

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

WAYNE LUNDAY)	
Claimant)	
)	
VS.)	
)	
DUAL COUNTY SANITATION SERVICE)	
Respondent)	Docket No. 1,016,900
)	
AND)	
)	
NATIONWIDE MUTUAL INSURANCE)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the January 27, 2006 Post Award order by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on May 9, 2006.

APPEARANCES

Joseph Seiwert, of Wichita, Kansas, appeared for the claimant. Leigh Hudson, of Fort Scott, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.¹ The parties agreed that the Post Award order, as written, failed to take into consideration the monies paid under the Agreed Award entered into on February 9, 2005. Thus, any order from the Appeals Board that includes additional compensation must take into account the \$22,197.10 paid to claimant under the terms of the Agreed Award.

¹ The ALJ's Post Award order lists four transcripts but the dates of those transcripts referenced within the Post Award order are wrong. Nonetheless, the proceedings and deponents are accurate and they are to be considered for purposes of this appeal.

ISSUES

The ALJ concluded the claimant was unable to continue working for respondent due the effects of his August 29, 2003 injury. Thus, he modified claimant's Agreed Award granting claimant a 54.5 percent work disability based upon a 49 percent wage loss and a 60 percent task loss.

Respondent argues that the claimant did not meet his burden of proof for a review and modification and that he is only entitled to the 10 percent functional impairment previously paid pursuant to the parties agreed-upon Award. Alternatively, respondent contends that in the event claimant is entitled to work disability benefits, the ALJ's Post Award order should be affirmed with one exception. The ALJ's Post Award order failed to account for the temporary total disability compensation and permanent partial disability compensation paid to the claimant under the terms of the parties' agreed-upon Award. Claimant agrees that this oversight must be corrected.

Claimant argues that at a minimum, he is entitled to the 62.5 percent work disability awarded by the ALJ and the Post Award order. And that if the Board should modify the ALJ's order, it should reflect an increase in the claimant's task loss to 72 percent, thus increasing his overall work disability percentage.

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:

Claimant was injured on August 29, 2003 in a compensable accident while performing his job as a trash truck driver. He received conservative treatment and was eventually returned to work.

Claimant returned to work driving his same truck but with the aide of a helper who would lift the trash into the back of the truck. This arrangement came to an end in April 2004 and for a period of time claimant did not work for respondent. Claimant continued to get medical treatment, including injections, and ultimately in October 2004, Dr. Paul Stein, the treating physician, issued restrictions which included no lifting more than 40 pounds occasionally, no lifting from below knuckle height, no repetitive bending or twisting of the lower back.²

Claimant's workers compensation claim was resolved by entering into an Agreed Award which was approved by an ALJ and filed with the Division of Workers Compensation

² Stein Depo., Ex. 2 at 3 (10/12/04 report).

on February 10, 2005. Pursuant to the terms of that Agreed Award, claimant's claim was settled based upon a 10 percent permanent partial functional impairment to the body as a whole. The right to review and modification was specifically left open.

In December 2004, just before he settled his claim, respondent contacted claimant and offered him an accommodated position, again with the aide of a helper, and agreed to pay him 90 percent of his pre-injury wage. Claimant agreed to perform this job and did so until the end of February 2005. According to claimant, at that point he was unable to do this job as he was required to twist while driving the trash truck, a maneuver that is prohibited by Dr. Stein's restrictions, and he would have to lift too much weight too frequently. Yet, upon cross examination, claimant admitted that the job to which he was assigned seemed to fit within Dr. Stein's restrictions.³ Claimant also maintained the "helper" they assigned to him, Deanna Shaver, did not always help him and he was forced to exceed Dr. Stein's restrictions. Claimant voluntarily left his position in March 2005.

Paul Pitts, respondent's owner, disputes claimant's contentions regarding the post-accident job. According to Mr. Pitts, claimant never complained to him about having to twist his low back while driving the trash truck. Mr. Pitts testified that he has driven the trucks and with the mirrors installed on these vehicles, twisting is unnecessary. Nevertheless, Mr. Pitts admitted that claimant complained frequently about Deanna, his helper, on this truck. According to Mr. Pitts, claimant believed Deanna was not performing her job, thus causing him to have to work harder which caused claimant's pain to increase.

Mr. Pitts said he had another employee run a route with Deanna and according to that individual, Deanna was a good helper and physically qualified to perform her job duties. Mr. Pitts also testified that claimant had inquired about another job with the company but that in his view, that job exceeded claimant's restrictions.

On March 21, 2005, claimant filed a request for a Review and Modification seeking work disability benefits under K.S.A. 44-510e(a). Claimant maintains he is unable to perform the accommodated position respondent offered and that as a result, he has sustained a work disability.

Dr. Paul Stein first saw claimant on September 22, 2004 and thereafter rated his low back complaints at 10 percent (DRE III) permanent partial impairment to the whole body. After leaving his employment with respondent in late-February 2005, claimant returned to Dr. Stein for another visit on March 3, 2005. He received additional conservative treatment and a month of physical therapy. Claimant was then released from Dr. Stein's care on May 13, 2005. It is worth noting that there were no changes made to claimant's restrictions nor was claimant advised to discontinue working.

³ R.M.H. Trans. at 28.

Based upon Mr. Lindahl's task analysis, Dr. Stein felt that claimant could no longer perform 16 out of 22 tasks for a 72 percent task loss. On cross examination, Dr. Stein testified that claimant was capable of performing as many as 3 additional tasks if the stooping involved in those tasks was done only occasionally and claimant modified his method of stooping. Thus, the task loss is anywhere from 60 percent to 72 percent.

According to Mr. Lindahl, claimant is capable of earning \$300 per week with his physical limitations, education, and job experience, although at present he remains unemployed and is not looking for a job.

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. 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, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.⁴

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁵ If there is a change in the claimant's work disability, then the award is subject to review and modification.⁶

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.⁷ Our appellate courts have consistently held that

⁴ K.S.A. 44-528.

⁵ *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁶ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

⁷ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.⁸

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.⁹ Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.¹⁰

The ALJ concluded claimant had met his burden of establishing a change in his condition, in that claimant was no longer able to perform his accommodated job. In doing so, he implicitly concluded that claimant's decision to leave his position with respondent was made in good faith.

The Board has considered the evidence contained within the record and finds the ALJ's Post Award order must be modified. The threshold issue in this case is whether claimant's decision to terminate his employment as of March 1, 2005 was made in good faith. As of that point, he had been provided with an accommodated position at 90 percent of his pre-injury wage.

Under these facts and circumstances, the Board believes claimant's decision to terminate his employment was not made in good faith. When claimant returned to Dr. Stein just days after leaving his position with respondent, Dr. Stein did not alter claimant's work restrictions in any fashion. He recommended a course of physical therapy but nothing more. Yet, at no time did Dr. Stein suggest that claimant should cease working. And although claimant maintains that certain aspects of the job caused him increased physical complaints, it appears that the bulk of his complaints are centered upon his female co-worker, a woman who others believe was well suited for her position as trash thrower. For these reasons the Board is unpersuaded that claimant's decision to cease working was made in good faith. Thus, the Board will impute the wage of the position he was working at the time he ceased working. Because that wage was 90 percent of his pre-injury wage,

⁸ See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

⁹ See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

¹⁰ *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

claimant is not entitled to work disability under K.S.A. 44-510e(a). The Post Award order is hereby reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award order of Administrative Law Judge Thomas Klein dated January 27, 2006, is reversed. Claimant is not entitled to a modification of the Agreed Award entered February 9, 2005.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joseph Seiwert, Attorney for Claimant
- Leigh Hudson, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge
- Paula S. Greathouse, Workers Compensation Director