NOT DESIGNATED FOR PUBLICATION

No. 124,772

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAMES ZUERN,
Appellant,

v.

RND UNDERGROUND INC.,
KANSAS BUILDERS INSURANCE GROUP, and
KANSAS WORKERS COMPENSATION FUND,
Appellees.

MEMORANDUM OPINION

Appeal from the Workers Compensation Board. Opinion filed March 31, 2023. Affirmed.

Peter C. Hagan, of Wichita, for appellant.

Edward D. Heath, Jr., of Law Office of Edward D. Heath, Jr., of Wichita, for appellees.

Before ISHERWOOD, P.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: James Zuern's workers compensation claim was dismissed because he did not file a motion to extend his case until four days after the statutory deadline. K.S.A. 44-523(f)(1) allows an extension of the three-year deadline but only if the claimant files a request for extension before the expiration of the three years. Zuern contends the Board of Workers Compensation Appeals (Board) erred by upholding the ruling of the Administrative Law Judge (ALJ) that the excusable neglect provision in K.S.A. 60-206(b) does not apply to the Kansas Workers Compensation Act (the Act).

The sole issue on appeal is whether the excusable neglect provision can be applied to extend the three-year deadline in K.S.A. 44-523(f)(1). Because the excusable neglect provision in K.S.A. 60-206(b) does not apply to the Act, we affirm the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

There is no factual dispute in this case. On December 8, 2015, while working for his employer, RND Underground, Inc. (RND), James Zuern was driving a mini excavator that was struck by a pickup truck traveling at high speed. He was ejected from the mini excavator, thrown into traffic, and hit by a truck. Treatment for his injuries ultimately resulted in over $400,000 in medical bills.

So that he could receive the workers compensation benefits to which he was entitled, Zuern filed an application for hearing on February 8, 2016. After a preliminary hearing in 2017, the ALJ ordered that Zuern receive temporary and total disability payments due to his injuries and inability to work. Although he was incarcerated in one form or another over much of the next two years, Zuern continued to receive treatment, had medical restrictions on the type of work he could perform, and was regularly evaluated by various medical providers. He was fully released from treatment in August 2018, and he received his final work impairment evaluation on December 5, 2018. The following day, Zuern's probation in a criminal case was revoked and he remained in custody until February 15, 2019.

As of February 8, 2019, exactly three years after he filed his initial application for hearing, Zuern had not yet resolved his claim by way of hearing or otherwise, and he had not filed a motion to extend the time to do so. Four days later, on February 12, 2019, RND filed an application for dismissal of Zuern's claim for lack of prosecution. There was no claim that Zuern had abandoned his claim or otherwise failed to prosecute it in any traditional sense; the dismissal application was based solely on the passage of the

three-year time limit in K.S.A. 44-523(f)(1) without either a hearing or a request by Zuern to extend the time for a hearing. On the same day RND filed its application to dismiss, Zuern filed a motion for extension of time for the hearing on his claim—four days past the expiration of the three-year deadline.

Before the ALJ, Zuern argued that dismissal was not warranted, citing our court's decision in *Green v. General Motors Corp.*, 56 Kan. App. 2d 732, 437 P.3d 94 (2019), *rev. granted* 313 Kan. 1040 (2021) (*Green I*). Alternatively, in the brief in support of the motion, Zuern argued that the ALJ should find the failure to timely file the request for extension was the result of excusable neglect and permit the extension under K.S.A. 2018 Supp. 60-206(b)(1)(B). Zuern identified several factors in support of his excusable neglect contention, including his incarceration, illness of his counsel, and lack of prejudice to RND from the four-day delay. Without addressing the excusable neglect argument, the ALJ denied Zuern's request for a time extension because Zuern failed to file his motion before the expiration of three years as expressly required by K.S.A. 44-523(f)(1). But the ALJ also denied RND's motion to dismiss, citing *Green I*, which held that the passage of the three-year time limit does not establish lack of prosecution, it "merely marks the threshold for an employer to present an argument for dismissal based on a lack of prosecution." 56 Kan. App. 2d at 739. In declining to dismiss Zuern's case, the ALJ found the "case is being actively prosecuted by the Claimant" and "remains active and on the Court's docket."

On September 11, 2019, RND filed a second application for dismissal of Zuern's claim in reliance on our Supreme Court's decision in *Glaze v. J.K. Williams, LLC*, 309 Kan. 562, 439 P.3d 920 (2019). *Glaze* held that "[u]nder K.S.A. 2011 Supp. 44-523(f)(1), a workers compensation claimant must move for an extension within three years of filing an application for hearing if the claim is to survive a proper motion to dismiss." 309 Kan. 562, Syl. Although the reason is not clear from the record, there was no hearing or resolution of RND's second motion to dismiss. In the meantime, Zuern continued to

pursue his claim by obtaining additional expert reports and supplementing an independent medical evaluation in advance of the regular hearing.

In March 2021, the Kansas Supreme Court summarily vacated and remanded *Green I* to the Court of Appeals for reconsideration, (*Green* v. *General Motors Corp*., No. 119,044 [order filed March 15, 2021]), in light of *Glaze* and *Knoll v. Olathe School District No. 233*, 309 Kan. 578, 439 P.3d 313 (2019). This was significant because the ALJ denied RND's initial application to dismiss in reliance on *Green I*.

On July 27, 2021, the day Zuern's hearing was supposed to take place, RND filed a motion renewing its July application for dismissal, citing the Supreme Court's remand in *Green I*. The ALJ continued Zuern's hearing and set RND's renewed application for dismissal for hearing. At the hearing, Zuern again argued that the ALJ should apply K.S.A. 2018 Supp. 60-206(b)(1)(B), find excusable neglect, and allow Zuern's case to proceed to hearing.

The ALJ did not address the merits of Zuern's excusable neglect claim, instead finding that the holding in *Glaze* was clear that an ALJ does not have discretion to grant an extension of the three-year deadline in K.S.A. 44-523(f)(1). Zuern sought review of the ALJ's determination by the Board, contending that excusable neglect provisions of K.S.A. 2018 Supp. 60-206(b)(1)(B) should apply to permit an extension of the statutory deadline in K.S.A. 44-523(f)(1). The Board affirmed the dismissal of Zuern's case and Zuern appeals.

ANALYSIS

Standard of Review

This is an appeal of an agency action. Under K.S.A. 44-556(a), this court may review the Board's decisions about matters of law. And interpretation of the Act is a

matter of law. *Woessner v. Labor Max Staffing*, 312 Kan. 36, 43, 471 P.3d 1 (2020).

Our scope of review is set out in the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., which authorizes the appellate court's review if one of the circumstances listed in K.S.A. 77-621(c) exists in the case. *Via Christi Hospitals Wichita, Inc. v. Kan-Pak, LLC*, 310 Kan. 883, 889, 451 P.3d 459 (2019). Here, K.S.A. 77-621(c)(4) applies, allowing this court to consider whether the agency erroneously interpreted or applied the law. And a claim that an agency has erroneously interpreted or applied the law is reviewed de novo. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 848, 397 P.3d 1205 (2017). This court owes no deference to the interpretation of the agency or Board. *Hanson v. Kansas Corp. Comm'n*, 313 Kan. 752, 762, 490 P.3d 1216 (2021).

The two statutes in question are K.S.A. 44-523(f)(1) and K.S.A. 2018 Supp. 60-206(b)(1)(B).

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

> "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."

In *Glaze*, our Supreme Court repeatedly and decisively emphasized the mandatory nature of the statute's requirement for a timely motion to extend, stating that it requires a claimant to "move for an extension within three years of filing an application for hearing if the claim is to survive a proper motion to dismiss." 309 Kan. 562, Syl. The *Glaze* holding is buttressed by additional findings made throughout the opinion concerning the unambiguous meaning of K.S.A. 44-523(f)(1):

- "[It] unambiguously prohibits an ALJ from granting an extension unless a motion for extension has been filed within three years of filing the application for hearing. Any other interpretation strains the common reading of the statute's ordinary language" 309 Kan. at 565-66.

- "In other words, an administrative law judge may grant 'an extension for good cause shown' but only if the extension has been sought by a timely motion." 309 Kan. at 567.

- "The Legislature stated plainly that the three-year period should function as a time bar to moving for an extension" 309 Kan. at 566.

- "The Court of Appeals' conclusion that the statute unambiguously requires a party to move for extension within three years of filing an application for hearing is correct." 309 Kan. at 569.

The bottom line here is that *Glaze* sweepingly rejects an ALJ's authority to grant a time extension outside of K.S.A. 44-523(f)(1)'s three-year deadline. In our view, the broad language used by the court in *Glaze* does not leave room for the application of excusable neglect.

In *Knoll*, decided on the same day as *Glaze*, the Supreme Court found a workers compensation case was properly dismissed, consistent with the holding in *Glaze*, because the claimant failed to file her motion for extension within three years from filing the application for hearing. As was the case in *Glaze*, the claimant in *Knoll* did not make an excusable neglect claim under K.S.A. 60-206(b).

Zuern asserts *Glaze* and *Knoll* are distinguishable from his case because excusable neglect was not argued or considered in those cases. According to Zuern, this was because Glaze was 54 days late to file for an extension, while Knoll's request was 3 ½ months past the 3-year statute—much too late for excusable neglect to apply. Zuern believes that because he was only four days late, his case is different and warrants a consideration of whether excusable neglect applies. But *Glaze* holds that an ALJ lacks the authority to extend the three-year deadline, not that an ALJ may consider granting extensions on a case-by-case basis.

Based on the broad scope of the ruling in *Glaze*, our court in *Green II* was compelled, on remand, to reverse its ruling and affirm the dismissal of Green's workers compensation claim. *Green v. General Motors Corp*., No. 119,044, 2022 WL 570692, at *7 (Kan. App. 2022) (unpublished opinion) (*Green II*). *Green II* thoroughly addresses the recent statutory changes to K.S.A. 44-523(f)(1) and includes a thoughtful analysis of the *Knoll* and *Glaze* Supreme Court decisions and the underlying Court of Appeals *Glaze* opinion. The inequity that can result to a claimant is succinctly identified in *Green II*:

> "If the claimant fails to request an extension, the employer can file a motion to dismiss for lack of prosecution. Based on the holding in *Glaze*, the administrative law judge *must* grant the motion precisely because no extension had been requested. And the administrative law judge *must* do so even if the claimant has diligently pursued the case, so the dismissal is not because of a true failure to prosecute but because no extension had been sought." *Green II*, 2022 WL 570692, at *7.

Consistent with the foregoing observations in *Green II*, Zuern's case is not based on any true failure to prosecute but simply failure to meet the statutory deadline for filing his motion for extension of time.

The statute Zuern seeks to apply to extend the three-year deadline in K.S.A. 44-523(f)(1) is found in the Code of Civil Procedure, which provides:

> "(b) *Extending time*. (1) *In general*. When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> . . . .
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect." K.S.A. 2022 Supp. 60-206(b)(1)(B).

The purpose of K.S.A. 60-206(b) "is to allow a trial court some discretion in order to prevent a miscarriage of justice which might occur if blind adherence to set time periods were otherwise required." *Boyce v. Boyce*, 206 Kan. 53, 55, 476 P.2d 625 (1970). Zuern argues this court should act to prevent an unjust outcome in this case. He argues, without opposition, that he has a meritorious case which he has actively prosecuted, and RND suffers no prejudice from a "four day extension which includes a Saturday and Sunday." While we agree these may be valid considerations in an excusable neglect analysis, the Act does not contain any provision granting relief based on excusable neglect.

Whether "excusable neglect" under K.S.A. 2022 Supp. 60-206(b)(1)(B) can apply to the Act to extend the three-year deadline is not a question which has been directly addressed. But caselaw does address related questions involving the application of the Code of Civil Procedure in workers compensation cases.

The Code of Civil Procedure is generally not applied to provisions in the Act.

There is a longstanding and general rule against applying the Code of Civil Procedure to workers compensation matters because the Act is considered complete and exclusive on its own. *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

> "'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.'" 260 Kan. at 557 (quoting *Bushman Construction Co. v. Schumacher*, 187 Kan. 359, 362, 356 P.2d 869 [1960]).

This general rule continues to be applied by Kansas appellate courts. See, e.g., *Mera-Hernandez v. U.S.D. 233*, 305 Kan. 1182, 390 P.3d 875 (2017); *Gerlach v. Choices Network, Inc.*, 61 Kan. App. 2d 268, 503 P.3d 1033 (2021).

In *Jones*, our Supreme Court declined to apply K.S.A. 60-206(e) to give Jones three more days to file his workers compensation appeal under the 30-day deadline in K.S.A. 1995 Supp. 44-556(a). 260 Kan. at 557-58. *Jones* noted that before 1993, appeal statutes in the Act referenced the Code of Civil Procedure. 260 Kan. at 555-57. But after the 1993 amendments, the Legislature removed these references. These changes led our Supreme Court to hold that the Code of Civil Procedure did not apply, and that Jones was beholden to the 30-day deadline provided in the Act. 260 Kan. at 555-57. As the Board noted in its decision in Zuern's case, while *Jones* discusses an appeal statute and Zuern does not, *Jones* still cements the general rule that the Code of Civil Procedure does not apply to the Act.

There have been two decisions by panels of this court that have refused to apply excusable neglect provisions in K.S.A. Chapter 60 to workers compensation cases. Although these cases do not consider the same workers compensation statute Zuern's case involves—K.S.A. 44-523(f)(1)—they provide persuasive authority that K.S.A. 60-206(b)'s excusable neglect provision does not apply to the Act.

In *Anderson v. Bill Morris Constr. Co., Inc.*, 25 Kan. App. 2d 603, 606, 966 P.2d 96, *rev. granted* 266 Kan. 1107 (1998), a panel of this court held that excusable neglect under K.S.A. 60-2103(a) did not apply to extend the deadline to file an application for review under K.S.A. 1996 Supp. 44-551(b)(1). It reasoned that "we were unable to find any [caselaw] where excusable neglect involving the deadline for filing an application for review under K.S.A. 44-551 (or K.S.A. 1996 Supp. 44-551) has ever been approved by our appellate courts." 25 Kan. App. 2d at 606.

And in *Polzkill v. Kansas Public Service*, No. 86,375, 2001 WL 37132148 (Kan. App. 2001) (unpublished opinion), a panel of this court declined to extend a notice of appeal deadline for excusable neglect. Relying on *Jones*, it reasoned that "K.S.A. 60-206(b) allows for an enlargement of time where failure to act was the result of excusable neglect. However, pursuant to legislative enactment, the provisions of Chapter 60, the Code of Civil Procedure, do not apply to workers compensation appeals." *Polzkill*, 2001 WL 37132148, at *2.

Despite this general rule, the Code of Civil Procedure has occasionally been applied to the Act.

The Code of Civil Procedure has been applied to the Act to supplement a method of counting calendar days where the civil statute specified that it applied to administrative rules. In *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 758, 986 P.2d 373 (1999), our Supreme Court held that K.S.A. 60-206(a) applied to determine what calendar days

counted toward the deadline in K.S.A. 44-520 because the workers compensation statute did not provide an answer, and had no provision that conflicted with the method in the Code of Civil Procedure. In *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 209-10, 929 P.2d 1386 (1996), a panel of this court held that the same Code of Civil Procedure provision—K.S.A. 60-206(a)—applied to K.S.A. 44-551 for the same reasons.

But *Baine* and *McIntyre* are distinguishable from Zuern's request for two reasons. First, those cases allowed the Code of Civil Procedure to apply to the Act when it was silent on which calendar days counted towards their respective deadlines. In Zuern's case, a three-year deadline is clear in the language of the statute, and he does not contest how to determine which calendar days counted towards his deadline.

Second, the former version of K.S.A. 60-206(a), which was utilized in *Bain* and *McIntyre*, by its express language, applied to "*any law . . . or any rule or regulation . . .* promulgated thereunder, [where] the method for computing . . . time is not otherwise specifically provided." (Emphasis added.) See K.S.A. 2022 Supp. 60-206(a) ("The following provisions apply in computing any time period . . . in any statute or administrative rule or regulation that does not specify a method of computing time."). Unlike K.S.A. 2022 Supp. 60-206(a), K.S.A. 2022 Supp. 60-206(b) does not include language making it applicable to any statute or administrative rule or regulation. *Bain* and *McIntyre* only support that K.S.A. 60-206(a) may apply when the Act is silent on how to determine which days count towards a deadline and when the civil provision states it applies to administrative rules—not that the Code of Civil Procedure applies to expand the Act's deadlines as Zuern requests.

Another case which applied the Code of Civil Procedure to the Act is *Drennon v. Braden Drilling Co.*, 207 Kan. 202, 483 P.2d 1022 (1971). There, our Supreme Court held that a Code of Civil Procedure provision, K.S.A. 60-241(a), could apply to the Act to allow Drennon to dismiss his claim for benefits with his employer's consent because

nothing in the Act prohibited dismissal and because the employer consented to it. 207 Kan. at 211.

Drennon, then, supports the principle that the Code of Civil Procedure may apply when there is no contradictory provision in the Act and when the employer gives its consent. But here, the appellees oppose Zuern's request. And as interpreted by our Supreme Court in *Glaze*, the unambiguous language of K.S.A. 44-523(f)(1) requires the motion for extension to be filed within three years. 309 Kan. 562, Syl. Application of K.S.A. 2022 Supp. 60-206(b)(1)(B) would allow for a motion for extension to be granted outside of that three-year period, and would therefore contradict K.S.A. 44-523(f)(1) and the holding in *Glaze*. *Drennon* does not advance Zuern's argument.

Zuern also cites *Woessner v. Labor Max Staffing*, 312 Kan. 36, 471 P.3d 1 (2020), to support his assertion that the application of the Code of Civil Procedure to the Act is "alive and well." But in that case, our Supreme Court rejected the contention that a rule of evidence from the Code of Civil Procedure applied to the Act. 312 Kan. at 54. *Woessner* cites K.S.A. 2019 Supp. 44-523(a), which provided: '"The director, administrative law judge or board shall not be bound by technical rules of procedure.'" 312 Kan. at 48. And our Supreme Court defined the technical rules of procedure as the rules in the Code of Civil Procedure. 312 Kan. at 48. Thus, *Woessner* does not support Zuern's argument that the Code of Civil Procedure applies to the Act.

Lastly, Zuern argues that because the Workers Compensation Fund (Fund) has been brought into the case, it can be required to reimburse RND approximately $400,000 for the cost of his medical care. Zuern contends it is against public policy for a four-day excusable mistake to cost the State that sum of money. But Zuern provides no authority holding that public policy warrants application of excusable neglect or that it would be against public policy for the Fund to be required to reimburse an employer under these

circumstances. To the contrary, whatever amount the Fund must pay is determined under the Act, which is the written expression of the public policy of the State.

To the extent the result in this case is viewed as harsh or a miscarriage of justice, it is simply the result of applying the law as written by the Legislature and interpreted by our Supreme Court. We are not empowered to add an excusable neglect provision into the three-year limitation in K.S.A. 44-523(f)(1). In that regard, we echo Chief Judge Arnold-Burger's comments in the Court of Appeals *Glaze* opinion: "The court must give effect to the statute's express language rather than determine what the law should or should not be. It is up to the legislature to change the statute if it wants to avoid this clearly harsh result in the future. [Citation omitted.]" *Glaze v. J.K. Williams, LLC*, 53 Kan. App. 2d 712, 719, 390 P.3d 116 (2017), *aff'd* 309 Kan. 562, 439 P.3d 920 (2019); see *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

For the reasons stated above, we determine the excusable neglect provision found in K.S.A. 2022 Supp. 60-206(b)(1)(B) does not apply to the Act to extend the three-year deadline under K.S.A. 44-523(f)(1). We affirm the decision of the Board dismissing Zuern's case.

Affirmed.