

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RODRIGO GATICA)
Claimant,)
)
vs.)
)
LAUNCH TECHNICAL WORKFORCE) **CS-00-0447-708**
SOLUTIONS, LLC) **AP-00-0450-882**
Respondent,)
)
and)
)
STARR SPECIALTY INSURANCE COMPANY)
Insurance Carrier.)

ORDER

Respondent requests review of the April 30, 2020, preliminary Order issued by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Jeff K. Cooper appeared for Claimant. Kevin M. Johnson appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the deposition transcript of Kailee Ellis taken February 19, 2020, with exhibits 1-9; the transcript of the Preliminary Hearing held February 25, 2020, with Claimant's Exhibits 1-3 and Respondent's Exhibits 1-4; and the pleadings and orders contained in the administrative file.

ISSUES

1. Does the Board have authority to review the Order for the payment of temporary total disability compensation?
2. Should the Order be vacated because it was not issued within five days of the preliminary hearing?
3. Did the ALJ exceed his authority under K.S.A. 44-551 in awarding temporary total disability benefits because Claimant was terminated for cause?

4. Did the ALJ exceed his authority under K.S.A. 44-551 in awarding temporary total disability compensation at the rate of \$666.00 per week, starting September 13, 2019 and continuing?

FINDINGS OF FACT

Claimant worked for Respondent as an aviation inspector, and was assigned to work at Spirit in Wichita. Claimant resides in Washington. On September 13, 2019, Claimant slipped and fell inside an unfinished plane he was inspecting. Claimant injured his neck, lower back and legs. Claimant later developed pain in his arms. Claimant was transported via ambulance to Via Christi's Emergency Department. At Via Christi, Claimant was told to see a neurosurgeon. No work restrictions were imposed by Via Christi.

Claimant was informed there would be a delay in his seeing a specialist in Wichita. Claimant did not want to wait for the referral, and elected to return to his home in Washington. Claimant intended to see a specialist in Washington. Respondent was not immediately informed of Claimant's decision to return home, and Claimant was terminated for job abandonment. Claimant denied working or receiving any income since leaving Wichita.

Claimant was seen at Concentra in Washington on September 29, 2019, for his work-related injuries. Concentra referred Claimant to a neurosurgeon and placed Claimant on modified duty. Respondent did not immediately authorize a neurosurgeon because of difficulty locating a neurosurgeon who would agree to payment under the Kansas Workers Compensation Medical Fee Schedule. Claimant saw Dr. Pearce on his own on October 23, 2019, and Dr. Pearce stated Claimant could not work starting October 23. On October 29, 2019, Concentra stated Claimant was not released to return to work starting October 18, 2019, and recommended Claimant follow up with Dr. Pearce. Further medical treatment was not forthcoming.

Claimant believed he could not perform his usual occupation as an aviation inspector. Claimant testified he was paid \$32.50 per hour straight-time, \$45.00 per hour overtime and a per diem while working in Wichita.

Ms. Ellis, who administers claims for Respondent, testified Claimant was paid \$12.00 per hour straight-time and a per diem while working in Wichita. Ms. Ellis confirmed Claimant was terminated for job abandonment after he chose to return to Washington. Ms. Ellis testified had Claimant not been terminated, accommodated work within the restrictions imposed by Concentra on September 26, 2019, would have been provided. Ms. Ellis, however, did not investigate whether accommodated work could have been provided based on restrictions imposed after September 26, 2019, because Claimant was terminated.

Claimant's injuries remained symptomatic and he wanted to resume medical treatment. Claimant sought medical treatment and temporary total disability at the preliminary hearing held on February 25, 2020. Respondent announced at the preliminary hearing additional medical treatment would be provided voluntarily, but temporary total disability compensation was disputed. Respondent did not dispute compensability or notice at the preliminary hearing. Following the preliminary hearing, ALJ Klein issued the preliminary Order granting Claimant's request for temporary total disability compensation and medical treatment. Respondent and Insurance Carrier were ordered to authorize a health care provider in Washington, and to pay Claimant temporary total disability compensation at \$666.00 per week, starting September 13, 2019, and continuing. Respondent appealed.

PRINCIPLES OF LAW AND ANALYSIS

Respondent requests review, stating the ALJ exceeded his jurisdiction under K.S.A. 44-551 in awarding temporary total disability benefits, ordering temporary total disability benefits to be paid at the maximum rate of \$666.00, and in failing to issue an order within five days of the preliminary hearing. Claimant argues the Board does not have jurisdiction to hear this appeal under K.S.A. 44-534a. Alternatively, if the Board possesses authority to consider this appeal, Claimant contends the Order is correct.

The Board first addresses the jurisdictional issue. The Kansas Workers Compensation Act states the Board's authority to consider appeals of preliminary orders is limited to questions of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of employment, whether notice was given or whether "certain defenses" apply.¹ "Certain defenses" in K.S.A. 44-534a imbue jurisdiction only if they dispute the compensability of the injury under the Act.² Moreover, K.S.A. 44-551 does not independently grant the Board authority to consider an appeal of a preliminary award of temporary total disability compensation.³ The issue may be reserved for final award.⁴

In this case, Respondent does not dispute compensability or notice. Respondent contends Claimant is ineligible to receive temporary total disability compensation because he was terminated for cause and accommodated work would have been provided. Respondent also argues no authorized physician took Claimant off work, and Respondent

¹ See K.S.A. 44-534a(a)(2).

² See *Carpenter v. National Filter Service*, 26 Kan.App.2d 672, 675, 994 P.2d 641 (1999).

³ See *Kersenbrock v. Holiday Resort, Inc.*, No. 211,918, 1997 WL 578252, at *1 (Kan. WCAB July 17, 1997).

⁴ *Id.*

disputes the compensation rate. The plain language of K.S.A. 44-534a does not grant the Board authority to hear these issues preliminarily. Because the Board does not possess authority to consider the issues raised by Respondent at this time, Respondent's appeal must be dismissed. The remaining issues asserted by Respondent are moot, and may be preserved by Respondent for final award.

By statute, preliminary findings and conclusions are neither final, nor binding, and may be modified upon a full hearing of the claim.⁵ Moreover, this review has been conducted by only one Board Member, as permitted by K.S.A. 44-551(l)(2)(A).

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member these review proceedings are dismissed for want of jurisdiction. The preliminary Order issued by ALJ Klein dated April 30, 2020, remains in force and effect.

IT IS SO ORDERED.

Dated this 30th day of June 2020.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Jeff K. Cooper
Kevin M. Johnson
Hon. Thomas Klein

⁵ K.S.A. 44-534a.