

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VICTORIA NAKIA MOMINA JONES)
Claimant)
V.) AP-00-0471-470
) CS-00-0030-532
GENERAL MOTORS LLC)
Self-Insured Respondent)

ORDER

The respondent and its insurance carrier (respondent), through Kristina Mulvany, requested review of Administrative Law Judge (ALJ) Julie Sample's Order dated October 10, 2022.¹ The claimant appeared pro se. Due to a conflict, Board Member William Belden recused himself from this appeal. Mark Kolich was appointed as a Board Member Pro Tem for this case.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the: (1) preliminary and motion to dismiss hearing transcript, held October 5, 2022; (2) all associated exhibits; and (3) documents of record filed with the Division.

ISSUES

1. Does the Board have jurisdiction to review the ALJ's Order denying the 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

On July 26, 2017, the claimant filed an application for hearing alleging a fall at work on April 10, 2017. A preliminary hearing was held June 5, 2018. The ALJ found the claimant's injury did not arise out of and in the course of her employment. The claimant appealed to the Board. In an order dated August 24, 2018, a single Board Member reversed and remanded for the ALJ to order authorized medical treatment.

¹ The Order references five separate cases; however, only CS-00-0030-532 was appealed to the Board.

On October 15, 2019, the respondent filed an application for termination of medical benefits. A preliminary hearing was held May 13, 2020. The ALJ granted the respondent's request after finding the claimant failed to prove her need for treatment was related to the work accident. The claimant appealed to the Board. In an order dated August 26, 2020, the Board dismissed the claimant's appeal for lack of jurisdiction based on the claimant not filing an appeal within 10 days of the ALJ's ruling.

On February 28, 2020, the claimant filed a motion for extension of time to proceed to regular hearing, pursuant to K.S.A. 44-523. On August 3, 2022, the respondent filed an application for dismissal, pursuant to K.S.A. 44-523(f). A hearing was held on October 5, 2022, and both parties were given an opportunity to be heard. In an Order dated October 10, 2022, the ALJ denied the respondent's motion, stating:

It would be easy to just dismiss this claim and leave it to the Appeals Board to find its way through the evidentiary forest and decide whether that decision was appropriate. But the Court is not inclined to do so. Claimant has certainly moved her claim partially forward in that she has been evaluated, received recommendations for treatment and presented those records to Respondent, asking the Court to order that treatment. She has demonstrated, albeit scattershot, "good cause" for her claim moving forward. To be clear, that does not mean she has met her evidentiary burden and Claimant should not interpret this finding as such. The Court is only determining and deciding that Claimant has shown "good cause" for this claim not to be dismissed at this moment in time. Accordingly, Respondent's Motion to Dismiss is denied without prejudice to any future requests.

PRINCIPLES OF LAW AND ANALYSIS

The respondent argues the Board has jurisdiction to hear this appeal because the possibility of a dismissal in K.S.A. 44-523(f) directly affects compensability of this claim, and is a "certain defense" under K.S.A. 44-534a(a). The respondent asserts the claimant has been at maximum medical improvement for over three years, the medical reports fail to prove the work accident was the prevailing factor for her condition or need for treatment, and the claimant failed to prove good cause for an extension. The claimant maintains the Order should be affirmed.

K.S.A. 44-523(f)(1) states:

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.

Not every decision of an ALJ is subject to Board review. The Board has authority to review preliminary hearing orders under circumstances specified in K.S.A. 44-534a(a)(2) and K.S.A.44-551(i)(2)(A).

K.S.A. 44-534a states, in part:

(a)(2) 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. . . . 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.

The statute does not define the "certain defenses" which may be appealed, but "certain defenses" are defined as being subject to review "only if they dispute the compensability of the injury" under the Act.²

K.S.A. 44-551(l)(1) grants the Board authority to review "[a]ll final orders, awards, modifications of awards ... shall be subject to review by the board upon written request by any interested party within 10 days."

In *Hoffman*,³ the Board, in a divided opinion, concluded the time limitations contained in K.S.A. 44-523(f)(1) directly affected compensability, it was an affirmative defense, and found it had jurisdiction to consider an appeal from a motion to dismiss which stemmed from a preliminary hearing decision. The *Hoffman* opinion is an outlier. The vast majority of decisions indicate an order denying a motion to dismiss is interlocutory in nature and not subject to review by the Board.⁴ Had the ALJ dismissed the claim for lack of

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

³ *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

⁴ See *Brooks v. Kincaid Coach Lines, Inc.*, No. 1,067,241, 2015 WL 5918874, at *2 (Kan. WCAB Sept. 24, 2015); *Hellebuyck v. Honeywell International*, No. 1,065,658, 2015 WL 4716624, at *2 (Kan. WCAB July 9, 2015); *Avila v. Mitesh Constr., Inc.*, No. 1,068,185, 2015 WL 4071484, at *4 (Kan. WCAB June 25, 2015); *Nelson v. Wichita Vending*, No. 1,062,842, 2014 WL 6863032, at *3 (Kan. WCAB Nov. 4, 2014); *Walker v. State of Kansas*, No. 1,048,030, 2013 WL 485696, at *2 (Kan. WCAB Jan. 25, 2013); *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954, at *2 (Kan. WCAB Mar. 14, 2012); *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903, at *2 (Kan. WCAB Nov. 22, 2011).

prosecution, then a final order would have resulted and the Board would have jurisdiction to review the Order.⁵ The ALJ's Order, with respect to the respondent's motion, was also not a final ruling or an appealable preliminary order.

Contrary to *Hoffman*, K.S.A. 44-523(f) does not present an affirmative defense as to compensability. No provision in the Act states a dismissal is a "certain defense." K.S.A. 44-523(f)(1) applies to all claims in which an application for hearing has been filed, making no distinction between compensable and noncompensable claims. The subject of the provision concerns dismissal for lack of prosecution, not whether or not the claim is compensable. The Board does not have jurisdiction to consider the ALJ's denial of the motion to dismiss as a "certain defense." K.S.A. 44-523(f) is not a "certain defense."

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶ As such, the Board dismisses the respondent's appeal. The ALJ's decision is otherwise affirmed. The issue concerning good cause is moot.

AWARD

WHEREFORE, the Board dismisses the respondent's appeal of the Order dated October 10, 2022.

IT IS SO ORDERED.

Dated this _____ day of December, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (via OSCAR)

Victoria Nakia Momina Jones
Kristina Mulvany
Hon. Julie Sample

⁵ *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *cf. Salama v. Hen House Market*, No. 1,009,525, 2008 WL 2673163 (Kan. WCAB June 30, 2008).

⁶ See *Berumen v. U.S.D. 233*, No. 1,067,401, 2014 WL 6863036 (Kan. WCAB Nov. 4, 2014).