

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

<b>RUTH A. MALEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,530
<b>YOR-WIC CONSTRUCTION COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>DEEP SOUTH</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from the January 25, 2000, Order for Compensation from Administrative Law Judge Bryce D. Benedict.

**ISSUES**

Respondent raises the following issues in its application to the Board:

- “(1) Whether claimant is entitled to temporary total disability at the rate of \$213.44 per week, commencing March 22, 1999 through August 31, 1999;
- “(2) Whether medical treatment should be provided and paid for by respondent and insurance carrier until claimant is certified as having reached maximum medical improvement;
- “(3) Whether claimant suffered at least a temporary aggravation of pre-existing asthma as a result of an exposure to some substance at work;
- “(4) Whether claimant was temporary totally disabled for a period of time thereafter;

- “(5) That respondent did not raise the issue of written claim at the hearing and as the claimant did not have an opportunity to present evidence on this point, the respondent will not be allowed to raise it at this later date;
- “(6) That respondent’s request to be relieved of its stipulation that the claimant was not its employee and that the claimant would be unduly prejudiced if the court were to grant this request which was made after the claimant had presented her evidence;
- “(7) That the deposition of Mr. Wicker is not part of the preliminary hearing record;
- “(8) Any and all other findings in this Order.”

In addition, in its brief, respondent argues the Administrative Law Judge exceeded his jurisdiction in refusing to hear the issues of compensability and timely written claim at preliminary hearing, and further disputes whether respondent, Yor-Wic Construction Company, is the proper respondent party in this action.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 1999 Supp. 44-551 limits the right of a party to appeal from a preliminary hearing order to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested at preliminary hearing. K.S.A. 1999 Supp. 44-534a lists certain jurisdictional issues appealable from preliminary hearings, dealing specifically with whether claimant 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.

In respondent’s Application for Board of Appeals Review and Docketing Statement, Issue Nos. 1, 2, 4, 6, 7 and 8 do not raise jurisdictional issues under K.S.A. 1999 Supp. 44-551 or K.S.A. 1999 Supp. 44-534a and are not appealable from this preliminary hearing decision. Therefore, respondent’s appeal on those issues is dismissed.

Respondent’s Issue No. 5 discusses written claim. Written claim is listed in K.S.A. 1999 Supp. 44-534a as a jurisdictional issue and normally appealable. But the issue specifically raised by respondent is not whether claimant submitted written claim in a timely

fashion, but whether the Administrative Law Judge erred in refusing to allow respondent to raise that issue after the preliminary hearing and after claimant had submitted all of claimant's evidence. That issue is also not jurisdictional and not appealable from a preliminary hearing order. The Administrative Law Judge, by refusing to allow respondent to raise an issue at that late date, was merely protecting the due process rights of all parties. Respondent's appeal on that issue is dismissed.

Respondent does raise an appealable issue regarding compensability in Issue No. 3 regarding whether claimant suffered at least a temporary aggravation of claimant's pre-existing asthma condition as a result of an exposure to some substance at work. That asks whether claimant suffered accidental injury arising out of and in the course of her employment.

Claimant, however, disputes respondent's right to raise that issue, contending that particular issue was waived by respondent at preliminary hearing. It is noted that, at the time of preliminary hearing, respondent agreed to authorize Gerald R. Kerby, M.D., for treatment, but did not waive its denial of compensability as an issue. The conversation at the time of preliminary hearing indicates that respondent intended only to dispute claimant's entitlement to temporary total disability benefits at that particular preliminary hearing. The compensability question appears to have been reserved for determination at a later time. However, the Administrative Law Judge, in his Order for Compensation, specifically found that claimant had suffered at least a temporary aggravation of her pre-existing asthma as a result of her exposure to some substance at work.

The record appears confused regarding whether that issue was to be decided at preliminary hearing. The Administrative Law Judge, erring on the side of caution, decided the issue. Therefore, that issue is properly before the Appeals Board from the Administrative Law Judge's preliminary hearing Order for Compensation dated December 22, 1999.

On the alleged date of accident, claimant testified to feeling light-headed and nauseated and smelling a funny smell. Claimant reported this smell to her supervisor, Lance Hall, the construction foreman. Mr. Hall acknowledges claimant contacted him on Monday, March 15, 1999, somewhere between 9:00 and 10:00 in the morning. Claimant advised Mr. Hall that she believed the smell was propane gas. Mr. Hall investigated the situation, but was unable to locate the smell. Claimant continued experiencing symptoms, including lethargy and light-headedness, and sought medical treatment. She ultimately came under the care of Shawn M. McGee, M.D., a pulmonologist with the Cotton-O'Neil Clinic in Topeka, Kansas. Dr. McGee, in his June 29, 1999, letter to claimant, stated that exposure to propane gas could cause or contribute to an increase in claimant's asthma symptoms.

Respondent argues that claimant had asthma pre-existing the alleged March 15 or March 19, 1999, exposures. Even assuming this is true, an exacerbation of a preexisting condition is compensable, even if only temporarily.

Based upon the testimony of claimant and the medical opinion of Dr. McGee, the Board finds claimant suffered at least a temporary exacerbation of her asthma condition on March 15, 1999.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order for Compensation of Administrative Law Judge Bryce D. Benedict dated January 25, 2000, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2000.

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BOARD MEMBER

c: George H. Pearson, III, Topeka, KS  
R. Todd King, Wichita, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director