

- (1) Whether the Administrative Law Judge exceeded his jurisdiction in ordering respondent to reimburse claimant his mileage expense for travel to vocational rehabilitation in excess of the \$3,500.00 limitation contrary to K.S.A. 1992 Supp. 510(e)(3) and K.S.A. 1992 Supp. 44-510g(f).
- (2) Whether the Administrative Law Judge's order violates respondent's right to equal protection of the laws.
- (3) Whether the Workers Compensation Appeals Board has jurisdiction to review this matter pursuant to K.S.A. 44-534a and K.S.A. 44-551.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes on before the Appeals Board pursuant to a November 16, 1993, Order of Administrative Law Judge James R. Ward from an October 25, 1993, hearing on claimant's application for penalties. Claimant sought the imposition of penalties against the respondent due to the respondent's refusal to pay certain mileage expenses incurred by claimant in connection with a vocational rehabilitation plan which respondent was ordered to pay by order of Administrative Law Judge Ward dated January 15, 1992. That vocational rehabilitation order was appealed to the Director. By order of Assistant Director David Shufelt dated May 29, 1992, the vocational rehabilitation order of Judge Ward was found to be a preliminary order and not subject to review. Citing K.S.A. 44-551(b)(2)(A) the Assistant Director found that the finding that the claimant was entitled to vocational rehabilitation services was a factual determination, that the Administrative Law Judge had jurisdiction to make such determination, that he therefore did not exceed his authority, and that the preliminary order was accordingly not subject to review. The Assistant Director further found that because the vocational rehabilitation services were not being provided at the expense of the employer, the statutory thirty-six (36) week limitation of K.S.A. 44-510g(e)(3) was not applicable to this case.

A petition for judicial review of the Director's Order was certified to the District Court of Marshall County. The August 19, 1992, Memorandum Decision of District Court Judge J.D. Euler adopted the findings of fact and conclusions of law made by the Administrative Law Judge in his January 15, 1992, Order. The District Court further rejected the allegations of respondent that its constitutional rights to equal production of the laws and subsequent due process were violated.

Respondent appealed the Decision from the Marshall County District Court to the Kansas Court of Appeals. By Memorandum Opinion dated July 23, 1993, the Court of Appeals found that the vocational rehabilitation Order entered by Judge Ward on January 15, 1992, was a preliminary award and as such was not appealable, citing K.S.A. 1992 Supp. 44-551(b)(2)(A). The Court rejected respondent's argument that the order for vocational rehabilitation was reviewable by the Court pursuant to K.S.A. 1992 Supp. 44-556. That argument was found to be without merit and ignored the Director's acknowledgement that the Administrative Law Judge's order was a preliminary order only and therefore subject to very limited review. The Court of Appeals noted the distinction between a preliminary order and a final order after a full hearing on the claim. As the record was void of any final order and as there had not been a full hearing on the claim, the appeal was dismissed.

On September 2, 1993, claimant filed his application for penalties. A hearing was

held on this application before Administrative Law Judge Ward on October 25, 1993. Respondent does not appeal the finding of the Administrative Law Judge with respect to the imposition of penalties, which were in fact denied. Respondent does allege that the November 16, 1993, order of Administrative Law Judge Ward modified the earlier vocational rehabilitation order of January 15, 1992, by Judge Ward in that it ordered respondent to pay vocational rehabilitation mileage in excess of the \$3,500.00 respondent had already paid, and in so doing, violated the cap set forth in K.S.A. 1992 Supp. 44-510g(f).

Although an order awarding penalties may be a final order subject to de novo review by this Board pursuant to K.S.A. 44-551(b)(1), the order with respect to payment of vocational rehabilitation mileage expense is a preliminary order and as such is subject to the limitations prescribed by K.S.A. 44-551(b)(2)(A) which 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.”

What is to be considered jurisdictional and subject to review by the Board is given further elaboration in K.S.A. 44-534a(a)(2) which provides in pertinent part:

“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.”

The respondent alleges that the Administrative Law Judge exceeded his jurisdiction in ordering respondent to pay mileage during vocational rehabilitation in excess of \$3,500.00 unless there is a “special order” whereupon the employer could be required to pay an additional amount up to \$2,000.00. This is the same argument made below to the Administrative Law Judge. Judge Ward agreed that this specific issue was not addressed in the earlier January 15, 1992 preliminary hearing order. He went on to find that:

“Subsection (f) predicates the employer's limitation for board, lodging and travel of \$3,500.00 on the same premise that Subsection (e)(3) limits an employer's liability to pay temporary total to 36 weeks, i.e. it only applies in cases where the vocational rehabilitation is to be furnished at the expense of the employer. Also, the subsection applies only where the rehabilitation is being provided at a facility requiring that a claimant reside at or near the facility or institution away from the employee's customary county of residence. This was not the case with the claimant's vocational rehabilitation plan since he was not required to reside away from his customary county of residence.

Respondent contends that by providing the mileage the respondent is furnishing at least part of the vocational rehabilitation at its expense. This, however, is not deemed to be the intent of the legislature in its use of the word ‘expense’. In this context the word refers to tuition, books, fees, etc.

The only case in which an employer is relieved from paying travel

expenses, other than in those instances where the rehabilitation is being furnished at the expense of the employer and where the employee is required to reside away from his customary county of residence, is found in subsection (h) which provides that the employer shall not be required to pay the reasonable cost of the employee's travel where such costs are borne by any federal state or other public agency. Therefor, it appears that employers are to be responsible for mileage in every case of an approved rehabilitation, limited only by the exception in subsection (h) which is not applicable here."

We agree with the reasoning of the Court of Appeals in its Memorandum Opinion of July 23, 1993, finding that there is a distinction between a preliminary order and a final order after a full hearing on the claim. Here, as with the prior Vocational Rehabilitation Order entered by Judge Ward which was appealed first to the Director, then to District Court, and ultimately to the Court of Appeals, the record is void of any final order and there has not been a full hearing on the claim. The evidence does not present an issue considered jurisdictional under K.S.A. 44-534a(a)(2). The Appeals Board must therefore decide whether this case otherwise demonstrates that the Administrative Law Judge exceeded his jurisdiction in granting the relief requested at the preliminary hearing, i.e. ordering the payment of vocational rehabilitation mileage expense. See, Sawyer v. Oldham's Farm Sausage Co., 246 Kan. 327, 787 P.2d 697 (1990).

Black's Law Dictionary 991 (rev. 4th ed., 1968) defines jurisdiction as:

"The authority by which courts and judicial officers take cognizance of and decide cases." It is "the legal right by which judges exercise their authority."
"It is the authority, capacity, power or right to act". (citations omitted).

There are three essential elements of jurisdiction: jurisdiction of the subject matter; jurisdiction of the person; and, jurisdiction to render the particular judgement which was given. Harder v. Johnson, 147 Kan. 440, 76 P.2d 763 (1938). Here there can be no question as to the Administrative Law Judge's jurisdiction of the subject matter nor of the person. The challenge then is as to the jurisdiction to render the particular judgement which was given. Jurisdiction does not depend upon the correctness or rightfulness of the decision made, nor upon the ability of the judge to reason correctly. Rather it is the authority, in a broad sense, to entertain and decide the issue presented. Here the administrative law judge was following the broad legislative mandate set forth in K.S.A. 1992 Supp. 44-510g(a) where it provides that: "A primary purpose of the Workers Compensation Act shall be to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages, ...". The administrative law judge is given the broad statutory authority to order any treatment, medical and physical rehabilitation as he may deem necessary and may order such benefits to be provided at the expense of the employer. K.S.A. 1992 Supp. 44-510g(e)(2).

It is the opinion of the Appeals Board that the issue raised by the respondent herein, to wit, whether the administrative law judge correctly interpreted and applied the vocational rehabilitation statutes in ordering respondent to pay travel expenses for claimant's mileage to and from vocational rehabilitation, is not a jurisdictional issue and hence not reviewable by this Board on appeal from a preliminary order. The rationale for limiting appeals from preliminary orders is set forth by the Kansas Court of Appeals in its decision in Stout v. Stixon Petroleum, 17 Kan. App. 2d 195, 836 P.2d 1185 rev. denied, 251 Kan. 942 (1992) as follows:

“The overriding purpose of the Workers Compensation Act is to secure prompt payment to injured employees of the benefits provided for under its terms.’ Hatfield v. Wal-Mart Stores, Inc., 14 Kan. App. 2d 193 196-197, 796 P.2d (1990). The intent of the legislature in enacting K.S.A. 1991 Supp. 44-534a, providing for a summary procedure under which benefits can be granted to a claimant and making any order nonreviewable until time of the final hearing, seems clearly to have been directed toward insuring that the claimant did not become destitute or succumb to pressures for a quick settlement while awaiting a final decision in his case. If the ALJ’s award is later found to be erroneous, the employer or his insurer are reimbursed for any erroneous payments by the workers compensation fund. K.S.A. 1991 Supp. 44-534a(b). If the statutory interpretations sought by the respondents were affirmed, these legislative purposes would clearly be frustrated.” Id. at 202-203.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Order of Administrative Law Judge James R. Ward dated November 16, 1993, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of March 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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