

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ANA MABEL RIVERA-GARAY** )  
Claimant )  
VS. )  
**MCCRITE PLAZA RETIREMENT COMM.** )  
Respondent )  
AND )  
**KANSAS HEATHCARE ASSN. WCIT** )  
Insurance Carrier )

Docket No. **1,000,191**

**ORDER**

Claimant requested review of the December 10, 2008 Review & Modification Award by Administrative Law Judge Rebecca Sanders. The Board heard oral argument on March 10, 2009.

**APPEARANCES**

Beth Regier Foerster of Topeka, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the pleadings and correspondence contained in the administrative file, the transcripts of hearings and depositions taken in connection with the litigation of claimant's Award as well as the transcript of the Review and Modification Hearing held on September 18, 2008; the transcript of the Preliminary Hearing held on May 24, 2006; the transcript of the Preliminary Hearing held October 11, 2006; the transcript of the deposition of Sergio Delgado, M.D. taken on October 30, 2007; the transcript of the deposition of Ana Mabel Rivera-Garay taken on January 16, 2008; and the transcript of the deposition of Chris Fevurly, M.D., taken on November 17, 2008.

**ISSUES**

This is an appeal from a review and modification proceeding. In the underlying Award, dated February 24, 2003, and corrected by a Nunc Pro Tunc Order dated March 7, 2003, the Administrative Law Judge (ALJ) determined claimant suffered a 32.3 percent

work disability (a permanent partial general disability greater than the whole body functional impairment rating) based upon a 33.3 percent task loss and an imputed wage loss of 31.3 percent. The claimant filed an application for review and modification on February 9, 2005 but a hearing was not scheduled. The claimant filed a second application for review and modification on September 14, 2007, and the litigated issues at the review and modification hearing held on September 18, 2008, were whether claimant was entitled to additional weeks of temporary total disability compensation as well as an increased work disability. The ALJ found that claimant failed to meet her burden of proof that either her work disability had increased or that she was entitled to additional weeks of temporary total disability compensation.

Claimant requests review and argues that she is entitled to temporary total disability compensation from September 29, 2005 through June 7, 2006. She further argues that her task loss and wage loss both increased since the underlying award and, consequently, she is entitled to an increase in her work disability beginning 6 months before the application for review and modification was filed on February 9, 2005.

Respondent argues that there has been no change in claimant's condition since the original award and therefore the ALJ's Award should be affirmed.

The issues for Board determination are whether claimant is entitled to additional temporary total disability compensation, post award, and whether claimant is entitled to an increased work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was provided post-award medical treatment in 2005 with Dr. Steven Hendler and she was referred to Dr. John Ciccarelli for a surgical consult. A repeat MRI of the lumbar spine was performed on January 31, 2006 which revealed multilevel degenerative disk disease. A small disk herniation was noted at L2-3 but the study was otherwise unchanged from the MRI of December 3, 2001. The changes were noted to be a natural progression of the degenerative process. Dr. Ciccarelli did not recommend surgery. Claimant was sent for physical therapy which provided some improvement in her pain complaints.

Claimant testified she did not work after she left employment with respondent in 2001 until she started working for Motel 6 on October 5, 2006. She worked four hours a day at \$6.25 an hour folding sheets. But she was fired after working there for approximately two weeks.

Claimant started working part-time as a packer for Dillon's on December 17, 2006. Her job duties include bagging groceries for customers and cleaning the doors on the dairy case. Claimant testified she worked part-time 4 hours a day and either 5 or 6 days a week. She only applied for part-time work because her pain prevents her from working full-time. She is currently having pain in her low back, going down her left leg to the bottom of her foot. Dr. Hendler prescribed three different medications for claimant's pain as well as a TENS unit. Claimant is allowed to sit down at work when her pain increases. Claimant testified that she has a burning sensation that starts at her hip and runs down her left leg and her pain has worsened since 2003. She further testified that it burns a lot more but she agreed that she has had the burning pain sensation since the original injury in 2001.

At claimant's attorney's request, Dr. Sergio Delgado, a board certified orthopedic surgeon, examined and evaluated claimant on April 4, 2006. The doctor opined that claimant was temporarily, totally disabled due to her persistent symptoms in relation to her activities caused by her lumbar pathology. At that time Dr. Delgado opined that claimant needed to consider surgery but if she declined surgery then she would be considered at maximum medical improvement for the purpose of rating and imposing restrictions.

Upon examination, Dr. Delgado found claimant had muscle spasm in her back and increased pain while bending and extending the spine as well as limited range of motion. The doctor diagnosed claimant as having degenerative disk disease of the lumbar spine with central spinal stenosis at the L4-5 level. Dr. Delgado placed permanent restrictions on claimant of no lifting greater than 15 pounds and no repetitive bending, stooping or twisting. Based on the *AMA Guides*<sup>1</sup>, Dr. Delgado rated claimant as having a 10 percent whole person impairment due to her back pain and sciatic radiculopathy. The doctor opined that surgery may not relieve claimant's pain or improve her ability to return to work.

Q. Doctor, Ana Garay has been able to find employment since late December, early January of this year, 2007, working at Dillons, and some of her job duties include bagging groceries even though the pounds -- the pounds lifted are light. Do you have an opinion whether or not she would be able to continue in that line of work?

A. You have to describe the work to me more, but from my knowledge of seeing people bagging, that requires a lot of reaching, bending, stooping. If she has to perform a lot of the activities, plus if she has to stand for several hours, it would be difficult for her to do that on a regular basis -- or a full-time basis I should say.<sup>2</sup>

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<sup>1</sup>American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>2</sup> Delgado Depo. at 18.

But Dr. Delgado agreed that when he examined claimant and imposed restrictions he did not restrict claimant from full-time work. And Dr. Delgado agreed that it was difficult for him to determine whether claimant's condition had worsened as he saw her on only one occasion.

Dr. Delgado reviewed the list of claimant's former work tasks prepared by Mr. Dick Santner and concluded claimant could no longer perform 3 of the 6 tasks for a 50 percent task loss. Dr. Delgado agreed that claimant would have had this task loss from the date of the accident in 2001.

Dr. Chris D. Fevurly saw claimant at the request of respondent's attorney on October 22, 2008. Dr. Fevurly performed an examination of claimant and opined that his examination results from the October 22, 2008 exam did not significantly differ from his physical examination of claimant performed in June 2002. Nor were her complaints different. Dr. Fevurly also compared MRI studies performed on claimant in 2001 and 2006 and determined that although there was some mild progression in her degenerative changes there was essentially no change. Dr. Fevurly concluded that claimant's medical condition had not changed between his examinations of claimant in 2002 and 2006. Based on the October 22, 2008 examination, Dr. Fevurly opined claimant was still capable of performing 4 out of 6 job tasks which is no change from her previous task loss. The doctor also opined that claimant was capable of working a full-time job.

Dr. Fevurly agreed that a functional capacity evaluation performed in 2006 resulted in a restriction that limited claimant to occasional lifting up to 10 pounds and his restriction was occasional lifting to 15 pounds. Nonetheless the doctor again noted he did not believe there was any change in her functional capacity. But Dr. Fevurly agreed claimant now walks with an antalgic gait. Dr. Fevurly also found two centimeters of atrophy in claimant's left leg which was not noted in his report of examination of claimant in 2002 but he noted that was to be expected as a consequence of the radiculopathy which he had rated in 2002.

The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the

administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation **subject to the limitation provided in the workers compensation act.**<sup>3</sup> (Emphasis Added)

However, any modification under the review and modification statute is effective the date the claimant's functional impairment or work disability changed or no earlier than six months prior to the date the application for review and modification was made.<sup>4</sup> Moreover, a modified award only compensates for the remaining unpaid weeks, if any, that are proven but not yet expired. Once the employer pays the maximum amount, the modified award does not offer further payment.<sup>5</sup>

The claimant does not argue that her functional impairment has changed, instead she argues that her task loss and wage loss have increased and as a result her work disability has increased. The ALJ concluded that the claimant had not met her burden of proof to establish that her task loss had changed. The Board agrees. Dr. Fevurly had examined claimant and provided ratings, restrictions and an opinion regarding claimant's task loss in 2002. That task loss opinion was adopted by the ALJ in the underlying award. Dr. Fevurly again examined claimant in 2008 and opined that her condition was unchanged and he further opined that her task loss was unchanged. Dr. Delgado also offered a task loss opinion but agreed that it would be the same as she would have had in 2001. Claimant has failed to meet her burden of proof that she has suffered an additional task loss.

Turning to the wage loss component of the work disability formula the Board must determine the effect of the recent decision in *Bergstrom*.<sup>6</sup> The Supreme Court in *Bergstrom* said that the factfinder should follow and apply the plain language of the statute. Because claimant's injuries are not covered by the schedule of injuries in K.S.A. 44-510d, her compensation is set out in K.S.A. 44-510e. It provides that once an injured worker is no longer earning 90 percent or more of her preinjury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. And the wage loss is determined by comparing the pre-injury average weekly wage with the actual post-injury earnings, if any.

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<sup>3</sup> K.S.A. 44-528.

<sup>4</sup> K.S.A. 44-528(d).

<sup>5</sup> *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

<sup>6</sup> *Bergstrom v. Spears Manufacturing Company*, \_\_\_ Kan. \_\_\_, Syl. ¶¶ 1, 3, 214 P.3d 676 (2009).

The respondent argues that *Bergstrom* is not applicable and cites *Scheidt*.<sup>7</sup> The Board disagrees. *Scheidt* is distinguishable as that case provides that the underlying award cannot be relitigated in a review and modification proceeding. In this instance the underlying award was for a work disability and this review and modification proceeding simply addresses the issue of whether that work disability has increased. That is exactly what a review and modification proceeding is designed to determine. In this case the decision in *Bergstrom* interpreted K.S.A. 44-510e to provide that the post-injury wage loss must be based simply upon the actual post-injury average weekly wage claimant is earning, if any. Such case law change in the interpretation of a statute applies to cases pending when the change is determined.<sup>8</sup>

Consequently, claimant is entitled to a work disability analysis based upon the decision in the *Bergstrom* case. In this instance, claimant quit working for respondent in 2001 and she did not work again until she started working for Motel 6 on October 5, 2006. As previously noted, any modification under the review and modification statute is effective the date the claimant's functional impairment or work disability changed or no earlier than six months prior to the date the application for review and modification was made. In this instance, claimant filed her application for review and modification on February 9, 2005 and six months before would be August 9, 2004. Consequently, claimant's work disability changed on that date because she was unemployed and her wage loss was 100 percent. Therefore, claimant would be entitled to compensation for a 66.65 percent work disability (100 percent wage loss, 33.3 percent task loss) from August 9, 2004 until October 5, 2006 when she obtained employment with Motel 6.

At Motel 6 claimant worked four hours a day at \$6.25 an hour folding sheets. But she was fired after working there for approximately two weeks. This calculates to \$125 per week. For this two week period claimant would have a 58 percent wage loss. This calculates to a 45.65 percent work disability (58 percent wage loss and 33.3 percent task loss).

Claimant would again have a 66.65 percent work disability from October 20, 2006 until she started working part-time as a packer for Dillon's on December 17, 2006. Her job duties include bagging groceries for customers and cleaning the doors on the dairy case. Claimant testified she works part-time 4 hours a day and either 5 or 6 days a week. She initially was paid \$5.40 an hour and \$118.80 per week. Consequently, from December 17, 2006 through December 31, 2007, claimant had a 60 percent wage loss which calculates to a 46.65 percent work disability (60 percent wage loss, 33.3 percent task loss).

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<sup>7</sup> *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009).

<sup>8</sup> *Myers v. Lincoln Center*, 39 Kan. App. 2d 372, 180 P.3d 584 rev.denied \_\_\_ Kan. \_\_\_(2008).

The evidence regarding claimant's wages for the year 2007 were based upon the exhibits attached to the review and modification hearing. It appears her average weekly earnings were \$132.06 which calculates to a 56 percent wage loss. Accordingly, her work disability for the year 2007 would be 44.65 percent (56 percent wage loss, 33.3 percent task loss). And it further appears that her wage loss for the year 2008 would be based upon an average wage of \$157.32 per week which calculates to a 48 percent wage loss. Accordingly, her work disability for the year 2008 and thereafter would be 40.65 percent (48 percent wage loss, 33.3 percent task loss). And it should be noted the 415 weeks runs on September 11, 2009.

As demonstrated by this case, there can be periods of time when the claimant's disability percentage changes. The reform legislation enacted in 1993 changed the method used to calculate the weekly benefit payable but did not address how to calculate benefits payable for an injury when the disability rate changes for one injury.

Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and, consequently, the percentage of work disability may change. Under the pre-1993 calculation, a change in the disability rate meant a change in the weekly rate for the remaining weeks. The calculation used for injury after July 1, 1993, does not lend itself so easily to a change.

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Board concluded the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 800 (1998), *rev. denied* 266 Kan. 1116 (1999), and further explained in *Deist v. Dillon Companies, Inc.*, No. 213,485, 1999 WL 1314825 (Kan. WCAB Dec. 30, 1999).

As previously noted, the Board's calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially, a payment rate must be determined, which in this case is calculated by multiplying the \$300 average gross weekly wage by .6667.<sup>9</sup> Such calculation computes to \$200.01 in a weekly compensation rate.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid. The first 15 weeks of temporary total disability compensation is excluded. The remainder is multiplied by the percentage of permanent partial general disability.<sup>10</sup>

Herein, in the underlying Award the parties stipulated that 32.86 weeks of temporary total disability compensation had been paid. Accordingly, 17.86 weeks ( $32.86 - 15 = 17.86$ ) would be subtracted from 415 weeks and the remainder of 397.14 ( $415 - 17.86 = 397.14$ ) would be multiplied by the 32.3 percent permanent partial general disability. Such calculation results in 128.28 weeks for which permanent partial disability compensation is payable.

The same calculation is made for each subsequent change in the work disability with the additional step of deducting the weeks of previously paid permanent partial disability from the total disability weeks payable as determined by each new calculation.

On August 9, 2004, the work disability increased to 66.65 percent. The new calculation would result in 264.69 disability weeks payable. From those weeks the prior 116.43 weeks of paid permanent partial disability would be deducted resulting in a total of 148.26 disability weeks payable.

On October 5, 2006, the work disability decreased to 45.65 percent. The new calculation would result in 181.29 disability weeks payable. From those weeks the prior 228.72 weeks of paid permanent partial disability would be deducted resulting in no additional disability weeks payable..

On October 20, 2006, the work disability increased to 66.65 percent. The new calculation would result in 264.69 disability weeks payable. From those weeks the prior 228.72 weeks of paid permanent partial disability would be deducted resulting in a total of 35.97 disability weeks payable.

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<sup>9</sup> K.S.A. 44-510e(a)(1).

<sup>10</sup> K.S.A. 44-510e(a)(2).

On December 17, 2006, the work disability decreased to 46.65 percent. The new calculation would result in 185.27 disability weeks payable. From those weeks the prior 236.86 weeks of paid permanent partial disability would be deducted resulting in a total of no additional weeks payable.

On January 1, 2007, the work disability decreased to 44.65 percent. The new calculation would result in 177.32 disability weeks payable. From those weeks the prior 236.86 weeks of paid permanent partial disability would be deducted resulting in a total of no additional weeks payable.

On January 1, 2008, the work disability decreased to 40.65 percent. The new calculation would result in 161.44 disability weeks payable. From those weeks the prior 236.86 weeks of paid permanent partial disability would be deducted resulting in no additional disability weeks payable.

Because claimant had already been compensated for more permanent partial disability weeks than that sum, the claimant is not entitled to additional compensation from that date forward unless the claimant's percentage of disability is again modified to provide additional weeks of disability compensation. Subject to the 415 week limitation from the date of accident which concludes on September 11, 2009.

Claimant also requested additional weeks of temporary total disability compensation. Claimant relies upon the opinion of Dr. Sergio Delgado. Interestingly, the doctor said claimant was temporarily totally disabled on the date he saw her on April 4, 2006, unless she elected not to undergo surgery and in that case she was at maximum medical improvement. Dr. Delgado then proceeded to provide a permanent impairment rating on April 4, 2006. The permanent impairment rating necessarily relied upon the fact that claimant was at maximum medical improvement. An injury is no longer temporary when maximum recovery is reached or when the condition becomes medically stationary or stable.<sup>11</sup> The claimant has failed to meet her burden of proof that she is entitled to any additional temporary total disability compensation.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Review & Modification Award of Administrative Law Judge Rebecca Sanders dated December 10, 2008, is modified.

Claimant is entitled to 32.86 weeks of temporary total disability compensation at the rate of \$200.01 per week or \$6,572.33 followed by 116.43 weeks of permanent partial disability compensation at the rate of \$200.01 per week or \$23,287.16 for a 32.30 percent work disability followed by 112.29 weeks of permanent partial disability compensation at

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<sup>11</sup> *Rose v. Thornton & Florence Electric Co.* 4 Kan. App. 2d 669, 609 P.2d 1180 (1980).

the rate of \$200.01 per week or \$22,459.12 for a 66.65 percent work disability from August 9, 2004 through October 4, 2006, followed by 0 weeks of permanent partial disability compensation at the rate of \$200.01 per week or \$0 for a 45.65 percent work disability from October 5, 2006 through October 19, 2006, followed by 35.97 weeks of permanent partial disability compensation at the rate of \$200.01 per week or \$7,194.35 for a 66.65 percent work disability from October 20, 2006 through December 16, 2006, making a total award of \$59,512.96 which is ordered paid in one lump sum less amounts previously paid.

No additional weeks are payable even though there are additional changes in work disability.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Beth Regier Foerster, Attorney for Claimant
- Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
- Rebecca Sanders, Administrative Law Judge