

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DALIA AVILA

Claimant

v.

KD FAMILY MGMT LLC

d/b/a McDONALDS N TOPEKA BLVD

Respondent

AP-00-0472-854

CS-00-0469-496

and

KS RESTAURANT AND HOSPITALITY

ASSN SI FUND

Insurance Carrier

ORDER

Respondent requests review of the December 21, 2022, Preliminary Hearing Order issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

George H. Pearson, III, appeared for Claimant. Weston A. Mills 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 15, 2022, including Claimant's Exhibits A1-3 and Respondent's Exhibit B1; the transcript of Evidentiary Deposition of Dalia Avila, taken November 18, 2022, including Exhibit 1; the transcript of Videoconference Deposition of Heidi M. Gowen, taken November 30, 2022, after overruling all objections except the objection made on Page 69, which is sustained, including the errata page and Exhibits B1-5; 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 Respondent's application for review?
2. If the Appeals Board possesses jurisdiction, is the award of temporary total disability compensation erroneous because Claimant was not rendered temporarily and totally disabled on account of the injury sustained on July 13, 2022?
3. If the Appeals Board possesses jurisdiction, is the award of temporary total disability compensation erroneous because Claimant refused accommodated work offered by Respondent?

FINDINGS OF FACT

Claimant was born in Mexico, and came to the United States in November 2007. Claimant is an undocumented worker. Respondent hired Claimant on May 19, 2022, knowing the Social Security number Claimant provided on her application was not valid. Claimant worked for Respondent until July 13, 2022.

On July 13, 2022, Claimant sustained an injury to her right hand from a work-related accident. It is undisputed Claimant sustained a compensable right hand injury requiring medical treatment and temporary work restrictions.

Claimant provided her work restrictions to the store manager. Respondent's Human Resources Supervisor, Ms. Gowen, was notified of the accident and restrictions. As part of her usual procedure, Ms. Gowen reviewed Claimant's personnel file. Ms. Gowen discovered Claimant was previously employed at another restaurant under Ms. Gowen's purview. During Claimant's prior period of employment, the validity of the Social Security number Claimant provided was questioned, and Claimant stopped working.

Following a meeting of Ms. Gowen, Claimant, the restaurant manager, and one of Respondent's owners, Ms. Gowen sent Claimant a text message offering Claimant accommodated work. The text message also stated accommodated work would be provided upon Claimant's producing valid documentation confirming she could legally work in the United States. Claimant is willing to perform accommodated work, but she has not provided documentation confirming she can legally work in the United States. According to Ms. Gowen, Claimant's employment with Respondent has not been terminated.

Claimant sought medical treatment and payment of temporary total disability compensation, and a preliminary hearing was held on November 15, 2022. Respondent agreed the claim was compensable, and medical treatment was authorized. Respondent

contested the request for temporary total disability compensation, arguing the right hand injury did not render Claimant temporarily and totally disabled, and Claimant refused accommodated work.

Following the submission of evidence, ALJ Roth issued the Preliminary Hearing Order. ALJ Roth essentially concluded Respondent did not offer Claimant accommodated work Claimant would be legally capable of performing, and Claimant was eligible to receive temporary total disability compensation. Temporary total disability compensation was awarded. ALJ Roth subsequently approved the Addendum to Preliminary Hearing Order of December 21, 2022, which clarified the temporary total disability compensation payable. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues the Board possesses jurisdiction to review the Preliminary Hearing Order because ALJ Roth exceeded his jurisdiction by misapplying K.S.A. 44-510c, and the issue of eligibility for temporary total disability compensation falls within the ambit of “certain defenses.” Respondent argues Claimant has not been rendered temporarily and totally disabled on account of the right hand injury, and Claimant refused to perform accommodated work within her temporary work restrictions. Claimant argues the Preliminary Hearing Order was correctly decided, and the Act does not require Claimant to produce evidence she can legally work in the United States to receive temporary total disability compensation.

Before addressing the merits of the parties’ arguments, the Board must address whether it possesses jurisdiction to consider Respondent’s application for review at this time. Generally, 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.¹ “Certain defenses” are issues concerning the compensability of the injury under the Workers Compensation Act.² If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.³

Respondent argues *Carpenter* provides any preliminary order dealing with medical or temporary total disability compensation concerns compensability. In particular, Respondent appears to rely on the following:

¹ See K.S.A. 44-534a(a)(2).

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

³ See *id.* at 676.

In *Shain[v. Boeing Military Airplanes]*, the Fund argued it was not liable under recent amendments to the Workers Compensation Act. An administrative law judge denied the Fund's motion to dismiss and the Board dismissed the Fund's appeal as interlocutory. 22 Kan. App. 2d at 914, 924 P.2d 1280. A panel of the Court of Appeals determined the judge's order denying dismissal was not a preliminary award under [K.S.A.]44-534a because it did not relate to medical or temporary total disability compensation. 22 Kan. App. 2d at 915, 924 P.2d 1280. *In other words, it did not deal with the compensability of the injury.*⁴

Respondent's interpretation fails based a fuller reading of *Carpenter*. "[I]t", from the final sentence, refers to the judge's order denying dismissal of the Fund. Whether the Fund should be dismissed from an action is a separate issue from the compensability of the underlying claim. Respondent conceded compensability at the preliminary hearing.⁵ The Board's review is limited to the evidence and proceedings as presented to the ALJ.⁶ Respondent cannot take a contrary position on compensability on review.

The Act clearly limits the Board's authority to review of preliminary orders to issues involving compensability. This matter does not involve a compensability issue. Respondent stipulated to compensability. The appropriate action is to dismiss the application for review. Preliminary rulings are not binding in a full hearing on the claim.⁷ If Respondent desires, the issue of eligibility for temporary total disability compensation may be litigated anew 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 Respondent's application for review is dismissed. The Preliminary Hearing Order issued by ALJ Steven M. Roth, dated December 21, 2022, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of February, 2023.

⁴ *Id.* at 675 (emphasis added).

⁵ See P.H. Trans., at 6.

⁶ See K.S.A. 44-555c(a).

⁷ See K.S.A. 44-534a(a)(2)

DALIA AVILA

5

**AP-00-0472-854
CS-00-0469-496**

**WILLIAM G. BELDEN
APPEALS BOARD MEMBER**

c: Via OSCAR
George H. Pearson, III
Weston A. Mills
Hon. Steven M. Roth