

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

<b>ARLENE K. CATHEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>U.S.D. 290</b>	)	
Respondent	)	Docket No. 1,044,389
	)	
AND	)	
	)	
<b>KANSAS ASSOCIATION OF SCHOOL BOARDS</b>	)	
<b>WORKERS COMPENSATION FUND INC.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requests review of the February 11, 2010 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh (ALJ).

**ISSUES**

The ALJ granted claimant's request for temporary total disability (TTD) benefits at a rate of \$529 per week beginning February 24, 2009. The respondent requests review of this decision and alleges the ALJ exceeded his authority and/or jurisdiction when he granted claimant TTD benefits and ignored claimant's termination for cause and her ongoing receipt of unemployment benefits.

Claimant argues the Board has no jurisdiction to hear this appeal and the Board should do nothing more than dismiss this proceeding. And even if jurisdiction is found, claimant maintains that her termination was suspect and that she remains temporarily and totally disabled. Thus, the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member finds that the claimant's appeal should be dismissed for lack of jurisdiction.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those are (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 which dispute the compensability of the injury under the Workers Compensation Act.<sup>1</sup> The Board can also review those decisions when a party alleges the ALJ exceeded his jurisdiction.<sup>2</sup>

Respondent does not argue that the underlying compensability of claimant's claim is in dispute.<sup>3</sup> Rather, respondent adamantly maintains that the ALJ exceeded his jurisdiction in granting claimant's request for TTD benefits under these facts, thus giving rise to jurisdiction. Specifically, respondent contends that:

Judge Hursh took it upon himself to ignore the facts that [c]laimant had been terminated for cause and that she did not dispute the allegations against her. As such, he found that she was entitled to temporary total disability benefits, which was in error. Rather, Judge Hursh should have found that because [c]laimant was terminated for cause and because she would have continued in her accommodated position with [r]espondent, had she not been terminated, that she is not entitled to temporary total disability benefits.<sup>4</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ 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

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

<sup>2</sup> K.S.A. 2008 Supp. 44-551(i)(2)(A).

<sup>3</sup> Respondent had earlier contested the compensability of claimant's injury but at this second preliminary hearing, the sole focus was claimant's entitlement to TTD benefits. Compensability was not at issue.

<sup>4</sup> Respondent's Brief at 6 (filed Mar. 3, 2010).

decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>5</sup>

The ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. Although he may have made a decision that respondent believes was “wrong” and that he “should have”<sup>6</sup> denied claimant’s request for TTD, that decision was his alone to make at this juncture of the claim. Accordingly, the ALJ did not exceed his jurisdiction in awarding claimant TTD benefits and the Board does not have jurisdiction to address this issue at this point in the proceedings. Respondent’s appeal is therefore 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.<sup>7</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 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 Kenneth J. Hursh dated February 11, 2010, is dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2010.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Matthew R. Bergmann , Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge

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<sup>5</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>6</sup> Respondent’s Brief at 6.

<sup>7</sup> K.S.A. 44-534a.