



assessment. Specifically, it is alleged that said benefits should not have been ordered as the evidence does not establish that claimant is unable to perform work at a comparable wage as a result of the subject injury as required by K.S.A. 1992 Supp. 44-510g(d).

Also, claimant has filed a motion to dismiss this appeal alleging that respondent has failed to raise an issue over which the Appeals Board has jurisdiction.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

We will first address the issue of whether the Appeals Board has jurisdiction to review this appeal from a preliminary order. Although not characterized as such in the request for Appeals Board review filed by the respondent, it is alleged that the Appeals Board has jurisdiction of this matter pursuant to K.S.A. 44-534a(a)(2) as it is argued that the Administrative Law Judge exceeded his jurisdiction by ordering a vocational rehabilitation assessment and temporary total disability compensation when the claimant is not off work because of his injury as required by K.S.A. 1992 Supp. 44-510g(d). Respondent alleges that the claimant was returned to work with the respondent at an accommodated position earning a comparable wage but was subsequently terminated for cause unrelated to his injury and the subject claim. It is argued that the evidence further establishes that absent such misconduct and the resulting termination of claimant's employment with respondent, claimant would still be gainfully employed at comparable wage. Hence, claimant is not unable to perform work at a comparable wage "as a result of an injury."

The argument is then that the Administrative Law Judge exceeded his jurisdiction in ordering benefits under such circumstances and that this constitutes a certain other defense under K.S.A. 44-534a(a)(2). The Appeals Board does not agree that a jurisdictional issue has been raised. Claimant testified that he understood the accommodated light-duty job he was given by respondent following his conditional release with restrictions to have been temporary. He further testified that he could not perform the so-called light-duty position as it required him to perform tasks in violation of the physical restrictions imposed by the authorized treating physician. Whether the claimant is unable to earn a comparable wage due to his injury and the need for a vocational rehabilitation assessment are questions for determination by the Administrative Law Judge. His Order for a vocational rehabilitation assessment and for temporary total disability compensation was clearly within his authority to make. Consequently, the Appeals Board does not have jurisdiction to review the issue raised by this appeal from the Preliminary Hearing Order of the Administrative Law Judge.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that this appeal should be, and hereby is, dismissed. The Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer, dated May 24, 1994, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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