

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SINIKI THOMAS)	
Claimant)	
V.)	
)	
OLD DOMINION FREIGHT LINE)	AP-00-0463-726
Respondent)	CS-00-0366-123
AND)	
)	
INDEMNITY INSURANCE CO. OF)	
NORTH AMERICA)	
Insurance Carrier)	

ORDER

The respondent and its insurance carrier (respondent), through Kip Kubin, requested review of Administrative Law Judge (ALJ) Steven Roth's Order Denying Motion to Dismiss dated February 7, 2022. Patrick Smith appeared for the claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the motion to dismiss and regular hearing transcript, held February 4, 2022, and documents of record filed with the Division.

ISSUES

1. Does the Board have jurisdiction to review the ALJ's Order denying respondent's motion to dismiss?
2. If so, should this claim be dismissed for lack of prosecution, pursuant to K.S.A. 44-523(f)?

FINDINGS OF FACT

The claimant filed an Application for Hearing with the Division on January 19, 2017, alleging injuries for a work-related accident sustained on December 13, 2016.

On January 16, 2020, the claimant filed a motion for extension of time, pursuant to K.S.A. 44-523(f), stating: "As of the date of this Motion there is no necessity for a hearing

on this matter. That the matter will be set for hearing at such time as the parties are unable to agree on said extension or tolling of the statute of limitations until further Order of the Court.”¹ A hearing was not set.

On April 8, 2020, the ALJ issued an order requesting a report from a court-ordered independent medical examiner, Dr. Daniel Stechschulte. The claimant saw Dr. Stechschulte on July 17, 2020. The doctor opined the claimant reached maximum medical improvement.

On September 25, 2020, a prehearing settlement conference was held. The ALJ noted the parties stipulated to the claimant’s average weekly wage being enough to qualify for the maximum workers compensation rate of \$627 and stated, “Respondent shall provide documentation supporting their position as to average weekly wage, including fringe benefits, if any, prior to or at the time of a regular hearing setting.”²

On December 30, 2021, the respondent filed an Application for Dismissal. Both the respondent’s motion to dismiss and a regular hearing were scheduled for February 4, 2022. The respondent argued three years passed after the date the Application for Hearing was filed and the claimant needed to establish just cause for the case to continue and not be dismissed. The claimant’s attorney stated, “[W]e filed our Motion for Extension prior to the running of the three-year statute and I think the record is pretty adequate that we are trying to move this along despite some delay with COVID, that kind of thing. Since I am being kind of charged with delay, I would also just point out I guess another reason to not grant that motion is that two years after being ordered to provide me with wage information, I still don’t have it.”³

In an Order dated February 7, 2022, the ALJ stated:

The Kansas Supreme Court held failure of the Claimant to file a motion to extend prior to the expiration of the three year time limit, despite having good cause for failure to proceed to regular hearing, results in dismissal of the claim upon request of Respondent. *Glaze v. J.K. Williams LLC*, 309 Kan. 562, 439 P.3d 920 (2019).

In this case, however, Claimant has timely filed a motion to extend the expiration of the three year deadline. While Claimant's motion remained on file, the three years came and went with no request for a hearing. These facts are

¹ Motion to Grant Extension of Time (filed Jan. 16, 2020) at 1.

² Pretrial Settlement Conference Stipulations (filed Sept. 30, 2020).

³ Motion to Dismiss and R.H. Trans. at 4-5.

somewhat similar to those in *Gerlach v. Choice Network*, CS-00-0066-280. (Kan. WCAB, Nov. 3, 2020). In *Gerlach*, the Board held:

The plain language rule does not allow adding requirements or language to the statute not already present. K.S.A. 44-523(f) only contains two conditions to keep a claim viable. First, Claimant must file a motion to extend prior to the expiration of the three year limitation. Second, good cause must exist for the claim to be extended. In this case, Claimant met both conditions. (*Gerlach*, p.4)

and

Once Claimant filed the first Motion to Extend for good cause prior to the expiration of the three year limitation, Claimant's claim remained viable until good cause no longer existed. (*Id.*, p. 5)

Claimant's timely filing of a motion to extend his time, coupled with his statements in support of good cause to order such an extension, prevails. Respondent's motion for dismissal is overruled. The case will proceed to an Award.

This appeal followed.

PRINCIPLES OF LAW

K.S.A. 44-523 states, in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, ensure the employee and the employer an expeditious hearing and act reasonably without partiality.

...

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be

considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

K.S.A. 44-534a(a)(2) states, in part: “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 of by the board.”

K.S.A. 44-551(l)(1) states, in part: “All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days.”

ANALYSIS

The respondent argues the claim should be dismissed under K.S.A. 44-523(f). The respondent asserts the Board has jurisdiction to hear this appeal based on the ALJ exceeded his authority in granting an extension without a hearing on the claimant’s motion to extend or any evidence to support a good cause for the extension. The respondent argues the claimant’s attorney’s statements as to why the case should not be dismissed are not evidence. The claimant argues the Board lacks jurisdiction to review this appeal because it is from an interlocutory order. In the alternative, the claimant maintains the Order should be affirmed because the claimant proved good cause for the extension based on the respondent’s failure to produce wage information as ordered by the ALJ.

K.S.A. 44-523(f)(1) requires a hearing on the issue of dismissal. The statute does not state an evidentiary hearing must be scheduled by the claimant regarding a motion for extension of time. In any event, a hearing effectively addressing the dismissal and the extension was held. The argument the respondent was denied due process due to the lack of a hearing is rejected. The parties had fair opportunity to be heard on these intertwined issues. The parties had ample notice the issue of dismissal would be taken up by the ALJ and there is no argument to the contrary. Rather, it appears the respondent simply wanted the claimant to schedule a separate hearing on the issue of an extension of time, and seemingly argues its own motion to dismiss the case was not the proper forum. K.S.A. 44-523(a) does not require this level of formality, especially when K.S.A. 44-523(f) has no requirement for the claimant to schedule a hearing to extend time. K.S.A. 44-523(f) requires the claimant to file a motion to extend within the three-year limitation. That occurred.

The Board has held orders denying motions to dismiss are interlocutory. The Order issued by Judge Roth was interlocutory, not final, and not a preliminary award appealable

under K.S.A. 44-534a(a)(2). Interlocutory orders are generally not subject to appeal.⁴ When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.⁵ The Board is without jurisdiction to review Judge Roth’s Order dated February 7, 2022, and the appeal is dismissed.

WHEREFORE, the Board dismisses the respondent’s appeal from the Order of Administrative Law Judge Steven Roth dated February 7, 2022.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)
Patrick Smith
Kip Kubin
Honorable Steven Roth

⁴ See *Damron v. State of Kansas*, Nos. 1,028,933, 1,033,846, 1,053,691 & 1,039,526, 2012 WL 4763646 (Kan. WCAB Sept. 5, 2012).

⁵ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶1, 869 P.2d 755 (1994).