

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

STEPHEN T. BROWNE
Claimant

VS.

OVERNITE TRANSPORTATION COMPANY
Respondent
Self-Insured

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Docket No. 228,665

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Julie A.N. Sample dated June 4, 1998, wherein claimant was provided temporary total disability compensation.

ISSUES

“Whether claimant is entitled to temporary total disability benefits where respondent provided claimant with an accommodated position within his restrictions, claimant performed accommodation duty but was later terminated for absenteeism.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges accidental injury on November 8, 1997, while employed with respondent. Following claimant’s alleged on-the-job injury, he was provided medical treatment, returned to work with restrictions on February 20, 1998, and provided accommodated employment. Claimant accepted the accommodated position with respondent but was later terminated as a result of attendance problems. Claimant then filed for preliminary hearing, which was held before Judge Sample on June 3, 1998. At that time, claimant’s request for reinstatement of temporary total disability compensation was granted.

Respondent argues the Administrative Law Judge violated K.S.A. 1997 Supp. 44-551 and K.S.A. 1997 Supp. 44-534a, exceeding her jurisdiction in granting claimant the benefits requested. Respondent specifically argues the jurisdictional issue under K.S.A. 1997 Supp. 44-534a(a) as to whether certain defenses apply.

Claimant, on the other hand, alleges this appeal is nonjurisdictional and should be dismissed.

Respondent is correct in that an appeal, dealing with whether certain defenses apply, is jurisdictional under K.S.A. 1997 Supp. 44-534a(a)(2). However, as the phrase "certain defenses" is not defined by the statute, it must first be determined whether this particular issue raised by respondent falls within the Appeals Board's definition of that phrase. The phrase "certain defenses" is analogous to some defenses, as opposed to all defenses or any defenses. In considering what "certain defenses" would include, the Appeals Board has held, in the past, that "certain defenses" are defenses that go to the compensability of the claim. In other words, for a workers compensation claim to be compensable, each and every issue listed must be proven by claimant before he or she can recover benefits.

Respondent argues the Administrative Law Judge improperly awarded claimant benefits after claimant had been returned to work at an accommodated position, and was only terminated as a result of his own attendance problems. Respondent's argument does not go to the compensability of the claim, but instead challenges claimant's entitlement to temporary total disability compensation. Claimant's termination of employment for attendance problems does not constitute a "certain defense" under K.S.A. 1997 Supp. 44-534a and, therefore, the Administrative Law Judge, in awarding temporary total disability benefits, did not exceed her jurisdiction under K.S.A. 1997 Supp. 44-551. Therefore, respondent's appeal in this matter should be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A.N. Sample dated June 4, 1998, remains in full force and effect, and the appeal by respondent should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: John H. Thompson, Kansas City, MO
Jeff S. Bloskey, Overland Park, KS
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Director