BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL PORTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 234,065
CLARENCE M. KELLY DETENTION	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

and

PAUL PORTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,160
U.S.D. NO. 501	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent, U.S.D. No. 501, appeals from the Order of Administrative Law Judge Brad E. Avery dated May 25, 1999. In the Order, the Administrative Law Judge granted claimant benefits in the form of temporary total disability compensation and medical treatment, finding that claimant did suffer accidental injury arising out of and in the course of his employment with respondent, U.S.D. No. 501.

ISSUES

Respondent, U.S.D. No. 501, raises the following issues for Board consideration:

(1) Did the alleged injury of either November 9 or November 13, 1998, while claimant was in the employ of U.S.D. No. 501, temporarily aggravate claimant's preexisting back injury and then resolve itself to the same previous level?

(2) Is the surgery currently recommended the same surgery that had been recommended by Dr. Michael Smith in September of 1998, which claimant declined? Is claimant, therefore, in violation of K.A.R. 51-9-5, as this was an unreasonable refusal by claimant to submit to medical and surgical treatment, and, if so, should claimant's compensation be denied?

(3) Which respondent is responsible for the surgery to claimant's low back and the temporary total disability compensation stemming from his January 26, 1999, treatment?

Respondent, Clarence M. Kelly Detention, and its insurance carrier, Hartford Accident & Indemnity, raise the following issues in their brief:

(a) Does claimant's need for medical treatment to his low back stem from the May 1998 date of accident with Clarence M. Kelly Detention or from the aggravation of November 1998, while claimant was employed with U.S.D. No. 501?

(b) Will K.A.R. 51-9-5 disallow claimant's entitlement to medical treatment at this time?

(c) Did claimant's November 1998 accident arise out of and in the course of claimant's employment with U.S.D. No. 501?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

It is agreed by the parties that claimant suffered accidental injury on May 8, 1998, while in the employ of Clarence M. Kelly Detention. At that time, claimant was sitting in a chair that was knocked out from under him, and he fell to the floor. Claimant aggravated a preexisting back condition which claimant had had for many years. It was recommended that claimant undergo surgical treatment, although that recommendation by orthopedic surgeon Dr. Michael Smith was presented as an alternative to conservative treatment and not an absolute recommendation. Claimant declined the surgery at that time.

On November 9, 1998, while in the employ of U.S.D. No. 501, claimant was lifting a trash can when he felt a sharp pain in his groin and back. Claimant was diagnosed with and underwent surgical repair of a right side hernia on November 30, 1998. Claimant also described an increase in pain in his low back. It is acknowledged by the parties that

claimant's back pain, while increasing on the date of accident, did later subside to a level comparable to that experienced before the accident.

The dispute before the Board is not whether claimant suffered accidental injury on the date alleged, but whether the injury to claimant's low back was temporary or permanent, and which respondent should be responsible for the costs of the surgery associated with this back injury. Therefore, the dispute between the parties centers not on whether claimant suffered accidental injury on the date alleged, but rather on the nature and extent of that particular injury.

K.S.A. 1998 Supp. 44-551(b)(2)(A) states in part that an appeal from a preliminary award under K.S.A. 1998 Supp. 44-534a shall be allowed to the Board if it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at preliminary hearing. K.S.A. 1998 Supp. 44-534a lists specific jurisdictional issues which are subject to review by the Board, including whether the employee suffered accidental injury, whether the accidental 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.

While respondent, U.S.D. No. 501, argues that this is a jurisdictional issue, the Appeals Board disagrees. An issue dealing with the nature and extent of injury and whether an aggravation is temporary or permanent is not a jurisdictional issue under K.S.A. 1998 Supp. 44-534a and does not confer jurisdiction to the Board under K.S.A. 1998 Supp. 44-551 to review a preliminary hearing order. The administrative law judge is authorized to decide issues dealing with medical treatment and temporary disability compensation. As respondent, U.S.D. No. 501, has acknowledged that claimant suffered a temporary aggravation and as this is supported by Dr. Smith's opinion in his March 2, 1999, letter to Roger Fincher, the Appeals Board finds that the issues currently before the Board do not constitute jurisdictional issues under K.S.A. 1998 Supp. 44-534a and will not confer jurisdiction on the Board under K.S.A. 1998 Supp. 44-551.

The Appeals Board, therefore, finds that the appeal in this matter is not properly before the Board and the appeal by the respondent, U.S.D. No. 501, is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated May 25, 1999, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

_____
BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Gregory J. Bien, Topeka, KS
Heather Nye, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director