

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**WILLIE MILLER**

Claimant

v.

**TRUECARE NURSING SERVICES LLC**

Respondent

AP-00-0472-485

CS-00-0457-597

and

**QBE INSURANCE CORPORATION**

Insurance Carrier

**ORDER**

Claimant requests review of the December 2, 2022, preliminary Order issued by Administrative Law Judge (ALJ) Ali Marchant.

**APPEARANCES**

Roger A. Riedmiller appeared for Claimant. Kelsy Allison appeared for Respondent and Insurance Carrier.

**RECORD AND STIPULATIONS**

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing, held November 8, 2022, including Exhibits A1-3; 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 application for review?
2. If the Appeals Board possesses jurisdiction, is the preliminary Order erroneous because the value of Claimant's hotel lodging paid by Respondent should be included in his average weekly wage?

3. If the Appeals Board possesses jurisdiction, is Claimant entitled to a preliminary award of \$5,456.76 for underpayment of temporary total disability compensation?

#### FINDINGS OF FACT

Claimant worked for Respondent as a part-time traveling CNA. Respondent is a staffing agency, and offered Claimant various short-term jobs in nursing homes and other health care facilities in other states. Claimant could accept or reject any jobs offered with no penalty to him. If Claimant accepted an out-of-state job, Respondent provided travel to and from Claimant's home in Hutchinson, Kansas. Respondent also provided hotel lodging. Respondent made all travel and hotel arrangements, and paid the airline and hotel directly. Claimant was not expected to make any payments for travel or lodging. Claimant would have rejected any job requiring him to pay for travel or lodging.

It appears Claimant sustained a compensable work-related injury on December 20, 2020. Claimant was paid temporary total disability compensation for seventy-four weeks. Claimant's average weekly wage did not take into account the value of the hotel lodging Respondent paid.

On November 8, 2022, a preliminary hearing took place before ALJ Marchant. Claimant sought additional temporary total disability based on his compensation rate. Claimant argued he was underpaid temporary total disability compensation because his average weekly wage did not include the value of the hotel lodging paid by Respondent. Respondent argued the value of hotel lodging was not included in Claimant's average weekly wage because it was not paid to him as wages. Compensability was not disputed at the hearing.

On December 2, 2022, ALJ Marchant issued the preliminary Order. Relying on prior Appeals Board decisions, ALJ Marchant ruled the value of hotel lodging paid by Respondent should not be included in Claimant's average weekly wage because the payments did not result in an economic gain to Claimant. Claimant's request for additional temporary total disability compensation was denied. These proceedings follow.

#### PRINCIPLES OF LAW AND ANALYSIS

Claimant argues ALJ Marchant exceeded her jurisdiction by incorrectly interpreting K.S.A. 44-511. Claimant contends the value of the hotel lodging paid by Respondent should be included in his average weekly wage. Respondent argues the Board does not have jurisdiction to review this issue. In the alternative, Respondent argues the Order was decided correctly.

Claimant's application for review concerns a preliminary order. 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>1</sup> "Certain defenses" are issues concerning the compensability of the injury under the Workers Compensation Act.<sup>2</sup> The Board's jurisdiction to review allegations a judge exceeded his or her jurisdiction must be read together with K.S.A. 44-534a.<sup>3</sup> If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.<sup>4</sup>

In this case, Claimant does not seek review of an issue pertaining to compensability. Claimant seeks review of an issue concerning the calculation of his average weekly wage and resulting compensation rate. The plain language of K.S.A. 44-534a does not allow the Board to review preliminary determinations of wage or compensation rate. Therefore, the Board does not have jurisdiction to consider the issues raised by Claimant at this time. Claimant's application for review must be dismissed.

Preliminary findings and awards are not binding in a full hearing, and are subject to a full presentation of the facts.<sup>5</sup> Claimant may raise the issue of the calculation of his average weekly wage and resulting compensation rate at regular hearing.

In light of the Board's ruling on jurisdiction, it is unnecessary to address the remaining issues at this time.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member Claimant's application for review is dismissed. The Order issued by ALJ Marchant, dated December 2, 2022, remains in force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2023.

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<sup>1</sup> See K.S.A. 44-534a(a)(2).

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

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 676.

<sup>5</sup> See K.S.A. 44-534a(a)(2).

**WILLIE MILLER**

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WILLIAM G. BELDEN  
APPEALS BOARD MEMBER

c: Via OSCAR

Roger A. Riedmiller  
Kelsy Allison  
Hon. Ali Marchant