

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

KEVIN L. WEST)	
Claimant)	
VS.)	
)	Docket No. 1,050,882
LKQ CORPORATION)	
Respondent)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 15, 2013, Order on Respondent's Motion to Stay Review and Modification by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on March 11, 2014.

APPEARANCES

James E. Benfer, III, of Topeka, Kansas, appeared for the claimant. Clifford K. Stubbs, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Order, including the Review and Modification Hearing transcript dated September 12, 2013, with attached exhibits and the documents of record filed with the Division.

ISSUES

The ALJ stayed and/or denied claimant's application for Review and Modification, stating claimant's application is premature, as claimant cannot be found to be permanently and partially disabled and temporarily and totally disabled at the same time.

Claimant contends the ALJ erroneously concluded review and modification was premature because claimant is not at maximum medical improvement for the injury that is the basis for the work disability under the provisions of K.S.A. 44-510e. Claimant believes the ALJ considered the wrong injury when making her determination. Claimant argues review and modification should be granted. Claimant also contends that he is entitled to a 50 percent work disability retroactive 6 months from the date of filing his March 28, 2013, application for Review and Modification.

Respondent first argues the Board has no jurisdiction over this matter as the ALJ's Order was not a final order, award or modification of award. Respondent argues the ALJ has the inherent power to control her docket and therefore the stay was proper. Additionally, respondent argues that if claimant were to receive temporary total disability benefits for his head injury and work disability benefits for his back injury under his original award based on wage loss, it would constitute loss duplication, which is prohibited by Kansas Law.

The issues on appeal are as follows:

1. Does the Board have jurisdiction to decide this matter?
2. Is claimant entitled to review and modification?
3. Is claimant entitled, simultaneously, to both temporary total disability benefits for his head injury with Goodyear and work disability benefits based on wage loss as modification of his low back injury award against LKQ?

FINDINGS OF FACT

Claimant suffered injury to his low back on February 26, 2010. He filed a workers compensation claim (Docket No. 1,050,882) and on June 6, 2011, claimant settled this workers compensation claim for \$10,754.10, based on a 5 percent functional impairment to the body as a whole, with claimant retaining the right to claim future medical treatment upon application to the director and the right to file for review and modification of the award.

Claimant became employed at Goodyear Auto Service Center (Goodyear), and, on December 6, 2011, suffered a serious work-related accident (Docket No. 1,060,137). Claimant was paid temporary total disability (TTD) benefits due to his work-related accident at Goodyear at the rate of \$555.00 per week from December 12, 2011, to September 10, 2012, and from March 18, 2013, forward until he has been released to work, been offered accommodated work within the temporary restrictions or has reached maximum medical improvement, pursuant to Court order. As of September 12, 2013, claimant was still receiving temporary total disability benefits for the Goodyear injury.

On March 27, 2013, claimant filed an application review and modification for his running award in Docket No. 1,050,882, claiming a 100 percent wage loss after the accident at Goodyear. A review and modification hearing was held on September 12, 2013. Respondent filed a motion to stay the review and modification proceedings. The ALJ issued an order on respondent's motion on October 15, 2013, stating claimant's application for review and modification was premature, as claimant cannot be found to be permanently and partially disabled (PPD) and temporarily and totally disabled at the same time. The application for review and modification was "stayed and/or denied" ¹ The ALJ also determined that claimant's review and modification was "premature because Claimant is not at maximum medical improvement for the injury that is the basis for the work disability under the provisions under K.S.A. 44-501e [sic]." ² Claimant then filed an application for review with the Board.

Claimant acknowledged his job with Goodyear paid better than his original job with respondent. The only reason claimant was not working at Goodyear and earning the higher wage was due to the work injury occurring while claimant worked at Goodyear.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2009 Supp. 44-508(g) states:

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

¹ ALJ Order (Oct. 15, 2013) at 4.

² *Id.*

K.S.A. 44-528 Furse 2000 states:

(a) 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.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

K.S.A. 44-510e(a) Furse 2000 states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

- (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
- (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and
- (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

As noted above, claimant settled his initial workers compensation claim against respondent on June 6, 2011. Thereafter, he obtained a job with Goodyear earning a greater wage. This wage disqualified claimant from a permanent partial general (work) disability under K.S.A. 44-510e(a) Furse 2000. However, when claimant suffered the work injury at Goodyear, the circumstances changed. He was no longer earning 90 percent or more of the average weekly wage he had earned with respondent.

K.S.A. 2009 Supp. 44-551(i) states:

(i) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(2) (A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (i) (1), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid

until the order of the board is issued, except that no payments shall be made under this provision for any period before the first day after such time period. Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute.

(C) In any case in which the final award of an administrative law judge is appealed to the board for review under this section and in which the compensability is not an issue to be decided on review by the board, medical compensation shall be payable in accordance with the award of the administrative law judge and shall not be stayed pending such review. The employee may proceed under K.S.A. 44-510k and amendments thereto and may have a hearing in accordance with that statute to enforce the provisions of this subsection.

Respondent first contends the Board does not have jurisdiction over this matter as the ALJ's Order did not constitute a final order, award, modification of award or preliminary award. However, the Order from the ALJ states claimant's application for Review and Modification "is stayed and/or denied at this time."³ Respondent's argument might carry more weight if the ALJ had not both stayed and denied the request. The Board also has the authority to review an order of an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in issuing the decision. Here, the ALJ determined the request for review and modification was premature because claimant was not at "maximum improvement for the injury that is the basis for the work disability under the provisions under K.S.A. 44-501e [sic]." Apparently the ALJ meant K.S.A. 44-510e, which controls a claimant's entitlement to a work disability. However, the ALJ erred in holding claimant was not at maximum medical improvement (MMI) for the injury that is the basis for the work disability. That injury would be the low back injury suffered while claimant worked for respondent. That matter was settled on a running award on June 6, 2011, based upon a 5 percent whole person functional impairment. Clearly, claimant had reached MMI in that litigated matter.

Additionally, the ALJ ruled claimant's application was premature as claimant could not be both temporarily and totally disabled and permanently partially disabled at the same time. While the ALJ's ruling might be correct if the TTD and PPD were being ordered in the same case, with the same employer and stemming from the same injury claim, that is not the case here. The Board has held that a claimant's receipt of TTD because he suffered a separate injury to a different part of his body does not affect his claim for work disability in an original injury claim.⁴ The Board's rationale in *Ratcliff* is adopted for the purposes of this decision, in ruling both TTD and PPD may be ordered simultaneously, when dealing with separate accidents to different parts of the body and, as here, with different employers.

³ *Id.*

⁴ *Ratcliff v. Par Electrical Contractors, Inc.*, No. 1,050,846, 2012 WL 1142961 (Kan. WCAB Mar. 22, 2012).

In the claim against respondent, claimant has experienced a change in his work disability status under K.S.A. 44-510e. The fact claimant may also be receiving TTD from a separate accident to a separate body part while working for a separate employer is irrelevant to this review and modification request. Claimant's request for review and modification under K.S.A. 44-528 is properly before the ALJ and deserves a determination on the merits.

Here claimant experienced a 100 percent wage loss on December 6, 2011, when he suffered the head injury at Goodyear. Under *Bergstrom*⁵ and *Tyler*⁶, the cause of claimant's wage loss is immaterial. The Board notes K.S.A. 44-528 states the ALJ "may modify" the award. It is not mandatory. However, at the very least, claimant is entitled to a determination of his request for review and modification on the merits.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Order of the ALJ should be reversed and the matter remanded to the ALJ for further proceedings consistent with this decision. Claimant is not prohibited from receiving both TTD and PPD simultaneously, when dealing with different injuries suffered on different dates while working for different employers.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order on Respondent's Motion to Stay Review and Modification of Administrative Law Judge Rebecca Sanders dated October 15, 2013, is reversed and the matter remanded to the ALJ for further proceedings consistent with this order.

⁵ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

⁶ *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

IT IS SO ORDERED.

Dated this _____ day of April, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Benfer, III, Attorney for Claimant
jebbenfer@mcwala.com

Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
mvpkc@mvplaw.com
cstubbs@mvplaw.com

Rebecca Sanders, Administrative Law Judge