

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TYLER HANEY

Claimant

v.

CS-00-0097-315

AP-00-0455-924

CITY OF LAWRENCE

Self-Insured Respondent.

ORDER

Claimant requests review of the Order Sustaining Respondent's Motion to Dismiss (Order), dated January 13, 2021, issued by Administrative Law Judge (ALJ) Steven M. Roth.

APPEARANCES

Bruce Alan Brumley appeared for Claimant. Kip A. Kubin appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board considered the record reviewed by the ALJ, consisting of the transcript of the Motion for Dismissal and the post-hearing submissions filed by the parties, as well as the Preliminary Hearing Transcript, pleadings and orders contained in the administrative file. The Board also took judicial notice of the procedural history of this matter. The Board also reviewed the parties' briefs. This matter was set on the Board's summary calendar for decision without oral argument.

ISSUES

1. Was the Order erroneously issued because a good faith reason exists for Claimant's delay in proceeding to regular hearing within one year from the date of the preliminary order denying compensability?
2. Was the Order erroneously issued in violation of the Kansas Supreme Court's Administrative Order suspending all deadlines and time limitations?

FINDINGS OF FACT

On March 8, 2018, Claimant caused an Application for Hearing to be filed with the Division. Claimant alleged he sustained personal injury from an accident arising out of and in the course of his employment with Respondent on December 10, 2017. On March 15,

2018, Claimant filed an Application for Preliminary Hearing, seeking medical treatment and temporary total disability compensation. During this time, Claimant was represented by legal counsel. Claimant's legal counsel was granted leave to withdraw as attorney for Claimant on November 12, 2018.

A preliminary hearing on Claimant's request for medical treatment and temporary total disability compensation was held on March 5, 2019. Claimant was not represented by legal counsel. Respondent confirmed the event of December 10, 2017, occurred, but disputed compensability, particularly prevailing factor.¹ At the conclusion of the hearing, ALJ Roth told Claimant about the appeal process generally and referred Claimant to the statutes for further information. ALJ Roth also told Claimant time deadlines existed.² The record was held open for fifteen days to allow the parties to submit additional evidence and post-hearing briefs.

On April 1, 2019, ALJ Roth issued the preliminary Order concluding Claimant did not meet his burden of proving the alleged work-related accident was the prevailing factor causing his current medical condition, need for treatment and resulting disability. Claimant's requests for medical treatment and temporary total disability compensation were denied. ALJ Roth also suggested Claimant consider retaining new legal counsel, but did not discuss review procedure or deadlines. The preliminary Order was not appealed.

The matter did not proceed to a regular hearing, and on April 1, 2020, Respondent filed its request for dismissal under K.S.A. 44-523(f)(2). The hearing on Respondent's motion for dismissal occurred on May 13, 2020. Again, Claimant was unrepresented by legal counsel, and he advised the Court he was uncertain how to proceed. Claimant stated he believed he had three years to proceed to regular hearing.³ Claimant also stated he was trying to obtain legal counsel prior to the motion hearing, and was waiting for an attorney to call him back.⁴ ALJ Roth took the parties' statements under advisement, and announced he would defer ruling on the motion to dismiss until June 23, 2020. If no attorney filed an entry of appearance and a motion opposing the request for dismissal by June 23, 2020, ALJ Roth stated he would grant the motion to dismiss.

On May 29, 2020, Claimant's counsel filed his entry of appearance as counsel for Claimant. On May 30, 2020, Claimant's counsel filed Claimant's brief in opposition to the motion to dismiss.

¹ See P.H. Trans. at 6.

² See *id.* at 41-42.

³ See M.H. Trans. at 7.

⁴ See *id.* at 8.

On January 13, 2021, ALJ Roth issued the Order granting Respondent's motion to dismiss. ALJ Roth concluded Administrative Order 2020-PR-016 issued by the Kansas Supreme Court, which suspended the running of all time limits and stated no action shall be dismissed for lack of prosecution, applied only to the judicial branch, and not to workers compensation proceedings. ALJ Roth also found the COVID-19 public health emergency did not create a good faith basis for failing to proceed to regular hearing within one year of the April 1, 2019, Order because Claimant could still access the Division of Workers Compensation and because the COVID-19 emergency only impacted the last twenty-two days of the one-year period to proceed to regular hearing. ALJ Roth concluded Claimant did not otherwise demonstrate a good faith basis for failing to proceed to regular hearing within one year. Therefore, Respondent's motion to dismiss was granted. This appeal follows.

PRINCIPLES OF LAW AND ANALYSIS

In support of the application for review, Claimant argues Administrative Rule 2020-PR-016 tolls the running of the one-year period for proceeding to regular hearing under K.S.A. 44-523(f)(2). Claimant also argues the underlying Order dated April 1, 2019, failed to advise Claimant of potential deadlines or appeal rights, which created good cause for extending the time to prosecute. Finally, Claimant argues he acted in good faith, despite the failure to proceed to regular hearing within one year, because he was not aware of the one-year limitation, was hindered by the COVID-19 emergency from finding an attorney, and was now prepared to prosecute this matter. Respondent argues Administrative Rule 2020-PR-016 does not apply to workers compensation, no denial of due process occurred because Claimant is not entitled to advice on workers compensation procedure by ALJ Roth, and Claimant did not otherwise prove a good faith reason for the delay in proceeding to regular hearing.

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 or 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.⁵

In this case, following a preliminary hearing on the contested issue of compensability, ALJ Roth issued the preliminary Order, dated April 1, 2019, concluding Claimant did not meet his burden of proving the alleged work-related accident was the prevailing factor causing Claimant's alleged injury, need for medical treatment or resulting disability. The preliminary Order constitutes a preliminary award denying compensability

⁵ See K.S.A. 44-523(f)(2).

under K.S.A. 44-523(f)(2). This matter was subject to dismissal if a regular hearing did not take place “within one year from the date of the preliminary award.”⁶ Claimant had until March 31, 2020 to proceed to regular hearing. This matter did not proceed to regular hearing within one year from the date of the preliminary Order. On April 1, 2020, Respondent filed its motion to dismiss. Unless Claimant can prove a good faith reason for the delay in proceeding to regular hearing, K.S.A. 44-523(f)(2) mandates dismissal with prejudice.

Claimant failed to prove a good faith reason for the delay in proceeding to regular hearing. In determining whether an employee proved a good faith reason for a delay in prosecution under K.S.A. 44-523(f)(2), the Appeals Board affirmed an administrative law judge considering whether the employee was gathering evidence and moving a case towards a regular hearing.⁷ Here, Claimant did not demonstrate he was in the process of gathering evidence or moving his claim towards a regular hearing. Rather, Claimant stated he thought he had three years, rather than one year, to proceed to regular hearing. Claimant stated he contacted an attorney before the hearing held on May 13, 2020, but it is not clear whether Claimant attempted to obtain legal counsel before or after the motion to dismiss was filed. As ALJ Roth noted, the COVID-19 public health emergency only impacted the last twenty-two days Claimant had to proceed to regular hearing, and there is no record Claimant made an effort to move the claim to regular hearing before the COVID-19 emergency. The lack of evidence Claimant was gathering evidence or moving this claim to regular hearing supports ALJ Roth’s conclusion Claimant did not prove a good faith reason for the delay in proceeding to regular hearing.

Claimant’s argument good cause for extending the time to prosecute exists because Claimant was not specifically advised of impending deadlines or appeal rights also fails. Claimant provides no legal authority supporting his argument. A *pro se* litigant in a civil case is required to follow the same rules of procedure and evidence as a represented party. An unrepresented party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules.⁸ Claimant was not entitled to receive legal advice from ALJ Roth or from Respondent’s counsel on impending deadlines or appeal rights, and therefore this cannot constitute a good faith reason for failing to proceed to regular hearing.

Claimant’s argument good faith was present because Administrative Order 2020-PR-016 suspended the one-year deadline under K.S.A. 44-523(f)(2) must also fail. Due

⁶ See K.S.A. 44-523(f)(2).

⁷ See *White v. RGV Pizza Hut*, No. CS-00-0267-536, 2019 WL 6695512, at *6 (Kan. WCAB Nov. 21, 2019).

⁸ See *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595, 730 P.2d 1109 (1986).

to the COVID-19 emergency, the Chief Justice of the Kansas Supreme Court was empowered to issue an order extending or suspending any deadlines or statutory time limitations if such action was necessary to secure the health and safety of court users, staff and judicial officers.⁹ Pursuant to that authority, the Chief Justice issued Administrative Order 2020-PR-016, which suspended all statutes of limitation, statutory time standards or deadlines applying to judicial proceedings, and provided no action shall be dismissed for lack of prosecution.¹⁰ The plain language of “judicial proceedings” means “proceedings of the judicial branch.” Workers compensation cases are not heard in district courts,¹¹ and administrative law judges and the Appeals Board are not district courts.¹² Workers compensation proceedings are administrative proceedings, and not judicial proceedings. The Appeals Board previously affirmed an administrative law judge’s ruling the Supreme Court’s Administrative Orders suspending time standards and deadlines did not apply to workers compensation proceedings.¹³ Because the Division of Workers Compensation is not a component of the Kansas Judicial Branch, it is not bound by Administrative Order 2020-PR-016. Accordingly, Administrative Order 2020-PR-016 cannot create a good faith basis, or otherwise excuse Claimant’s failure to proceed to regular hearing.

In conclusion, the Appeals Board finds this matter did not proceed to regular hearing within one year from the April 1, 2019, preliminary Order denying compensability. Claimant failed to prove a good faith reason for the failure to proceed to regular hearing within one year. Therefore, K.S.A. 44-523(f)(2) mandates dismissal with prejudice.

All five members of the Board considered the evidence and issues presented in this appeal.¹⁴ The findings and conclusions set forth reflect the majority’s decision and the signatures below attest this decision is the majority’s.

DECISION

WHEREFORE, it is the finding, decision and order of the Appeals Board the Order issued by ALJ Steven M. Roth, dated January 13, 2021, is affirmed.

⁹ See 2020 Special Sess. L., ch. 1, § 24(a).

¹⁰ See Admin. Order 2020-PR-016, ¶ 15.

¹¹ See *Rogers v. ALT-A & M JV LLC*, 52 Kan. App. 2d 213, 220, 364 P.3d 1206 (2015).

¹² See *Gould v. Wright Tree Service, Inc.*, No. 116,008, 2018 WL 1545789, at *6 (Kansas Court of Appeals Unpublished Opinion Mar. 30, 2018).

¹³ See *Martinez v. Packers Sanitation Services, Inc.*, No. CS-00-0312-250, 2021 WL 391043, at *4 (Kan. WCAB Jan. 26, 2021).

¹⁴ K.S.A. 2018 Supp. 44-555c(j).

IT IS SO ORDERED.

Dated this _____ day of March, 2021.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The text of K.S.A. 44-534a states,

(a) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. 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. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge

finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. 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.

(b) If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a, and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525, and amendments thereto, as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith. No reimbursement shall be certified unless the request is made by the employer or employer's insurance carrier within one year of the final award.

K.S.A. 44-523(f)(2) states:

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. 44-525 states:

(a) Every finding or award of compensation shall be in writing, signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the

amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. No award shall include the right to future medical treatment, unless it is proved by the claimant that it is more probable than not that future medical treatment, as defined in subsection (e) of K.S.A. 44-510h, and amendments thereto, will be required as a result of the work-related injury. The award of the administrative law judge shall be effective the day following the date noted in the award.

(b) No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award, or except at the discretion of the director on settlement agreements, and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.

(c) In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

K.S.A. 44-534a refers to an ALJ being able to make a preliminary "award" (the statute uses the term "award," "awarded" or "awards" six times) and refers to a preliminary "order" just once. K.S.A. 44-523(f)(2) refers to a preliminary "award." K.S.A. 44-525 applies to "every" award. Arguably, the statute may refer to final awards, insofar as it references awards of future medical treatment, lump sum settlements and overpayments of temporary total disability benefits. However, K.S.A. 44-525 does not actually say it applies only to final awards and does not specify a difference between preliminary or final awards. Workers compensation statutes are meant to be interpreted based on plain language.¹⁵ Judicial blacksmithing is not permitted.¹⁶ Words not in a statute should not be added to the law.¹⁷ Quite simply, K.S.A. 44-525 does not say it applies only to final orders, but it applies to "every" award.

K.S.A. 44-525(a) states the effective date of an award is the day following the date noted in the award. The date noted in the preliminary award in question is April 1, 2019.

¹⁵ See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607, 214 P.3d 676 (2009).

¹⁶ See *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

¹⁷ See *State v. Pattillo*, 311 Kan. 995, 1004, 469 P.3d 1250 (2020) ("Courts apply the plain language of statutes and avoid adding, deleting, or substituting words.").

Therefore, the effective date of the award is April 2, 2019.¹⁸ One year from the date of the preliminary award is April 2, 2020. The respondent's motion, filed April 1, 2020, was filed one day early. The ALJ did not have jurisdiction to consider the respondent's premature motion.¹⁹ Likewise, the Board lacks jurisdiction to consider the respondent's motion.

/s/ John F. Carpinelli
BOARD MEMBER

c: Via OSCAR

Bruce Alan Brumley
Kip A. Kubin
Hon. Steven M. Roth

¹⁸ *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 196, 836 P.2d 1185, rev. denied 251 Kan. 942 (1992), references K.S.A. 44-525 as to the effective date of a preliminary award.

¹⁹ See *Aikins v. Gates Corp.*, 57 Kan. App. 2d 875, 883, 462 P.3d 189 (2020) (application for penalties was premature and ineffectual). *Sandate v. Kansas Dep't of Revenue*, 58 Kan. App. 2d 450, 452, 471 P.3d 700 (2020) (Questions of subject-matter jurisdiction may be raised at any time, including by the court sua sponte.).