BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN ARCHER Claimant	)	
VS.	)	
SUN & SWIM POOLS, INC. Respondent	)	Docket Nos. 1,039,402 1,039,491[1] 1,039,492
AND	)	
ACCIDENT FUND INS. CO. OF AMERICA Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 9, 2008 preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) entered an order that stated as follows:

> For the time being temporary total disability [TTD] is ordered commenced and possibly another impartial provider designated to explore further treatment or relaxation for his restrictions.
>
> This matter remains under advisement.[2]

Although the ALJ attempted a cursory summary of the underlying facts, his order is unclear as to in which claim (there are 3) the TTD benefits are to be paid. Moreover, after the hearing and the issuance of the ALJ's Order, the parties filed a motion and an Order

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[1] See footnote No. 4 on page 2.

[2] ALJ Order (May 9, 2008) at 2.

dismissing Docket No. 1,039,491, a claim which claimant alleged a series of microtraumas. Thus, to the extent the ALJ's award of TTD benefits relates to that claim, his Order is moot. Claimant asserts that the ALJ's Order relates to the other two remaining claims and he is therefore entitled to the TTD benefits.

The respondent requests review of compensability of the claims, jurisdiction and "which docket number the Court's May 9, 2008 order applies to".[3] Respondent points out that docket number 1,039,491 has been dismissed[4] making the Order arguably moot. And respondent also contends that the finality of the Order is in question.

Claimant admits that Docket No. 1,039,491 has been dismissed but that the intent of the ALJ's Order was to pay TTD in the remaining two docketed claims. Claimant contends that TTD should commence May 8, 2008 the day of the Order[5] and the issue of designating a provider for additional medical treatment should be remanded back to the ALJ for determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Before the parties respective positions can be considered, this Board Member must consider whether there is jurisdiction to review the May 9, 2008 Order.

The issues are whether the claimant is entitled to temporary total disability compensation and whether a physician should be designated for additional medical treatment or relaxation of claimant's restrictions.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

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[3] Application for Review (filed May 21, 2008).

[4] Motion and Order of Dismissal were filed on May 14, 2008, 4 days after the ALJ's Order. And although the Docket Number is still on the caption (because the ALJ's Order included that claim in his Order) it will hereinafter be removed as that case is no longer active.

[5] The Order is dated May 9, 2008, but claimant's brief referenced May 8, 2008, the day of the hearing.

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders.

Although respondent's application for review suggests that it is appealing the compensability of claimant's accident, the record makes it clear that any dispute as to the compensability of the claimant's claims was solely aimed at Docket No. 1,039,491, the alleged series of microtraumas. The compensability of the other two remaining claims were never disputed at the preliminary hearing. And the respondent's brief to the Board makes no mention of the compensability of the remaining two claims. Instead, the entirety of its argument stems from the ambiguity of the Order as it relates to the payment of TTD and the lack of finality of that Order.

In either instance, those are not appealable issues. The ALJ has the authority to decide an employee's entitlement to TTD benefits at the preliminary hearing level. It would certainly have been helpful for the ALJ to provide a reason for his Order and indicate which accidental injury had led to the obligation to pay TTD, either the August 23, 2007 accident or the November 13, 2007 accident. But his failure to do so is not the basis for an appeal.

And like the respondent, this Board Member finds that the ALJ's Order, as it relates to medical treatment, is interlocutory in nature. The ALJ has yet to decide that aspect of claimant's request. Thus, there is no statutory basis for the Board to review that matter at this juncture of the claim.[6]

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[7] Accordingly, respondent's appeal is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[8] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as

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[6] K.S.A. 44-534a.

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

[8] K.S.A. 44-534a.

permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the appeal of the Order of Administrative Law Judge Robert H. Foerschler dated May 9, 2008 is dismissed.

IT IS SO ORDERED.

Dated this _____ day of July 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: John R. Stanley, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge