

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HARRY WUNDERLICH, JR.)
Claimant)
V.)
GRAGG TRUCKING, LLC) AP-00-0474-643
Respondent) CS-00-0470-199
AND)
KANSAS WORKERS COMPENSATION)
FUND)

ORDER

The Kansas Workers Compensation Fund (Fund), through Timothy Emerson, requested review of Administrative Law Judge (ALJ) David Bogdan's preliminary hearing Order, dated March 21, 2023. Roger Riedmiller appeared for the claimant. Kirby Vernon appeared for the respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of: (1) the preliminary hearing transcript, held December 7, 2022; (2) all exhibits uploaded and admitted under HE-00-0075-024; (3) documents of record filed with the Division; and (4) the parties' briefs.

ISSUES

1. Did the ALJ err or exceed his jurisdiction in applying the provisions of K.S.A. 44-532a against the Fund, without making findings regarding the respondent's solvency and/or lack of workers compensation insurance?
2. If the Fund is liable to provide benefits to the claimant, which party directs the claimant's medical care and treatment?

FINDINGS OF FACT

The claimant worked for the respondent as a truck driver. On August 4, 2022, the claimant was involved in a motor vehicle accident near Severy, Greenwood County, Kansas. Following the accident, the claimant was transported via ambulance to the Greenwood County Hospital emergency room, but it appears he left without treatment.

Four days later, the claimant was involved in another motor vehicle accident while riding in a car with his wife. His wife swerved to miss a deer and went into the ditch. At the time, the claimant was wearing a seat belt. He denied suffering any injury as a result of this accident.

On August 22, 2022, the claimant began treating with his primary care physician, Joseph Hutchison, M.D., for low back pain. An MRI was ordered which showed: (1) degenerative disc and bony disease at L4-5 and L5-S1, (2) mild central stenosis at the L4-5 level and mild narrowing of the neural foramina on the right; (3) no high-grade stenosis at L5-S1, but fairly severe narrowing of the neural foramina bilaterally; and (4) no evidence of acute bony abnormality or a cord lesion.

On September 2, 2022, the claimant filed an Application for Benefits alleging injuries to his head, back, right leg, feet, shins and urinary tract from the August 4, 2022, accident.

On October 14, 2022, the respondent filed a Notice to Implead Workers Compensation Fund for the State of Kansas, stating it was uninsured at the time of the work-related accident.

At his attorney's request, the claimant saw George Fluter, M.D., on October 31, 2022. The claimant complained of pain affecting the neck/upper back, left shoulder girdle, middle/lower back, right buttock/thigh/groin, and left foot. Dr. Fluter diagnosed: (1) neck/back pain; (2) left shoulder pain; (3) right hip/groin pain; (4) left foot pain; (5) shin lacerations; and (6) psychological/emotional sequelae. The doctor opined the prevailing factor for these diagnoses was the work accident on August 4, 2022. Dr. Fluter recommended additional medical treatment and imposed temporary work restrictions.

The claimant has not worked anywhere since August 4, 2022. He testified he continues to have symptoms in his low back, left foot and urinary tract, in addition to psychological concerns.

The ALJ found the claim compensable and ordered medical treatment and temporary total disability from August 5, 2022, until the claimant returned to accommodated duty or reached maximum medical improvement. The ALJ ordered the respondent to provide the names of two health care providers for the claimant to select from. The ALJ determined the Fund should be responsible for all costs associated with this claim, noting the respondent was uninsured at the time of the work-related accident.

PRINCIPLES OF LAW AND ANALYSIS

The Fund argues there is insufficient evidence to assess benefits against the Fund, and the ALJ's Order should be overturned as lacking jurisdiction over the Fund. Both the claimant and the respondent argue the Fund's appeal should be dismissed for lack of jurisdiction. Alternatively, the respondent asserts the Fund has the burden of rebutting the

implication the respondent is uninsured and financially unable to pay benefits to the claimant.

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 . . . and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act,. . . 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. . . . 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.

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.

The issues raised by the Fund are not subject to Board review of a preliminary hearing 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.¹ “Certain defenses” are issues concerning the compensability of the injury under the Act.² If jurisdiction under K.S.A. 44-534a is not present, it is appropriate to dismiss the appeal.³

Fund liability is not an issue concerning the compensability of the claimant’s injury and is not an issue over which the Board has jurisdiction to review on appeal of a preliminary hearing.⁴ Control of medical treatment is not an appealable issue listed in K.S.A. 44-534a. The Board does not have jurisdiction under K.S.A. 44-534a to consider these issues.

WHEREFORE, the undersigned Board Member rules the Order dated March 21, 2023, 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 May, 2023.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)

Roger Riedmiller
Kirby Vernon
Timothy Emerson
Hon. David Bogdan

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 *Id.* at 676.

⁴ See *Strack v. Restoration Family Services*, No. AP-00-0462-454, 2022 WL 350012, at *3-4 (Kan. WCAB Jan. 31, 2022); *Alvarez v. John E. Minson d/b/a Quick Response Property Care*, No. 1,078,510, 2017 WL 491311, at *6 (Kan. WCAB Jan. 26, 2017); *Gomez-Ramirez v. Esquedas Trash Serv.*, No. 1,060,625, 2013 WL 2455709, at *5 (Kan. WCAB May 8, 2013); *Olds-Carter v. Lakeshore Farms, Inc.*, No. 1,035,967, 2010 WL 769935 (Kan. WCAB Feb. 26, 2010); *Fanestil v. Affordable Improvements*, No. 259,078, 2001 WL 641615, at *3 (Kan. WCAB May 31, 2001); and *Mercer v. Martin’s Paving*, No. 1,029,358, 2001 WL 641615, (Kan. WCAB May 31, 2001).