

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

STEVEN C. IVEY)	
Claimant)	
VS.)	
)	Docket No. 217,041
BUCKLEY INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge John D. Clark dated November 6, 1996, wherein Judge Clark granted claimant temporary total disability and medical compensation. The Administrative Law Judge denied claimant's request for a change of authorized treating physician.

ISSUES

Is the claimant entitled to temporary total disability compensation per the Order of the Administrative Law Judge?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board must first determine whether it has jurisdiction to review this appeal from the preliminary hearing Order. The Order dated November 6, 1996, from which respondent appeals, deals solely with the issue of temporary total disability compensation. K.S.A. 1996 Supp. 44-551(b)(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. 1996 Supp. 44-534a(2) grants authority to the Administrative Law Judge to make a preliminary award of temporary total disability compensation. That statute further makes provision regarding the jurisdiction for the Appeals Board to review preliminary hearing orders as follows:

"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 ."

Respondent contends that claimant voluntarily terminated his employment with respondent after a dispute with his supervisor. It is respondent's position that claimant would be disqualified from receiving temporary total disability compensation benefits as a result of this voluntary termination. Respondent alleges claimant's voluntary termination constitutes a "certain defense" under K.S.A. 1996 Supp. 44-534a.

The Appeals Board has discussed the definition of "certain defenses" in prior opinions. See Ghramm v. Emporia Construction & Remodeling, Docket No. 199,776, (January 12, 1996). In Ghramm, it was noted that the legislative guidance in K.S.A. 1996 Supp. 44-534a is practically nonexistent regarding what "certain defenses" was intended to mean. The phrase "certain defenses" is analogous to some defenses as opposed to any and all defenses which might be raised. The Appeals Board, in considering the definition of "certain defenses," noted the other issues raised by K.S.A. 1996 Supp. 44-534a which, if disputed, were considered jurisdictional. The common denominator in all these issues is that it goes to the compensability of the claim in all instances. For a workers compensation claim to be compensable, each of the issues in K.S.A. 1996 Supp. 44-534a, if disputed, must be proven by claimant before he could recover benefits under the Workers Compensation Act. The Appeals Board has previously held, and reaffirms the position, that the "certain defenses" contemplated by K.S.A. 1996 Supp. 44-534a(2) are defenses which go to the compensability of the claim. Examples would be allegations of willful failure to use a guard, or a defense of intoxication, or use of illegal drugs under K.S.A. 1996 Supp. 44-501.

The defense raised by the respondent herein, if successful, could justify the denial or termination of temporary total disability compensation but would not in and of itself prevent claimant from proving a compensable claim.

As such, the issue raised by the respondent does not go to the ultimate question of the compensability of claimant's claim but instead to the issue of claimant's entitlement to ongoing or future benefits and does not constitute a "certain defense."

WHEREFORE, it is the finding, decision and order of the Appeals Board that the appeal of the respondent and its insurance carrier should be, and hereby is, dismissed and the Order of Administrative Law Judge John D. Clark dated November 6, 1996, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director