BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIXIE L. MAYHEW (FORMERLY LUNA)	)	
Claimant	)	
VS.	)	
	)	Docket No. 176,868
SOUTHWESTERN BELL TELEPHONE CO.	)	
Respondent	)	
Self-Insured	)	

ORDER

Both parties requested review of the Award dated July 23, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on January 9, 1998, in Wichita, Kansas.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. David M. Druten of Kansas City, Kansas, appeared for the respondent, a self-insured.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the record includes that set forth in the original award entered in this proceeding dated February 24, 1995.

ISSUES

This proceeding is now before the Division of Workers Compensation upon claimant's request for review and modification of an award which granted claimant permanent partial general disability benefits for a 10 percent whole body functional impairment. In the initial award, claimant's permanent partial general disability benefits were limited to her functional impairment rating because she had returned to her regular job with respondent without accommodations at a comparable wage. Claimant requested

this review and modification proceeding after being terminated by respondent in October 1995. By Award dated July 23, 1997, the Administrative Law Judge found that respondent was no longer providing claimant with accommodated work, determined the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e was no longer applicable, and modified claimant's award to grant her a 51 percent permanent partial general disability.

Respondent requested the Appeals Board to review the issue of claimant's entitlement to review and modification. Respondent contends claimant's award should not be modified as claimant was terminated for medical absences unrelated to her work-related injuries. Claimant requested the Appeals Board to determine the appropriate date the modification of the award should become effective. Claimant contends the date should be earlier than August 5, 1996, the date utilized by the Judge. Those are the only issues before the Appeals Board on this review.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Since filing this claim, claimant has married and her surname is now Mayhew.

(2) By Award dated February 24, 1995, the Administrative Law Judge awarded claimant a 10 percent permanent partial general disability for bilateral arm injuries sustained on October 23, 1991. By Order dated July 28, 1995, the Appeals Board affirmed that award after finding (1) that claimant had returned to work for respondent at a comparable wage and to her regular job duties and (2) that the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e was applicable.

(3) On October 19, 1995, respondent terminated claimant's employment for attendance problems. Both parties agree claimant's attendance problems relate to health matters unrelated to claimant's work-related injuries to her upper extremities. Respondent does not contend claimant has acted in bad faith.

(4) After recovering from her bilateral arm injuries and various surgeries, claimant returned to work for respondent to the same job and same duties. After returning to work, claimant's upper extremities remained stable. That conclusion is based upon claimant's testimony at the motion hearing held in connection with the request for review and modification in March 1997.

CONCLUSIONS OF LAW

Because hers is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e which provides in pertinent part as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

Review and modification of claimant's award is governed by K.S.A. 1991 Supp. 44-528 which provides in part as follows:

> 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 director 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 director may appoint one or two health care providers to examine the employee and report to the director. The director shall hear all competent evidence offered and if the director 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 director 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.

In proceedings for review and modification, the principles set forth in Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), must also be considered. In Watkins, the worker requested review and modification of his award when his employer discontinued operations and terminated his employment. The Court of Appeals held that where a worker returns to work in an unaccommodated job and earns wages comparable to what was earned before the injury, the presumption of no work disability applies and the presumption will not be rebutted without evidence of a change in the worker's physical condition. In reaching that conclusion, the Court reasoned:

> If following an injury an employee is physically able to return to work, perform his or her job duties without special accommodation, and earn a wage comparable to his or her pre-injury wage, then by definition that employee does not have a work disability. See K.S.A. 1992 Supp. 44-510e(a). ***If the employee subsequently loses the job for economic or other reasons,***

> ***the loss of employment cannot by itself create a work disability, absent a change in the employee's physical condition.*** In other words, the loss of a job does not change an employee's physical ability to perform work in the open labor market and earn a comparable wage. It is the employee's ability to perform work at a comparable wage which determines work disability, not whether the employee is utilizing that ability. See *Brown v. City of Wichita*, 17 Kan. App. 2d 72, 77, 832 P.2d 365, *rev. denied* 251 Kan. 937 (1992). Where an employee returns to work in an unaccommodated job and earns wages comparable to those earned before his or her injury, the presumption of no work disability applies and will not be rebutted absent evidence of a change in the employee's physical condition. (Emphasis added.)

Following Watkins, claimant's request for review and modification of her award must be denied as claimant (1) returned to work to her regular job duties without accommodations, (2) earned a wage comparable to what she was earning at the time of her accidental injuries, and (3) did not prove a worsening of her work-related injuries.

Based upon the above, claimant's request for review and modification is denied. Because the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e remains intact, claimant is entitled to receive permanent partial general disability benefits for a 10 percent whole body functional impairment as originally awarded.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 23, 1997, entered by Administrative Law Judge John D. Clark should be, and hereby is, reversed. The Appeals Board hereby reinstates the Award dated February 24, 1995, and the Appeals Board's Order dated July 28, 1995, wherein claimant was granted a 10% permanent partial general disability for bilateral arm injuries for a date of accident of October 23, 1991.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dixie L. Mayhew (formerly Luna) and against the respondent, Southwestern Bell Telephone Co., for an accidental injury which occurred October 23, 1991, and based upon an average weekly wage of $520.48 for 27.55 weeks of temporary total disability compensation at the rate of $289 per week or $7,961.95, followed by 387.45 weeks at the rate of $34.70 per week or $13,444.52, for a 10% permanent partial general disability, making a total award of $21,406.47.

As of January 31, 1998, there is due and owing claimant 27.55 weeks of temporary total disability compensation at the rate of $289 per week or $7,961.95, followed by 299.88

weeks of permanent partial disability compensation at the rate of $34.70 per week in the sum of $10,405.84 for a total of $18,367.79, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $3,038.68 is to be paid for 87.57 weeks at the rate of $34.70 per week, until fully paid or further order of the Director.

The remaining orders set forth by the Administrative Law Judge in the Award dated July 23, 1997, are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS
David M. Druten, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director