

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LEILA McSMITH

Claimant

v.

CREEKSTONE FARMS PREMIUM BEEF

Respondent

CS-00-0447-356

AP-00-0457-090

and

NATIONWIDE AGRIBUSINESS INS. CO.

Insurance Carrier

ORDER

Claimant requests review of the March 19, 2021, preliminary Order issued by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Joseph Seiwert appeared for Claimant. John B. Rathmel 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 transcript of Preliminary Hearing held February 4, 2021, with Claimant's Exhibits 1-3 and Respondent's Exhibits 1-3; the transcript of Evidentiary Deposition of Sylvia Galindo taken February 3, 2021, with Exhibit 1; the transcript of Evidentiary Deposition of Scotty Knight taken February 3, 2021, with Exhibit 2; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs.

ISSUES

1. Does the Appeals Board possess jurisdiction to consider Claimant's request for review at this time, or should Claimant's application for review be dismissed?

2. Is Claimant eligible to receive temporary total disability compensation, or is she barred from receiving temporary total disability compensation because she was terminated for cause and would have been provided accommodated work but for her termination?
3. If Claimant is eligible to receive temporary total disability compensation, when is temporary total disability compensation payable and what is the compensation rate?

FINDINGS OF FACT

Claimant sustained personal injuries to both upper extremities from repetitive trauma arising out of and in the course of her employment with Respondent from September 1, 2019, through October 28, 2019. Claimant has another pending claim against Respondent concerning a shoulder injury, which is not the subject of this appeal.

Respondent authorized medical treatment. Temporary work restrictions were imposed. Respondent provided accommodated work to Claimant within her temporary work restrictions. On November 29, 2019, Claimant was terminated by Respondent for violating its attendance policy. Claimant's current authorized treating physician is Dr. Do, who diagnosed bilateral carpal tunnel syndrome and right ring finger trigger finger, and imposed temporary work restrictions effective November 17, 2020.

Claimant sought temporary total disability compensation, and a preliminary hearing took place on February 4, 2021, before ALJ Marchant. At the preliminary hearing, Claimant confirmed she was seeking temporary total disability compensation starting November 17, 2020. Respondent confirmed compensability was not at issue. Respondent disputed entitlement to temporary total disability compensation because Claimant was terminated for cause, and but for Claimant's termination accommodated work would have been provided. Respondent confirmed Dr. Do was the authorized treating physician. The preliminary hearing litigation focused on the circumstances of Claimant's termination for violation of Respondent's attendance policy, and not on compensability.

Following the preliminary hearing and submission of deposition transcripts, ALJ Marchant issued the Order dated March 19, 2021. ALJ Marchant analyzed whether Claimant was terminated for cause, using the *Morales-Chavarin*¹ standard. ALJ Marchant found Claimant violated Respondent's attendance policy, and was aware she was doing so. ALJ Marchant concluded Respondent met its burden of proving Claimant was terminated for cause, and could have accommodated Claimant's temporary work

¹ *Morales-Chavarin v. National Beef Packing Company*, No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006)

restrictions but for her termination. The request for temporary total disability compensation was denied. This appeal follows.

ANALYSIS AND CONCLUSIONS OF LAW

Claimant argues the Order is erroneous because Claimant missed time from work to attend medical appointments for her workers compensation injuries, and Respondent did not apply or enforce its attendance policy consistently. Claimant argues she was not terminated for cause, and is eligible to receive temporary total disability compensation starting November 20, 2020. Respondent and Insurance Carrier argue the appeal should be dismissed for lack of jurisdiction under K.S.A. 44-534a.

The Board first considers the jurisdictional issue. 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.² “Certain defenses” are issues concerning the compensability of the injury under the Workers Compensation Act.³ If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.⁴

In this case, compensability was not at issue at the preliminary hearing. Respondent confirmed it did not dispute compensability. Respondent disputed entitlement to temporary total disability compensation under K.S.A. 44-510c(b)(2)(C). ALJ Marchant denied the request for temporary total disability compensation under K.S.A. 44-510c(b)(2)(C), and not due to a compensability issue. Claimant argues temporary total disability compensation should be awarded because Claimant was not terminated for cause. Claimant’s appeal does not raise a disputed issue of whether Claimant suffered repetitive trauma, whether the injury arose out of and in the course of employment, whether notice was given or other issues concerning compensability. The Board has no jurisdiction to consider whether Claimant was terminated for cause at this stage of the proceedings. Therefore, Claimant’s application for review should be dismissed.

The remaining issues raised by Claimant are moot and not addressed by the Board at this time.

² See K.S.A. 44-534a(a)(2).

³ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁴ See *id.* at 676.

DECISION

WHEREFORE, it is the ruling, decision and order of the undersigned Board Member Claimant's Application for Review is dismissed. The Order issued by ALJ Marchant, dated March 19, 2021, remains in effect.

IT IS SO ORDERED.

Dated this _____ day of May, 2021.

WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Joseph Seiwert
John B. Rathmel
Hon. Ali Marchant