

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

SANDRA WOLF)	
Claimant)	
VS.)	
)	Docket Nos. 155,949 & 155,950
EVCON INDUSTRIES, INC.)	
Respondent)	
AND)	
)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review by the Appeals Board of the Award of Review and Modification entered by Administrative Law Judge Jon L. Frobish dated October 28, 1996.

APPEARANCES

Claimant appeared by and through her attorney, Stephen J. Jones of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Vincent A. Burnett of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of Review and Modification. Also considered were the record and stipulations listed in the original Award dated October 21, 1992, and in the Award of Review and Modification dated January 28, 1994.

ISSUES

Claimant appealed raising the following issues in reference to this review and modification proceeding:

- (1) Whether the original Award of October 21, 1992, should be modified.
- (2) Whether claimant's attorney is entitled to an award of attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The original Award was entered by Administrative Law Judge David V. Jackson on October 21, 1992. This case contains two docket numbers: 155,949 with a date of accident from April 17, 1990, to August 23, 1990; and 155,950 with a date of accident of August 23, 1990. The Administrative Law Judge denied claimant benefits in Docket No. 155,949 and granted claimant a 24 percent loss of use of her right lower extremity in Docket No. 155,950. The Award was sustained by the Director on November 3, 1992, and affirmed on appeal to the District Court on January 25, 1993. No appeal was taken from that judgment.

Claimant then filed a Petition for Review and Modification before the Administrative Law Judge on July 23, 1993, concerning only Docket No. 155,950 with a date of accident of August 23, 1990. The petition alleged that claimant's right leg had progressively worsened causing an increase in her disability. The Administrative Law Judge, in the Award of Review and Modification dated January 28, 1994, denied claimant's request for modification. From that award claimant appealed to the Appeals Board. In an Order dated July 28, 1995, the Appeals Board affirmed the Administrative Law Judge's award.

Thereafter, on February 23, 1996, claimant filed a Motion for Review and Modification of the original Award. The motion alleged that claimant's right leg injury had progressively worsened, her functional impairment had increased from a lower extremity impairment to a whole body impairment, resulting in a substantial work disability. In an Award of Review and Modification dated October 28, 1996, that is the subject of this appeal, Administrative Law Judge Jon L. Frobish denied claimant's request for modification. The Administrative Law Judge found claimant had failed to prove that her physical condition had worsened since the original award was entered. Claimant appealed and argues that she has proven her physical condition has worsened and she now suffers from a whole body impairment. Claimant contends, that since she does suffer from a whole body impairment, she is eligible for a work disability award.

(1) Two of claimant's treating physicians testified in this review and modification proceeding. Dr. Philip R. Mills testified on behalf of the respondent and Dr. Jay Stanley Jones testified on behalf of the claimant. Dr. Mills testified in the original proceeding but did not testify in the first review and modification proceeding. On the other hand, Dr. Jones did not testify in the original proceeding but did testify in the first review and modification proceeding.

Dr. Mills' original functional impairment rating of 24 percent to claimant's right lower extremity was the basis for the original award. Dr. Mills first testified on July 21, 1992, and diagnosed claimant with reflex sympathetic dystrophy (RSD) that resulted from claimant's work-related right foot injury. Although Dr. Mills found pain in claimant's hip, Dr. Mills' 24 percent permanent partial impairment rating did not include permanent impairment in claimant's hip. He did, however, convert the 24 percent right lower extremity rating to a 10 percent whole body rating based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

Dr. Mills testified in this review and modification proceeding on October 17, 1996. Dr. Mills had not examined or seen claimant since April 2, 1992. The doctor was requested by the respondent to compare the range of motion study completed by Dr. Jones on claimant's right lower extremity on November 11, 1993, with the range of motion study completed on July 17, 1996, by a physical therapist utilizing an ERGOS machine. The July 17, 1996, range of motion study was done at Dr. Jones's request. Dr. Mills found an overall decrease in claimant's lower extremity impairment of 9.5 percent. The doctor testified the 9.5 percent improvement was due to substantial improvement in claimant's hip range of motion, a modest improvement in claimant's knee range of motion, and a mild decrease in claimant's ankle range of motion. However, Dr. Mills' original functional impairment rating of 24 percent did not include a permanent impairment rating for an abnormality in claimant's right hip. Dr. Mills opined that claimant's reflex sympathetic dystrophy, that had manifested itself in claimant's right ankle, was also now causing loss of motion in her hip. The 1996 range of motion study indicated an abnormality in the internal rotation of the hip. Dr. Mills was requested to give an opinion on claimant's whole body impairment based on the 1996 range of motion study. The doctor opined the whole body impairment would be 17.5 percent.

Dr. Mills was not questioned on how he arrived at the 17.5 percent whole body impairment rating by either party. The Appeals Board finds this opinion somewhat confusing because Dr. Mills on direct examination testified that claimant's right lower extremity rating had improved by 9.5 percent based on the comparison of the 1993 and 1996 range of motion studies. The Appeals Board finds the only explanation for the 17.5 percent whole body rating now compared to Dr. Mills' original 10 percent whole body rating would be that Dr. Mills included an abnormality found in claimant's right hip and the right hip was not included in Dr. Mills' original 10 percent whole body rating. Dr. Mills also was asked whether an abnormal range of motion finding in claimant's right hip was necessarily related to an injury. Dr. Mills replied, not always but in this case it would be more probable.

Dr. Mills was not asked, however, whether he was relating the hip impairment to the 1990 injury.

Orthopedic surgeon Jay Stanley Jones treated claimant from October 16, 1990, through November 11, 1993. Dr. Jones did not testify in the original proceeding but did testify in the first review and modification proceeding. At that time, Dr. Jones believed claimant had a 27 percent permanent functional impairment of the right lower extremity that included loss of range of motion in claimant's right hip. Dr. Jones converted the lower extremity rating to a whole body rating of 11 percent. The doctor believed claimant's permanent injury was a body as a whole impairment because RSD was a central nervous system problem.

At claimant's attorney's request, Dr. Jones examined the claimant on June 27, 1996. He also had claimant undergo a functional capacity evaluation that included a range of motion study of her right lower extremity. Dr. Jones testified, based on the comparison of the 1993 and 1996 range of motion studies, he believed claimant's right lower extremity permanent functional impairment had increased from 27 percent to 30 percent and her whole body rating had increased to 12 percent. Dr. Jones based these assumptions on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

In the original award, claimant testified on June 30, 1992, that she was not employed but was actively looking for work. In the first review and modification proceeding, claimant testified on August 23, 1993, that she was working at a dry cleaners and had been working there for approximately a month-and-a-half. Claimant testified she had constant pain in her right lower extremity. The pain would radiate into her hip and back after she was on her feet for about 30 minutes. Claimant's job duties at the dry cleaner included being on her feet running a press and alternating those press duties with clerical duties where she could sit down.

Claimant testified in the present review and modification proceeding on June 25, 1996, that her foot continued to swell and she was in constant pain. She also, since July of 1993, had continued to work at the dry cleaners for 40 to 45 hours per week. Her job now required her to be on her feet pressing clothes utilizing three separate presses. Claimant testified because of the pain and discomfort in her feet, hip, and back she had to rest every 20 minutes for approximately 15 minutes which included lying down on a sleeping bag. Claimant testified the hot environment of the dry cleaners caused her foot to swell and her hip to become more symptomatic as the workday continued.

Dr. Jones was questioned by the respondent concerning what the effect of claimant's current work activities at the dry cleaners had on claimant's RSD condition. The doctor testified claimant's work activities stimulated the pain fibers and required her to sit or lie down after she had been on her feet. Dr. Jones further testified that claimant's work activities made her RSD condition worse. Dr. Jones believed the longer claimant was on her feet the more her symptoms would worsen. Dr. Jones concluded that claimant's RSD

condition had worsened and the worsening was attributed to her present work and being on her feet.

The claimant argues she has had an increase in her permanent partial impairment as a result of her RSD condition worsening. This condition now is present in her hip and back resulting in a whole body functional impairment. That whole body impairment qualifies claimant for not only higher permanent partial disability benefits based on an increase in functional impairment but a higher work disability award. See K.S.A. 1990 Supp. 44-510e(a).

The review and modification statute found at K.S.A. 44-528 permits modification of a workers compensation award in order to conform with changed conditions. The subsequent progression of a work-related injury remains compensable so long as the worsening is the direct and natural result of the primary injury and not produced by an independent cause. See Nance v. Harvey County, Docket No. 75,703 (Kan., opinion filed December 30, 1997.)

The Appeals Board finds the record in this review and modification proceeding does prove, through Dr. Jones' and the claimant's testimony, that claimant's RSD condition has worsened. However, the Appeals Board concludes this worsening condition is more likely than not related to claimant's work activities she has performed since July 1993 while employed by the dry cleaners. This conclusion is supported by claimant's testimony that her symptoms in her lower extremity, hip, and back all increase as she continues to work in the hot environment and on her feet at the dry cleaners. Dr. Jones' testimony likewise supports this conclusion as he attributes claimant's worsening RSD condition to claimant's work at the dry cleaners. Therefore, the Appeals Board concludes that claimant's request to modify the original award entered in this case on October 21, 1992, should be and is denied.

(2) The Appeals Board has on numerous other occasions found that attorney fees should be awarded when an additional award of compensation is not rendered in a review and modification proceeding. See K.S.A. 44-534(g). Respondent argues the claimant should not be awarded attorney fees in this case because her motion for review and modification was frivolous. The Administrative Law Judge found claimant's motion although not frivolous, was not a well-grounded argument. The Administrative Law Judge went on to find claimant should be awarded reasonable attorney fees in the amount of zero dollars.

The Appeals Board agrees with the Administrative Law Judge that claimant's motion for review and modification was not a frivolous motion. As previously discussed, claimant's RSD condition was directly related to her original foot injury. However, the record as a whole proved the worsening of the RSD condition was more likely than not caused by claimant's subsequent employment rather than the natural and probable result of the original injury. Although the claimant's request for modification of the original Award was

denied, the Appeals Board finds, that since claimant's arguments were not without merit, the Administrative Law Judge's finding that a reasonable attorney's fee is zero dollars should be reversed. Claimant may file a motion for reasonable attorney fees which should be considered in a hearing before the Administrative Law Judge whereby respondent would be afforded an opportunity to cross-examine and otherwise be heard on the question.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Review and Modification entered by Administrative Law Judge Jon L. Frobish dated October 28, 1996, should be, and is hereby, affirmed and an award of review and modification against the respondent, Evcon Industries, Inc., and its insurance carrier, St. Paul Fire & Marine Insurance Company, and in favor of the claimant, Sandra Wolf, is denied.

The Administrative Law Judge's order that claimant's attorney is awarded zero dollars in attorney fees is reversed.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stephen J. Jones, Wichita, KS
- Vincent A. Burnett, Wichita, KS
- Jon L. Frobish, Administrative Law Judge
- Philip S. Harness, Director