

Also, in its brief to the Appeals Board, respondent and CNA Insurance Companies, (hereinafter CNA) raise an issue concerning whether claimant has proven a need for additional medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

The Administrative Law Judge did not exceed his jurisdiction in granting the relief requested at the preliminary hearing.

The Appeals Board has on several occasions approved use of preliminary hearing procedures as a part of a post-award application for review and modification. The Board has done so based largely upon the fact that parties have treated the proceedings as a preliminary hearing. See Andrews v. Blackburn, Inc., Docket No. 158,135 (July 1996). In this case, no party challenged the authority of the Administrative Law Judge to conduct a preliminary hearing in a post-award matter.

Because this claim is being treated as an application for preliminary hearing, the Appeals Board does not have jurisdiction to consider respondent and CNA's argument that the evidence does not support a finding that claimant is in need of medical treatment or temporary total disability benefits.

K.S.A. 44-551, as amended, limits the jurisdiction of the Appeals Board to review preliminary hearing orders only in cases where one of the parties has alleged the administrative law judge exceeded his or her jurisdiction. This jurisdiction includes the specific issues identified in K.S.A. 44-534a, as amended. A contention that the administrative law judge has erred in his finding that the evidence shows a need for medical treatment and temporary total disability benefits is not an argument the Appeals Board has the jurisdiction to consider on an appeal from an order entered pursuant to K.S.A. 44-534a and amendments thereto.

In its brief, respondent and Hartford argue that compensability is an issue but as the Appeals Board views the arguments presented, the issue is actually which of respondent's two insurance carriers should pay for the benefits ordered. The Administrative Law Judge ordered Hartford to pay because claimant's initial injury occurred and his current condition was diagnosed during Hartford's coverage. Hartford's argument of a permanent worsening of claimant's condition after its coverage ended and during CNA's period of coverage was rejected. Neither Hartford nor CNA argues that claimant's injury is not compensable.

Instead, the arguments pertain to what date of accident should control for purposes of determining which insurance carrier is liable. This does not give rise to a disputed issue of whether claimant's injury occurred as a result of an accident which arose out of and in

the course of claimant's employment with respondent. Whether claimant's date of accident is found to be before or after October 1, 1996, does not alter the fact that the injury is the result of claimant's employment with respondent. That fact appears to be undisputed.

Respondent and Hartford further allege the Appeals Board has jurisdiction of this appeal from a preliminary hearing order because certain defenses apply. The Appeals Board has previously held that the certain types of defense contemplated by K.S.A. 44-534a(a)(2), as amended, are defenses which go to the compensability of the claim. See Cockerham v. Nichols Fluid Service, Docket No. 201,867 (February 1996). As indicated above, the issues raised by this appeal do not fall within that category.

The order for payment of attorney fees was made pursuant to K.S.A. 44-536(g), as amended, and is considered a final order. See Shirley v. Vulcan Materials Company, Docket No. 165,635 (September 1995). However, no party has appealed from that portion of the preliminary hearing Order relating to attorney fees.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that it does not have jurisdiction to review at this juncture of the proceedings the preliminary hearing Order entered by Administrative Law Judge John D. Clark, dated April 8, 1997, and that this appeal should be, and the same is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

c: Gary E. Patterson, Wichita, KS
P. Kelly Donley, Wichita, KS
D. Steven Marsh, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director