sanders granted claimant's request to reinstate temporary total disability benefits.

Respondent and its insurance carrier (respondent) contend the Judge exceeded her jurisdiction and authority by redefining the eligibility requirements for temporary total disability benefits set by the state legislature. In short, respondent maintains that claimant is statutorily disqualified from receiving temporary total disability benefits as he received a release to return to work in October 2008. Moreover, respondent argues there is no evidence claimant's more recent medical restrictions were based upon any assessment of claimant's work. Consequently, respondent asserts the May 8, 2009, Order should be vacated.

Conversely, claimant maintains the May 8, 2009, Order is not appealable to the Board under K.S.A. 44-534a. In the alternative, claimant argues the Order should be affirmed as he remains in treatment, under restrictions, and he has not reached maximum medical improvement.

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction in the review of a preliminary hearing order to determine whether a worker's medical condition renders the worker temporarily and totally disabled?
2. If so, did Judge Sanders err by ordering the payment of temporary total disability benefits?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

This is an appeal from a preliminary hearing order. Accordingly, the Board's review of preliminary hearing orders and findings is limited. Not every alleged error in law or fact is subject to review.

The implicit finding that claimant satisfies the definition of being temporarily and totally disabled as set forth in K.S.A. 44-510c is not one of the issues denoted as a jurisdictional issue in K.S.A. 44-534a and subject to Board review from a preliminary hearing order, which are, namely, (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 that challenge the compensability of the injury under the Workers Compensation Act.<sup>1</sup>

In addition, the Board has the jurisdiction to review allegations that an administrative law judge exceeded his or her jurisdiction. K.S.A. 2008 Supp. 44-551(i)(2)(A) provides:

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. . . .

But the judge had the authority to determine claimant's right to receive temporary total disability benefits as K.S.A. 44-534a(a)(2) provides: "Upon a preliminary finding that the injury to the employee is compensable . . . the administrative law judge may make a

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<sup>1</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

preliminary award of medical compensation and temporary total disability compensation . . . .” And the jurisdiction and authority to enter such order is not affected by whether the issue was decided correctly or incorrectly.

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.<sup>2</sup>

In conclusion, the Board does not have the jurisdiction or authority at this juncture to review the implicit finding that claimant satisfied the definition of being temporarily and totally disabled.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member dismisses this appeal, leaving the May 8, 2009, Preliminary Hearing Order entered by Judge Sanders in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant  
John B. Rathmel, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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

<sup>3</sup> K.S.A. 44-534a.