

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

<b>JAMES ZUERN</b>	)	
Claimant	)	
V.	)	
	)	AP-00-0461-797
<b>RND UNDERGROUND INC.</b>	)	CS-00-0214-547
Respondent	)	
AND	)	
	)	
<b>KANSAS BUILDERS INSURANCE GROUP</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appealed the October 14, 2021, Order issued by Administrative Law Judge (ALJ) Gary K. Jones.

**APPEARANCES**

Peter Hagan appeared for the Claimant. Edward Heath Jr. appeared for Respondent and its insurance carrier. Kathryn Gonzales appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Motion Hearing transcript and exhibits from March 19, 2019; Motion Hearing transcript from October 11, 2021, and the documents of record filed with the Division.

**ISSUES**

1. Should this claim be dismissed with prejudice pursuant to K.S.A. 44-523(f)?
2. Whether K.S.A. 60-206(b)(1)(b) provision of excusable neglect applies in workers compensation cases for computing or extending time under K.S.A. 44-523(f)(1)?

**FINDINGS OF FACT**

On February 8, 2016, Claimant filed an Application for Hearing alleging a skull injury, occurring on December 8, 2015. Dr. Estivo examined Claimant on June 7, 2016. An Application for Preliminary Hearing was filed on February 23, 2017. A Preliminary Hearing was held on May 11, 2017, and no record was made. The ALJ issued an Order on May 12, 2017, ordering temporary total disability paid from April 28, 2016, to January 2, 2017.

Respondent filed an Application for Dismissal on February 12, 2019. Claimant filed a Motion for Extension of Time on February 12, 2019.

A Motion hearing was held on March 19, 2019. The ALJ issued an Order on March 19, 2019, denying Claimant's Motion to Extend and Respondent's Application for Dismissal.

The ALJ denied Claimant's Motion For Extension of Time because Claimant failed to file a Motion for Extension of Time prior to the ending of the three year period pursuant to K.S.A. 44-523(f)(1). The three year period ended on February 8, 2019, and Claimant's Motion to Extend was not filed until February 12, 2019.

However, according to the ALJ, "But the denial of the Claimant's motion does not mean the case is dismissed."<sup>1</sup>

The ALJ next considered Respondent's Application of Dismissal. The Court stated:

Based on the *Green* case, the Court finds that the Respondent's motion should be denied. It is apparent from the statements of counsel and the exhibits submitted by the Claimant that the case is being actively prosecuted by the Claimant. The Claimant's last treatment was in August 2018. He was evaluated by Dr. Pedro Murati on October 1, 2018. He was fully released by Dr. Xavier Ng on December 5, 2018, and Dr. Ng issued a final report on December 27, 2018. A prehearing settlement conference is scheduled for March 27, 2019.

The practical effect of the rulings in this Order is that the case is not dismissed. It remains active and on the Court's docket. The prehearing settlement conference set for March 27, 2019, remains on the Court's schedule.

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<sup>1</sup> ALJ Order (March 19, 2019) at 2.

In summary, the Claimant's Motion for Extension of Time is denied. The Respondent's Motion to Dismiss is also denied. The case is not dismissed and remains active on the Court's docket.<sup>2</sup>

Respondent filed a second Application for Dismissal on September 12, 2019.

Claimant filed another Motion for Extension of time on December 7, 2020.

Notice to Implead the Fund was filed on July 16, 2021.

Jennifer Oullette and Kathryn Gonzales entered their appearance on behalf of the Fund on July 27, 2021.

On July 27, 2021, the ALJ issued an Order continuing the Regular hearing set for July 27, 2021. The ALJ noted Respondent's Application for Dismissal filed on September 12, 2019, had not been heard. The Court set deadlines for filing briefs and Respondent had 45 days after September 27, 2021, to schedule the Application for Dismissal for hearing.

A Motion hearing was held on October 11, 2021, and the ALJ issued an Order on October 14, 2021, dismissing the claim with prejudice.

The ALJ rejected Claimant's argument the claim should not be dismissed because there was excusable neglect under K.S.A. 60-206(b)(1)(b) for failing to file the Motion For Extension of Time prior to February 12, 2019. Claimant did not file a request for Extension of Time until February 12, 2019, four days after three years from February 8, 2016, had ended. K.S.A. 44-523(f)(1) requires a request for extension of time be filed within three years, and did not occur in this case. The ALJ cited the case of *Glaze v. J.K. Williams, LLC*.<sup>3</sup> In that case the Supreme Court indicated a extension of time must be filed within three years after the date the application for hearing is filed. The ALJ ruled he did not have authority to grant an extension for excusable neglect.<sup>4</sup>

The ALJ was also not persuaded the dismissal should be denied because Claimant was incarcerated from June 23, 2015, to February 14, 2019. The ALJ stated K.S.A. 60-508(a), tolling of time limitations due to incapacity, does not indicate it should apply to workers compensation cases. The ALJ considered K.S.A.44-509, which is similar to K.S.A. 60-508(a). K.S.A. 44-509 refers to appointment of a guardian or conservator for an

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<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Glaze v. J.K. Williams, LLC*, 309 Kan. 562, 439 P.3d 313 (2019).

<sup>4</sup> ALJ Order (October 14, 2021) at 3.

incapacitated person, but an individual does not require a guardian or conservator because he or she is in prison.<sup>5</sup>

The ALJ did not entertain the Fund's argument it should not reimburse Respondent for payments Respondent made after February 8, 2019, as the Respondent has not filed for reimbursement and that is not a matter the Court would rule on.

According to Claimant's counsel, there was a delay in filing a Motion For Extension of Time because Claimant's counsel had the flu from February 2, 2019, to February 5, 2019, and his paralegal was unexpectedly out of the office for the week of January 28, 2019

Claimant was incarcerated from June 23, 2015, to February 14, 2019. During his incarceration, Claimant was injured on the job and filed an Application for hearing to receive workers compensation benefits. Claimant saw Dr. Estivo and Dr. Murati. Claimant filed a request for preliminary hearing, received a hearing and he was awarded temporary total benefits and authorized medical care.

#### **PRINCIPLES OF LAW AND ANALYSIS**

Claimant appeals arguing the request for extension was only four days late and there was no prejudice to Respondent who made no effort to expedite the proceedings. Further, Claimant argues he was incarcerated until February 14, 2019, his counsel was ill and counsel's assistant was out of the office when the deadline to file the motion expired. Claimant's counsel claims excusable neglect under K.S.A. 60-206(b)(1)(B) as a reason for the Board to reverse the ALJ's dismissal.

Respondent argues the facts are simple, this case has not proceeded to a Regular hearing, Settlement hearing, or Agreed Award within three years of the filing of the Application for Hearing, and no Motion to Extend was filed prior to the expiration of the three year deadline. Therefore, the case must be dismissed with prejudice.

The Fund argues it should not be liable for reimbursement to Respondent or insurance carrier for medical and or compensation paid, in the event the Board sustains the dismissal due to lack of prosecution within the three-year limit.

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<sup>5</sup> See *Mitts v. White Star*, No. 189,398, 1994 WL 749050 (Kan. WCAB Oct. 12, 1994).

K.S.A. 44-523(f)(1) states:

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 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.

The ALJ dismissed this claim because Claimant failed to file an Extension of Time within three years from the date the Application for Hearing was filed. The three year time limitation ended on February 8, 2019. Claimant did not file his Extension for Time until February 12, 2019.

In *Glaze*,<sup>6</sup> the Kansas Supreme Court held a claimant must move for an extension within three years of filing an application for hearing to survive a proper motion to dismiss. Nowhere in the *Glaze* opinion does the Court make exceptions for reasons constituting excusable neglect or due to incarceration.

Claimant argues excusable neglect should apply, citing K.S.A. 60-206(b)(1)(B).

In *Jones v. Continental Can Company*,<sup>7</sup> the Kansas Supreme Court was reviewing whether specific language in a workers compensation statute requiring an appeal to be filed within 30 days of a final order can be extended by application of Supreme Court rule, stating computation of time in appellate courts shall follow the three day mailing rule provided in the Code of Civil Procedure.

The Supreme Court reviewed the appeal statutes involving workers compensation, with several amendments and changes over the years. Prior to 1993, there were appeal statutes with specific reference to the Code of Civil Procedure and the Act for Judicial

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<sup>6</sup> *Glaze v. J.K. Williams, LLC*, 309 Kan. at 566.

<sup>7</sup> *Jones v. Continental Can Company*, 260 Kan. 547, 920 P.2d 939 (1996).

Review and Civil Enforcement of Agency Actions. However, in *Jones*, the Kansas Supreme Court noted all changed with the 1993 amendments to the Kansas Workers Compensation Act. The Court said:

Having gone full circle in the wake of the many legislative changes, we are back to the clear statement and rule in of *Bushman Construction Co .v. Schumacher*, 187 Kan. 359,362, 356 P. 2d 869 (1960) which states:

“Our decisions are replete that the Workmen’s Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial. Complete and exclusive, and we must look to the procedure of the act for the methods of its administration. Rules and methods provided by the code of civil procedure not included in the act itself are not available in determining rights thereunder.”<sup>8</sup>

*Jones* involved interpretation of a Workers Compensation appeal statute, nevertheless it is instructive in addressing Claimant’s argument of adding excusable neglect to the time limitation in K.S.A. 44-523(f)(1). Courts are reluctant to add provisions to statutes. “[The] court will not speculate on legislative intent and will not read the statute to add something not readily found in it.”<sup>9</sup>

Case law and statutory interpretation do not persuade the Board to add excusable neglect be read into the three year limitation in K.S.A. 44-523(f)(1).

Claimant also argues he was limited or incapacitated to file a motion within the three year period due to his incarceration. The Board is not persuaded by this argument either. This Board has previously ruled incarceration is not incapacitation Claimant was incarcerated from June 23, 2015, to February 14, 2019. During his time of incarceration Claimant was injured on the job, filed an Application for hearing to obtain workers compensation benefits, saw two doctors for medical evaluations, filed and received a preliminary hearing, was awarded temporary total benefits, and received authorized medical care. Such a record of activity on his workers compensation claim while incarcerated does not indicate Claimant’s inability to pursue and protect his rights.

*Green v. General Motors Corp.*<sup>10</sup> was cited as authority to not dismiss this claim under K.S.A. 44-523(f)(1). *Green* is about the retroactive application of K.S.A 44-523(f)(1)

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<sup>8</sup> *Jones v. Continental Can*, at 557.

<sup>9</sup> *Bergstrom V. Spears Manufacturing Co.*, 289 Kan. 605,608, 214 P.3d 676 (2009).

<sup>10</sup> *Green v. General Motors Corp.*, 56 Kan. App 2d 732, 427 P.3d. 94 (2019).

to cases pending when the statute was enacted and defining prosecution of a claim. The case was remanded to the Appeals Board so a hearing could be held on the motion to dismiss as required by the statute. The Court does not mention, except in passing, the provision requiring a filing of motion to extend within the three year time limit. *Green* is not persuasive on allowing a claim to proceed when a motion to extend is not filed within the three year time limitation.

The Board will not entertain the Fund’s argument it should not be made to reimburse Respondent for payments Respondent made after February 8, 2019, as the Respondent has not filed for reimbursement.

This claim is dismissed because Claimant failed to file a Motion to Extend prior to the expiration of the three year time limitation set out in K.S.A. 44-523(f)(1).

**ORDER**

**WHEREFORE**, it is the finding, decision and order of the Board the Order of Administrative Law Judge Gary K. Jones dated October 14, 2021, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2022.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: (Via OSCAR)

Peter Hagan, Attorney for Claimant  
Edward Heath Jr., Attorney for Respondent and its Insurance Carrier  
Kathryn Gonzales, Kansas Workers Compensation Fund  
Gary K. Jones, Administrative Law Judge