

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

YORDY GAMEZ OLIVER)	
Claimant)	
V.)	
)	AP-00-0464-295
NATIONAL BEEF PACKING CO., LLC)	CS-00-0315-522
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant appealed the March 9, 2022, the Order issued by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on July 7, 2022.

APPEARANCES

Conn Felix Sanchez appeared for Claimant. Shirla McQueen 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 Motion Hearing from March 8, 2022, and the documents of record filed with the Division.

ISSUE

Does the Board have jurisdiction to issue an order when Claimant died and no real party in interest has been substituted for Claimant?

FINDINGS OF FACT

In pleadings filed with the ALJ by Claimant’s attorney on January 19, 2021,, titled “Motion For Attorney Fee Approval And Open an Estate Trust Account And/Or Naming Dependents of Claimant” it was stated “The Claimant died due to COVID-19 Related illness on December 24, 2020.” The brief filed by Claimant’s attorney with the Board on April 26,

2022, stated, "On December 24, 2020, Mr. Gamez Oliver died of COVID-19 related infection after an extended hospital stay in Liberal, Kansas." There are no other documents or statements in the Division records concerning Claimant's death. There was "No Suggestion of Death Upon The Record Under K.S.A. 60-225(a)(1)" or substitution of parties filed with the Division.

On January 12, 2021, this Board issued an Order modifying the ALJ's award of 20 percent permanent partial functional impairment and awarded Claimant 86.86 weeks of temporary total disability at a rate of \$408.15, totaling \$35,452.00, followed by 125.53 weeks of permanent partial disability at \$408.15 per week, totaling \$51,235.07, for a total of \$86,687.07, less amounts previously paid, for a 36 percent work disability. The award of future medical was affirmed.

On January 19, 2021, Claimant's attorney filed a Motion for Attorney Fees and Open Estate Trust Account And/or Naming Dependents of Claimant. On January 20, 2021, Claimant's attorney filed a Demand for Compensation. Respondent filed a response to this motion on January 21, 2021, and February 3, 2021. On February 5, 2021, Respondent filed an Application for Review and Modification. These pleadings were filed with the ALJ and were not brought to the attention of the Board or the Court of Appeals by either party.

Respondent appealed the Board's Order to the Kansas Court of Appeals. On December 17, 2021, the Kansas Court of Appeals affirmed the Board's Order. Unbeknownst to either this Board or the Court of Appeals, Claimant died from COVID-19 on December 24, 2020.

On January 13, 2022, Claimant filed another Demand for Compensation. Respondent filed a response to this motion on the same day and a "Motion For Hearing to Determine Amount of Award Owed". Claimant filed a response to this Motion on March 7, 2022.

On March 8, 2022, a hearing was held before ALJ Fuller on Respondent's Motion to Determine Award Amount Due. Respondent was seeking a determination of the amount of the Award owed to Claimant (his dependents or heirs). Respondent states they previously paid \$12,244.31.

The ALJ ruled K.S.A. 44-510e(b) controlled and Respondent's obligation for weekly payments terminated as of the Claimant's passing on December 25, 2020. From May 23, 2019, through December 25, 2020, there were 581.98 days or 83.14 weeks of compensation due or \$33,933.59. The total amount due and owing to the Claimant was \$69,385.59, less amounts previously paid. Claimant's attorney is entitled to 25 percent of the awarded benefits and \$2,945.00 in expenses.

The ALJ also ordered Respondent to make payment to the estate once a proper probate has been filed. If no probate is filed, the benefits shall be held in trust until there has been a hearing before the Court to determine lawful heirs, which was not properly before the Court at that time.

No filing or notification has been received by the Board or the Division of Workers Compensation or an estate or trust being opened on Claimant's behalf.

Claimant's death was not due to his injury claim, but to COVID-19. There may be surviving a common law spouse and dependent children but the record is not clear. Claimant has no known official heirs, no estate and no trust established at this time for potential heirs to receive the compensation.

PRINCIPLES OF LAW AND ANALYSIS

Claimant's counsel argues the ALJ erred when she reduced the amount of compensation owed to Claimant, as this was not a Review and Modification Hearing. Claimant's counsel contends \$74,442.76 is owed as of the date of Claimant's death.

Respondent argues the Board should affirm the ALJ's Order. Respondent also argues any heirs of Claimant are only entitled to benefits up to December 24, 2020, the date of Claimant's death. That amount would be \$69,385.59, less the \$12,244.31 previously paid for a total owing of \$57,141.28. Therefore, an estate should be setup before there is an obligation to pay anything, and a determination must be made as to what exactly is owed given Claimant's death.

*Belk v. State of Kansas*¹, is instructive and analogous to this case. In *Belk*, the ALJ issued an order appointing a neutral physician to perform an evaluation on Claimant's medical records for Claimant's left shoulder injury. The Suggestion of Death Upon The Record Under K.S.A. 60-225(a)(1) was filed with the Division on April 24, 2006. No motion for substitution was ever filed and there was no indication in the Division records an estate was opened for the deceased Claimant. One Board Member ruled: "As no real party in interest has been identified in this matter, no estate has been opened and no legal representative has been appointed for the deceased claimant, the ALJ was without jurisdiction to enter an Order herein. Therefore, that Order is reversed and the matter remanded to the ALJ for further proceedings consistent with this Order."²

¹ *Belk v. State of Kansas*, No. 1,024,926, 2010 WL 769922 (Kan. WCAB Feb. 25, 2010).

² *Id.* at 3.

As in *Belk*, no estate has been opened and no legal representative appointed for the deceased Claimant. Therefore no real party in interest has been identified in this case. The ALJ was without jurisdiction to enter an Order.

The Order issued by the ALJ on March 16, 2022 is vacated.

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Order of Administrative Law Judge Pamela J. Fuller dated March 9, 2022, is vacated.

IT IS SO ORDERED.

Dated this _____ day of August, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Conn Felix Sanchez, Attorney for Claimant
Shirla McQueen, Attorney for Respondent and its Insurance Carrier
Hon. Administrative Law Judge