



On February 8, 1999, claimant initiated this review and modification proceeding. Claimant contends his condition has worsened since the October 1991 accident and, therefore, he requests the agreed Award be modified to grant him benefits for a permanent total disability. By Award dated February 8, 2000, Judge Avery denied claimant's request to modify the initial Award after finding that claimant had failed to prove that (1) his back had worsened and (2) claimant's inability to work was traceable to a change in his back injury or condition.

Claimant contends the Judge erred. Claimant argues that the greater weight of the evidence indicates that claimant's back has worsened and that he is unable to engage in any substantial, gainful employment. Claimant argues that his symptoms are now worse and that a 1998 MRI objectively establishes that his back has worsened.

Conversely, respondent and its insurance carrier contend the Judge's Award should be affirmed as claimant's back has not worsened. In the alternative, respondent and its insurance carrier argue that if claimant's condition has worsened, that worsening was caused either by his diabetes or other work that he has performed since leaving respondent's employment. Furthermore, respondent and its insurance carrier contend claimant has failed to prove that he is unable to engage in any substantial and gainful employment.

The only issues before the Appeals Board on this review are whether claimant's condition has worsened since the October 1991 accident, and, if so, whether claimant's back now prevents him from working in any substantial, gainful employment.

#### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant injured his back on October 20, 1991, while working for respondent. The parties entered into an agreed Award in July 1993 in which it was determined that claimant had a work disability and, therefore, was entitled to receive the statutory maximum of \$100,000 in permanent partial general disability benefits. Following the accident, claimant was diagnosed with degenerative disc disease and a herniated disc at the L4-5 intervertebral level.
2. On February 8, 1999, claimant filed an application to review and modify the July 1993 Award. Claimant requested review of the initial Award on the basis that his back condition has worsened since the agreed Award was entered and that he is now unable to engage in any substantial, gainful employment.
3. Claimant has suffered severe back pain since the October 1991 accident. At the regular hearing, claimant testified, in part:

Q. (Mr. Cooper) Could you do more in '91-- or '91, '92, '93 than you can now without having the pain?

A. (Claimant) No, not really.<sup>1</sup>

. . .

JUDGE AVERY: . . . Sir, you're in obvious discomfort today. Is this the same condition that your back has been in for the last eight years or whatever it has been since the accident at work?

A. (Claimant) Yes. Actually, this is very tense, and that makes it worse, too, but if I stay home and relax, it's a lot better. . . .

Q. (BY JUDGE AVERY) Well, that's okay. Is this the same condition your back has been in ever since your injury occurred or--

A. Yes.<sup>2</sup>

4. All three doctors who testified in this review and modification proceeding stated that claimant's condition had worsened since the October 1991 accident and that claimant was unable to engage in any substantial, gainful employment.

Dr. C. Erik Nye, the physician selected by the Judge for an independent medical evaluation, examined claimant in June 1999. Dr. Nye testified that claimant's condition had worsened and that worsening was related to claimant's work-related injury and the continuing development of degenerative changes in the low back. The doctor compared 1991 and 1998 MRIs, both of which show a protruding disc at L4-5 and degenerative changes at L5-S1, and found that the 1998 MRI showed more degenerative change. Regarding the numbness in claimant's feet, the doctor stated that symptom could be the result of claimant's diabetes or both the disc and diabetes problems. According to Dr. Nye, claimant cannot work.

At claimant's attorney's request, Dr. P. Brent Koprivica examined and evaluated claimant in October 1998 for purposes of this claim. Comparing the 1991 and 1998 MRIs, Dr. Koprivica found that claimant had increased disc protrusion at L4-5 and increased disc desiccation. The doctor also indicated that the 1998 MRI shows new findings at L3-4. Based upon the MRIs, the doctor stated that there is objective evidence that claimant's condition is worse now as compared to 1991 and 1992. The doctor would also further

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<sup>1</sup> Regular Hearing, October 14, 1999; pp. 24, 25.

<sup>2</sup> Regular Hearing, October 14, 1999; pp. 49, 50.

restrict claimant's work activities as he would (1) limit claimant to 10 pounds lifting as compared to the 25-to-35-pound lifting restriction that he was given in 1993 and (2) restrict all frequent lifting as compared to the previous 15-to-20-pound restriction. Dr. Koprivica believes that claimant now must periodically lie down and that he is unable to perform any type of substantial, gainful employment. In his October 9, 1998 report, Dr. Koprivica wrote, in part:

2. In my opinion, Mr. Dreasher [claimant] has severe restrictions on activities. With the data that I have now been provided, I would restrict Mr. Dreasher to sedentary physical demand level of activities. Captive sitting would be limited to one hour intervals with the allowance of changing posture and taking a break 5 to 10 minutes every hour. Captive standing should be limited to less than 10 minutes [sic] intervals with the allowance of sitting on an as needed basis. Walking should be limited and only performed on an occasional basis. I would recommend that he not do squatting, crawling, kneeling or climbing. He should avoid sustained or awkward postures of the lumbar spine as well.

3. Associated with Mr. Dreasher's chronic pain situation, I believe that allowance of reclining throughout the day for chronic pain management purposes is medically consistent with his condition.

4. . . . it is my opinion that Mr. Dreasher, realistically and practically is totally disabled. Clearly Mr. Dreasher is occupationally totally disabled for the job tasks that he has performed in the past. However, in addition, I believe his pain presentation is such that he is incapable of substantial gainful employment of any sort.

Further, Dr. Koprivica believes claimant is a surgical candidate and the doctor would recommend referral to a spine surgeon who specializes in fusions as claimant may need a possible discectomy at L4-5 with a two-level fusion.

Dr. Phillip L. Baker, who treated claimant for several months after the October 1991 accident, initially diagnosed degenerative disc disease, a herniated disc, and spondylosis. Dr. Baker re-examined claimant in September 1999 and reports that claimant no longer has a herniated disc and no longer has the radiculopathy into his legs that he had in 1992 and which the doctor related to the October 1991 accident. As a result of the September 1999 examination, the doctor found no significant changes from claimant's December 1991 x-rays, which revealed degenerative disc disease at L4-5 and bilateral spondylosis with pars defects at L5. Dr. Baker believes that claimant's physical condition is now worse and that he is unable to work. According to Dr. Baker, claimant's legs have worsened but not his back. But the doctor relates that worsening to claimant's diabetes and the resulting neuropathy. The doctor specifically testified that claimant's orthopedic condition, or degenerative disc disease, has not worsened since 1991.

5. Following October 1991, claimant has not worked for any employer but he has participated in at least two business activities. At the time of the accident, claimant worked for respondent as a janitor and also operated a snow removal and snow removal parts business. Claimant attempted to operate the snow removal business after the 1991 accident but found that he was physically unable to continue this business. Later, claimant sold the snow removal equipment but retained the parts business. Claimant later sold the snow removal parts business when he found that he had problems operating it.

6. Because of an investment gone sour and another individual's bankruptcy, claimant and three others managed a dirt race car track during the 1996 race season. Those individuals purchased the track through a corporation that they had formed and operated the track for the 1997 season. The track was sold in early 1998. During the 1997 racing season, claimant mowed around the track with a large tractor having an air ride seat. Additionally, claimant made minor repairs at the track and he was also responsible for taking the gate receipts to the track's office. With some exceptions, the races ran on Saturdays from April through September.

7. Judge Avery found and concluded that the medical evidence from Dr. Baker indicated that claimant's inability to work could not be traced to the back condition. The Appeals Board affirms that finding. Further, the Appeals Board concludes that any worsening of claimant's condition is related to the neuropathy in claimant's legs, which is a natural consequence of his diabetes, rather than from a natural progression or worsening of claimant's back condition.

#### CONCLUSIONS OF LAW

1. The Workers Compensation Act provides that an award may be modified, among other reasons, when the worker's functional impairment or disability has either increased or diminished. The Act reads, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, . . . 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. . . . 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.<sup>3</sup>

2. In light of claimant’s testimony, which does not support a worsening of the back condition, coupled with Dr. Baker’s opinion that claimant’s back has not worsened, the Appeals Board concludes that claimant has failed to prove that his work-related back injury has worsened.

3. Because claimant has failed to prove that the disability or functional impairment, which resulted from the October 1991 accident, has increased, claimant’s request for modification of the July 1993 Award should be denied.

4. The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

**AWARD**

**WHEREFORE**, the Appeals Board affirms the February 8, 2000 Award entered by Judge Brad E. Avery.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

We respectfully disagree with the majority as we believe that the greater weight of the evidence establishes that claimant’s back condition has naturally worsened since the October 1991 accident and the July 1993 agreed Award. Claimant had a difficult time at

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<sup>3</sup> K.S.A. 44-528(a).

the regular hearing explaining how his back was now worse. But he later testified that his pain was now worse. Claimant testified, in part:

Q. (Mr. Cooper) I guess what I'm asking you to do is compare with me if you would, could you do more physical activities without aggravating the pain in '91 and '92 as compared to now? In other words, does it take less now as compared to what it did in '91 or '92 or is it more or is it the same?

MR. BAUSCH: I object to it as leading and suggestive. Go ahead and answer.

A. (Claimant) Well, I've learned what I can do and what I can't, how much I can stand, because it's hard on my nerves. So I have to say it's yes, because if I do more than I should, I just, I just can't handle it. I just want to curl up on the floor or scream.

...

Q. (Mr. Cooper) What I'm asking you to do is compare with me how your pain-- is your pain worse now than it was back in '91 or '92?

A. (Claimant) To be truthful, I have to say in '91 when I first got hurt it was just terrible. There was nights I just screamed because I couldn't handle it and by April it was a little better, and then since then it's got worse. It's just-- (pause)<sup>4</sup>

Additionally, all three doctors who testified in this claim, Doctors Nye, Koprivica, and Baker, determined that claimant's condition was now worse as compared to his condition following the October 1991 accident. Both Dr. Nye and Dr. Koprivica identified changes on the 1998 MRI that objectively established that claimant's back was now worse. Only Dr. Baker believed that claimant's condition was worse because of his diabetes. We find Dr. Nye's opinions are the most credible as he was appointed by the Judge to conduct an independent medical evaluation and appears to be unbiased. Further, Dr. Baker's opinions are not credible as he was unable to adequately explain the change in his diagnoses and his opinion regarding the need for surgery in light of 1998 MRI studies that show a protruding disc to the same degree, or perhaps even greater degree, than demonstrated by the 1991 MRI. In short, Dr. Baker's opinions defy common sense.

We believe that claimant is now permanently and totally disabled from engaging in any substantial and gainful employment because of the natural progression and worsening

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<sup>4</sup> Continuation of Regular Hearing, December 16, 1999; pp. 31, 32.

of the back injury that he sustained in October 1991. Therefore, the agreed Award should be modified to grant claimant a permanent total disability.

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BOARD MEMBER

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BOARD MEMBER

- c:     Jeff K. Cooper, Topeka, KS  
       John A. Bausch, Topeka, KS  
       Brad E. Avery, Administrative Law Judge  
       Philip S. Harness, Director