

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 10, 2021

CLAIM NO. 201886162

KS ENERGY SERVICES INC.

PETITIONER

VS.

APPEAL FROM HON. AMANDA PERKINS,  
ADMINISTRATIVE LAW JUDGE

THOMAS GIBSON/THE ESTATE OF  
THOMAS E. GIBSON/DEBBIE GIBSON/  
TIFFANY MAYSE, JOINT ADMINISTRATORS  
and HON. AMANDA PERKINS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION AND ORDER  
DISMISSING APPEAL AND REMANDING

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

**STIVERS, Member.** The Respondents have filed an Objection to and Motion to Dismiss the Notice of Appeal filed by the Petitioner, KS Energy Services, Inc. ("KS Energy").<sup>1</sup> The Respondents note that during the pendency of the claim, KS Energy

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<sup>1</sup> Since a Notice of Appeal cannot be dismissed, we will treat the Objection to and Motion to Dismiss Petitioner's Notice of Appeal as a Motion to Dismiss the Appeal.

filed a Motion to Dismiss the Claim alleging there is no one qualified to substitute as a party in this claim. The Respondents in turn filed a Motion to Substitute the Estate of Thomas E. Gibson (“Estate”) and its Joint-Administrators as Plaintiffs in the claim. Hon. Amanda Perkins, Administrative Law Judge (“ALJ”) entered an Order passing the Motion to Dismiss to the merits and ordering the parties substituted in place of the deceased, Thomas E. Gibson (“Gibson”). KS Energy then filed a Petition for Reconsideration. On October 5, 2021, the ALJ entered an Order clarifying the Order substituting is procedural and not a determination of the substituted Plaintiffs’ right to recover. KS Energy filed a Notice of Appeal which the Respondents contend is premature because the ALJ’s Orders are interlocutory.

### **BACKGROUND**

On December 9, 2019, Gibson filed a Form 101 alleging a March 27, 2018, injury while in the employ of KS Energy. The Form 101 alleges he was injured in the following manner: “Plaintiff suffered injury to his right knee when he fell and developed compensatory left knee symptoms causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5<sup>th</sup> Edition AMA Guides.” The parties proceeded to litigate the matter.

The death certificate filed in the record reveals Gibson died on April 11, 2020. On May 22, 2020, Hon. Richard Neal, Administrative Law Judge (“ALJ Neal”) entered an Order noting Gibson had recently died and parties would need to be added to the claim. The Order indicated the parties may file the appropriate motion when the claim is ready to move forward.<sup>2</sup> By Order dated July 15, 2020,

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<sup>2</sup> The claim had been assigned to ALJ Neal.

Hon. Douglas W. Gott, Chief Administrative Law Judge (“CALJ”) reassigned the claim to Hon. Paul Whalen, Administrative Law Judge (“ALJ Whalen”). On September 30, 2020, a Notice of Representation was filed by KS Energy’s current counsel. Apparently, because no action was taken by the parties, ALJ Whalen entered a March 20, 2021, Order directing the parties to file a Status Report within twenty (20) days of the date of the Order. On May 11, 2021, the CALJ transferred and reassigned the claim to the ALJ.

On August 28, 2021, KS Energy filed a Motion to Dismiss representing Gibson passed away from causes unrelated to the work injury and during a May 22, 2020, Telephonic Status Conference, Gibson’s counsel advised ALJ Neal of Gibson’s passing and that she would file a request to substitute his widow as a party to the claim. Consequently, ALJ Neal’s May 22, 2020, Order directed any party may file the appropriate motion when the claim is ready to move forward. KS Energy noted no pleadings had been filed since the May 22, 2020, Telephonic Status Conference which was fifteen (15) months ago. It represented it had been advised by Gibson’s counsel that Gibson was divorced, had no will, and had no dependent children. KS Energy asserted since Gibson had no dependents as outlined in KRS 342.730(3), there is no one qualified to substitute in the claim as a party. Therefore, the claim should be dismissed.

In a September 7, 2021, response, Gibson’s counsel asserted that even though Gibson was not married and did not have dependent children at the time of his death, Gibson’s Estate was in existence, and his ex-wife, Debbie Gibson, and daughter, Tiffany Mayse, had been appointed Joint-Administrators of the Estate.

Counsel represented she was concurrently filing a Motion to Substitute them in their fiduciary capacity as parties in this claim. Counsel further asserted that although there is no party eligible to receive any future benefits owed to Gibson, any past due benefits owed through the date of death are payable to him and should now be paid to the Estate. On that same date, counsel for Gibson moved to substitute the Estate of Thomas E. Gibson and the Joint-Administrators as parties to the action. Attached to the motion is the death certificate and the August 25, 2020, Order entered by the Edmonson District Court appointing Debbie Gibson and Tiffany Mayse as Joint-Administrators of the Estate.

KS Energy filed a Response and Objection to the Motion to Substitute Parties maintaining the death certificate established Gibson died from causes unrelated to his work injury and Plaintiff's counsel acknowledged Gibson was not married and had no dependent children at the time of his death. KS Energy asserted KRS 342.730(3), unlike KRS 342.750, does not list the injured workers' estate as a qualified survivor to receive benefits after his/her death. It argued the assertion that the Estate is entitled to any past due benefits due at the time of death is in conflict with KRS 342.730(3). Thus, it contended as follows: "since the 'Estate' of the injured worker is not listed as a qualified survivor under KRS 342.730(3) the 'Estate' cannot be substituted in as a party Plaintiff." KS Energy also referred the ALJ to the Form 11 which it asserted is intended to be used when a request is made to substitute a party in a claim for purposes of receiving benefits. That form specifically requires the party being substituted to affirm he/she is a dependent of the deceased Plaintiff/employee and requires documented proof of the dependency such as birth

certificates for dependent children and marriage licenses for widows. Consequently, it argued the estate and the Joint-Administrators are unable file a Form 11 because Gibson had no dependents as outlined in KRS 342.730(3) at the time of his death. Thus, there is no one qualified to substitute as a party.

It also asserted even if there were qualified dependents, the claim must be dismissed because a request to substitute the Estate and Joint-Administrators was not made within one (1) year of Gibson's death. Since Gibson passed away on April 11, 2020, and the Motion to Substitute Parties was not filed until September 7, 2021, Hammons v. Tremco, 887 S.W.2d 336 (Ky. 1994) mandates the claim must be dismissed.

On September 13, 2021, the ALJ ordered KS Energy's Motion to Dismiss passed to the merits of the claim. On that same date, the ALJ entered an Order substituting the Estate of Thomas E. Gibson, and Debbie Gibson and Tiffany Mayse as Plaintiffs in this claim.

KS Energy filed a Petition for Reconsideration reiterating the same arguments it previously made and asserting Debbie Gibson, an ex-wife, is not a qualified survivor under the statute and cannot be properly substituted in as a party Plaintiff to the claim. Similarly, it asserted Tiffany Mayse, an adult independent daughter, also does not qualify as a survivor under KRS 342.730(3). Therefore, the substitution of Debbie Gibson and Tiffany Mayse as parties is patent error.

By Order dated October 5, 2021, the ALJ denied the Petition for Reconsideration stating the Order "granting a substitution of party [Gibson] is

procedural and not a determination on whether Gibson is entitled to benefits under the Act.”

On November 3, 2021, KS Energy filed its Notice of Appeal appealing from the September 13, 2021, Order and October 5, 2021, Order ruling on the Petition for Reconsideration. This triggered the Objection and Motion to Dismiss the appeal filed by the Estate and Joint-Administrators.

On November 19, 2021, KS Energy filed a Response to the Motion to Dismiss asserting it was not appealing from an interlocutory order. It concluded with the following:

The primary issue before the ALJ was whether or not the Estate of the deceased Plaintiff had legal standing to substitute into the claim as a Plaintiff to seek benefits resulting from the work injury when the Plaintiff died from causes unrelated to the work injury; the deceased Plaintiff was not married and had no dependents as defined in KRS 342.730(3), and, when the Motion to Substitute was not made within one year of the injured workers’ death. Whether or not a party has standing to sue is a substantive issue. The Order of the Administrative Law Judge ruling that the Estate did have that right was not an Interlocutory Order but was rather a final and appealable decision.

### **ANALYSIS**

Since we conclude the September 13, 2021, and October 5, 2021, Orders are interlocutory in nature and not final and appealable, we dismiss KS Energy’s appeal and remand this claim to the ALJ. The arguments on appeal by KS Energy notwithstanding, we conclude, as a matter of law, the ALJ’s Order of September 13, 2021, substituting the Estate, Debbie Gibson, and Tiffanie Mayse, as Plaintiffs in this action is interlocutory and does not represent a final and appealable

order. 803 KAR 25:010, § 21(2)(a), provides as follows: “[w]ithin thirty (30) days of the date of a final award, order or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order or decision may file a notice of appeal to the Workers’ Compensation Board.” 803 KAR 25:010, § 21(2)(b) defines a final award, order or decision as follows: “[a]s used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).”

Civil Rule 54.02(1) and (2) state as follows:

(1) When more than one claim for relief is presented in an action, . . . the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

Hence, an order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *Cf. KI USA Corp. v. Hall*, 3 S.W.3d 355 (Ky. 1999); *Ramada Inn v. Thomas*, 892 S.W.2d 593

(Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).

The ALJ's September 13, 2021, Order and October 5, 2021, Order ruling on the Petition for Reconsideration meet none of these requirements. The ALJ's Orders do not operate to terminate the action. Moreover, the ALJ's ruling does not act to finally decide all outstanding issues, nor does it operate to determine all rights of KS Energy and the Estate as to divest the ALJ once and for all of authority to decide the overall merits of the claim.

Assuming Gibson died from causes unrelated to the work injury, the ALJ has yet to determine whether there are any beneficiaries as defined by KRS 342.730(3). KS Energy relies upon what it has been told; however, we are unable to locate proof in the record establishing there are not qualified beneficiaries as set forth in KRS 342.730(3). Further, the record contains no proof or stipulation indicating Gibson's death is unrelated to the alleged work injury. One of the other potential issues include, and is not limited to, whether past income benefits and medical benefits were due prior to Gibson's death. As a matter of law, therefore, the September 13, 2021, Order and subsequent Order ruling on the Petition for Reconsideration must be deemed interlocutory, and it is the ALJ as fact-finder, not this Board, who retains jurisdiction. *See* KRS 342.275.

We are compelled to note the Form 11 attached to KS Energy's Response and Objection to Substitute Parties is not applicable to this situation as it relates to a request to substitute a party and continue benefits. This form is germane to post-award benefits and not to claims where future income and medical benefits



have yet to be awarded. Further, entitlement to benefits and the qualification to serve as a personal representative of an estate are entirely different issues. In order to serve as a personal representative the individual appointed as the personal representative does not have to be a recipient of the estate. There is no merit to KS Energy's assertion that only a person entitled to benefits pursuant to KRS 342.730 may serve as a personal representative of an estate.

We point out this Board has no authority to rule on KS Energy's Motion to Dismiss which has yet to be resolved by the ALJ. Proof on these issues must be introduced and the ALJ may not base a ruling upon mere assertions and references to conversations.

Accordingly, it is ordered the Respondent's Motion to Dismiss is **SUSTAINED** and the appeal of KS Energy is **DISMISSED**.

ALVEY, CHAIRMAN, CONCURS.

/s/ FRANKLIN A. STIVERS  
FRANKLIN A. STIVERS, MEMBER  
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