

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHEILA A. HACKLER)
Claimant)
V.)
PENINSULA GAMING PARTNERS, LLC)
Respondent)
and)
NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA)
Insurance Carrier)

Docket No. 1,060,759

ORDER

Claimant requested review of Administrative Law Judge Gary K. Jones' December 29, 2015 Order. Lawrence M. Gurney appeared for claimant. Christopher J. McCurdy appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record consists of preliminary hearings transcripts dated March 5, 2013, December 10, 2013, July 15, 2014, and February 17, 2015, with all attached exhibits, but exclusive of medical records without supporting physician testimony, the December 17, 2015 Motion to Dismiss transcript, with the attached exhibit, the court-ordered report of Paul Stein, M.D., dated January 21, 2014, and the February 7, 2013 evidentiary deposition of Steven Scudiero.

ISSUES

This case involves dismissal of an asserted 2012 injury by repetitive trauma based on K.S.A. 2011 Supp. 44-523(f). The judge found claimant had good cause for a reasonable extension of time to proceed to a regular hearing, agreed award or settlement hearing. Citing *Ramstad*,¹ the judge nonetheless dismissed the claim with prejudice because claimant's motion for an extension of time was not filed within three years after her application for hearing was filed.

The only issue is: should this claim be dismissed?

¹ *Ramstad v. U.S.D.* 229, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB, Aug. 31, 2015), was appealed to the Kansas Court of Appeals, but such appeal was voluntarily dismissed on November 24, 2015.

FINDINGS OF FACT

Claimant alleged injury by repetitive trauma to her right arm from early March 2012 through April 23, 2012. Claimant filed her application for hearing on May 14, 2012.

Two preliminary hearings were held in 2013. A prior judge ordered temporary total disability (TTD) benefits following the first preliminary hearing. Another judge ordered a neutral independent medical evaluation with Paul S. Stein, M.D., after the second preliminary hearing. Dr. Stein evaluated claimant on January 21, 2014. Dr. Stein noted claimant had right lateral epicondylitis surgery, apparently in late-2012. The doctor indicated there was a causal relationship between claimant's work and her right upper extremity complaints, including her shoulder, forearm and wrist.

Preliminary hearings were held on July 15, 2014, and February 17, 2015. The current judge ordered TTD after the former hearing and denied respondent's request to terminate TTD following the latter hearing, thus allowing TTD payments to continue.

On March 23, 2015, Steven R. Kassman, M.D., an orthopedic surgeon, reported claimant did not need right shoulder surgery and he released her from active orthopedic care under his direction. Dr. Kassman's report was offered into evidence without objection at the hearing regarding respondent's motion to dismiss.

On July 24, 2015, claimant filed a motion for extension pursuant to K.S.A. 44-523(f). On July 27, 2015, respondent filed an application for dismissal and the hearing was held December 17, 2015. Respondent argued to the judge the claim had not proceeded to regular hearing, settlement hearing or an agreed award within three years from the date of claimant's application for hearing and claimant failed to file a motion to extend prior to the expiration of the three year period. Respondent argued K.S.A. 2011 Supp. 44-523(f) clearly and unambiguously required claimant's claim be dismissed with prejudice and there is no need to look for legislative intent anywhere except the language of the statute.

Claimant argued to the judge she had not reached MMI, she may need right shoulder surgery and she was trying to determine whether her potential need for shoulder surgery would be her work activities or some other cause. Claimant argued K.S.A. 2011 Supp. 44-523(f) only bars stale and inactive claims and her claim does not meet those criterion. Claimant noted *Welty*² did not find K.S.A. 44-523(f) was a statute of repose or statute of limitations, but it was a method to dispose of stale claims. Along these lines, claimant argues the applicable statute of limitations is K.S.A. 44-534 and K.S.A. 2011 Supp. 44-523(f) is not meant to be a second statute of limitations. Claimant attached portions of the appellate brief filed in *Ramstad*, which cited various sources for the proposition the statute was not meant to eliminate active cases:

² *Welty v. U.S.D.* 259, 48 Kan. App. 2d 797, 302 P.3d 1080 (2012)

The Kansas Department of Labor's written materials – presented by Secretary Karin Brownlee – simply indicated that the change in K.S.A. 44-523(f):

“. . . changes the five-year rule for keeping an application open for hearing to three years if hasn't seen any activity”.

House Commerce & Economic Development, 2/7/2011, Attachment 2-2.

John M. Ostrowski – presenting the Kansas AFL-CIO – included information from the National Council on Compensation Insurance (NCCI). This presentation referred to the proposed changes in K.S.A. 44-523(f) as a:

“. . . modified mechanism for dismissing dormant claims”.

Gary Terrill – current member of the Workers Compensation Board of Appeals [*sic*] – also provided written testimony. At the time of the testimony, he was a defense attorney with Wallace Saunders. His written testimony was provided on behalf of the Kansas Association of Defense Counsel and was submitted to the Senate Commerce Committee on March 9, 2011. Referring to K.S.A. 44-523(f), Mr. Terrill indicated:

“The legislation also provides for a procedure to dismiss aging claims in which there has been no activity for a period of years.”

Senate Commerce Committee, 3/9/2011, Attachment 3-2.³

Claimant also argued to the judge that K.S.A. 2011 Supp. 44-523(f)(1) is ambiguous because:

K.S.A. 44-523(f)(2) does not contain the ambiguity of subsection (f)(1). It clearly states that the claimant may extend the one year time limit based upon a “good faith reason” for delay. This subsection seems to parallel subsection (f)(1). Both set a time in which the Court needs to consider whether a claim has been abandoned. Both allow for dismissal based upon lack of prosecution. Both subsections allow the claimant to proceed if there is good cause or a good faith reason why the claim has not been settled or proceeded to regular hearing. The Kansas Court of Appeals has held that, when “construing a statute, a Court may properly look to the meaning in a patten of related statutes”. *In re: Estate of Clare*, No. 112,762 (Kan. App. 9/4/2015) citing *Van Beeck v. Sabine Towing Company*, 300 U.S. 342, 351, 57 S. Ct. 452, 81 L.Ed 685 (1937).⁴

³ Brief for Derek J. Ramstad at 8-9, *Ramstad v. U.S.D.* 229, No. 114,513, 2015 WL 9092350 (Kansas Court of Appeals, Oct. 26, 2015).

⁴ *Id.* at 15-16.

Claimant contended to the judge that K.S.A. 2011 Supp. 44-523(f)(1) is unconstitutional based on equal protection and due process concerns.⁵ Further, claimant contends there is no statutory mechanism allowing her to file a motion to extend her time period for proceeding to a regular hearing, settlement hearing or award.

PRINCIPLES OF LAW

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.⁶ The text of a statute should not be supplanted by information outside the plain wording of a statute.⁷ *Hoesli*⁸ states:

When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007). We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy. See *State v. Phillips*, 299 Kan. 479, 495, 325 P.3d 1095 (2014) (first task in construing statute is to ascertain legislative intent through analysis of language employed, giving ordinary words their ordinary meanings). A court does not read into the statute words not readily found there. *Whaley*, 301 Kan. at 196, 343 P.3d 63; *Graham*, 284 Kan. at 554, 161 P.3d 695; see *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 525, 154 P.3d 494 (2007). When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley*, 301 Kan. at 196, 343 P.3d 63.

K.S.A. 2011 Supp. 523(f) states, in part:

(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

⁵ Claimant acknowledges the Board lacks the authority to determine if K.S.A. 2011 Supp. 44-523(f)(1) is constitutional, but wishes to preserve her arguments for appellate review.

⁶ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); see also *Fernandez v. McDonald's*, 296 Kan. 472, 478, 292 P.3d 311 (2013); *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 618, 256 P.3d 828 (2011); *Hall v. Knoll Bldg. Maint., Inc.*, 48 Kan. App. 2d 145, 152, 285 P.3d 383 (2012); *Messner v. Cont'l Plastic Containers*, 48 Kan. App. 2d 731, 741-42, 298 P.3d 371 (2013), *rev. denied* (Aug. 30, 2013); and *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

⁷ See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 560-61, 293 P.3d 723 (2013).

⁸ *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 361 P.3d 504, 508-09 (2015).

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.

(2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, 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. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. 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. 2011 Supp. 44-534 states:

(a) Whenever the [parties] cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the [parties] may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. . . .

(b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

ANALYSIS

The Board has addressed this issue before. In *Hoffman*,⁹ the Board concluded K.S.A. 2011 Supp. 44-523(f) is "very specific in its requirement that the motion to extend be filed prior to the running of the three year limitation[,] " [t]here is nothing ambiguous about this statute" and attempts to label the statute vague appeared to be an attempt to avoid the legislative mandate in the statute.

⁹ *Hoffman v. Dental Central, P.A.*, No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

In *Ramstad*,¹⁰ the Board stated the motion to extend the three year period upon a showing of good cause must be made before the three year period expires. Because no such motion was filed, the Board affirmed a judge's dismissal of Mr. Ramstad's claim. In *Riedmiller*,¹¹ the Board reversed a dismissal under K.S.A. 2011 Supp. 44-523(f) where the claimant: (1) requested an extension of time before the three year period expired and (2) she was prosecuting her claim.

We do not have the benefit of appellate precedent. The holding in *Welty*¹² – that K.S.A. 2006 Supp. 44-523(f) did not apply retroactively – is not pertinent. Of note, the *Welty* court had no reason to analyze whether an actively litigated case is subject to dismissal. However, *Welty* contains *dicta* that might be relevant. First, *Welty* states K.S.A. 2006 Supp. 44-523(f) “provides a way for the workers compensation division to cleanse its house of stale claims.”¹³ Second, the *Welty* court specifically avoided labeling K.S.A. 2006 44-523(f) as a statute of limitations or a statute of repose, but noted K.S.A. 44-534(b) “appears to be the applicable statute of limitations”¹⁴

Claimant argues an actively litigated case should not be dismissed. Claimant also argues the purpose of K.S.A. 2011 Supp. 44-523(f) is to dispose of stale claims. Neither the 2006 nor the 2011 version of K.S.A. 44-523(f) expressly says anything about disposing of stale claims. Recent appellate decisions, as noted in footnotes 6-8, require us to look at the plain meaning of workers compensation statutes. We may only look at legislative history if a statute is vague and ambiguous. The Board concludes K.S.A. 2011 Supp. 44-523(f) is not vague or ambiguous and it does not expressly require a lack of prosecution before a respondent may file a motion to dismiss and the statute does not say a motion, or a ruling, under the statute is disallowed if a case is actively pursued.

Under the literal text of the statute, a motion to extend must be filed within the three years after an application for hearing is filed and claimant must prove good cause to warrant an extension. The statute equates a lack of prosecution with a claimant taking more than three years after the filing of an application for hearing to get to a regular hearing, settlement hearing or award. In this case, claimant had good cause, but filed her motion outside of the three year time frame.

¹⁰ *Ramstad*, *supra*, fn. 1.

¹¹ *Riedmiller v. Del Monte Foods Co.*, No. 1,061,483, 2015 WL 9672643 (Kan. WCAB Dec. 14, 2015).

¹² *Welty v. U.S.D.* 259, 48 Kan. App. 2d 797, 302 P.2d 1080 (2012).

¹³ *Welty*, 48 Kan. App. 2d at 800.

¹⁴ *Id.* at 803.

Claimant argues there can only be one statute of limitations. The Board does not find the operation of K.S.A. 2011 Supp. 44-523(f) is dependent upon whether it is characterized as a statute of limitations. No matter the label attached to K.S.A. 2011 Supp. 44-523(f), it permits a respondent to file a motion for dismissal for lack of prosecution where a case has not proceeded to a regular hearing, settlement hearing or award within three years after an application for hearing is filed. The Board knows of no requirement that a case is subject to only one time limitation. Kansas workers compensation law has traditionally included several deadlines, such as notice (K.S.A. 44-520), written claim prior to May 15, 2011 (K.S.A. 44-520a), the filing of an application for hearing (K.S.A. 44-534) and some form of K.S.A. 44-523(f) from 2006 forward.

Claimant's argument that K.S.A. 2011 Supp. 44-523(f) contains no procedure for her to file a motion for an extension is rejected. The statute contemplates a motion being filed to extend the time to proceed to regular hearing, settlement hearing or award. Who better to file such motion than the party who stands to have his or her case dismissed?

Regarding the dissent, it does not adhere to strict construction of workers compensation statutes as noted in cases such as *Bergstrom* and *Hoesli*. The dissent ignores the statutory requirement that a motion to extend be filed before the expiration of the three year limitation. K.S.A. 2011 Supp. 44-523(f) says respondent may file a motion to dismiss based on a lack of prosecution if a claim has not proceeded to a regular hearing, settlement hearing or award within three years of an application for hearing being filed. As noted above, the statute is not vague or ambiguous, no matter how individual Board Members might perceive the statute's fairness. Moreover, the statute is not a technical rule of procedure. Why have rules if they can be arbitrarily enforced under K.S.A. 44-523? Finally, the Code of Civil Procedure is typically not relevant in construing workers compensation statutes.

CONCLUSIONS

Having carefully reviewed the entire evidentiary file contained herein, the Board affirms the judge's dismissal under K.S.A. 2011 Supp. 44-523(f).

ORDER

WHEREFORE, the Board affirms the December 29, 2015 Order.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents. The Board Majority focuses on the mere passage of three years as being the key to this case. To the contrary, regardless of the inevitable passage of time, the first sentence of K.S.A. 2011 Supp. 44-523(f) clearly states a lack of prosecution is a condition necessary for a respondent to file a motion to dismiss:

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.**

Dismissal of claimant's case is inappropriate because her case was not stale, inactive or suffered from lack of prosecution. The statute does not clearly, plainly or unambiguously state that a claimant taking longer than three years to proceed to a regular hearing, settlement hearing or award after filing an application for hearing is guilty of failing to prosecute his or her claim. Neither the statute nor the Kansas Workers Compensation Act simplistically define a "lack of prosecution" as taking longer than three years from the date of filing an application for preliminary hearing to get to a regular hearing, settlement hearing or award. Just because a respondent may file for dismissal based on "lack of prosecution" after three such years does it mean a lack of prosecution occurred because three years came and went. Yet, this is the approach embraced by the Board majority. Equating the facts of this specific case with a lack of prosecution is incorrect.

The fourth sentence in K.S.A. 2011 Supp. 44-523(f) says:

If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge **for lack of prosecution**.

Therefore, a judge may only dismiss a case if there is: (1) a lack of prosecution and (2) a lack of good cause, apparently for not prosecuting the case faster. The Board majority acknowledges that the judge found claimant established good cause, but misses that the judge lacked the jurisdiction to dismiss the case absent a lack of good cause.

K.S.A. 2011 Supp. 44-523(f) specifically requires a lack of prosecution. If there is a lack of prosecution (and not merely the passage of time in an otherwise vibrantly litigated claim), the judge may consider a motion by respondent to dismiss. On such consideration, the judge must find claimant did not have just cause for getting to a regular hearing, settlement hearing or award within three years after the application for hearing was filed. In other words, the statute only requires a motion to extend during the three year period if there has been a lack of prosecution. A claimant need not even ask for an extension if the case does not suffer from a lack of prosecution.

This Board Member believes the majority has imposed an unnecessary rule created by the ambiguity of K.S.A. 2011 Supp 44-523(f): a requirement that a claimant must file a motion within three years of the filing of his or her application for hearing to extend the claim, or it will be dismissed. Furthermore, under the majority's interpretation of K.S.A. 2011 Supp 44-523(f), there are no exceptions to this requirement. Theoretically, a claim where a preliminary hearing was held two years and eleven months after the application for hearing was filed could be dismissed merely because of the foregoing requirement. In order to avoid this pitfall, the Board Member has observed counsel for claimants filing a motion to extend pursuant to K.S.A. 2011 Supp 44-523(f) on the same day they file an application for hearing on behalf of their client.

If the Legislature intended K.S.A. 2011 Supp. 44-523(f) to be an absolute bar to workers compensation litigation if a claimant did not make it to a regular hearing, settlement hearing or award within three years from the filing of an application for hearing, it certainly could have said so with plain, outright and obvious terms. For instance, the Kansas Legislature could have said, "Any claim that does not proceed to a regular hearing, settlement hearing or agreed award within three years after the filing of an application for hearing must be dismissed with prejudice." Instead, it added caveats concerning "lack of prosecution" and lack of "good cause."

Granted, K.S.A. 2011 Supp. 44-523(f) could be read narrowly, as the majority has done. However, this proposal is equally, if not more, valid and shows the statute is vague and ambiguous. Insofar as the statute is vague as to purpose and effect, it is entirely proper to look at the legislative history, which shows the purpose of the statute is to dispose of dormant claims, not to jettison active and compensable claims.

This Board Member knows of no similar requirement imposed by the Kansas Code of Civil Procedure. Once a civil case has been filed, a plaintiff is not required to file a motion to extend the case after a set period of time, and have the motion granted, or the civil case is dismissed. The majority also ignores K.S.A. 2011 Supp 44-523(a), which provides the Board. “. . . shall not be bound by the technical rules of procedure, but will give the parties reasonable opportunity to be heard and present evidence . . .” By imposing an artificial requirement, the majority has used a technical rule to deny claimant an opportunity to be heard and present evidence.

Application of the statute as proposed by the Board majority creates a procedural trap for the unwary, especially when K.S.A. 2011 Supp. 44-523(f) facially requires a lack of prosecution and the absence of good cause for delay. The majority, in essence, is adding a third statute of limitations for injured workers. First, injured workers must provide timely written notice of their accidents or injuries by repetitive trauma within the very tight time constraints of K.S.A. 2011 Supp. 44-520. Next, under K.S.A. 2011 44-534(b), the injured worker must file his or her application for hearing within three years of their accident or injury by repetitive trauma or within two years after last receiving compensation.

Obviously, the Board is not permitted to comment on the constitutionality of K.S.A. 2011 Supp. 44-523(f) and such issue requires appellate guidance.

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Honorable Gary K. Jones, Administrative Law Judge