

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHN K. RANDEL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,165 <sup>1</sup>
<b>LEROY A. PERRY d/b/a PERRY CONSTRUCTION</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Kansas Workers Compensation Fund appealed the January 19, 2007, Order entered by Administrative Law Judge Bryce D. Benedict. The Board placed this appeal on its summary docket for disposition without oral argument. Claimant and the Kansas Workers Compensation Fund presented their arguments to the Board by written brief. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. John A. Bausch of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund (Fund). There was no appearance on behalf of respondent.

**ISSUES**

The claim against Leroy A. Perry is for an October 25, 1999, accident. But when the self-employed respondent Leroy A. Perry died in March 2002, neither claimant nor the Fund, nor anyone else for that matter, initiated probate proceedings. Consequently, no claim was made against Mr. Perry's estate. The Fund now contends the claim should be dismissed.

Judge Benedict addressed the Fund's request to dismiss in the January 19, 2007, Order. The Judge held that the Kansas non-claim statute, K.S.A. 59-2239, is not applicable to the Workers Compensation Act. Moreover, the Judge found the Fund may have liability as Mr. Perry was uninsured at the time of the accident and his death is the equivalent of an employer who "cannot be located and required to pay . . ." as provided by K.S.A. 44-532a(a). The Judge also determined that claimant's earlier request to substitute respondents was

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<sup>1</sup> The January 19, 2007, Order included Docket No. 251,166. Another respondent was named in that claim, but to date claimant has only elected to proceed against Leroy A. Perry d/b/a Perry Construction. It appears that docket was listed inadvertently. Any references to respondent in this Order refer to Mr. Perry.

moot and that it was not a procedure recognized by the Workers Compensation Act. In short, the Judge ruled claimant was entitled to proceed against the Fund.

The Fund contends Judge Benedict erred by denying its request to dismiss the claim. First, the Fund argues claimant cannot proceed against it as claimant neither filed a claim against Mr. Perry's estate nor obtained a determination that the estate was insolvent. Accordingly, the Fund contends there is no evidence that claimant can establish that the estate was unable to pay the claim. Second, as Mr. Perry is now deceased and there is no estate to proceed against, the Fund contends claimant is now proceeding directly against it, which the Fund argues is prohibited because the Fund's liability is only derivative to that of Mr. Perry. Consequently, the Fund requests the Board to reverse the January 19, 2007, Order and dismiss the claim.

Conversely, claimant argues the January 19, 2007, Order is an interlocutory decision rather than a final order or award and, therefore, the Board lacks jurisdiction at this juncture to review the Order. In the alternative, claimant argues the Order should be affirmed. In that respect, claimant argues: (1) the Workers Compensation Act does not provide an employee a mechanism to open an estate for a deceased employer; (2) for purposes of K.S.A. 44-532a(a), a deceased employer is not available to pay benefits awarded and, therefore, the Fund can be ordered to provide those benefits; (3) because the time to file a claim in Mr. Perry's estate has expired, the employer is financially unable to pay compensation to claimant for purposes of K.S.A. 44-532a(a); and (4) claimant does not have the burden to prove an employer's insolvency.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction at this juncture to review the January 19, 2007, Order?
2. If so, was claimant required to file a claim against Mr. Perry's estate before pursuing benefits from the Workers Compensation Fund under K.S.A. 44-532a(a) on the basis that Mr. Perry was uninsured and now, by reason of his death, is either financially unable to pay compensation or unable to be located and required to pay such compensation?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes this appeal should be dismissed.

The Workers Compensation Act limits this Board's jurisdiction to final orders, awards, modifications of awards, and certain preliminary awards.

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 board upon written request of any interested party within 10 days. . . . On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.<sup>2</sup>

The January 19, 2007, Order *in this context* is not a final order as the Fund’s request to dismiss may be reserved and reconsidered at the time of final hearing and award. And the Order is not an award, modification of an award, or a preliminary award entered under K.S.A. 44-534a. Consequently, the Board lacks jurisdiction to review the January 19, 2007, Order.

**WHEREFORE**, the Board dismisses this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Jeff K. Cooper, Attorney for Claimant
- John A. Bausch, Attorney for the Fund
- Bryce D. Benedict, Administrative Law Judge

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<sup>2</sup> K.S.A. 2006 Supp. 44-551(i)(1).