

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAVID W. CHAPMAN)
Claimant)
)
V.)
)
PRO DIG, LLC)
Respondent) Docket No. 1,073,510
)
AND)
)
FARM BUREAU PROPERTY &)
CASUALTY INSURANCE CO.)
Insurance Carrier)

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 2, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Zachary K. Mark of Mission, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent.

The ALJ found claimant's termination was without good cause and awarded temporary total disability (TTD) benefits commencing June 21, 2015. The ALJ explained:

At the time of claimant's termination, he was receiving medical care for the workers compensation injury sustained on March 20, 2015. Further, there is some indication in at least claimant's testimony regarding his termination may be interpreted as being the indirect result of his filing of a workers compensation complaint. If such was the situation it would violate the public policy of the State of Kansas. In essence, the [ALJ] finds that in the absence of a written protocol and procedure for termination of an employee by Respondent for cause, there must be weight given to the utterance made by [respondent's director] at the time of claimant's termination. . . . The [ALJ] finds under the facts presented herein that claimant's termination was without good cause¹

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 1, 2015, Preliminary Hearing and the exhibits, and the

¹ ALJ Order (Sept. 2, 2015) at 3.

transcript of the June 24, 2015, discovery deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant was not making a good faith effort to retain his employment, establishing his termination was for cause. Respondent maintains “the ALJ’s finding that the lack of documentation justifies the finding that the claimant was not terminated for cause is contrary to the stated employment-at-will doctrine and the exceptions recognized by Kansas courts.”² Finally, respondent argues the Board has jurisdiction to review its appeal because the ALJ misapplied the certain defense of termination for cause by requiring the termination be for “good cause” as opposed to termination for “cause”.³

Claimant argues the Board lacks jurisdiction to hear respondent’s appeal. Alternatively, claimant contends the ALJ’s Order should be affirmed.

The sole issue for the Board’s review is: Does the Board have jurisdiction to review respondent’s appeal?

FINDINGS OF FACT

Claimant was employed by respondent as a machinist on March 20, 2015, when he suffered an injury while at work. Claimant slipped on oil while stepping down from a pallet and injured his low back and right shoulder. Claimant reported the incident to his supervisor and received conservative medical treatment. Claimant continued working for respondent with no restrictions until his termination on April 10, 2015.

Claimant testified he was told by his boss, respondent’s director Chris Gillibrand, he was being terminated. Claimant stated respondent was displeased with his service. He testified:

A. [Mr. Gillibrand] called me into the office around lunchtime and said that I wasn’t being a team player, that I was complaining, and that I filed a complaint and –

Q. When he said that you “filed a complaint,” do you know what he was referring to?

² Resp. Brief (filed Sept. 22, 2015) at 6.

³ See *id.* at 6-7.

A. I guess my work comp claim.⁴

Claimant explained he mentioned his claim during the conversation with Mr. Gillibrand, but could not recall Mr. Gillibrand's response.

Mr. Gillibrand stated claimant always worked very hard, and his work ethic could not be faulted. Mr. Gillibrand explained claimant was terminated for his disruptive attitude, insubordination, walking off-site, and refusing to do tasks as requested. He said, "At no time did I mention his claim. I responded to his comment about the claim only to say that that will be dealt with in due course as is appropriate."⁵ Mr. Gillibrand testified no formal disciplinary procedures were in effect at the time of claimant's termination on April 10, 2015. Claimant did not receive written warnings, reprimands or oral counseling.

Claimant was placed on temporary restrictions by a physician on June 15, 2015. Claimant applied for and received unemployment benefits through June 20, 2015. Mr. Gillibrand explained the unemployment request was uncontested due to a dereliction of duties by respondent's human resource administrator, who has since been terminated. Mr. Gillibrand indicated he did not receive any notice letter and was unaware of claimant receiving unemployment benefits until he reviewed respondent's payment records.

Claimant has not worked since his termination on April 10, 2015. He remains under temporary work restrictions.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-510c(b)(2) states, in part:

(B) A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.

(C) If the employee has been terminated for cause . . . following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

⁴ P.H. Trans. at 10.

⁵ *Id.* at 24.

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

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 accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2014 Supp. 44-551(l)(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.

K.S.A. 2014 Supp. 44-534a(a)(2) grants an ALJ jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. K.S.A. 44-534a also specifically gives the ALJ authority to grant or deny the request for TTD compensation pending a full hearing on the claim. "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."⁶

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and jurisdictional issues listed in K.S.A. 2014 Supp. 44-534a(a)(2), which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.⁷

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

The Board has consistently held that whether a claimant was terminated for cause, and thus not entitled to TTD benefits pursuant to K.S.A. 2014 Supp. 44-510c(b)(2)(C), is not a jurisdictional issue listed in K.S.A. 2014 Supp. 44-534a(a)(2).¹⁰ Since the review requested by respondent does not raise an issue of compensability enumerated in K.S.A. 2014 Supp. 44-534a(2), and there has been no showing the ALJ exceeded his authority, the application for Board review must be dismissed for lack of jurisdiction.

CONCLUSION

The Board does not have jurisdiction to consider respondent's appeal.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that that respondent's appeal be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

⁷ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

⁹ K.S.A. 2014 Supp. 44-555c(j).

¹⁰ *Gosnell v. Adventures While Growing Childcare Center, Inc.*, No. 1,069,327, 2014 WL 4402476 (Kan. WCAB Aug. 18, 2014); *Willis v. Clearview City*, No. 1,067,116, 2014 WL 1340598 (Kan. WCAB Mar. 24, 2014); *Chappell v. Sugar Creek Packing Co.*, No. 1,068,774, 2014 WL 3055470 (Kan. WCAB June 5, 2014); *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014); *Dominguez-Rodriguez v. Amarr Garage Doors*, No. 1,058,613, 2012 WL 1652979 (Kan. WCAB Apr. 24, 2012).

Dated this _____ day of November, 2015.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge