



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board agrees with the Administrative Law Judge's decision that claimant's award of compensation should be reduced to \$88.44 per week for a 39 percent permanent partial general impairment. The Appeals Board finds that the Review and Modification Award should, however, be modified in certain respects. Specifically, the change in compensation rate is to be retroactive only to August 28, 1995. In addition, that portion of the Award assessing an alleged overpayment against the Workers Compensation Fund is in error and is reversed.

Claimant received an award of 50 percent general body disability approved by the District Court of Cowley County, Kansas, on November 19, 1990. The Award was affirmed by the Kansas Court of Appeals on October 4, 1991. The decision by the Court of Appeals was entered after *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990), a decision where the Kansas Supreme Court approved a two-prong test for determining work disability. Nevertheless, in the present case the Court of Appeals approved a finding which relied solely upon the wage loss factor. The Court of Appeals stated in its decision:

"It appears that the trial court calculated the 57 percent disability based upon the wage differential. However, there is no indication that the court did not also consider the vocational counselor's recommendation and the obvious medical need to change from factory work to clerical work. There was sufficient evidence for the trial court to consider both parts of the *Hughes* test, and it did consider this information."

As above indicated, the record in this case consists only of a transcript of the hearing held March 21, 1996, and the record of the original claim. Claimant did not testify at the hearing on review and modification. Claimant's counsel indicated, however, he did not disagree with the statement that claimant's wage had changed as shown in the wage record. Claimant's counsel argued that it, nevertheless, should not result in an 18 percent reduction in the award. He argued that the 18 percent should be divided by two to account for the labor market prong of the work disability test. Claimant's counsel also argues the wage records of claimant's current employment show a 17 percent change in wage, not 18 percent.

The Appeals Board considers the wage statement for claimant's current employment as a stipulated part of the record. It appears not to be in dispute. Only the method of calculation is disputed. The Appeals Board agrees with the method of calculation used by the respondent. It appears claimant was a full-time employee, even though she may have frequently worked less than a 40-hour week. Using the base hourly wage times 40 and then adding the average overtime for the 26 weeks preceding the date of accident yields an average weekly wage of \$207.46. This yields an 18 percent wage change and represents a 39 percent loss of ability to earn a comparable wage when compared to the wage claimant was earning on the date of accident.

The Appeals Board also agrees that this change in wage warrants a change in the award. The decision by the District Court, as approved by the Court of Appeals,

represented a finding that claimant's award should be based upon the wage prong only. Nothing in the record before us suggests any reason why that conclusion should be changed on review and modification. The only evidence of a change in circumstance is the evidence of a significant change in the wage. The Appeals Board, therefore, affirms the finding that this award should be modified to one based upon a 39 percent permanent partial general disability.

The modification should date back to August 28, 1995. K.S.A. 1993 Supp. 44-528(d) provides in pertinent part as follows:

"Any modification of an award under this section on the basis that the . . . 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."

The application in this case was made February 28, 1996, and the effective date of the modification should, therefore, be August 28, 1995, six months prior to the application.

The Award entered by the Administrative Law Judge also calls for a reimbursement from the Kansas Workers Compensation Fund for overpayment compensation from March 24, 1995, to the date of the Review and Modification Award. On appeal, respondent argues that the reimbursement by the Fund should include what respondent considers overpayment beginning in 1989 when claimant first went to work for Phil Stop. The Appeals Board views the six-month limit contained in K.S.A. 44-528(d) as an absolute limit on the modification and finds no other authority requiring the Fund to reimburse payments made from up to the effective date of the modification. K.S.A. 44-534a, as amended, authorizes an order for reimbursement in certain cases when benefits are ordered by a preliminary hearing order and later it is determined the amounts ordered should be reduced or totally disallowed. K.S.A. 44-556(d) authorizes reimbursement by the Fund in certain cases relating to benefits paid while a case is pending on appeal. Review and modification presents a different circumstance. Under the provisions of K.S.A. 44-528 the effect of the award on review and modification can only extend to the six months preceding the date of the application. As a result, there is not and cannot be an award, finding that the benefits paid prior to that date should be reduced or disallowed. Until the original award is modified, the benefits due under the Award are proper and cannot constitute an overpayment. If there was an overpayment during the six months preceding the date of application, that is after August 28, 1995, the amount of those overpayments is credited on the amounts due under the Award and not reimbursed by the Workers Compensation Fund. See K.S.A. 44-525, amended.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated March 22, 1996, should be modified and claimant's award of compensation should be reduced to \$88.44 per week as of August 28, 1995. Any overpayment made by the respondent after that

date is credited against future payments due. No award is made against the Kansas Workers Compensation Fund. The accident in this case occurred on November 7, 1988, and the benefits would, therefore, run until October 21, 1996. Benefits ordered, therefore, are modified to the rate of \$88.44 per week from August 28, 1995, until October 21, 1996. Respondent is to receive a credit for any amounts paid after August 28, 1995.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William A. Taylor III, Wichita, KS
- Frederick L. Haag, Wichita, KS
- Nelsonna Potts Barnes, Administrative Law Judge
- Philip S. Harness, Director