

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PHILLIP PEAVY

Claimant

v.

DEFFENBAUGH INDUSTRIES, INC.

Respondent

CS-00-0441-234

AP-00-0455-578

and

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**

Insurance Carrier

ORDER

Claimant requests review of Administrative Law Judge (ALJ) Troy A. Larson's alleged refusal to grant Claimant's Motion for Recusal and Change of Administrative Law Judge.

APPEARANCES

Phillip Peavy appears *pro se*. Mark J. Hoffmeister appears for Respondent and its Insurance Carrier.

RECORD AND STIPULATIONS

A hearing on Claimant's Motion for Recusal and Change of Administrative Law Judge did not occur and there is no transcript. No order, oral or written, was issued by ALJ Larson. The Appeals Board reviewed the pleadings and orders contained in the administrative file, and took judicial notice of the procedural history of this matter. The Appeals Board considered the parties' briefs, excluding the attachments to Claimant's Reply to Brief filed January 22, 2021. This matter was placed on the Board's summary calendar for decision without oral argument.

ISSUES

1. Does the Appeals Board have jurisdiction to consider the issues raised by Claimant in the Appeal from Notice?

2. If the Appeals Board has jurisdiction to consider the issues raised by Claimant in the Appeal from Notice, should Claimant's Motion for Recusal and Change of Administrative Law Judge be granted?

FINDINGS OF FACT

The Appeals Board considered a prior appeal in this matter,¹ and the facts contained in the Board's prior Order are incorporated herein as if fully set forth. Claimant subsequently filed a written request for a prehearing settlement conference. ALJ Larson's assistant sent an email to Claimant and Respondent's counsel advising of available dates. The email referenced "Peavy v. Deffenbaugh." The assistant to Respondent's counsel sent a responsive email with a signature block indicating she was the assistant to Respondent's counsel and another attorney in Respondent's counsel's law firm. It does not appear Claimant responded to ALJ Larson's assistant or scheduled a prehearing settlement conference.

On November 20, 2020, Claimant filed his Motion for Recusal and Change of Administrative Law Judge. Essentially, Claimant alleges ALJ Larson is biased because the email from ALJ Larson's assistant referencing "Peavy v. Deffenbaugh" changed the identity of the employer and because the email from Respondent's counsel's assistant introduced a new attorney for Respondent. Apparently ALJ Larson's assistant sent another email to Claimant and Respondent's counsel advising of available dates to hear the Motion for Recusal and Change of Administrative Law Judge. It also appears Claimant did not respond. A hearing on Claimant's Motion for Recusal and Change of Administrative Law Judge did not take place, and ALJ Larson did not rule on Claimant's Motion.

On December 21, 2020, Claimant filed his Appeal from Notice, arguing the lack of an order from ALJ Larson constituted a denial of his Motion for Recusal and Change of Administrative Law Judge. Claimant seeks an order from the Appeals Board granting his Motion. Claimant also filed a hand-written document asserting a claim for retaliation for filing a workers compensation claim. In response, Respondent and Insurance Carrier contend the Appeals Board does not possess jurisdiction to consider Claimant's request. In the alternative, Respondent and Insurance Carrier argue the Motion for Recusal and Change of Administrative Law Judge should be denied.

ANALYSIS AND CONCLUSIONS OF LAW

The Appeals Board first considers the jurisdictional issue. Generally, the Appeals Board possesses jurisdiction to review all final orders, awards, modifications of awards and

¹ See *Peavy v. Deffenbaugh Industries, Inc.*, No. CS-00-0441-234, 2020 WL 6540872 (Kan. WCAB Oct. 29, 2020).

preliminary awards under K.S.A. 44-534a made by an administrative law judge.² With regard to motions for recusal of an administrative law judge, the administrative law judge must first promptly hear the motion informally either with or without a record. If the administrative law judge refuses to grant the motion, the party seeking a change of administrative law judge may file an appeal with the Appeals Board within ten days.³

In this case, it appears ALJ Larson opted, pursuant to K.S.A. 44-523(e)(1), to conduct the hearing on Claimant's Motion for Recusal and Change of Administrative Law Judge with a record, and ALJ Larson's assistant sent the parties an email advising of available dates for the hearing. It also appears the hearing did not take place because Claimant did not respond. Because the hearing did not take place, ALJ Larson did not issue an order granting or denying Claimant's Motion. Under the plain language of K.S.A. 44-523(e)(1), the Appeals Board cannot consider an appeal of a denial of Claimant's Motion unless ALJ Larson issues an order denying it. The Appeals Board lacks jurisdiction to consider Claimant's application for review because there is no order to review under K.S.A. 44-523(e)(1). Accordingly, the Appeal from Notice must be dismissed.

Because the Appeals Board must dismiss these proceedings for lack of jurisdiction, the remaining issue is moot.

DECISION

WHEREFORE, it is the finding, decision and order of the Appeals Board Claimant's Appeal from Notice is dismissed.

IT IS SO ORDERED.

Dated this _____ day of February, 2021.

APPEALS BOARD MEMBER

APPEALS BOARD MEMBER

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² See K.S.A. 44-551(l)(1); *see also* K.S.A. 44-555c(a).

³ See K.S.A. 44-523(e)(1).

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c: Via OSCAR

Phillip Peavy, *pro se*
Mark J. Hoffmeister
Hon. Troy A. Larson