

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

PEDRO GUTIERREZ-NUNEZ)
Claimant)
V.)
FUSION PAINTING)
Uninsured Respondent)
AND)
KANSAS WORKERS)
COMPENSATION FUND)

CS-00-0447-200
AP-00-0450-748

PEDRO GUTIERREZ-NUNEZ)
Claimant)
V.)
BLEDSON CONSTRUCTION)
Uninsured Respondent)
AND)
KANSAS WORKERS)
COMPENSATION FUND)

CS-00-0062-362
AP-00-0450-747

ORDER

STATEMENT OF THE CASE

The Kansas Workers Compensation Fund (Fund) requested review of the April 23, 2020, Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Jan L. Fisher of Topeka, Kansas, appeared for claimant. The Pro Se respondent, Fusion Painting (Fusion), in Case No. CS-00-0447-200, did not appear.¹ Julie E. Parisi of Kansas City, Missouri, appeared for Robert Bledsoe, Bledsoe Construction, and Robert Bledsoe, LLC (Bledsoe), the respondent in Case No. CS-00-0062-362. Christopher J. McCurdy of Overland Park, Kansas, appeared for the Fund in both cases.

¹ Case No. CS-00-0447-200.

The Fund filed a Motion to Add Respondent in both cases on March 26, 2020. The ALJ found:

Even if the cases were consolidated, the matter would essentially have to be retried, at least with witnesses to date being recalled for cross-examination by Bledsoe. Additionally, Bledsoe did not appear at the prehearing settlement conference required to be held before a claim may proceed to full hearing. Consolidation would require reversing course on the Fusion case now mostly complete.

The court's solution is to leave things as they are. First, complete the present case involving the claimant, Fusion, and the fund. Then, if any party thinks, after the present case is concluded, reopening and pursuing the Bledsoe case is in their interest, they may seek to do so. The fund's motion is denied.²

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 22, 2020, Motion Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

The Fund argues the Board has jurisdiction to review its appeal because the ALJ exceeded his jurisdiction by denying the Fund a mandatory right provided under the Kansas Workers Compensation Act (Act). The Fund argues, "These actions taken by [ALJ] Hursh exceeded his jurisdiction, as he does not have the authority or discretion to deny the Fund's Legislative grant of an ability to file an Application for Benefits."³ The Fund contends the ALJ's Order should be reversed, and the Board should add Bledsoe as a party to the present pending action in the interests of judicial economy.

Claimant contends the ALJ's Order should be affirmed. Claimant argues adding Bledsoe into the Fusion case creates a fundamental due process issue solved only by claimant retaking all the evidence, as the Fund's Motion was filed after numerous depositions were taken. Claimant further states, "There is no statutory authority for the Fund to bring in an additional employer to an existing case."⁴

Bledsoe argues, "Because the Fund's appeal is based on the erroneous premise that the Order denied its right to file an Application for Benefits, the appeal should be

² ALJ Order (Apr. 23, 2020) at 2.

³ Fund Brief (filed May 11, 2020) at 10.

⁴ Claimant's Brief (filed May 12, 2020) at 4.

denied and dismissed.”⁵ Bledsoe maintains the Board lacks jurisdiction to review the Fund’s appeal because the ALJ’s Order did not deny the Fund a statutory right. Alternatively, Bledsoe argues judicial economy is not served by restarting a nearly-complete proceeding, and the ALJ’s Order should be affirmed.

The issues for the Board’s review are:

1. Does the Board have jurisdiction to review the Fund’s appeal?
2. If so, did the ALJ exceed his authority and jurisdiction in denying the Fund’s Motion to Add Respondent?

FINDINGS OF FACT

Claimant originally filed an injury claim against Bledsoe on August 31, 2018. Claimant alleged he fell from a roof while power washing a house on July 3, 2018. The Fund was implied as Bledsoe was uninsured. After taking Bledsoe’s deposition on August 9, 2019, evidence arose indicating claimant was employed by Fusion Painting. Subsequently, claimant filed a claim on October 23, 2019, alleging his direct employer was Fusion. The Fund was implied on October 24, 2019, as Fusion was also uninsured.

Claimant filed a Motion to Consolidate these two cases on November 13, 2019. This Motion was later dismissed as all parties reached an agreement to dismiss Bledsoe on December 4, 2019, in Case No. CS-00-0062-362.

The claim against Fusion continued. Claimant’s discovery deposition was taken by the Fund on December 13, 2019. A prehearing settlement conference was held January 22, 2020. The evidentiary deposition of Arturo Hernandez and Elizabeth Arroyo Reyes was taken February 24, 2020. Dr. Daniel Zimmerman’s evidentiary deposition was taken March 3, 2020. Bledsoe was no longer a party to the Fusion claim, and therefore had no notice of these depositions and did not participate in them.

As a result of testimony given in the deposition of Arturo Hernandez, the Fund filed its Motion to Add Respondent on March 26, 2020. The Fund indicates in its Motion it attempted to file an Application for Benefits, pursuant to K.S.A. 44-534, but was unable to do so. The Fund explained the Division’s electronic docketing system (OSCAR) does not provide an option for the Fund to file an Application for Benefits. Further, any paper forms the Fund may have utilized in the past no longer exist on the Division’s website. The Fund contacted the Director of the Kansas Division of Workers Compensation to discuss this issue. The Fund was advised by the ALJ’s office to file a motion to add Bledsoe as an

⁵ Bledsoe Brief (filed May 21, 2020) at 4.

employer. The Fund alleged Bledsoe may be financially capable of paying an award of compensation.

The Fusion regular hearing was then held April 2, 2020, with no objection from the Fund. Bledsoe was not a party to the regular hearing and did not appear.

A hearing regarding the Fund's motion was held April 22, 2020, and the ALJ issued an Order on the matter the following day. The Fund timely appealed.

PRINCIPLES OF LAW and ANALYSIS

The exact issue being appealed here is found in *Portillo v. Carl Cole Masonry*, wherein the Board wrote:

The 1997 Kansas Legislature amended K.S.A. 1996 Supp. 44-551(b)(1). Effective July 1, 1997, the amendment changed the jurisdiction of the Appeals Board from reviewing “[a]ll acts, findings, awards, decisions, rulings or modifications of findings or awards made by an administrative law judge . . .” to review of “[a]ll final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge . . .”

The Appeals Board finds the Order which is the subject of this appeal, is not a final order, award, modification of an award, or preliminary award as contemplated by K.S.A. 1998 Supp. 44-551(b)(1). The Appeals Board concludes the Order is an interlocutory order made by the Administrative Law Judge during the litigation of a workers compensation case. It is an order the Administrative Law Judge has the authority to make, during the trial process, and the Appeals Board lacks jurisdiction to review the Order until it is contained in a final order or award.⁶

In *Goodwin, Jr. v. Training Rehabilitation & Development Institute, Inc.*, an interlocutory appeal involving the consolidation of multiple claims, the Board wrote:

The 2011 and 2014 versions of K.S.A. 44-555c(a) give the Board jurisdiction to review a judge's decision, finding, order or award. Both versions of K.S.A. 44-551 give the Board jurisdiction to review “[a]ll final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a” The applicable versions of K.S.A. 44-534a and K.S.A. 44-551 allow the Board to review specific jurisdictional issues from a preliminary hearing order.

TRDI's appeal is not from a preliminary decision or a final order or award. The judge's order is not a final order. The judge may revisit this matter and could even decide to sever the consolidation, a possibility noted in the prior quotation from

⁶ *Portillo v. Carl Cole Masonry*, No. 220,294, 1999 WL 195265 (Kan. WCAB Mar. 29, 1999).

Solis. Consolidation orders are interlocutory orders within a judge's authority in controlling his or her docket. TRDI's appeal is dismissed because the Board lacks jurisdiction to review the Order until it is contained in a final order or award.⁷

Based upon the Board's prior holding in *Portillo* and *Goodwin, Jr.*, the Board finds it lacks jurisdiction to consider the appeal at this time because it is interlocutory.

ORDER

WHEREFORE, the appeal of Administrative Law Judge Kenneth J. Hursh's Order dated April 23, 2020, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of June, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Jan L. Fisher, Attorney for Claimant
- Julie E. Parisi, Attorney for Bledsoe Construction
- Arturo Hernandez d/b/a Fusion Painting, Pro Se Respondent
- 5232 Lyon Avenue, Kansas City, Missouri 64123
- Christopher J. McCurdy, Attorney for Kansas Workers Compensation Fund
- Hon. Kenneth J. Hursh, Administrative Law Judge

⁷ *Goodwin, Jr. v. Training Rehabilitation & Development Institute, Inc.*, Nos. 1,074,408 & 1,052,679, 2016 WL 858303 (Kan. WCAB Feb. 22, 2016).