

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KEVIN CLIFFT)	
Claimant)	
V.)	
)	CS-00-0452-592
AK ROOFING & CONSTRUCTION LLC)	AP-00-0456-423
Respondent)	
AND)	
)	
RIVERPORT INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Riverport Insurance Company appeals the February 8, 2021, preliminary hearing Order issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Daniel Bangerter appeared for Claimant. Shirla McQueen appeared for Respondent, AK Roofing and Construction LLC (AK Roofing). John Emerson appeared for Riverport Insurance Company. Travis Ternes appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held February 2, 2021, with exhibits attached; Deposition of Richard Vertrees, with exhibits attached, taken January 28, 2021; Deposition of Bryan Pierce, with exhibits attached, taken January 28, 2021; and the documents of record filed with the Division.

ISSUE

Does the Workers Compensation Appeals Board have jurisdiction to consider Riverport Insurance's appeal of the preliminary hearing order issued on February 8, 2021?

FINDINGS OF FACT

The ALJ ordered workers compensation benefits be paid to Claimant by Riverport Insurance, which ALJ Fuller concluded, was Respondent's insurance carrier at the time of Claimant's accident.

None of the parties are contesting compensability of this claim. There is a dispute as to whether AK Roofing had workers compensation insurance coverage on the date of accident June 25, 2020. All the evidence presented at the preliminary hearing held on February 2, 2021, concerned whether Riverport Insurance was AK Roofing's workers compensation insurance carrier on June 25, 2020.

PRINCIPLES OF LAW AND ANALYSIS

Riverport Insurance argues it was not the carrier for AK Roofing on the date of accident, and AK Roofing was not insured at that time, therefore, the Fund should be liable for any benefits.

The Kansas Workers Compensation Fund argues the appeal should be dismissed because Riverport's appeal is improper. The ALJ did not exceed her authority in making factual and legal findings to determine Riverport should pay Claimant's benefits pending a full hearing. The Fund also argues Riverport's jurisdiction argument is nothing more than a ruse to convince the Board to examine a disputed question of fact.

AK Roofing also argues the appeal should be dismissed for lack of jurisdiction.

The Board's review authority from preliminary hearing orders is limited. K.S.A. 2020 Supp. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accident, repetitive trauma or resulting injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given;

(4) Whether certain defenses apply.

“The term “certain defenses” in K.S.A. 2020 Supp.44-534a refers to defenses subject to review by the Workers Compensation Appeals Board only if they dispute the compensability of the injury under the Workers Compensation Act.”¹

The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.²

The Kansas Court of Appeals considered the dismissal of an appeal by the Workers Compensation Appeals Board of a preliminary hearing order in the *Carpenter* case. an issue similar to the one in this case. The appeal was a challenge to the ALJ’s order finding the employer’s insurance policy covered claimant’s injuries. The Kansas Court of Appeals affirmed the Board’s dismissal of the appeal, finding the Board did not have jurisdiction to consider the appeal under the preliminary hearing appeal procedure.³

This Board in other cases, dismissed appeals from preliminary orders where the appellant was challenging insurance coverage.⁴

In this case, Riverport Insurance is seeking review of the ALJ’s coverage determination. This Board Member finds the appeal by Riverport Insurance is dismissed due to lack of jurisdiction of this Board to consider an appeal from preliminary hearing order finding Riverport Insurance should pay Claimant’s benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2020 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

² See K.S.A. 2020 Supp. 44-551(I)(1).

³ See *Carpenter*, 26 Kan. App.2d 672, 994 P.2d 641 (1999).

⁴ *Irigoyen v. Moreno’s Framing Company*, No. 1,007,684, 2003 WL 21087622, (Kan. WCAB Apr. 30, 2003); *Mendez v. Greenleaf Construction Co, LLC*, No. 1,066,248, 2013 WL 6382919,(Kan. WCAB Nov. 18, 2013).

⁵ K.S.A. 2020 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the appeal from the preliminary hearing Order should be dismissed for lack of jurisdiction.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the appeal of the Order of Administrative Law Judge Pamela J. Fuller dated February 8, 2021, is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of April, 2021.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Daniel Bangerter, Attorney for Claimant
Shirla McQueen, Attorney for Respondent
John Emerson, Attorney for Riverport Insurance Company
Travis Ternes, Attorney for Kansas Workers Compensation Fund
Pamela J. Fuller, Administrative Law Judge