

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**DARRELL MANROE**  
Claimant

v.

**DAY & ZIMMERMANN NPS, INC.**  
Respondent

AP-00-0481-128  
CS-00-0455-612

and

**ZURICH AMERICAN INSURANCE CO.**  
Insurance Carrier

**ORDER**

Claimant appeals the January 23, 2024, Order of Dismissal issued by Administrative Law Judge (ALJ) Bruce E. Moore.

**APPEARANCES**

Adam M. Brillhart appeared for Claimant. John D. Jurcyk appeared for Respondent and its insurance carrier (Respondent). Kathryn Gonzales appeared for the Kansas Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The Appeals Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Proceedings, held January 23, 2024, the pleadings and orders contained in the administrative file, and the parties' briefs.

**ISSUES**

1. Did the ALJ err in granting the motion to dismiss without allowing Claimant to present evidence of good cause?
2. Did the ALJ err in refusing to consider whether good cause existed for extending the time to prosecute before granting the motion to dismiss?

**FINDINGS OF FACT**

On December 24, 2020, Claimant filed an application for benefits (E1) alleging he sustained personal injury from an accident arising out of and in the course of his employment with Respondent on December 11, 2020. No motion to extend the time to

prosecute was filed. This matter did not proceed to regular hearing, settlement hearing or agreed award. On December 26, 2023, Respondent filed its application for dismissal. A hearing on Respondent's application was held on January 23, 2024.

At the hearing, Claimant's counsel made an oral motion to extend the time to prosecute, which was denied by the ALJ. ALJ Moore ruled he did not have jurisdiction to extend the time to prosecute if a written motion was not filed within three years of the filing of the E1. Claimant's counsel argued good cause existed for not dismissing the claim. Claimant's counsel offered two exhibits and Claimant's testimony in support of the good cause argument. ALJ Moore denied Claimant's offer of the exhibits and Claimant's testimony. ALJ Moore stated he did not have jurisdiction to consider good cause because a timely motion to extend the time to prosecute was not filed. Respondent's application for dismissal was granted. These proceedings follow.

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

Claimant argues the Order of Dismissal was erroneous because Claimant was denied the opportunity to present evidence of good cause. Claimant also argues the ALJ must first determine whether good cause exists for the delay in prosecution before considering whether the claim should be dismissed. Claimant requests the Order of Dismissal be vacated, and this matter remanded to ALJ Moore for a hearing on whether good cause exists. Respondent argues the Order of Dismissal was correctly issued because no motion to extend the time to prosecute was filed, a hearing on the application for dismissal was held, and Claimant is not entitled to a second hearing.

The Kansas Workers Compensation Act mandates dismissal with prejudice of a matter that has not proceeded to regular hearing, settlement hearing or agreed award within three years from the date the application for hearing is filed.<sup>1</sup> The Act allows the employer to file an application for dismissal based on the lack of prosecution.<sup>2</sup> Upon the filing of the application, the Act mandates the matter be set for a hearing with notice to Claimant's attorney.<sup>3</sup> The ALJ may grant an extension of the time to prosecute if a motion to extend is filed prior to the three-year limitation, and good cause is shown.<sup>4</sup>

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<sup>1</sup> See K.S.A. 44-523(f)(1).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

Workers compensation procedures must adequately provide due process.<sup>5</sup> The essential elements of due process are notice and the opportunity to be heard.<sup>6</sup> Unless counsel, on timely request, is given the right to analyze the facts and present a party's theory of the application of the law, the litigant has not been heard.<sup>7</sup> To invoke due process, it must appear counsel has not waived the right by silence or acquiescence.<sup>8</sup>

Claimant was not provided an opportunity to be heard at the hearing on Respondent's application for dismissal. Claimant's counsel offered two exhibits and Claimant's testimony on good cause to contest Respondent's application. Claimant's request was denied. Claimant did not waive the right to be heard by silence or acquiescence. Claimant was denied due process. Essentially, a hearing on Respondent's application for dismissal did not occur.

At the hearing, ALJ Moore stated the Court lacked jurisdiction to receive evidence of good cause because a motion to extend was not filed. The plain language of K.S.A. 44-523(f) does not prohibit an ALJ from receiving evidence of good cause, notwithstanding the failure to timely file a written motion for an extension of time to prosecute. The jurisdictional hurdle raised by the ALJ does not exist.

Where an order has been issued in violation of a party's right to due process, the appropriate remedy is to vacate the order.<sup>9</sup> Therefore, the Order of Dismissal is vacated. Until a meaningful hearing on Respondent's application is held, and the ALJ issues a decision based on the evidence and the law, it is premature for the Appeals Board to address the merits of Respondent's application for dismissal. This matter is remanded to ALJ Moore with instructions to conduct a hearing on Respondent's application for dismissal, and to allow the parties to submit evidence in support of their respective positions.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board the Order of Dismissal issued by ALJ Bruce E. Moore, dated January 23, 2024, is vacated. This matter is remanded to ALJ Moore with instructions to conduct an evidentiary hearing, to

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<sup>5</sup> See *Nguyen v. IBP, Inc.*, 266 Kan. 580, 589, 972 P.2d 747 (1999).

<sup>6</sup> See *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971).

<sup>7</sup> See *id.* (citing *Richa v. Wichita Precision Tool Co.*, 190 Kan. 136, 145, 373 P.2d 201 (1962)).

<sup>8</sup> See *id.* at 620.

<sup>9</sup> See, e.g., *Collins*, 207 Kan. at 621.

allow the parties to present evidence, and to reconsider Respondent's application for dismissal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2024.

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APPEALS BOARD MEMBER

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APPEALS BOARD MEMBER

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APPEALS BOARD MEMBER

c: Via OSCAR

Adam M. Brillhart  
John D. Jurcyk  
Kathryn Gonzales  
Hon. Bruce E. Moore