

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>ROCHELLE STRACK</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0462-454
<b>RESTORATION FAMILY SERVICES</b>	)	CS-00-0459-692
Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund (Fund) requests review of the November 17, 2021, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

**APPEARANCES**

Phillip Slape appeared for Rochelle Strack. Brock Baxter and Dallas Rakestraw appeared for respondent. Timothy Emerson appeared for the Fund.

**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 12, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Marilyn Shaw taken October 1, 2021, with exhibits attached; the transcript of the Evidentiary Deposition of Sharilyn Ray taken October 1, 2021; the transcript of the Evidentiary Deposition of LaDonna Tucker taken October 1, 2021; and the documents of record filed with the Division.

**ISSUES**

1. Did the ALJ err in applying the provisions of K.S.A. 44-532a against the Fund and in favor of respondent?
2. Did the ALJ exceed his jurisdiction when he concluded, by applying K.S.A. 44-532a to the evidence, respondent is "preliminarily financially unable to pay" the costs and

medical bills associated with this case, despite the evidence showing respondent's assets exceed its debts?

3. May the Fund avail itself of K.S.A. 44-534a(a)(2) and whether "certain defenses apply" for purposes of a preliminary hearing order?

#### FINDINGS OF FACT

Respondent is a non-profit child welfare organization located in Wichita, Kansas. Respondent has net assets of approximately \$172,000.00, but does not have a consistent cash flow. Respondent's revenue is dependent on reimbursements from the Kansas Department for Children and Families, which are sporadic, inconsistent, and at times cause respondent to have a negative account balance.

On August 17, 2021, both Ms. Strack and another employee, Makayla Young, were involved in a motor vehicle accident near Derby, Kansas, while driving a company vehicle. A couple of weeks prior to the accident another employee, Rhonda Rogers, was injured in a company vehicle accident. Sharilyn Ray, founder and CEO, stated respondent acquired the two vehicles for the use of staff to preserve their personal vehicles. Ms. Ray testified the vehicles were purchased using respondent's account for a total of \$25,000.00. Both vehicles were totaled in their respective accidents. Ms. Ray indicated respondent plans to use any insurance recovery money to replace the company vehicles because some staff members do not have reliable vehicles for travel.

Following the accident, Ms. Strack and Ms. Young were taken to the emergency room. Respondent received medical bills concerning treatment for all three employees injured in the two accidents. Ms. Strack's medical bills alone exceed \$165,000.00. Ms. Strack continues ongoing treatment with Dr. Grundmeyer.

Respondent's workers compensation coverage expired on June 1, 2021, before both accidents occurred. Ms. Strack filed a motion to implead the Fund with the Division on August 24, 2021.

Ms. Strack has not worked since the accident. The ALJ ordered temporary total disability benefits (TTD) paid \$560.03 per week from August 18, 2021, and continuing. Ms. Ray testified:

Q. . . . Can [respondent] afford to pay [Ms. Strack] that back TTD, back to the date of the accident, and moving forward at the rate of \$560 per week?

A. I don't think so.

Q. Tell me why not.

A. A lot of times we just – when I say we over-hire, we just pray that – the vision has been from God, and that’s why we established the agency. So we do a lot of walking in faith. So funds are just – they’re tight. Yeah, it’s tight.<sup>1</sup>

The ALJ found the Fund preliminarily responsible for the costs associated with this claim, noting respondent has no workers compensation insurance and is unable to pay. The ALJ determined:

In applying K.S.A. 44-523(a) [*sic*] the Court finds that the Respondent is unable to pay the costs and medical bills associated with this case. The facts, including the testimony of Respondent’s representatives, demonstrate that the Respondent’s entire net assets are only \$172,000.00 and that the costs of this action are likely to exceed that number. There is no statutory requirement that the Respondent must liquidate its assets before Fund liability, only that they be financially unable to pay. The Court preliminarily finds that Respondent is financially unable to pay and assesses this order against the Fund.<sup>2</sup>

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

The Fund argues the weight of the evidence shows respondent is solvent and financially able to pay Ms. Strack’s requested benefits. The Fund contends respondent did not meet its burden of establishing it is financially unable to pay benefits.

Respondent maintains the ALJ’s Order should be affirmed. Respondent argues it is unable to meet its financial obligations under the Kansas Workers Compensation Act (Act), and further, the Fund has the legal right to request the Commissioner of Insurance pursue a cause of action against respondent for monies paid by the Fund.

Ms. Strack maintains the ALJ’s Order should be affirmed, arguing:

The Fund attempting to appeal its liability from the preliminary level instead of trying the case to a final award and using its subrogation right enumerated by the Act arguably contradicts the very purpose of the Fund, which the legislature considered and created for issues such as the issues at bar.<sup>3</sup>

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<sup>1</sup> Ray Depo. at 47-48.

<sup>2</sup> ALJ Order (Nov. 17, 2021) at 1-2.

<sup>3</sup> Claimant’s Brief at 3.

**1. Did the ALJ err in applying the provisions of K.S.A. 44-532a against the Fund and in favor of the respondent?**

K.S.A. 44-532a states:

(a) If an employer has no insurance or has an insufficient self-insurance bond or letter of credit to secure the payment of compensation, as provided in subsection (b)(1) and (2) of K.S.A. 44-532, and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44- 569, and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

(b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.

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.

Whether the ALJ erred by applying the provisions of K.S.A. 44-532a against the Fund is not an issue subject to review of a hearing held pursuant to K.S.A. 44-534a. 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>4</sup> "Certain defenses" are issues concerning the compensability of the injury under the Act.<sup>5</sup> If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.<sup>6</sup>

Fund liability is not an issue concerning the compensability of Ms. Strack's injury and is not an issue over which the Board has jurisdiction to review on appeal of a preliminary hearing.<sup>7</sup> The Board does not have jurisdiction under K.S.A. 44-534a to consider the issue at this time.

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<sup>4</sup> See K.S.A. 44-534a(a)(2).

<sup>5</sup> See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>6</sup> *Id.* at 676.

<sup>7</sup> See *Alvarez v. John E. Minson, d/b/a Quick Response Property Care*, No. 1,078,510, 2017 WL 491311, (Kan. WCAB Jan. 26, 2017); *Helms v. Pendergast*, 21 Kan. App. 2d 303, 313, 899 P.3d 501 (1995); *Olds-Carter v. Lakeshore Farms, Inc.*, No. 1,035,967, 2010 WL 769935, (Kan. WCAB Feb. 26, 2010); *Mercer v. Martin's Paving*, No. 1,029,358, 2001 WL 641615, (Kan. WCAB May 31, 2001); *Fanestil v. Affordable Improvements*, No. 259,078, 2001 WL 641615, (Kan. WCAB May 31, 2001).

**2. Did the ALJ exceed his jurisdiction when he concluded, by applying K.S.A. 44-532a to the evidence, respondent is "preliminarily financially unable to pay" the costs and medical bills associated with this case, in spite of the evidence showing respondent's assets exceed its debts?**

The same is true with respondent's second issue. Whether the ALJ exceeded his jurisdiction by applying K.S.A. 44-532a to the evidence is not an issue listed in 44-534a. The Board will not consider the Fund's appeal of this issue.

It should be noted, in his Order, the ALJ cited K.S.A. 44-523(a) as the basis of his assessment of fund liability. This appears to be a typographical error. The correct cite is K.S.A. 44-532a.

**3. May the Fund avail itself to K.S.A. 44-534a(a)(2) and whether "certain defenses apply" for purposes of a preliminary hearing order?**

In *Kuepker v. Rodney's Refrigeration Inc.*, the Board wrote:

The Appeals Board's jurisdiction and authority is limited by statute. The legislature has specifically limited the Board's review to those legal and factual questions that were presented to the Administrative Law Judge. The rationale behind that limitation is that the parties should have an opportunity to present evidence to the Division on the issues raised, which they cannot do before the Appeals Board.<sup>8</sup>

The Court of Appeals, in *Carpenter v. National Filter Service*, stated "[b]ecause in 44-534a jurisdiction means coverage by the Act, 'certain defenses' are subject to review only if they dispute the compensability of the injury under the Act."<sup>9</sup> The Board has held the term "certain other defenses" refers to defenses which dispute the compensability of the injury under the Act.<sup>10</sup>

First, whether the Fund may assert certain defenses at a preliminary hearing is not an issue subject to review of a hearing held pursuant to K.S.A. 44-534a. The Fund is not alleging certain defenses apply to the facts presented to the ALJ, upon which he issued his Order.

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<sup>8</sup> *Kuepker v. Rodney's Refrigeration Inc.*, No. 227,024, 1998 WL 921325, at \*2 (Kan. WCAB Dec. 30, 1998); citing K.S.A. 1997 Supp. 44-555c(a).

<sup>9</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

<sup>10</sup> See *Williams v. Durham School Services*, No. 1,027,861, 2006 WL 3891445 (Kan. WCAB Dec. 22, 2006); *Rivera v. Beef Products, Inc.*, No. 1,062,361, 2013 WL 3368492 (Kan. WCAB June 18, 2013).

Second, the Fund is asking the Board for an advisory opinion, which is beyond the Board's jurisdiction. The Board's review "shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."<sup>11</sup> The record does not indicate the Fund's request has been formally raised to the ALJ or formally ruled upon.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member the Order of Administrative Law Judge Thomas Klein dated November 17, 2021, remains in full force and effect. The Fund's application for review is dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

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

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

c: Via OSCAR

Phillip Slape, Attorney for Ms. Strack  
Brock Baxter, Attorney for Respondent  
Dallas Rakestraw, Attorney for Respondent  
Timothy Emerson, Attorney for Kansas Workers Compensation Fund  
Hon. Thomas Klein, Administrative Law Judge

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<sup>11</sup> K.S.A. 44-555c(a).