

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DEREK WERTH
Claimant

v.

UNITED PARCEL SERVICE, INC.
Respondent

AP-00-0460-811
CS-00-0444-932

and

LIBERTY MUTUAL INS. CO.
Insurance Carrier.

ORDER

Claimant requested review of the Order, dated August 18, 2021, issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Terry J. Malone appeared for Claimant. Karl L. Wenger appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Appeals Board considered same the record as the ALJ, consisting of the transcript of Motion Hearing, held August 17, 2021; and the pleadings and orders contained in the administrative file. The Appeals Board also reviewed the parties' briefs. This matter was placed on the summary calendar for disposition without oral argument.

ISSUE

Was the Order dismissing this matter with prejudice, pursuant to K.S.A. 44-523(f)(2), erroneous because a good faith reason for the delay in prosecution was proven by Claimant?

FINDINGS OF FACT

On August 19, 2019, Claimant filed his Application for Benefits alleging he sustained a right leg injury from an accident arising out of and in the course of his employment with Respondent on July 12, 2019. Compensability was disputed at a preliminary hearing held in September 2019, and Dr. Pratt was appointed to perform a Court-ordered independent medical examination in an Order dated September 18, 2019. The Order was appealed to the Appeals Board, and the Board dismissed the appeal on December 10, 2019.

Following Dr. Pratt's evaluation, a second preliminary hearing was held on May 13, 2020. On May 14, 2020, ALJ Fuller issued an Order finding Claimant failed to prove the alleged work-related accident was the prevailing factor causing his alleged injury and need for medical treatment. ALJ Fuller also concluded Claimant was barred from receiving compensation because he violated Respondent's safety regulations. The Order denying compensability was not appealed to the Appeals Board. A regular hearing has not taken place.

On May 27, 2021, Respondent filed its Application for Dismissal with Prejudice. Respondent sought dismissal with prejudice because more than one year elapsed since the Order dated May 14, 2020, was issued, and this matter had not proceeded to regular hearing. Claimant filed his Response to Respondent's Application for Dismissal with Prejudice on August 16, 2021, arguing the Kansas Supreme Court's Administrative Orders 2020-PR-016, and 2021-PR-020, suspended the running of the one-year limitation until April 15, 2021, and Claimant had until April 15, 2022, to proceed to regular hearing. No other explanation for the delay in prosecution was given by Claimant.

On August 17, 2021, ALJ Fuller conducted a hearing on Respondent's Application for Dismissal. No testimony was given, and counsel made argument in support of their positions. Essentially, Respondent argued more than one year elapsed since ALJ Fuller issued the Order denying compensability, K.S.A. 44-523(f), mandated dismissal, and the Administrative Orders issued by the Kansas Supreme Court did not apply to workers compensation proceedings. Claimant referred the Court to the arguments in Claimant's Response to Respondent's Application for Dismissal with Prejudice.

On August 18, 2021, ALJ Fuller issued the Order granting Respondent's Application for Dismissal. ALJ Fuller found more than one year elapsed since the Order denying compensability, and this matter had not proceeded to regular hearing. Citing *Haney v. City of Lawrence*¹, ALJ Fuller ruled Administrative Order 2020-PR-016, did not apply to workers compensation proceedings. ALJ Fuller concluded Claimant did not prove a good faith

¹ *Haney v. City of Lawrence*, AP-00-0455-924, CS-00-0097-315, 2021 WL 1270407 (Kan. WCAB Mar. 24, 2021).

basis for failing to proceed to regular hearing within one year of the Order denying compensability. Accordingly, the claim was dismissed with prejudice, pursuant to K.S.A. 44-523(f)(2). This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Order is erroneous because the deadline for proceeding to regular hearing under K.S.A. 44-523(f), was suspended under Administrative Order 2020-PR-016, no order exempting this matter from the suspension of time limits was issued under the Administrative Order 2021-PR-020, and Claimant had until April 15, 2022, to proceed to regular hearing because the time to proceed did not start running until April 15, 2021. Claimant also argues he acted in good faith in his belief the Administrative Orders applied to workers compensation proceedings, and Respondent's request for dismissal should be denied because it did not prove Claimant was acting in bad faith. Respondent argues the Order was decided correctly, and should be affirmed.

The Kansas Workers Compensation Act provides for dismissal of a claim with prejudice if the claim has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim. The employer may file an application for dismissal, which shall be set for a hearing with notice sent to the Claimant's attorney. Unless the Claimant can prove a good faith reason for the delay, the claim shall be dismissed with prejudice by the administrative law judge.²

In this case, the Order denying compensability was dated May 14, 2020. Under K.S.A. 44-523(f)(2), Claimant had one year from the date of the Order, or May 14, 2021, to proceed to regular hearing. This matter did not proceed to regular hearing by May 14, 2021. Respondent filed its Application for Dismissal with Prejudice on May 27, 2021, and a hearing took place with notice given to Claimant's counsel. Under K.S.A. 44-523(f)(2), this matter must be dismissed with prejudice unless Claimant can prove a good faith reason for the delay.

First, Claimant argues Administrative Orders 2020-PR-016, and 2021-PR-020, create a good faith reason for the delay in prosecution, and Claimant's deadline for proceeding to regular hearing was extended to April 15, 2022. Claimant offers no legal authority supporting the application of the Administrative Orders to workers compensation proceedings. The Appeals Board previously ruled Administrative Order 2020-PR-016, does not apply to workers compensation proceedings, because it applies to "judicial proceedings," and not to administrative proceedings conducted by Executive Branch

² See K.S.A. 44-523(f)(2).

agencies outside the Judicial Branch.³ Because the Division of Workers Compensation is not bound by Administrative Order 2020-PR-016, it cannot create a good faith basis or otherwise excuse a claimant's failure to proceed to regular hearing.⁴ Similarly, Administrative Order 2021-PR-020, cannot create a good faith basis for the failure to prosecute, or extend the time to proceed to regular hearing, because the Division of Workers Compensation is not a component of the Judicial Branch subject to Administrative Orders of the Kansas Supreme Court.

Second, Claimant argues good faith for the failure to proceed to regular hearing is present because his reliance on Administrative Orders 2020-PR-016, and 2021-PR-020, proves his good faith. This argument was not made at the motion hearing before ALJ Fuller. There is no evidence Claimant made any action to resume prosecution of this matter. Instead, Claimant argues Respondent has the burden of proving Claimant acted in bad faith. This argument is contrary to the plain language of the Workers Compensation Act, which must be followed when plain and unambiguous.⁵ In this case, the applicable statute clearly states, "Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge."⁶ The plain language of K.S.A. 44-523(f)(2), does not place the burden on the employer to prove bad faith.

In conclusion, the Appeals Board finds more than one year passed since the Order, dated May 14, 2020, denying compensability was issued and this matter has not proceeded to regular hearing. The Appeals Board also finds Claimant failed to prove a good faith reason for the delay in prosecution, because the Administrative Orders issued by the Kansas Supreme Court do not apply to workers compensation proceedings or imbue good faith, and because Claimant failed to otherwise prove a good faith reason. K.S.A. 44-523(f)(2), mandates dismissal of this matter with prejudice.

DECISION

WHEREFORE, it is the finding, decision and order of the Appeals Board the Order, dated August 18, 2021, issued by Administrative Law Judge Pamela J. Fuller is affirmed. This matter is dismissed with prejudice, pursuant to K.S.A. 44-523(f)(2).

³ See *Martinez v. Packers Sanitation Services, Inc.*, AP-00-0453-773, AP-00-0453-774, CS-00-0312-250, 2021 WL 391043, at *4 (Kan. WCAB Jan. 26, 2021); *Haney v. City of Lawrence*, AP-00-0455-924, CS-00-0097-315, 2021 WL 1270407, at *4 (Kan. WCAB Mar. 24, 2021).

⁴ See *Haney*, 2021 WL 1270407, at *4.

⁵ See, e.g., *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

⁶ K.S.A. 44-523(f)(2).

IT IS SO ORDERED.

Dated this _____ day of October, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Terry J. Malone
Karl L. Wenger
Hon. Pamela J. Fuller