

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>CHRIS SIGWING</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0464-591
<b>UNITED PARCEL SERVICE, INC.</b>	)	CS-00-0447-390
Respondent	)	
AND	)	
	)	
<b>LM INSURANCE GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (Respondent) request review of the March 29, 2022, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

**APPEARANCES**

David H. Farris appeared for Claimant. Karl L. Wenger appeared for Respondent.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of the Preliminary Hearing held October 13, 2021, with exhibits attached, and the documents of record filed with the Division.

**ISSUES**

1. Does the Board have jurisdiction to review Respondent's appeal?
2. If so, did the ALJ exceed his jurisdiction in granting Claimant temporary total disability benefits (TTD)?

**FINDINGS OF FACT**

Claimant sustained a compensable back injury in the course of his employment with Respondent. Claimant initially treated with Dr. Murati for pain management, including physical therapy, medication, branch blocks, and work restrictions. Claimant was

eventually referred to Dr. Wingate, a neurosurgeon, who performed an L4-5 transforaminal lumbar interbody fusion with L3-5 pedicle screw instrumentation in October 2020.

After Dr. Wingate moved, Dr. Weimar became Claimant's authorized treating physician. Dr. Weimar provided physical therapy, injections, medication, and work restrictions. Respondent was unable to accommodate any of Claimant's work restrictions and voluntarily paid TTD at the rate of \$666.00 for an extended period.

Claimant reported to Dr. Weimar continued pain following surgery and "no significant long-standing improvement of his complaints" after several rounds of physical therapy.<sup>1</sup> A CT scan of Claimant's lumbosacral spine was obtained and reviewed by Dr. Weimar. In a letter dated August 30, 2021, Dr. Weimar wrote:

My impression is that [Claimant's] instrumentation is intact. I do not see any foraminal or central stenosis to indicate there would be nerve root impingement. Unfortunately, I do not have anything much more to offer him. I do not think he needs any further surgery. He has tried numerous rounds of physical therapy as above and I do not think any more physical therapy would be of benefit. I think, at this point in time, he has reached maximum medical improvement. I think, as a last option, he might consider Physiatry to see if there is anything additional they would add and to possibly perform a Functional Capacity Exam, so that we could obtain some kind of final disposition. Again, at this point in time, I am afraid I do not have much more to offer him. He can follow up with me on an as-needed basis at this point in time.<sup>2</sup>

Respondent terminated TTD effective August 31, 2021. A preliminary hearing was held October 13, 2021, after which the ALJ reinstated TTD from August 31, 2021, through December 31, 2021, based on the compensation rate of \$666.00.

### **PRINCIPLES OF LAW AND ANALYSIS**

Respondent argues the ALJ exceeded his jurisdictional authority by awarding TTD after Claimant was placed at maximum medical improvement (MMI). Respondent maintains the ALJ's Order should be reversed.

Claimant contends the Board lacks jurisdiction to review Respondent's appeal. Alternatively, Claimant argues the ALJ did not exceed his jurisdiction in awarding TTD because Claimant was not at MMI in August 2021, needed additional medical treatment, and remained off work.

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<sup>1</sup> P.H. Trans., Ex. 1.

<sup>2</sup> *Id.*

K.S.A. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.... Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

The Board possesses the authority to review preliminary orders on disputed issues 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.<sup>3</sup> "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.<sup>4</sup> If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.<sup>5</sup>

Respondent argues the Board has jurisdiction to review the ALJ's Order based upon a Board Member's holding in *Witherspoon v. HCA Inc.*<sup>6</sup> *Witherspoon* involved an ALJ not

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<sup>3</sup> See K.S.A. 44-534a(a)(2).

<sup>4</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>5</sup> See *id.* at 676.

<sup>6</sup> *Witherspoon v. HCA Inc.*, No. CS-00-0442-483, 2019 WL 6695521 (Kan. WCAB Nov. 5, 2019).

following the statutory procedure in applying a credit for overpayment of TTD, wherein the Board Member wrote:

Under K.S.A. 44-525(c) and K.S.A. 44-534a(b), the method to address an overpayment of TTD requires that the case proceed to a full hearing. There has not been a full hearing on this case. A TTD overpayment is credited to the employer and insurance carrier at the conclusion of a case, not at the preliminary stages. The judge's decision is not in accordance with the statutes. In so doing, the judge exceeded his jurisdiction.

K.S.A. 44-534a(a)(2) specifically grants a judge jurisdiction to decide issues concerning payment of medical compensation and temporary total disability compensation. The undersigned concedes the ALJ ordered TTD benefits without any evidence supporting his decision. The issue of whether Respondent should be ordered to pay TTD is not an issue concerning the compensability of Claimant's injury. "Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."<sup>7</sup> The ALJ's order for TTD was within his jurisdiction.

The Board does not have jurisdiction under K.S.A. 44-534a to consider the issue at this time. The request for review of this issue is dismissed.

### **DECISION**

**WHEREFORE**, the Undersigned dismisses Respondent's appeal from the Order of Administrative Law Judge Thomas Klein dated March 29, 2022.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2022.

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SETH G. VALERIUS  
BOARD MEMBER

c: Via OSCAR

David Farris, Attorney for Claimant  
Karl Wenger, Attorney for Respondent and its Insurance Carrier  
Hon. Thomas Klein, Administrative Law Judge

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<sup>7</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).