

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

**SHECHINAH D. BENNETT**

Claimant

VS.

**CORNERSTONE VILLAGE, INC.**

Self-Insured Respondent

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Docket No. 1,044,663

**ORDER**

Claimant appealed the June 17, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

Claimant injured her low back on February 18, 2009, working for respondent as a nurses' aide. In the June 17, 2009, Order, Judge Hursh denied claimant's requests for a physician to be appointed to treat claimant and for temporary total disability benefits. The Judge held the record failed to show that respondent had unreasonably refused to provide medical treatment or that it had provided unsatisfactory medical treatment. In addition, Judge Hursh determined claimant was not temporarily and totally disabled on account of her work-related injury. The Judge wrote, in part:

Dr. Prostic's treatment recommendations were no different than those of Mt. Carmel, and the respondent still authorized another physician to evaluate and treat the claimant's injury. The record failed to show that the respondent has unreasonably refused to provide medical treatment or has provided unsatisfactory medical treatment, which are the two bases for directing a change of the authorized medical provider under K.S.A. 44-510h and 44-510j. The respondent shall not be ordered to provide authorized treatment through Dr. Prostic.

The claimant was capable of substantial and gainful employment by accommodated employment provided by the respondent. Her present unemployment resulted from her failure to show up for work when scheduled. The claimant is not temporarily totally disabled on account of the injury. Therefore, her request for temporary total disability benefits is denied.<sup>1</sup>

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<sup>1</sup> ALJ Order (June 17, 2009) at 2.

Claimant contends the June 17, 2009, Order, is subject to review by this Board as the Judge exceeded his jurisdiction and authority in two ways. First, claimant maintains the Judge's decision was arbitrary as it is contrary to the undisputed evidence. Second, claimant asserts the Judge did not consider the evidence. Consequently, claimant requests the Board to modify the June 17, 2009, Order and allow claimant the medical treatment proposed by her medical expert, Dr. Edward J. Prostic.

Conversely, respondent maintains the Board does not have jurisdiction to review the June 17, 2009, Order. In the alternative, respondent argues the Order should be affirmed as it had initially referred claimant for treatment at Mt. Carmel Regional Medical Center in Pittsburg, Kansas, and then just recently authorized Dr. Alexander S. Bailey to evaluate and treat claimant. Respondent asserts this preliminary hearing Order is neither subject to review under K.S.A. 44-534a nor K.S.A. 2008 Supp. 44-551(i)(2)(A).

The only issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review a preliminary hearing order to determine whether a worker should receive proposed medical treatment when compensability of the claim is not in issue?
2. Did Judge Hursh exceed his jurisdiction by denying claimant's request for the medical treatment recommended by Dr. Prostic?

Claimant did not raise the issue of temporary total disability benefits in either her Application for Review or the brief filed with the Board. Accordingly, that issue shall not be considered in this appeal.

**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. The Board's review of preliminary hearing orders and findings is limited. Not every alleged error in law or fact is subject to review at this juncture.

Whether an injured worker should receive certain medical treatment 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. Those jurisdictional issues 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 that challenge the compensability of the injury under the Workers Compensation Act.<sup>2</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 a judge has the authority to address a worker’s request to receive medical treatment (and temporary total disability benefits) at a preliminary hearing 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 preliminary award of medical compensation and temporary total disability compensation . . . .” Moreover, K.S.A. 2008 Supp. 44-510h gives a judge the authority to have another health care provider appointed when the medical services provided by an employer are unsatisfactory. The jurisdiction and authority to enter such orders 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>3</sup>

Claimant’s arguments that Judge Hursh did not consider the evidence and, therefore, ruled contrary to the evidence has little merit. Indeed, the Judge commented upon comparing Dr. Prostic’s treatment recommendations to the treatment provided by the providers associated with Mt. Carmel Regional Medical Center. In the absence of evidence to the contrary, it must generally be presumed a judge considers the evidence presented. The undersigned finds Judge Hursh did not exceed his jurisdiction and authority by denying the request for the medical treatment specifically recommended by Dr. Prostic.

In conclusion, the Board does not have the jurisdiction or authority at this juncture to review the June 17, 2009, preliminary hearing Order.

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

<sup>3</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

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>4</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 June 17, 2009, preliminary hearing Order entered by Judge Hursh in full force and effect.

**IT IS SO ORDERED.**

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

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KENTON D. WIRTH  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Joseph C. McMillan, Attorney for Respondent  
Kenneth J. Hursh, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.