

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

CARL J. CREASE, JR.)
Claimant)
)
VS.)
)
VEZERS PRECISION INDUSTRIAL)
CONSTRUCTORS INTERNATIONAL, INC.)
Respondent)
)
AND)
)
INSURANCE COMPANY OF THE STATE)
OF PENNSYLVANIA, and)
EVOLUTION INSURANCE CO., INC.)
Insurance Carriers)

Docket No. 1,035,775

ORDER

STATEMENT OF THE CASE

Respondent and Evolution Insurance Co., Inc., (respondent) requested review of the September 11, 2007, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier, Evolution Insurance Co., Inc.

There was no appearance by respondent or either insurance carrier and no record was made of the preliminary hearing that preceded the issuance of the Administrative Law Judge's (ALJ) order dated September 11, 2007. Nevertheless, the ALJ ordered respondent to pay claimant temporary total disability compensation beginning June 22, 2007, and continuing until he is released to substantial and gainful employment. The ALJ also ordered respondent to pay claimant's outstanding medical expenses from Susan B. Allen Memorial Hospital and Northeastern Nevada Regional Hospital, as well as medical mileage. Dr. H. Richard Kuhns was named as claimant's authorized treating physician. However, the ALJ stated that his order would not take affect until September 18, 2007, or if respondent scheduled a preliminary hearing to contest the issue by September 18, 2007.

The record on appeal is the same as that considered by the ALJ and consists only of the pleadings contained in the administrative file. There is no hearing transcript or exhibits. It is unknown whether the ALJ heard any testimony or whether counsel for claimant made a proffer of the expected testimony.

ISSUES

Respondent contends that as there was no preliminary hearing and no testimony, the record fails to show that claimant carried his burden of proof that he suffered an accidental injury arising out of and in the course of his employment with respondent, gave timely notice, filed a timely claim, or any other aspect of the claim, including whether the Kansas Workers Compensation Act applies to this claim. Respondent further asserts that the absence of a record upon which findings of fact can be made regarding these issues proves the ALJ exceeded his jurisdiction when he entered the September 11, 2007, Order. Respondent requests the Board reverse the Order of the ALJ. In the alternative, respondent requests the Board void *ab initio* the September 11, 2007, Order and remand the matter to the ALJ for further proceedings.

Claimant argues that an ALJ is not required to have a hearing before an order may be entered in a workers compensation claim. Claimant also argues that since there was no timely objection made to the absence of a record, the Board should not require a record of proceedings in order for the order to be deemed valid, so long as the adverse party had adequate notice of the hearing. Claimant contends that respondent was given notice of a preliminary hearing scheduled for September 11, 2007, and failed to attend. Claimant requests that the ALJ's Order of September 11, 2007, be affirmed. In the alternative, claimant argues that the Board has no jurisdiction on this Order other than to review respondent's contention that the ALJ exceeded his jurisdiction. In the event respondent wants to present evidence that the claim is not compensable, then respondent has the option of filing an application for a preliminary hearing to contest all issues it wants to contest and to present any evidence it wants to present. Accordingly, claimant requests the Board dismiss this appeal or affirm the Order of the ALJ.

The issue for the Board's review is:

- (1) Does the Board have jurisdiction of this appeal?
- (2) Did the ALJ exceed his jurisdiction by entering the Order dated September 11, 2007?
- (3) Did the claimant sustain his burden of proving that the Kansas Workers Compensation Act applies to this claim and that he suffered an accidental injury arising out of and in the course of his employment, that he gave timely notice, and that he filed a timely written claim?

FINDINGS OF FACT

The following pleadings are part of the administrative file in this case:

- (1) Form WC-K E-1, Application for Hearing, was filed July 26, 2007.
- (2) Form WC-K E-3, Application for Preliminary Hearing, was filed August 13, 2007.
- (3) Certification of Service of Notice of Intent and Denial of Benefits was filed on August 13, 2007.
- (4) Claimant's Notice of Intent letter was filed August 13, 2007.
- (5) Notice of Preliminary Hearing was filed on August 27, 2007, setting the case for preliminary hearing on September 11, 2007. The certificate of service shows a copy of the notice was sent to respondent and its insurance carrier.
- (6) Entry of Appearance by John B. Rathmel as counsel for Insurance Company of the State of Pennsylvania was filed on September 17, 2007.
- (7) Entry of Appearance by Matthew J. Schaefer as counsel for respondent, Vezers Precision Industrial Constructors International, Inc., and Federated Mutual Insurance Company was filed on October 2, 2007.

PRINCIPLES OF LAW

K.A.R. 51-1-1 states:

Forms filed with the division of workers' compensation, whether they are forms designated to be furnished by the division of workers' compensation or forms which are designated to be procured by the party filing the forms, shall be forms prescribed by or substitute forms approved by the director of workers compensation.

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

(a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the

intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. *The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.* [Emphasis added.]

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. 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, and subject to review by the board.

K.A.R. 51-3-5a(c) states: "In no case shall an application for preliminary hearing be entertained by the administrative law judge when written notice has not been given to the adverse party pursuant to K.S.A. 44-534a."

K.S.A. 2006 Supp. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. 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.

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. Such an appeal from a preliminary award may be heard and decided by a single member of the board.

K.S.A. 44-549 states:

(a) All hearings upon all claims for compensation under the workers compensation act shall be held by the administrative law judge in the county in which the accident occurred, unless otherwise mutually agreed by the employee and employer. The award, finding, decision or order of an administrative law judge when filed in the office of the director shall be deemed to be the final award, finding, decision or order of the administrative law judge.

K.S.A. 44-550 states:

The director shall designate a person to maintain a full, true and correct record of all proceedings of the director, of all documents or papers filed by the director, or with the director, of all awards, orders and decisions made by the director and such person shall be responsible to the director for the safe custody and preservation of all such papers and documents.

K.S.A. 44-552 states:

(a) The director with the approval of the secretary of labor shall at each hearing under the workers compensation act appoint a certified shorthand reporter, who may be within the classified service of the Kansas civil service act, to attend each hearing where testimony is introduced, and preserve a complete record of all oral or documentary evidence introduced and all proceedings had at such hearing unless such appointment is waived by mutual agreement. At the conclusion of the hearing in any case, if neither party has requested opportunity to file briefs, the administrative law judge may read into the record for certification and filing in the office of the director such stipulations, findings, rulings or orders the administrative law judge deems expedient to the early disposition of the case. If the administrative law judge uses such procedure, with the consent of the parties, no transcript of the record of the hearing shall be made, except that part which is read into the record by the administrative law judge.

(b) All testimony introduced and proceedings had in hearings shall be taken down by the certified shorthand reporter, and if an action for review is commenced or if the director, or either party or the best interests of the administration of justice, so instructs, the certified shorthand reporter shall transcribe the certified shorthand

reporter's notes of such hearing. If an action for review is commenced, the cost of preparing a transcript shall be paid as provided by K.S.A. 77-620 and amendments thereto. If no action for review is commenced, the cost of preparing a transcript shall be taxed as costs in the case at the discretion of the director in accordance with fair and customary rates charged in the state of Kansas. All official notes of such certified shorthand reporters shall be preserved and filed in the office of the director. Any transcript prepared as above provided and duly certified shall be received as evidence by the board and by any court with the same effect as if the certified shorthand reporter were present and testified to the records so certified.

(c) The director or administrative law judge, whoever is conducting the hearing, may make the findings, awards, decisions, rulings or modifications of findings or awards and do all acts at any time without awaiting the transcription of the testimony of the certified shorthand reporter if the director or administrative law judge deems it expedient and advisable to do so.

In *Ellibee*,¹ the Kansas Court of Appeals stated: "An appellant has the duty to designate a record sufficient to establish the claimed error. Without an adequate record, the claim of alleged error fails."

In *Collins*,² the Kansas Supreme Court stated: "The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."

"To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections."³

In *Kimbrough*,⁴ the Kansas Supreme Court stated: "The employer is entitled to notice and receipt of a written claim, not the insurance carrier. [Citations omitted.] '[T]he insurance carrier has no separate right of procedural due process flowing from provisions of the Workers Compensation Act.'"

¹ *Ellibee v. Aramark Correctional Services, Inc.*, 37 Kan. App. 2d 430, Syl. ¶ 6, 154 P.3d (2007).

² *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

³ *Johnson v. Brooks Plumbing*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

⁴ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 857, 79 P.3d 1289 (2003) (quoting *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 697, 6 P.3d 947 [2000]).

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

There is no transcript of a proceeding held on September 11, 2007. According to the Division's record, a preliminary hearing scheduled for September 11, 2007, was cancelled. There is no record of evidence having been presented to the ALJ upon which the trial court could make findings of fact and conclusions of law regarding the compensability of the claim. Accordingly, there is no evidence for the Board to review on appeal. But making a record is generally not the responsibility of the appellee. It is the appellant's burden to cause a record to be made in order to preserve the issues for appeal.

The issue of the ALJ's jurisdiction to enter his preliminary order begins with the requirement for due process of law. The basic requirements of due process are notice and an opportunity to be heard. Respondent implies that it did not receive notice of the preliminary hearing, but respondent does not expressly assert that notice was not received. A lack of notice would constitute a denial of due process. Claimant, however, contends that respondent was given notice. Counsel for respondent and its insurance carrier did not file an entry of appearance until October 2, 2007. The brief of counsel for respondent and its insurance carrier does not allege that the notice was not received by respondent or its insurance carrier, only that "the empty record fails to show claimant carried his burden of proof that he . . . gave notice" ⁷ But in fact the record does contain such proof. The administrative file contains a Notice of Preliminary Hearing with a Certificate of Service that certifies:

The undersigned hereby certifies that a true and correct copy of the above and foregoing **Notice of Preliminary Hearing** was deposited in the United States Mail, first class postage prepaid, on August 24, 2007, properly addressed to the following:

Vezer Precision industrial Constructors
110 Railroad Ave., Suite D2
Suisun City, CA 94585-1791

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).

⁷ Resp. brief filed October 19, 2007, at 6.

Ins. Co. of State of Pennsylvania
c/o American International Group
P O Box 25971
Shawnee Mission, Kansas 66225-5971

with the original mailed to:

Honorable Thomas Klein
Administrative Law Judge
110 East Waterman
Wichita, KS 67202⁸

CONCLUSION

The ALJ may have committed error by not causing a record to be made of the preliminary hearing, but the ALJ did not exceed his jurisdiction by entering his order dated September 11, 2007. Respondent was not denied due process of law. There is no record upon which this Board Member can conduct a review of the other issues raised by respondent. Furthermore, those issues were not raised to the ALJ.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal of the Order of Administrative Law Judge Thomas Klein dated September 11, 2007, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent Vezers Precision Industrial Constructors International, Inc., and Evolution Insurance Co., Inc.
John B. Rathmel, Attorney for Insurance Co. of the State of Pennsylvania
Thomas Klein, Administrative Law Judge

⁸ Notice of Preliminary Hearing, filed August 27, 2007, at 2.