

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

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| ELIDA ROSAS |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 140,073 |
| IBP, INC. |) | |
| Respondent, |) | |
| Self-Insured |) | |

ORDER

Respondent appealed the August 8, 2001 Award Upon Review and Modification (Award) entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on February 5, 2002.

The Director of the Division of Workers Compensation appointed Jeffrey K. Cooper of Topeka, Kansas, to serve as Board Member Pro Tem in place of Gary M. Korte, who recused himself from this proceeding.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the record includes the transcript from the review and modification hearing held on August 21, 1998, and the transcript from the preliminary hearing held on April 2, 1999. Moreover, the record also includes those transcripts listed in the September 24, 1996 Award entered by Special Administrative Law Judge Michael T. Harris, plus the August 8, 1991 medical report from Dr. Marc R. Baraban requested by Administrative Law Judge Floyd V. Palmer.

ISSUES

This is a claim for a series of accidents or repetitive traumas to both upper extremities, which ended on approximately October 30, 1990. Claimant is now requesting to review and modify an earlier order, in which the Board denied claimant's request for permanent partial general disability benefits. A review of the procedural history is helpful.

The parties initially submitted the claim for a decision in 1996. In an award dated September 24, 1996, Special Administrative Law Judge Michael T. Harris determined claimant had a 59 percent work disability (a disability greater than the functional impairment rating) due to permanent bilateral upper extremity injuries.

Respondent appealed the September 24, 1996 decision to this Board, which entered an order on May 30, 1997, finding claimant failed to prove she had sustained permanent injuries. Accordingly, the Board awarded claimant only temporary total disability benefits and medical benefits. Additionally, the Board awarded claimant the right to seek additional medical benefits, including left wrist surgery to remove a cyst as that operation had been previously postponed because claimant was pregnant.

Claimant appealed the Board's May 30, 1997 Order to the Court of Appeals, which affirmed the Board in an unpublished opinion filed on January 15, 1999. The Court of Appeals held the Board did not disregard undisputed evidence in determining that claimant had failed to satisfy her burden of proof. The Court of Appeals stated, in part:

Rosas [claimant] argues the Board disregarded her uncontradicted testimony that she experienced continued pain and numbness in her hands. The record, however, contains testimony from examining physicians that Rosas' complaints were vague and "nonanatomic," that Rosas' nerve conduction tests were within normal limits, that Rosas did not give full effort when subjected to strength tests, that there was a complete lack of objective findings, and that she had not sustained any permanent functional impairment.

But while the claim was pending before the Court of Appeals, claimant filed an application with the Division of Workers Compensation to review and modify the award and also to request additional medical treatment. That application was filed on April 7, 1998. Administrative Law Judge Avery ordered respondent to provide claimant with additional medical treatment, which claimant underwent, including surgery on the left elbow and left wrist.

Upon completion of the additional medical treatment, the parties submitted the review and modification request to the Judge for decision. In the August 8, 2001 Award Upon Review and Modification, Judge Avery held that claimant had a 31 percent whole

body functional impairment and a 46 percent work disability. Moreover, the Judge determined that the modified award should commence as of January 31, 2000, and continue until claimant was paid 351.07 weeks at \$96.73 per week.

Respondent appealed the August 8, 2001 Award and has raised the following issues:

1. Does the Division of Workers Compensation have jurisdiction to re-decide in a review and modification proceeding whether claimant has sustained permanent injury when that issue was decided against claimant in the initial award?

Respondent argues the finding that a worker did not sustain a permanent injury cannot be modified in a review and modification proceeding. Accordingly, respondent argues the request for modifying the award should be denied.

Conversely, claimant contends that she has established an increase in her functional impairment and, therefore, the initial award should be modified.

2. If the initial award can be modified, what is the nature and extent of claimant's injury and disability?

Respondent argues claimant has established an injury to the left upper extremity only and, therefore, would be entitled to benefits for a "scheduled" injury under K.S.A. 1990 Supp. 44-510d. Respondent also argues the Board cannot change the finding made in its initial May 30, 1997 Order that claimant voluntarily left respondent's employment. Accordingly, respondent argues that if the Board determines that claimant has sustained permanent injury to both upper extremities, that her permanent partial general disability is limited to her functional impairment rating.

Conversely, claimant argues she developed ulnar nerve entrapment in both upper extremities due to the work that she performed for respondent and, therefore, she should receive benefits for an "unscheduled" injury under K.S.A. 1990 Supp. 44-510e. Claimant requests the Board to affirm the 46 percent work disability award entered by Judge Avery.

In addition to the issues raised by respondent, at oral argument the Board advised the parties that there were two additional issues to be addressed. The first issue was the effective date for any modified award.¹ And the second issue was the number of weeks that should be ordered paid in a modified award, considering that the Workers Compensation Act limits the maximum number of weeks of temporary total and permanent

¹ See K.S.A. 44-528(d).

partial general disability to 415, or approximately eight years.² The Board notes that claimant objected to this Board considering those two issues as they had not been previously raised by either party in their briefs filed with the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

The August 8, 2001 Award Upon Review and Modification should be reversed. Awards of temporary disability are not subject to review and modification where the period of such temporary disability ends before the award is entered upon a full presentation of the facts.

This issue is governed by the *Coffee*³ case in which the Kansas Supreme Court held that a finding of temporary injury could not be reviewed and modified. The final award in that case granted the injured worker temporary total disability benefits and rejected the worker's claim for permanent disability benefits. The worker then filed an application to review and modify the award, and then proceeded to depose another doctor for evidence that her incapacity and disability had increased. The Court held that the initial award determined the question of permanent disability and that question was not subject to review. The Court held, in part:

Here the award sought to be modified determined that all disability had ended prior to the award as well as prior to the time of the submission of the case for adjudication. Appellant had alleged and sought to prove permanent disability. The award determined the question of permanent disability and of any disability beyond March 25, 1964, adversely to appellant. To that extent then, at that point she had lost her suit. The award did not look into the future and, under the cases cited, it left nothing to review.

...

... We, therefore, hold the district court's award of temporary total disability had become final and binding on the parties, that the period of disability of the appellant had ended before the award was made, and the award was not subject to review and modification.⁴

² See K.S.A. 1990 Supp. 44-510e(a).

³ *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

⁴ *Coffee*, at 458.

Under the principles set forth in *Coffee*, the finding in the Board's May 30, 1997 Order that claimant did not prove that she was permanently injured and was only entitled to receive temporary total disability benefits due to the injuries that she sustained while working for respondent is not subject to review. Accordingly, the August 8, 2001 Award entered by Judge Avery must be reversed. And all other issues are rendered moot.

AWARD

WHEREFORE, the Board reverses the August 8, 2001 Award Upon Review and Modification entered by Judge Avery. The request to review and modify claimant's award of temporary total disability benefits is denied.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Diane F. Barger, Attorney for Claimant
- Gregory D. Worth, Attorney for Respondent
- Brad E. Avery, Administrative Law Judge
- Philip S. Harness, Workers Compensation Director