

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>DERRICK ONNEN</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0463-727
<b>THE MONARCH CEMENT CO.</b>	)	CS-00-0072-007
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL FIRE INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appealed the February 7, 2022, Motion Hearing Order by Administrative Law Judge (ALJ) Steven M. Roth.

**APPEARANCES**

Patrick C. Smith appeared for Claimant. Kip A. Kubin 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 taken December 6, 2019, with exhibits attached; Motion to Dismiss Transcript, taken February 4, 2022, and the 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 the Board has jurisdiction, should this claim be dismissed for lack of prosecution, pursuant to K.S.A. 44-523(f)?

**FINDINGS OF FACT**

Claimant filed an application for hearing on September 6, 2018, alleging chemical exposure at work on February 2, 2017. A preliminary hearing was held on December 9, 2019. The ALJ found Claimant suffered a work-related injury and awarded temporary total benefits. Respondent appealed to the Board and the Board affirmed the ALJ's Order on February 27, 2020.

On September 3, 2021, Claimant filed a Motion to Grant An Extension of Time. Claimant did not request a hearing on the motion. On September 10, 2021, Respondent filed the Application for Dismissal.

A hearing was held on February 4, 2022, on Respondent's Application for Dismissal. At the hearing both parties were given an opportunity to be heard. Claimant's attorney stated he was having difficulty contacting his client, which was the basis for the motion to extend. The ALJ issued an Order denying Respondent's Motion to Dismiss and granting Claimant's Extension of Time. The ALJ found Claimant had good cause for the extension pursuant to K.S.A. 44-523(f) and the extension was timely filed. The extension of time was granted to August 4, 2022.

**PRINCIPLES OF LAW AND ANALYSIS**

Respondent argues the ALJ denied due process by not holding a hearing on Claimant's Motion to Extend and for finding good cause to extend the case without any evidence.

Claimant argues the ALJ's Order should be dismissed for lack of jurisdiction as an interlocutory order. In the alternative, the Order should be affirmed as good cause was provided for extension of prosecution of the claim.

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. 44-534(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 a review 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

The Order issued by the ALJ 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.<sup>1</sup> When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>2</sup> The Board is without jurisdiction to review the ALJ's Order dated February 7, 2022.

Respondent argues due process was denied because no hearing was held on Claimant's Motion to Extend. K.S.A. 44-523(f) requires a hearing on the issue of dismissal. The statute does not require an evidentiary hearing be held on a motion for extension of time. However, a hearing was held effectively denying the Motion to Dismiss and granting an extension of time. Respondent had ample opportunity to present all its arguments to the ALJ, including any objections to the extension of time. Respondent was not denied due process.

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<sup>1</sup> 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).

<sup>2</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Sy. ¶1, 869 P.2d 755 (1994).

**DECISION**

**WHEREFORE**, the Board dismisses Respondent's appeal from the Order of Administrative Law Judge Steven M. Roth dated February 7, 2022.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2022.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Patrick C. Smith, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier  
Hon. Steven M. Roth, Administrative Law Judge