

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

LISA SCHULTZ

Claimant

VS.

STORMONT VAIL REGIONAL MEDICAL CENTER

Respondent
Self-Insured

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Docket No. 198,888

ORDER

The respondent requests review of the Preliminary Hearing Order entered in this proceeding by Administrative Law Judge Floyd V. Palmer on July 12, 1995.

ISSUES

The Administrative Law Judge granted claimant's request for temporary total disability compensation and medical benefits. The respondent believes that the Administrative Law Judge exceeded his jurisdiction in this matter because there was no evidence to justify ordering temporary total disability compensation to be paid. The claimant disagrees and argues that the finding by the Administrative Law Judge was appropriate and further raises the issue of whether the Appeals Board has jurisdiction to review the Administrative Law Judge's Order at this stage of the proceedings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and the briefs of the parties, the Appeals Board finds:

The Appeals Board has limited jurisdiction when reviewing findings from preliminary hearings. Either the disputed issue must be one of those specifically enumerated in K.S.A. 44-534a or the Administrative Law Judge must have exceeded his jurisdiction as required by K.S.A. 44-551, as amended by S.B. 59 (1995). The enumerated issues in the preliminary hearing statute K.S.A. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply. Respondent asserts that this Order is appealable both because the Administrative Law Judge exceeded his jurisdiction and because a certain defense applies.

Respondent argues that K.S.A. 44-510c(b)(2) prohibits an award of temporary total disability compensation unless it is shown to be appropriate in the opinion of the authorized treating health care provider and that such opinion is shown to be based upon an assessment of the employee's actual job duties with the employer with or without accommodation. Furthermore, respondent argues that this evidentiary showing is not only required, but that its absence constitutes a defense to a claim for temporary total disability compensation at a preliminary hearing and its absence constitutes a certain defense as contemplated by K.S.A. 44-534a(a)(2).

The Appeals Board finds that respondent's reliance upon K.S.A. 44-510c(b)(2) as a "defense" for purposes of Appeals Board jurisdiction under of K.S.A. 44-534a(a)(2) is misplaced. The issues enumerated in K.S.A. 44-534a which, if disputed, give rise to Appeals Board jurisdiction are, in the opinion of the Appeals Board, intended to be issues and "defenses" which go to the compensability of the claim. A finding concerning a disputed issue of whether a given claimant at a particular point in time is or is not temporarily totally disabled is not an issue which goes to the question of whether the claimant has a compensable claim within the provisions of the Kansas Workers Compensation Act. It should be noted that at the preliminary hearing in this case, there was no question concerning the compensability of the claim.

Respondent further contends that the Administrative Law Judge exceeded his jurisdiction in entering an order for temporary total disability compensation in the absence of medical evidence that claimant is temporarily totally disabled in the opinion of the authorized treating health care provider and which opinion is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation. We disagree. K.S.A. 44-534a(a)(2) gives the Administrative Law Judge the authority to decide the issues concerning the furnishing of medical treatment and the payment of temporary total disability compensation at preliminary hearing. The statute provides that such preliminary hearings are to be summary in nature. The Administrative Law Judge may make a preliminary award of medical compensation and temporary total disability compensation "[u]pon a preliminary finding that the injury to the employee is compensable, and in accordance with the facts presented at such preliminary hearing"

"The facts presented" at a preliminary hearing as to whether or not a claimant is or is not entitled to temporary total disability compensation are not limited to the opinion of the authorized treating physician. K.A.R. 51-3-5a provides in pertinent part: "Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing." Furthermore, K.S.A.-510c(b)(2) also provides in part: "A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment" K.S.A. 44-510c(b)(2) requires consideration of the opinion of the authorized treating health care provider when he or she is issuing a release for a claimant to return to work if there are restrictions. It must be shown that they are based on an assessment of the employee's actual job duties with the employer, with or without accommodation. However, the Administrative Law Judge is not limited to only considering such evidence when determining in the first instance whether or not a claimant is temporarily totally disabled. The court should look to the entire record and all the facts presented in making such a determination and when determining whether a claimant should be awarded temporary total disability compensation therefore. This decision-making authority of the Administrative Law Judge has not been delegated to the authorized treating health care provider.

The record in this case contains testimony from the claimant and medical records and reports from other health care providers which are relevant to the issue of claimant's entitlement to temporary total disability compensation benefits. The Administrative Law Judge did not exceed his jurisdiction and authority in ordering said benefits.

Because the issue before the Appeals Board is not one enumerated in the preliminary hearing statute, nor did the Administrative Law Judge exceed his jurisdiction, the Appeals Board does not have jurisdiction to review this Preliminary Hearing Order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that respondent's Application for Review should be, and hereby is, dismissed and that the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer entered in this proceeding on July 12, 1995 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of October 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: Frederick J. Patton II, Topeka, KS
James C. Wright, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director