BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERMAN R. WHITE	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 265,120;
LABETTE COUNTY	)	265,121
Respondent	)	
	)	
and	)	
	)	
EMPLOYERS MUTUAL CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 13, 2002, preliminary hearing Order entered by Administrative Law Judge (ALJ) Jon L. Frobish.

ISSUES

Claimant suffered two separate work-related injuries. He was returned to work with restrictions which respondent was apparently accommodating until claimant was involved in an altercation with a co-worker and was terminated. Judge Frobish denied claimant's request for temporary total disability benefits because respondent terminated claimant for cause.

Claimant contends that Judge Frobish erred. Claimant argues that he is entitled to receive temporary total disability benefits because he was an innocent party in the alleged altercation and his termination was, therefore, unjustified. Furthermore, contrary to the ALJ's finding, respondent did not have a zero tolerance policy. Instead, respondent's human resource director had discretion whether or not to terminate claimant. Claimant

asserts that the reason respondent gave for terminating claimant was a pretext and that he was actually terminated in retaliation for filing a workers compensation claim.

Conversely, respondent contends claimant's appeal should either be dismissed or that the Order should be affirmed. Respondent argues that the Appeals Board (Board) does not have jurisdiction at this juncture of the claim to decide the issue now presented by claimant. In the alternative, respondent argues that the termination was justified and, therefore, claimant is not entitled to receive temporary total disability benefits. There is also an issue as to whether claimant meets the definition of being temporarily and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the evidence and considering the arguments, the Board concludes the issue raised by claimant is not reviewable at this stage of the proceedings. Therefore, this appeal should be dismissed.

2. This is an appeal from a preliminary hearing order. Therefore, not every error in law or fact is subject to review. Generally, preliminary hearing awards can be reviewed only when it is alleged the judge exceeded his or her jurisdiction in granting or denying benefits.[1] Preliminary hearing findings of whether (1) the worker sustained an accidental injury, (2) the injury arose out of and in the course of employment (3) notice was given or claim timely made, or (4) certain defenses apply, are deemed jurisdictional and subject to review from a preliminary hearing order.[2] The Board has held on numerous occasions that the term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.

3. The issue raised in this appeal is not a jurisdictional issue listed above and does not otherwise amount to an allegation that the judge exceeded his jurisdiction. Instead, the question presented by respondent is whether the judge erred in applying the law to a preliminary hearing issue over which the judge had jurisdiction.

WHEREFORE, the Appeals Board dismisses this appeal leaving the May 13, 2002 Order in full force and effect.

IT IS SO ORDERED.

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[1] K.S.A. 44-551(b)(2)(A).

[2] K.S.A. 44-534a.

Dated this _____ day of October 2002.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation