

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RUSSELL GRAFTON)	
Claimant)	
V.)	
)	AP-00-0492-435
BEN HUR CONSTRUCTION COMPANY)	CS-00-0480-411
Respondent)	
AND)	
)	
AMERICAN ZURICH INS. CO.)	
Insurance Carrier)	

ORDER

Respondent appealed the September 22, 2025, preliminary hearing Order entered by Administrative Law Judge (ALJ) Troy A. Larson. Claimant appeared Pro Se. Kristina Mulvany appeared for Respondent and its 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 September 9, 2025, with exhibits attached; the Evidentiary Deposition of Robert R. Cross. Jr., taken September 8, 2025, and the documents of record filed with the Division, including the parties' briefs.

ISSUES

Is Claimant entitled to temporary total disability benefits (TTD), including did the ALJ exceed his jurisdiction in awarding them and does the Appeals Board have jurisdiction to hear Respondent's appeal?

FINDINGS OF FACT

Claimant alleged he suffered personal injury by accident while in the course of his employment to his lumbar spine on December 5, 2023. A preliminary hearing to address Claimant's request for additional medical treatment was held on January 28, 2025. Each party presented medical reports in support of their position, Dr. Raskas for Claimant and Dr. Sylvester for Respondent. The ALJ ordered an independent medical examination (IME) with Adrian Jackson, M.D. The ALJ requested Dr. Jackson's diagnosis and his opinions

regarding what, if any, additional medical treatment was necessary. Dr. Jackson was asked to list any significant factor(s) which contributed to Claimant's condition.

After receiving Dr. Jackson's March 31, 2025, report, the parties returned for a preliminary hearing, held on July 1, 2025. The ALJ authorized Dr. Jackson to provide medical care and treatment. The ALJ postponed Claimant's request for TTD until Dr. Jackson's opinion regarding temporary work restrictions could be provided. On July 2, 2025, Dr. Jackson issued temporary work restrictions.

Robert Cross, Jr., is the operations manager for the western division for Respondent. At the time of Claimant's injury, he was acting as the general superintendent at the Panasonic plant in De Soto, Kansas, where Claimant was working. Mr. Cross' duties included oversight of employee orientation, including instruction on discipline and safety rules. Mr. Cross confirmed Claimant completed training. Claimant reviewed and acknowledged his understanding of the safety rules by signing and initialing the various orientation documents. Included in the documents signed by Claimant was a list of zero-tolerance items which resulted in immediate removal from the project and termination. Those included drug and alcohol use, possession or distribution. Mr. Cross testified:

"If you bring alcohol on a job, whether you're using it or not, you're fired. If you bring drugs onto a job, controlled substances, whether you're using or not, if they're found on your person, you're removed from the site."¹

Mr. Cross was aware Claimant alleged a work accident to his back on December 5, 2023. Claimant was provided accommodated work through January 11, 2024, when he was terminated after being caught with a marijuana cigarette in the break tent. According to Mr. Cross, a team member reported to supervision Claimant was smoking a marijuana cigarette. Claimant did not protest his termination or deny he was smoking marijuana. He was immediately removed from the project and offered a ride home. Claimant was not drug tested on the day of his termination because he admitted to marijuana use. Mr. Cross stated Claimant was terminated for violating the safety rule regarding zero tolerance for possession of drugs or alcohol on site.

According to Mr. Cross, Claimant was working in an accommodated job within his restrictions and would still be doing so had he not been fired for cause.

A third preliminary hearing was held on September 9, 2025, to determine if Claimant was entitled to temporary total disability from January 12, 2024, and continuing. At the hearing, the ALJ discussed the evidence in the record, which included four exhibits from Respondent, Mr. Cross' deposition and exhibits from Claimant that had not been formally

¹ Cross Depo. at 10.

included into the record. Claimant's exhibits included the results of a drug test taken by him on January 15, 2024, at Concentra Medical Center and a written statement. Respondent argued Claimant was terminated for cause (possession of drugs on-site) and therefore was ineligible for TTD, pursuant to K.S.A. 44-510c(b)(2)(C). Claimant argued he was taking Delta-9 THC (hemp) for pain control, which is not an illegal substance under Kansas law and therefore did not possess illegal drugs on-site. Claimant also briefly discussed what Delta-9 was, he was using it for pain and he was not drug tested when he was removed from the job site. No formal testimony was taken and Claimant was not cross-examined following his statement to the court.

The ALJ ordered Respondent to pay TTD at the maximum rate of \$804.00 from January 12, 2024, until he returned to work, temporary restrictions removed or released at maximum medical improvement (MMI). In so doing, the ALJ stated:

Respondent's company policy on possession of drugs is not entirely clear from the record. Respondent's Exhibit 1 is Claimant's orientation paperwork, in which it is stated that "Zero Tolerance Items" include "Drug & Alcohol use, possession, or distribution". However, there contains nothing in the record to indicate Respondent's definition of "Drug".²

. . .

Ultimately, the Court finds that the issue of whether Claimant was justifiably terminated "for cause" comes down to the question of whether the cigarette Claimant possessed at the work site was an illegal drug/controlled substance or not. The Court acknowledges that this is a difficult question to answer both at a state and federal level currently. Nonetheless, Claimant asserts that the cigarette he possessed was a legal Delta-9 hemp cigarette. Additionally, the drug sample collected by Concentra was negative for marijuana. Respondent has not yet provided sufficient evidence that the cigarette Claimant possessed was a controlled substance, and therefore Respondent has not met its burden to prove the defense of a "for cause" termination.³

Respondent appealed, arguing Claimant failed to prove he is completely and temporarily incapable of engaging in any type of substantial and gainful employment on account of his injury. Alternatively, Respondent argued the matter should be remanded to the ALJ for a new hearing on the issue of temporary total disability to allow Respondent the opportunity to cross-examine Claimant on the disputed issues. Claimant maintains the Order should be affirmed.

² ALJ Order at 2.

³ ALJ Order at 3.

PRINCIPLES OF LAW AND ANALYSIS**The Board does not have jurisdiction to review Respondent's appeal regarding TTD and the ALJ did not exceed his jurisdiction in awarding them.**

Respondent's argument the ALJ exceeded his jurisdiction in awarding TTD is considered and rejected. The basis for Respondent's argument is they were deprived the opportunity to cross-examine Claimant. Claimant was present at the September 9, 2025, preliminary hearing. At the preliminary hearing the parties had a pre-hearing discussion off the record. On the record, the parties reviewed the evidence to be considered by the ALJ, established a cut-off date to present evidence and heard the parties arguments in support of their position. In addition, Claimant made general comments regarding what he smoked, where he got it, why he did it, and why he did not contest his termination at the time it occurred. Respondent was aware Claimant was going to present additional evidence prior to the September 15, 2025, date established by the ALJ. Respondent could have requested Claimant be placed under oath or inquired informally regarding his comments and as to what was going to be offered as additional evidence. Respondent did not do so. ALJs have wide latitude in controlling their dockets and they have the jurisdiction to run their courtrooms. "Generally, the Board will not interfere with the judges' discretion in controlling their dockets."⁴ The ALJ did not exceed his jurisdiction in awarding TTD under these circumstances.

The Board's authority to consider appeals of preliminary orders is limited to questions 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.⁵ "Certain defenses" grant jurisdiction only if they dispute the compensability of the injury under the Kansas Workers Compensation Act.⁶ The determination regarding TTD is also within the ALJ's discretion and not reviewable by the Board.⁷

Respondent argued Claimant is not eligible for TTD because he was terminated for cause. Based on the evidence presented, the ALJ preliminarily found Respondent failed to prove Claimant was terminated for cause and awarded benefits. The plain language of

⁴ *Vargas-Jaramillo v. Marriott International, Inc.*, No. 241,554, 2001 WL 403320 (Kan. WCAB Mar. 9, 2001).

⁵ See K.S.A. 44-534a(a)(3).

⁶ See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 675, 994 P.2d 641 (1999).

⁷ See *Hargraves v. Goodyear Tire & Rubber Co.*, No. 1,022,008, 2005 WL 2519631 (Kan. WCAB Sept. 9, 2005).

K.S.A. 44-534a does not grant the Board authority to address this issue preliminarily. Respondent's appeal regarding TTD is dismissed for lack of jurisdiction.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that Respondent's appeal of ALJ Larson's September 22, 2025, Order is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of November, 2025.

CHRIS A. CLEMENTS
BOARD MEMBER

c: Via OSCAR and US Mail

Russell Grafton
Kristina Mulvany
Hon. Troy A. Larson